



THE

# Sri Lanka Law Reports

**Containing cases and other matters decided by the  
Supreme Court and the Court of Appeal of the  
Democratic Socialist Republic of Sri Lanka**

**[2009] 2 SRI L.R. - PART 1**

**PAGES 1-28**

**Consulting Editors** : HON S. N. SILVA, Chief Justice upto 07.06.2009  
HON J. A. N. De SILVA, Chief Justice from 08.06.2009  
HON. Dr. SHIRANI BANDARANAYAKE Judge of the  
Supreme Court  
HON. SATHYA HETTIGE, President,  
Court of Appeal

**Editor-in-Chief** : L. K. WIMALACHANDRA

**Additional Editor-in-Chief** : ROHAN SAHABANDU

**PUBLISHED BY THE MINISTRY OF JUSTICE**  
**Printed at M. D. Gunasena & Company (Printers) Ltd.**

**Price: Rs. 25.00**

# DIGEST

## Page

<b>FUNDAMENTAL RIGHTS</b> —Constitution—Article 4—Exercise of Sovereignty—Legislative Power, Executive Power, Judicial Power, Fundamental-Rights guaranteed by the Constitution — Article 14 (1) g — Freedom of Association — Article 15 (5) — Exercise of the Fundamental Rights — Article 28 — Fundamental Duties — Evidence Ordinance — Section 114 (d) — Presumptions — Judicial and Official Acts have been regularly performed — Review of judgments — <i>per incuriam</i> rule — Constitution of Benches in the Supreme Court — Limits of Judicial Power — Affidavit — Nature — Effect of withdrawal of an affidavit — Effect of withdrawal of an undertaking — Allegations of prejudice, bias or unfairness against a Judge — Constitution - Article 11, 13(1), 13(2), 52, 53, 118.	1
---	---

**Vasudeva Nanayakkara v. Choksy and Others And Now Between  
Dr. P. B. Jayasundera v. The Attorney General**

**VASUDEVA NANAYAKKARA V.  
CHOKSY AND OTHERS  
AND NOW BETWEEN  
DR. P. B. JAYASUNDERA V. THE ATTORNEY GENERAL  
(JONH KEELL'S CASE - NO. 2)**

SUPREME COURT

J. A. N. DE SILVA, C. J.

DR. SHIRANI BANDARANAYAKE, J.,

TILAKAWARDANE, J.,

MARSOOF, P. C., J.,

BALAPATABENDI, J.,

SRIPAVAN, J. AND

RATNAYAKE, J.,

S. C. (F. R.) APPLICATION NO 209/2007

SEPTEMBER, 24<sup>TH</sup>, 2009

*Fundamental Rights – Constitution – Article 4 – Exercise of Sovereignty – Legislative Power, Executive Power, Judicial Power, Fundamental-Rights guaranteed by the Constitution – Article 14 (1) g – Freedom of Association – Article 15 (5) – Exercise of the Fundamental Rights – Article 28 – Fundamental Duties – Evidence Ordinance – Section 114 (d) – Presumptions – Judicial and Official Acts have been regularly performed – Review of judgments – per incuriam rule – Constitution of Benches in the Supreme Court – Limits of Judicial Power – Affidavit – Nature – Effect of withdrawal of an affidavit – Effect of withdrawal of an undertaking – Allegations of prejudice, bias or unfairness against a Judge – Constitution - Article 11, 13(1), 13(2), 52, 53, 118*

In the original judgment dated 21.7.2008 *inter alia* the Supreme Court granted specifically the relief prayed for in paragraphs (g), (h), and (i) of the prayer to the petition. The Supreme Court directed the present petitioner who was the 8<sup>th</sup> respondent in the original petition to pay a sum of Rs. 500,000/= as compensation to the State on the basis that his conduct was *ultra vires*, biased and collusive.

The petitioner paid the said sum of Rs. 500,000/= as compensation to the State. This is the final determination of the application as far as the

8<sup>th</sup> respondent of that case (the present petitioner) is concerned.

After the judgment had been delivered on 21.7.2008 the original case was called by the Supreme Court on 8.10.2008 with regard to certain incidental matters such as,

- (i) Whether the petitioner was continuing to hold office under the Republic and if so, the nature of such office and place at which he is functioning.
- (ii) Whether he (the petitioner) is holding office in any establishment in which the Government of Sri Lanka has any interest, and if so, the nature of such office.

The present application of the 8<sup>th</sup> Respondent – Petitioner was made by his amended petition dated 31.07.2009 praying, -

- (a) for the vacation of the order made by the Supreme Court on 8.10.2008 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.
- (b) for an order relieving the 8<sup>th</sup> respondent – petitioner of the firm undertaking contained in paragraph 13 of the affidavit dated 16.10.2008 tendered by him pursuant to the order of the Supreme Court.

**Held:**

J. A. N. De Silva., C. J., and Balapatabendi J.

- (1) An order to file an affidavit, the contents of which are the dictates of Court amounts to an order made in excess of jurisdiction and as such the validity of the document becomes an issue. Accordingly, the Petitioner is not bound by its contents.
- (2) Under Article 52 (1) of the Constitution the prerogative of the appointment of a Secretary to a Ministry is with His Excellency the President of the Republic of Sri Lanka.
- (3) A document filed of record cannot be withdrawn. The appointing authority is free to consider all the attendant circumstances and take any decision he deems fit.

Held further

Dr. Shirani Bandaranayake, J.,

- (1) A citizen of the Republic of Sri Lanka has a fundamental right to engage in a lawful occupation and such right is guaranteed in terms of Article 14 (1) of the Constitution. Any restriction would only be based on the disciplinary procedure in terms of his employment.
- (2) It would not be possible for the Supreme Court, which possesses the jurisdiction for the protection of fundamental rights, to insist for an affidavit from a respondent 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' so as to deprive him from the freedom to engage in any lawful occupation or profession.
- (3) The appointments of Secretaries to Ministries are made by His Excellency the President of the Republic of Sri Lanka in terms of Article 52 (1) of the Constitution. The Supreme Court has no power to make such order or to give directives to that effect when the prerogative of making such appointments have been vested with His Excellency the President of the Republic.
- (4) No order had been made by the Supreme Court either accepting or rejecting the affidavit filed by the 8<sup>th</sup> Respondent. Without such valid acceptance and/or a clear order made to that effect, the question of vacating an order or relieving of an undertaking would not arise, since the 8<sup>th</sup> Respondent is not bound by its contents.

Shiranee Tilakawardane, J., (dissenting)

- (1) The Supreme Court's divisions are a product of administrative expediency and nothing more, and in the light of Section 114 (d) presumption under the Evidence Ordinance – which presumes that judicial acts have been regularly performed – the suggestion that a change in composition of a particular Bench itself somehow extinguishes jurisdiction, is proved to be patently incorrect.
- (2) The prayer to vacate an Order is a re-visitation of a judgment by the Supreme Court, and in this case by a Bench differing in composition than the one which issued the Order. Therefore, we are precluded from being able to take such action.

- (3) In the light of the judgment in “*Jeyaraj Fernandopulle v. Premachandra Silva and Others*” when the Supreme Court has decided a matter, that matter is at an end, and there is no occasion for other Judges to be called upon to review or revise a matter. To grant relief of the type that reverses a prior judgment of the Supreme Court is untenable and has no basis in Law.

- (4) An affidavit is a solemn declaration of the truth of the facts stated therein made by a person from his personal knowledge and is evidence given on oath for the purpose of being relied on and acted upon and therefore it cannot be withdrawn.

An affidavit cannot be retracted from the record once it is filed in Court. Any retraction on the evidence given by affidavit will entail similar consequences as going back on oral evidence. The consequence of any person who willfully and dishonestly swears or affirms falsely, to facts contained in an affidavit, would be guilty of making a false statement of Court, which attracts penal consequences.

- (5) An affidavit may be permitted to be withdrawn if it can be established and proved that it was not made voluntarily but that the maker at the time of making or shortly prior to it was subjected to threat, coercion or duress. An admission of law is permitted to be withdrawn, but not an admission of fact made by a party or his representative in Court.
- (6) An allegation of bias must be based on reasonable grounds and proved on material facts and/ or documents. An oblique reference in a speech delivered with candour and perhaps lack of judicious caution, at a function relating to judicial officers and officers of Court, does not remotely sustain even an allegation of bias.
- (7) An undertaking given to Court cannot be withdrawn and the application to do so is refused, the petitioner would be, standing in contempt of Court for violating an undertaking he has given to Court.
- (8) The power to appoint public officers should be linked to the Fundamental Duties set out in Article 28 of the Constitution. The provision of an Article empowering a person to make an appointment cannot be considered in isolation, disregarding the basic structure and tenet of the Constitution which is embodied in the other Articles.

- (9) Under the Constitution which guarantees democracy to its people even an Executive President does not have untrammelled power and all acts of governance, especially those that involve public finance, must be in tune with the spirit of the Constitution, which mandates good and responsible governance.
- (10) The entire fabric of the Constitution mandates that the Rule of Law be the ultimate framework for all acts carried out under the Constitution, including the acts of the executive, legislature and the judiciary. Rule of law is the backbone of good governance. The stunting of one necessarily leads to a halt in the growth of the other.

Per Shiranee Tilakawardane, J.,

“When the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other Judges to be called upon to review or revise a matter”.

Per Shiranee Tilakawardane, J.,

“Affidavit of confidential nature” filed by the Petitioner, though not argued by the President’s Counsel, contained an allegation of bias. . . . This document, not tendered to some of the Justices, was filed after the amended petition as an “affidavit of confidential nature”, something alien to the normal practice of Court and the law, and which of course lost its “confidentiality” the moment it was filed, became a matter of public record. . . .”

Saleem Marsoof, P.C., J., (agreeing with J. A. N. De Silva, C. J.,)

- (1) 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 with 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.

- (2) 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, it is not at all appropriate to determine the suitability of any person to hold or continue to hold public office.

- (3) It is only the Bench which pronounced a judgment or order, is in the best position to reconsider, revise, review, vary or set aside its judgment whether on the basis of manifest error (*per incuriam*) or any other ground.

If 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.

- (4) None of the fundamental rights guaranteed by the Constitution may be compromised or waived by any person who is otherwise entitled to its protection.
- (5) The Court has the inherent power to make such orders as may be necessary, to do the real and substantial justice for the administration of which above Courts exist.
- (6) The President of the Republic of Sri Lanka who as 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. Hence, the question of the propriety of the petitioner holding public office, as Secretary to the Ministry of Finance, has to be considered by the President of the Republic of Sri Lanka.

Accordingly, the President is free to consider appointing the petitioner as Secretary to the Minister of Finance.

- (7) The Court cannot lawfully make a determination that a person was not fit to hold public office, without affording a proper opportunity of being heard on his fitness or otherwise, of holding public office. Imposing a life-time bar on a person from 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.



- (8) The direction made by the Supreme Court on 8<sup>th</sup> 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.
- (9) None of the fundamental rights guaranteed by the Constitution may be compromised or waived by any person who is otherwise entitled to its protection. As the petitioner is not competent to compromise or waive his fundamental rights guaranteed by Article 14 (1) (g) of the Constitution, he is not bound by the undertaking given by him in his affidavit dated 16<sup>th</sup> October 2008.

Held further –

Sripavan, J., (agreeing with the conclusion of J. A. N. De Silva, C. J.,)

- (1) It is a fundamental principle that no Bench is empowered to enlarge the ambit and scope of the judgment or punishment imposed by a previous Bench, [nothing is to be implied and no inferences could be drawn from the judgment. One has to look fairly at the language used in the final judgment, or otherwise the door will be opened for unfettered conclusions being reached.]
- (2) An intention to deprive a subject of the lawful occupation or profession cannot be gathered from inconclusive or ambiguous language. Explicit words are necessary in the judgment to achieve that purpose. If any clarification is needed, any party to the application is free to refer the matter to the same Bench that delivered the judgment.
- (3) The petitioner is not permitted to withdraw part of the undertaking contained in his affidavit dated 16.10.2008, namely, paragraph 13 thereof. The petitioner cannot request to undo an act which he has already performed, as the said affidavit forms part of the record and cannot be withdrawn from the subsequent proceedings.
- (4) The Court becomes “*functus*” once a judgment is delivered. The judgment delivered on 21.7.2008, is to be considered final. The judgment once delivered cannot be reviewed by the same Bench or by any other division of the Court except in the limited circumstances as set out in the case of *Jeyaraj Fernandopulle and others v. De Silva and others*.
- (5) Enlarging the limits of the final judgment delivered by a different Bench would give rise to a order made without jurisdiction.

- (6) The President of The Republic of Sri Lanka being the appointing authority in terms of Article 52 of the Constitution, would be free to consider appointing the petitioner to the post of Secretary to the Ministry of Finance and Planning, if the President so desires.
- (7) The petitioner cannot now request to undo an act, which he has already performed. If such a course of action is allowed, it may lead to the opening of floodgates where parties may seek to withdraw the undertakings given to the Court after considerable length of time. Accordingly, the petitioner is not permitted to withdraw part of the undertaking contained in his affidavit dated 16.10.2008 namely, paragraph 13 thereof.

Held further –

Ratnayake, J., (agreeing with the conclusion of J. A. N. De Silva C. J.,)

- (1) In the absence of the explicit order in the journal entry of 8<sup>th</sup> October 2008 to the effect that the 8<sup>th</sup> Respondent – Petitioner was ordered by the Supreme Court not to hold “any office in any Government institution either directly or indirectly or purport to exercise in any manner executive or administrative function” as described by the 8<sup>th</sup> Respondent – Petitioner in paragraph “a” of the amended petition, the necessity to vacate such an order dated 8<sup>th</sup> October 2008 does not arise. Indeed all that the journal entry dated 8<sup>th</sup> October 2008 stated was that the 8<sup>th</sup> Respondent – Petitioner “may consider” filing an affidavit in which he may make a statement to the effect that he would not hold any office in any Governmental institution either directly or indirectly. . . . The use of the words “may consider” in the said journal entry makes it unambiguously clear that the making of such statement in the affidavit was optional on the part of the 8<sup>th</sup> Respondent – Petitioner.
- (2) A party may apply to Court for a release (as opposed to variation) from an undertaking to Court provided it is supported by evidence showing why that party should be released from an undertaking. However, this should only be allowed in exceptional cases usually where there has been change in circumstances.
- (3) The mere necessity for the 8<sup>th</sup> Respondent – Petitioner’s services once again for the same post as set out in the letter of His Excellency the President dated 25<sup>th</sup> May 2009 does not by itself constitute a sufficient basis for the 8<sup>th</sup> Respondent – Petitioner to withdraw from an undertaking. Hence, the 8<sup>th</sup> Respondent –

Petitioner is not entitled to the relief prayed for in paragraph (b) of the amended petition.

- (4) A breach of an undertaking is punishable with contempt if that undertaking is recorded in the written order of the Court. An undertaking resulting from an arrangement does not attract punishment by contempt.
- (5) His Excellency the President, being the appointing authority in terms of Article 52 of the Constitution, would be free to consider appointing the 8<sup>th</sup> Respondent – Petitioner to the post of Secretary to the Ministry of Finance notwithstanding the undertaking contained in paragraph 13 of the affidavit dated 16<sup>th</sup> October 2008 filed in this Court by the 8<sup>th</sup> Respondent – Petitioner.

**Cases referred to:-**

1. *Vasudeva Nanayakkara v. Choksy*, SCFR 209/2007 SCM 21.7.2008 - 2008 - 1 Sri L. R. 134
2. *Gunasekara v. Samarasekera* – SC FR Application 607/99 and 608/99, SCM 12.1.2000
3. *State of West Bengal v. Subodh Gopal* AIR (1954) SC 92
4. *Gopalan v. State of Madras* AIR (1950) SC 27
5. *Nagle v. Feilden* [1966] 1 All E. R. 689
6. *Brigadier Rohan Liyanage v. Chandrananda de Silva, Secretary, Ministry of Defence and others* SC (Application) No. 506/99 SCM 18.07.2000
7. *Jeyaraj Fernandopulle v. Premachandra de Silva and Others* [1996] 1 Sri L. R. 70
8. *Kumarasinghe v. Ratnakumara and Others* [1983] 2 Sri L. R. 393
9. *Basheshar Nath v. The Commissioner of Income Tax. Delhi and Rajasthan & Another* (1959) Vol. 46 Air (SC) 149
10. *Herath Banda v. Sub Inspector of Police, Wasgiyawatta Police Station, and Others* [1993] 2 Sri L.R. 324
11. *Rodger v. Comptoir D'Escompte de Paris* (1871) 3 PC 465
12. *Ittepana v. Hamawathie* [1981] 1 Sri L. R. 476
13. *Amato v. The Queen* (1982) 69 CCC (2d) 31
14. *Gunasekara v. Bandaratilake* [2000] 1 Sri LR 292
15. *A and others v. Home Secretary* (No. 2) [2006] 2 AC 221

16. *Regina v. Loosely* [2001] 4 All ER 897
17. *Bandula Ravindranata Jayantha & eight others v. Ms. Chandrika Bandaranaike Kumaratunge & others* S. C. Minutes 3.8.2009
18. *Wilson & Others v. Abeyratna Banda* [2004] 1 Sri L.R. 255
19. *Hussain v. Hussain* (1986) 1 All ER 961
20. *Cutler v. Wandsworth Stadium Ltd.* (1945) 1 All ER 103
21. *Chatrubhujdas v. Narwarlal* (1931) AIR Bom. 509
22. *Gour Gopal Dutt v. Smt. Shantidata Mitra* (1976) AIR Cal. 475
23. *B. Himmat Sinka v. M/s Kuldip Industrial Corporation* (1981) CR. L. J. (Himachal Pradesh) 1414
24. *Biba Ltd. v. Startford Investments Ltd.* (1972) All ER 1041
25. “Water’s Edge Case” SCFR No. 352/2007
26. *Uvais v. Punyawathie* [1993] 2 Sri L. R. 46
27. *Premachandra v. Major Monataque Jayawickrama and another* [1942] 2 Sri L. R. 90
28. *In re 19<sup>th</sup> Amendment to the Constitution* [2002] 3 Sri L. R. 85
29. *Abdul Cadre Ayoob v. The Inspector General of Police and others* [1997] 1 Sri L. R. 412

**APPLICATION** for infringement of Fundamental Rights. - Main case reported in 2008 - 1 Sri L. R. 134

*Faiz Musthapa, P. C., with Anura Meddegoda and Lakdini Perera* for the 8<sup>th</sup> Respondent- Petitioner.

*M. A. Sumanthiran with Viran Corea* for the Petitioner – Respondent.

*Nihal Sri Amarasekera*, 22<sup>nd</sup> Respondent – Respondent appearing in person.

*Mohan Peiris, P. C., The Attorney General with Y. J. W. Wijayatilake, P. C., Sanjay Rajaratnam, D. S. G., and Nerin Pulle, S. S. C.* as Amicus.

*Cur.adv.vult.*

October 13<sup>th</sup> 2009

**J. A. N. DE SILVA, C. J.,**

When this matter was taken up for hearing on the 24<sup>th</sup> September 2009, the Court pronounced that by a 6 to 1

majority decision relief would be granted to the 8<sup>th</sup> Respondent-Petitioner and the reasons would be given in due course. Now I proceed to give reasons for the aforementioned decision.

The application to this Court was to release the 8<sup>th</sup> Respondent-Petitioner from the binding force of the contents of a purported affidavit tendered by him at the direction of this Court. This was originally a case where the Supreme Court found the 8<sup>th</sup> Respondent-Petitioner guilty of violations of certain fundamental rights in his capacity of a public officer and awarded compensation to the State which the 8<sup>th</sup> Respondent-Petitioner paid. Accordingly the case against the 8<sup>th</sup> Respondent-Petitioner had reached its finality.

I will briefly trace the history of this present application. The present Petitioner (hereinafter called the “Petitioner”) was cited as the 8<sup>th</sup> Respondent in S. C. F/R Application No. 209/2007.<sup>(1)</sup> At the time material to that application, the Petitioner held the post of Secretary to the Treasury and Chairman, Public Enterprises Reform Commission. His Lordship Sarath N. Silva, Chief Justice, Justices Nimal Amaratunga and Jagath Balapatabendi delivered judgment in the said application on 21<sup>st</sup> July 2008 granting specifically the relief prayed for in paragraphs (g), (h), and (i) of the prayer to the petition. The Supreme Court directed the present Petitioner to pay a sum of Rs. 500,000/- as compensation to the State on the basis that his conduct was arbitrary, *ultra vires*, biased and collusive. The Petitioner paid the said sum of Rs. 500,000/- as compensation to the State on 28.07.2008. This is the final determination of the application as far as the 8<sup>th</sup> Respondent of that case (the present Petitioner) is concerned.

After delivery of Judgment the Registered Attorney for Vasudeva Nanayakkara *viz:* Abdeen Associates filed a motion

dated 2<sup>nd</sup> September 2008 which was marked and produced C(1). This motion makes no reference to the present Petitioner. The case was mentioned on 8<sup>th</sup> September 2008, before Hon. Chief Justice, Sarath N. Silva, Justice Tilakawardane and Justice Amaratunga which was not the original Bench.

In the course of hearing into the motion Mr. Nanayakara's Counsel submitted that "The findings 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 is disqualified from holding office." This submission has no basis in the Judgment. It perplexes the mind as to how this submission was made by the Counsel. On that day the Court ordered that "The matter should be referred to the Bench that heard the main case."

On 29<sup>th</sup> September 2008 the case was mentioned before Hon. Sarath N. Silva, C. J., and Justices Tilakawardane and Amaratunga. Again the Bench was not the Bench that heard the main case. Here the Court observed that the Petitioner "has infringed the fundamental rights guaranteed by Article 12(1) of the Constitution" and noted that "motion indicated that notwithstanding these findings which show that he has acted in flagrant violation of the Constitution the 8<sup>th</sup> Respondent (the present Petitioner) is yet continuing to hold public office." At this stage Addl. Solicitor General who appeared for the 8<sup>th</sup> Respondent informed Court that the 8<sup>th</sup> Respondent has resigned from his office and he no longer appears for the 8<sup>th</sup> Respondent. However, the Court directed the Attorney General to assist Court since he is not appearing for any particular party now. There was a further direction that the case be resumed before the same Bench on 8<sup>th</sup> October 2008.

I note here with some trepidation that the Bench and the Counsel appearing have lost sight of the fact that the

order made on 2<sup>nd</sup> September 2008 was to have taken up before the Bench that heard the main case. The Bench which initially heard the motion was different from the original Bench and the Bench that noted that the Petitioner was still holding public office as aforesaid was different from the original Bench as well as the one that initially heard the motion.

The Petitioner received a notice dated 03<sup>rd</sup> October 2008, requiring him to appear before Court on 08<sup>th</sup> October 2008 and reveal to Court:

1. *Whether the petitioner was continuing to hold office under the Republic and if so, the nature of such office and place at which he is functioning;*
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;*

The response to the notice was taken up before Hon. Sarath N. Silva, Chief Justice and Justices Thilakawardane and Ratnayake, again a Bench different to the previous Benches. This was neither the Bench that heard the main case nor the Bench that made the order on 29<sup>th</sup> September 2008. Justice Amaratunga and Balapatabendi who were associated with the Judgment were not members. Justice Amaratunga who was a member of the Bench which sat on 2<sup>nd</sup> September 2008 and 29<sup>th</sup> September 2008 was not a member of the Bench on 08<sup>th</sup> October 2008. Justice Ratnayake came in for the first time. This is not in keeping with the initial order made on 2<sup>nd</sup> September 2008 that the matter should be listed before the Bench that heard the main case. The Bench that sat on 8<sup>th</sup> October 2008 was not the Bench contemplated in either order namely, 2<sup>nd</sup> September 2008 which required that the case should go before the Court that heard the main case or the order of 29<sup>th</sup> September 2008 which directed that

the matter should be resumed before the same Bench which sat on 29<sup>th</sup> September 2008.

The Court record reveals that on the 8<sup>th</sup> October Mr. Faiz Musthapha P. C. who appeared for the Petitioner informed Court that Dr. Jayasundera has tendered his resignation from office after 4 days of pronouncement of the Judgment and tendered an unreserved apology for having continued functioning after the Judgment. Apparently the Court had not been satisfied by this statement/submission of the President's Counsel and gave time to Dr. Jayasundera to file an appropriate affidavit in which he may consider including the said expression of regret and "a firm statement" that he would not hold any office in any Government institution either directly or indirectly or purport to exercise in any manner executive or administrative functions.

As the record reveals an affidavit has been filed by the Petitioner on the lines required and suggested by the Court. In the said document the Petitioner has pledged not to assume public office in the future. President's Counsel for the Petitioner pleads that no order had been made on the questioned document and as such the Petitioner desires to withdraw it. A perusal of the record reveals that this to be correct, in that no order had been made on the validity or effect of the document. It appears that so far the filing of the document is concerned it has not extended beyond a clerical exercise and the Court has not adverted to its contents. I presume that the Court advisedly did not make any order with regard to the affidavit as that would have expended the scope of the Judgment. In that context the question whether the document can now be withdrawn must be considered.

Mr. Sumanthiran contended that since the Court has used the word 'may' file an affidavit, there was an option for the Petitioner to file or not to file the affidavit. In reply to



this Mr. Musthapha, P. C., submitted that Dr. Jayasundera simply did not walk into this Court to file an affidavit. He was noticed by Court to appear and answer two questions. He himself and through his Attorney provided the required information but Court not being satisfied requested him to file an affidavit and also gave a date to make a final order. In those circumstances there was no option available to Dr. Jayasundera.

I am disturbed by the fact that the so called affidavit was prepared and filed at the insistence of the Supreme Court. Not only was the Petitioner directed to file an affidavit but the Supreme Court also dictated its contents. It seems to me that the order to file an affidavit, the contents of which are at the dictates of Court amounts to an order made in excess of jurisdiction and as such the validity of the document becomes an issue.

Accordingly, having regard to the fact that final Judgment in F. R. case was delivered and it was concluded and the successive Benches that considered this matter did not comprise the original Bench as per initial order, the fact that no meaningful action has been taken by the Court on the affidavit upon it being filed and also that the contents of the said affidavit appears to have been dictated by Court, I hold that the petitioner is entitled to complain about the purported affidavit. Accordingly, I hold and declare that the Petitioner is not bound by its contents. However, I do not permit the Petitioner to withdraw this document as it is filed of record. The appointing authority is free to consider all the attendant circumstances and take any decision he deems fit. Under Article 52(1) of the Constitution the prerogative of the appointment of a Secretary to a Ministry is with His Excellency the President. The Supreme Court or no other authority can do it.

In the case of *Gunasekera v. Samarasekera* <sup>(2)</sup>, Justice D. P. S. Gunasekera, with Hon. Sarath N. Silva, Chief Justice

and Justice Priyantha Perera agreeing held that ordering to pay compensation for violation of a fundamental right cannot be equated to a conviction by a Court of law.

It is the duty of the Counsel not to mislead Court or attempt to turn the Supreme Court into an instrument of persecution. It must also be borne very firmly in mind that there must be an end to litigation in a cause.

In conclusion I may add that Mr. Sumanthiran also submitted that there had been an affidavit filed by Dr. Jayasundera in which there was an allegation that former Chief Justice had been biased against Dr. Jayasundera. Mr. Sumanthiran demanded that Dr. Jayasundera be charged with contempt of Court.

This was an affidavit filed under a confidential cover. Mr. Musthapha, P. C., mentioned that it has reference to a statement made by former Chief Justice at a ceremony in Embilipitiya where he is purported to have said that the question of salaries of the Judges are being 'blocked' by some high officials in the Finance Ministry and he will deal with them. Some TV stations had given full publicity to this statement. This had happened prior to the delivery of the Judgment in F. R. Application where Dr. Jayasundera was the 8<sup>th</sup> Respondent. In this affidavit Dr. Jayasundera has stated that he believes that it was a reference to him. Mr. Musthapha submitted that one cannot be held in contempt for a perception.

I agree with the submission of the Attorney General on this point that pursuit of such an affidavit will not assist the honour of this Court or upholding of justice in this country. I make no order with regard to costs.

**BALAPATABENDI J.** – I agree.

*The appointing authority is free to consider all the attendant circumstances and take any decision he deems fit.*

October 13<sup>rd</sup> 2009

**DR. SHIRANI BANDARANAYAKE., J**

I have had the advantage of reading in draft the judgment of His Lordship the Chief Justice of which I am in agreement. I would however, wish to include the following as reasons for my decision in agreeing with the majority of six to one for granting relief to the 8<sup>th</sup> respondent-petitioner on 24.09.2009.

The 8<sup>th</sup> respondent-petitioner had filed an amended petition dated 31.07.2009, praying for relief in order to enable him to comply with the direction of His Excellency the President who had indicated that the 8<sup>th</sup> respondent-petitioner's services are required in the national interest.

The 8<sup>th</sup> respondent-petitioner submitted that the order dated 08.10.2008 relates to the inclusion of a firm statement in the affidavit which the 8<sup>th</sup> respondent-petitioner was required to file in terms of the said order, that he would not hold any public office or exercise any executive or administrative functions in the future. In the circumstances, the 8<sup>th</sup> respondent-petitioner prayed for relief by vacating the order dated 08.10.2008, making an order relieving the 8<sup>th</sup> respondent-petitioner of the undertaking contained in paragraph 13 of the affidavit dated 16.10.2008 and/or by granting him such other relief that would seem to be appropriate.

The background to the present application based on the decision in SC (Application) No. 209/2007(*Supra*), the subsequent orders made therein and the effect of those had been examined by His Lordship the Chief Justice with which I had agreed and accordingly I do not wish to analyse the said matters in detail. Instead, let me turn to consider briefly a few aspects which are of direct relevance to the matter in issue.

The 8<sup>th</sup> respondent-petitioner had filed the affidavit dated 16.10.2008 not on the basis of his own free will, but on the directions given by this Court on 08.10.2008. On that day, *viz.*, 08.10.2008, learned President's Counsel for the 8<sup>th</sup> respondent-petitioner had informed Court that within four (4) days of the main judgment in SC (Application) No. 209/2007 was delivered, the 8<sup>th</sup> respondent-petitioner had tendered his resignation from the post of Secretary, Ministry of Finance, but had continued to function in that post to discharge official duties since the resignation was not accepted until much later. Learned President's Counsel had further submitted that the 8<sup>th</sup> respondent-petitioner does not hold any office in any Government Establishment nor in any other Establishment in which Government has any interests. Learned President's Counsel had further submitted that the 8<sup>th</sup> respondent-petitioner tenders an unreserved apology to Court for having continued functioning after the judgment of this Court. At that stage the Court had made order thus:

“Hence the 8<sup>th</sup> respondent is given time to file appropriate affidavit in which he may consider including the said expression of regret and 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. **Further affidavit to be filed as early possible. Mention for a final order on the matter on 20.10.2008**” (emphasis added).

This Court had taken up the issue of the filing of the affidavit by the 8<sup>th</sup> respondent-petitioner on 20.10.2008. On that day the Court had noted that 8<sup>th</sup> respondent-petitioner had filed his affidavit on 16.10.2008, but quite interestingly had made no order on the affidavit. The relevant Journal Entry of 20.10.2008 stated that,

*“Counsel for the 8<sup>th</sup> respondent submits that the 8<sup>th</sup> respondent has, pursuant to the proceedings had in Court on 08.10.2008 filed an affidavit dated 16.10.2008 together with the annexure A-E. Mr. Sumanthiran for the petitioner submits that the annexures are only letters sent by the respective parties and that the 8<sup>th</sup> respondent has not included a copy of any letter said to have written been by him. Subject to that, he submits that the affidavit is insufficient compliance with the undertaking given by the 8<sup>th</sup> respondent.”*

In the said affidavit dated 16.10.2008, the 8<sup>th</sup> respondent-petitioner had averred that he does not hold any office under the Republic in any establishment in which the Government of Sri Lanka has an interest, purporting to represent the Government of Sri Lanka and that he will not hold office in any Governmental institutions either directly or indirectly or purport to exercise in any manner executive and administrative functions.

It was not disputed at any stage of the previous application or in this application that the 8<sup>th</sup> respondent-petitioner had been a high ranking Government official, who had been functioning not only as the Secretary, Ministry of Finance and Planning, but also as the Secretary to the Treasury including memberships of the Monetary Board of the Central Bank of Sri Lanka, Finance Commission and Institute of Policy Studies. In simple terms, at the time this Court had directed the petitioner to tender the aforementioned affidavit the 8<sup>th</sup> respondent-petitioner was holding high ranking employment in the Government of Sri Lanka and was a professional of his chosen area of discipline.

Accordingly, as a citizen of this Democracy, the 8<sup>th</sup> respondent-petitioner enjoyed what every citizen of this

country was entitled to in terms of Article 14(1)g of the Constitution, *viz*, the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise, until the decision of this Court that a firm statement be given 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. Article 14 of our Constitution guarantees to our citizens, nine different types of fundamental freedoms, which are exercisable by them throughout this island Republic. These fundamental freedoms are generally known as basic civil rights upon which all the other freedoms in a democratic society would lie. Article 19(1) of the Indian Constitution contains provisions, which corresponds to Article 14 of our Constitution and referring to Article 19(1) of the Indian Constitution, it has been stated in *State of West Bengal v. Subodh Gopal*<sup>(3)</sup> that,

“Those great and basic rights are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country”.

The rights conferred by Article 14(1) g can be subjected only to restrictions that are stipulated in Article 15(5) of the Constitution. These restrictions indicate very clearly that in an organized society there cannot be any absolute or unfettered rights with regard to any matter whatever that maybe. Referring to the rationale in such restrictions in the corresponding provisions of the Indian Constitution, Justice Mukherjea, in *Gopalan v. State of Madras* <sup>(4)</sup> had stated thus:

“There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. . . . Ordinarily, every man has the liberty to order his life as he pleases, to say what

he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. . . . What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control . . . . Article 19 of the [Indian] Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality”

The restrictions with regard to the freedom to engage in any lawful occupation, profession, trade, business or enterprise enumerated in Article 14(1) g of the Constitution are stipulated in Article 15(5) of the Constitution and Article 15(5)a clearly states that the exercise and operation of the fundamental right pertaining to Article 14(1) g shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation, *inter alia*, to **disciplinary control of the person entitled to such fundamental right.**

It is therefore quite obvious that a citizen of this country has a fundamental right to engage in a lawful occupation and such right is guaranteed in terms of Article 14(1) g of the Constitution and also such right, if it is to be restricted in terms of Article 15(5) of the Constitution such restrictions would only be based on the disciplinary procedure in terms of his employment.

A citizen’s right to work, so guaranteed in terms of the Constitution, would also be protected by the Courts, again in terms of the Constitution. The basic principle that the Court

being the final protector of all citizens was clearly enumerated in *Nagle v. Feilden*<sup>(5)</sup> where Lord Denning had stated thus:

“... a man’s right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the Courts will intervene to protect his rights of property, so they will also intervene to protect his right to work”.

It is therefore the paramount duty of Courts to ensure that a citizen’s right to work is protected. The right to employment being a fundamental right guaranteed by the Constitution, it would be the duty of the Court to exercise their authority in the interest of the individual citizen and of the general public to safeguard that right. The importance of the fundamental rights safeguarded by the Constitution is clearly stipulated in Article 4 (d) of the Constitution where it is emphasized that,

“the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided”.

A careful consideration of the aforementioned constitutional provisions clearly elaborate the fact that the right to employment is a fundamental right declared and recognized by the Constitution which should not be abridged, restricted or denied in any manner other than to the extent provided by the Constitution itself. Article 118 of the Constitution clearly stipulates that the Supreme Court of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions enumerated in the Constitution exercise the jurisdiction **for the protection of fundamental rights**.



In fact the Supreme Court had been quite mindful of the provisions referred to above and specially to the fact that in the event that there has been evidence to the effect that a government official who had been named as a respondent in the matter in question had acted in violation of a petitioner's fundamental rights by way of executive and/or administrative action that the said respondent's appointing authority/supervising officer should be notified of such action in order to take relevant steps, if and when necessary.

There is a long line of cases under Articles 11, 13(1) and 13(2) of the Constitution that would bear witness to the said practice that even after finding a particular officer responsible for the violation of any one or more of Articles 11, 13 (1) and 13(2) of the Constitution, this Court had taken no steps to order such respondents to cease employment. In the event if they are found guilty, even after ordering to make payment personally as compensation, no directives have been given with regard to the cessation of their employment. The only step that has been taken consistently by the Supreme Court is to direct the Registrar of the Supreme Court to send a copy to the Inspector General of Police for the purpose of taking appropriate steps in terms of the procedure governing the respondent's employment. The purpose for informing the appointing authority the outcome of an action before the Supreme Court, without this Court taking steps to remove citizens from their employment is for the relevant establishment to follow due process of law, if the employee in question is to be deprived of his employment. Since the right guaranteed in terms of Article 14(1) g is not an absolute right, but one which is subject to permissible restrictions, if an employee is accused of any wrongdoing, necessary steps would have to be taken to inquire into such allegations in terms of his contract of employment.

In such circumstances for all the reasons aforementioned it would not be possible for this Court, which possesses the jurisdiction for the protection of fundamental rights, to insist for an affidavit from a respondent 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'** so as to deprive him from the freedom to engage in any lawful occupation or profession. In fact a question would arise as to whether the aforementioned difficulty was the reason for Court not to have made any order on the affidavit filed by the 8<sup>th</sup> respondent-petitioner on 20.10.2008 or even on 15.12.2008, when finally the proceedings were terminated. Be that as it may, it must clearly be borne in mind that in terms of the provisions contained in the Constitution protecting the fundamental rights of the citizens and the Supreme Court having the jurisdiction for the protection of fundamental rights, this Court has no jurisdiction to compel and dictate a respondent to file an affidavit **with firm statements** affirming/swearing that they would not hold office in any governmental institutions. As stated by Francis Bacon (Of Judicature), **'Judges must beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws.'**

The 8<sup>th</sup> respondent-petitioner in his amended petition had stated that he had received a letter dated 25<sup>th</sup> May 2009 from the Secretary to His Excellency the President directing the 8<sup>th</sup> respondent-petitioner to resume duties as Secretary, Ministry of Finance and Planning and Secretary to the Treasury. In the said letter the Secretary to His Excellency the President had stated, *inter alia*,

- a. that with the successful liberation of the North and East the country needs to embark on a massive development programme and that the country is confronted with

several challenges that required to be managed to restore the desired socio economic progress, the impact of the global economy that is confronted with a financial crisis being one such major challenge;

- b. that several major infrastructure development activities are in the final stage of implementation and many others are to be launched for which domestic and external funding and other resources need to be mobilized;
- c. that the implementation of post-war development programme in the North and East also demand experienced and committed public officers.

The said communication sent by the Secretary to His Excellency the President had further stated thus:

“As we know, His Excellency the President accepted your resignation from the post of Secretary, Ministry of Finance and Planning and other positions in the Government reluctantly in view of your insistence. Considering the vast knowledge and experience you command while acknowledging your honesty and integrity, His Excellency the President is of the view that it is a waste that your services are not available to the Government particularly in the present context. In this background, His Excellency the President has instructed me to inform you to resume duties as Secretary, Ministry of Finance and Planning and assist the Government in its endeavours” (E).

The appointments of Secretaries to Ministries are made by His Excellency the President of the Republic of Sri Lanka in terms of Article 52(1) of the Constitution. This Court has no power to make such an order or to give directives to that effect when the prerogative of making such appointments have been vested with His Excellency the President

of the Republic. This position had been clearly laid down by Amerasinghe, J., (Wijetunga, J., and Bandaranayake, J., agreeing) in *Brigadier Rohan Liyanage v Chandrananda de Silva, Secretary, Ministry of Defence and others*<sup>(6)</sup>

The 8<sup>th</sup> respondent-petitioner in his amended petition dated 31.07.2009 had prayed for the following:

1. vacate the order dated 08.10.2008 in so far as it relates to the inclusion in the Affidavit of a firm statement that the present petitioner “would not hold any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions”;
2. make an order relieving the present petitioner of the undertaking contained in Paragraph 13 of the said affidavit dated 6.10.2008;
3. grant such other and further relief that this Court may seem fit.

As referred to earlier, either on 08.10.2008, 20.10.2008 or even thereafter no order had been made by this Court either accepting or rejecting the affidavit filed by the 8<sup>th</sup> respondent-petitioner. Without such valid acceptance and/or a clear order made to that effect, the question of vacating an order or relieving of an undertaking would not arise, since the 8<sup>th</sup> responden-petitioner is not bound by its contents. Furthermore, it is also relevant to note at this juncture that the original petition filed by the petitioner in SC (Application) No. 209/2007, was heard and decided before a Bench consisting of Hon. Sarath N. Silva, C. J., Amaratunga, J., and Balapatabendi J. However, the Bench which sat on 08.10.2008 and 20.10.2008 comprised of Hon. Sarath N. Silva, C. J.,

Tilakawardane, J., and Ratnayake J. It is well settled law, as clearly stated by Amerasinghe J., in *Brigadier Rohan Liyanage (supra)* that the Bench of the Court which heard and determined a matter should hear any application touching its earlier decision. Therefore it would not be possible to grant the relief prayed under items 1 and 2 of the amended petition dated 31.07.2009. However, considering the circumstances of this application and the provisions contained in Article 52(1) of the Constitution His Excellency the President, being the appointing authority in terms of Article 52(1) of the Constitution would be free to consider appointing the 8<sup>th</sup> respondent-petitioner to the Post of Secretary Ministry of Finance and Planning/Secretary to the Treasury, notwithstanding any undertaking given to Court by the said 8<sup>th</sup> respondent-petitioner.

*The appointing authority would be free to consider appointing 8<sup>th</sup> Respondent to the post Secretary, Ministry of Finance and Planning/Secretary to the Treasury.*

October 13<sup>th</sup> 2009

**SALEEM 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 8<sup>th</sup> Respondent-petitioner (hereinafter referred to as the Petitioner) has prayed in his amended petition dated 31<sup>st</sup> July 2009 for the vacation of the order of this Court dated 8<sup>th</sup> 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 16<sup>th</sup> 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 8<sup>th</sup> October 2008 or permit the Petitioner to withdraw his undertaking given to Court in his affidavit dated 16<sup>th</sup> October 2008. In particular, he has submitted that the judgement of this Court dated 21<sup>st</sup> 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* <sup>(7)</sup> 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 21<sup>st</sup> July 2008 nor the order of this Court dated 8<sup>th</sup> October 2008 can lawfully be revised or varied by this Court.