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 2

PAGES 29-56

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

Price: Rs. 25.00

DIGEST

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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 Other* [8] 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 officer, 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 accordance 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 Constitu-

tion, 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 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. Amaratunge, 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 Ferandopulle v. Premachandra de Silva and Others (Supra)* 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, whether 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 (Supra)* 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 impunged 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 Commmissioner of Income Tax, Delhi and*

Rajasthan & Another [9], 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*[10] 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 honorable Judges who pronounced the judgement dated 21st July 2008 but also the honorable 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 had 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. Comptoit D'Escompte de Paris*(11) 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*(12) *Amato v. The Queen* (13); *Gunasena v. Bandaratilake* (14) *A and others v. Home Secretary* (15) As Lord Nicholls of Birkenhend observed in *Regina v Loodely*(16)

> "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.

October 13th 2009

SRIPAVAN, J.

Whilst I respectfully agree with the conclusion reached by My Lord the Chief Justice, I wish to set down my own reasoning on the issues involved.

The 8th Respondent-Petitioner (hereinafter referred to as the petitioner) by his amended petition dated 31.07.09, sought the following reliefs from this Court:

(a) Vacate the Order dated 08.10.08 in so far as 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".

(b) Make an order relieving the present petitioner of the undertaking contained in paragraph 13 of the said affidavit dated 16.10.08 tendered by the present petitioner pursuant to the Order of Your Lordship's Court and produced marked "D" to this Application.

(c) Grant such other and further relief as to Your Lordships' Court shall seem fit and meet.

Learned President's Counsel for the petitioner urged that the petitioner made this application to Court in order to comply with the directions of His Excellency the President as contained in the letter dated 25.05.09 marked "E". The last

paragraph of the said letter addressed to the petitioner by Mr. Lalith Weeratunga, Secretary to the President, reads 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."*

It is a common ground that the judgment in S. C. F. R. Application 209/2007 *(Supra)* instituted by Vasudeva Nanayakkara against the petitioner and 30 others was delivered on 21.07.08 by a Bench comprising His Lordship The Chief Justice Hon. Sarath N. Silva, Hon. Amaratunge, J. and Hon. Balapatabendi, J. The impugned executive action as alleged by Vasudeva Nanayakkara in the said application was primarily, the petitioner who functioned at the material time as Chairman of the Public Enterprise Reform Commission (previously and presently Secretary to the Treasury) caused the sale of shares to Lanka Marine Services Limited (hereinafter referred to as LMSL) a wholely owned Company of the Ceylon Petroleum Corporation which was a profit making, debt free, tax paying Company to John Keells Holdings Limited, (hereinafter referred to as JKH), without prior approval of the Cabinet of Ministers, in a process which was not transparent and was biased in favour of JKH. It was also alleged that the petitioner did not obtain a valuation for LMSL from the Government

Valuer and relied only on the valuation secured at his discretion from a private bank.

The Court having arrived at certain findings against the petitioner, observed as follows:-

". . . . P. B. Jayasundera, being the 8th Respondent and the then Chairman of the Public Enterprise Reform Commission, from the very commencement of the process, acted outside the authority of the applicable law, being the Public Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He has not only acted contrary to the Law but purported to arrogate himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but biased in favour of JKH. . . . .. The impugned transaction and granting of benefits to JKH has been an arbitrary exercise of executive power primarily on the part of the 8th Respondent, P. B. Jayasundera who functioned at the relevant time as the Chairman of the Public Enterprise Reform Commission.

. . . .The findings in the judgement demonstrated that the action of P. B. Jayasundera, 8th Respondent, has not only been arbitrary and ultra vires but also biased in favour of JKH. The allegation of the petitioner that he worked in collusion with S. Ratnayake of JKH to secure illegal advantages to the latter, adverse to the public interest is established. Accordingly, I direct the 8th Respondent to pay a sum of Rs. 500,000/- as compensation to the State. The 18th to 21st Respondents will pay the petitioner a sum of Rs. 250,000/- as costs."

The Court thus granted to Vasudeva Nanayakkara the relief sought in prayer (b) of his Petition that there has been

an infringement of the Fundamental Right guaranteed by Article 12(1) of the Constitution by executive or administrative action. The reliefs claimed in paragraphs (g), (h) and (i) of the prayer to the petition were also allowed.

The judgment thus delivered on 21.07.08 expressly and unambiguously declared that the Fundamental Right guaranteed by Article 12(1) of the Constitution has been violated and imposed compensation in a sum of Rs. 500,000/- on the petitioner. In the absence of clear and unambiguous language to that effect one cannot presume that the judgment debars the Petitioner from functioning as the Secretary to the Ministry of Finance and Planning. The Court becomes *"functus"* once the judgment is delivered. The said decision of the Supreme Court is to be considered as 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 *Jayaraj Fernandopulle and others vs. De Silva and others.*(Also vide *Bandula Ravindranata Jayantha & eight others vs. Ms. Chandrika Bandarnaike Kumaratunge & others* [17] However, any clerical or arithmetical mistake or any accidental slip or omission may be corrected by the **same Bench** (emphasis added) that delivered the final judgment. (Vide *Wilson & others vs. Abeyratna Banda* [18])

It is therefore, 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 judgement, or otherwise the door will be opened for unfettered conclusions being reached. 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** (Emphasis added) that delivered the judgment.

On 08.09.08 when the application came up before His Lordship The Chief Justice Hon. Sarath N. Silva, Hon. Tilakawardane, J. and Hon. Amaratunga, J. on a motion filed by the 19th Respondent, Counsel for Vasudeva Nanayakkara submitted to Court that the Officer (petitioner in these proceedings) in respect of whose conduct, adverse findings have been made by Court was yet continuing to hold public office notwithstanding the finding that the petitioner had violated provisions of the Constitution and thereby breached the Oath taken in terms of Article 53 of the Constitution. Accordingly, the Court made a specific order to have the application mentioned on 29.09.08 before the **same Bench** (emphasis added) that heard the main case. Unfortunately, on 29.09.08, the application was not listed before the same Bench that heard the main case and delivered its judgment on 21.07.08. The Court on 29.09.08 however, directed the Registrar to issue notice on the petitioner requesting him to appear in Court on 08.10.08 and made order that the case be resumed before the same Bench on 08.10.08.

On 08.10.08, the application came up before His Lordship The Chief Justice Hon. Sarath N. Silva, Hon. Tilakawardene, J. and Hon Ratnayake, J. . Mr. Faisz Mustapha, President's Counsel appearing for the petitioner submitted that the petitioner tendered an unreserved apology to Court for having continued functioning after the Judgment of the Court. Based on the apology tendered, the Court granted time to the petitioner to file an affidavit in that he **may**

consider (emphasis added) 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. The Court however, directed that the application be mentioned for a final order on 20.10.08.

Having submitted an affidavit dated 16.10.08, the petitioner cannot now be permitted to withdraw the undertaking contained in paragraph 13 of the said affidavit. The said affidavit now forms part of the record and cannot be withdrawn from these proceedings. In other words, the petitioner cannot request to undo an act which he has already performed. If such a course of action is allowed, it may lead to flood gates where parties may seek to withdraw the undertakings after a considerable length of time. If circumstances have changed, parties may file fresh affidavits explaining the supervening events and the changed circumstances, for the consideration of Court. Accordingly, I hold that the petitioner is not permitted to withdraw part of the undertaking contained in his affidavit dated 16.10.08, namely, paragraph 13 thereof.

At the hearing before us, the learned President's Counsel submitted that the petitioner would not be seeking to vacate the order dated 08.10.08 as prayed for in paragraph (a) of his amended petition. Hence, I do not express any opinion on that matter. However, I reiterate that the said order cannot be reviewed or set aside by another Bench except for certain limited circumstances as demonstrated in *Jeyeraj Fernandopulle'*s Case.

Advisedly, the Bench comprising His Lordship The Chief Justice Hon. Sarath N. Silva, Hon. Tilakawardane, J. and

Hon. Ratnayake, J. did not make any order on 20.10.08 on the affidavit of the petitioner dated 16.10.08 At the hearing before us, learned President's Counsel for the petitioner conceded that no order was made by Court, on the affidavit filed by the petitioner. Had this been done, it would have amounted to enlarging the limits of the final judgment delivered by a different Bench on 21.07.08 and would have given rise to a order made without jurisdiction.

Learned Attorney General brought to the notice of Court that after the delivery of the judgment on 21.07.08, actions have been initiated against the petitioner by the Bribery Commission, Criminal Investigations Department and the Commissioner General of Inland Revenue according to the relevant applicable statutes. The outcome of those investigations are not known to this Court. Considering the totality of the submissions made, the Court while refusing the reliefs sought in paragraphs (a) & (b) of the prayers to the amended petition dated 31.07.09, holds that His Excellency the President 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.

October 13th 2009

P.A. RATNAYAKE J.

I have had the advantage of perusing the draft judgment of His Lordship the Chief Justice and I agree with his conclusion that His Excellency the President, being the appointing authority in terms of article 52 of the Constitution would be free to consider appointing the 8th respondent petitioner to the post of Secretary to the Ministry of Finance notwithstanding the undertaking given to the Court by the

said 8th Respondent Petitioner. However, I would like to state my own reasons in arriving at the said conclusion.

The judgment in this case was delivered on 21st July 2008 by a Bench comprising of His Lordship the former Chief Justice Hon. Sarath N. Silva, Hon. Amaratunga J. and Hon. Balapatabendi J. The judgment was consequent to an application filed by the Petitioner in the original application (Mr. Vasudeva Nanayakkara) alleging a contravention of fundamental rights by executive and administrative action in the sale of shares of Lanka Marine Services Ltd., a wholly owned company of the Ceylon Petroleum Corporation. In that Judgment this Court held that the impugned transaction and the granting of benefits to John Keells Holdings Ltd., has been an arbitrary exercise of executive power primarily on the part of the 8th Respondent-Petitioner who functioned at the relevant time as the Chairman of the Public Enterprise Reform Commission. The judgment also found that the actions of the 8th Respondent-Petitioner was also biased in favour of John Keells Holdings Ltd. and that he worked in collusion with S. Ratnayake of John Keells Holdings Ltd. to secure illegal advantages to the latter adverse to the public interest. Pursuant to *inter alia* those findings, this Court directed the 8th Respondent-Petitioner to pay a sum of Rs. 500,000/- as compensation to the State.

Subsequent to the judgment this case was called again before different Benches of this Court pursuant to applications made by parties. The subject matter of the present application relates to the proceedings before this Court on 8th October 2008 and 20th October 2008.

After the judgment, this case was called on 8th September 2008 before His Lordships the Chief Justice Hon. Sarath N. Silva, Hon. Tilakawardane, J. and Hon. Amaratunga, J. on

a motion filed by the 19th Respondent (Lanka Marine Services Ltd.). At the hearing the counsel for the Petitioner in the original application (Mr. Vasudeva Nanayakkara) Mr. Sumanthiran submitted to this Court that the 8th Respondent-Petitioner against whom adverse findings were made by Court is yet continuing to hold public office notwithstanding the findings that he has violated the Provisions of the Constitution and the oath taken in terms of Article 53 of the Constitution. Accordingly, this Court made an order to have the application mentioned on 29th September 2008 before the same Bench who heard and decided the main case. The case has not been listed before the same Bench on 29th September 2008 but was called before His Lordship the Chief Justice Hon. Sarath N. Silva and Hon. Tillakawardane, J. and Hon. Amaratunga, J. On this day, the Court directed to issue notice on the 8th Respondent Petitioner in this application to appear before Court on 8th October 2008 and again directed the case be heard before the same Bench. The case was called again on 8th October 2008 before a Bench of which His Lordships Chief Justice Hon. Sarath N. Silva, Hon. Tillakawardane, J. and I were members.

On 08th October 2008 Mr. Faiz Musthapa, P. C. appeared for the 8th Respondent-Petitioner and submitted to Court that the 8th Respondent-Petitioner tendered his resignation from the post of Secretary Ministry of Finance within four days of the judgment. He however submitted that the 8th Respondent-Petitioner continued to function in that post to discharge official duties since the resignation was not accepted until much later. He further submitted that the 8th Respondent-Petitioner resigned from the Chairmanship of Sri Lankan Airlines on 19th September 2008 and that this was accepted on 30th September 2008. He further submitted that the 8th Respondent-Petitioner did not hold any office in

any Government Establishment nor in any establishment in which the Government has any interest. However, Counsel for the Petitioner in the original application (Mr. Vasudeva Nanayakkara) Mr. Sumanthiran submitted to Court that according to his instructions, the 8th Respondent-Petitioner has interest in companies incorporated in which the Government has an interest and he referred to two such companies. Mr. Musthapha submitted that he only holds a single share in these companies and that he would sever links with these companies as well. He further submitted that the 8th Respondent tenders an unreserved apology to Court for having continued functioning after the judgment of this Court. Thereafter this Court recorded the following statement in the Journal Entries of 8th October 2008, which was extensively referred to in these proceedings:

> "Hence the 8th 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 as possible. Mention for a final order on the matter on 20.10.2008. ..... Accordingly, Registrar to list this matter to be mentioned firstly on 20.10.2008 and later on 15.12.2008."

In the meantime the 8th Respondent-Petitioner filed an affidavit dated 16th October 2008 in which the following statement was contained in paragraph 13:

"I state that I do not hold office under the Republic or in any establishment in which the Government of Sri Lanka has an interest, purporting to represent the government of Sri Lanka and I will not hold in any governmental institution

either directly or indirectly or purport to exercise in any manner executive or administrative functions"

Thereafter, this case was called again on 20th October 2008 before a Bench of which His Lordship the Chief Justice Hon. Sarath N. Silva, Hon. Tillakawardane, J. and I were members. The following statement was also recorded in the Journal Entries of 20th October 2008, which was also extensively referred to in these proceedings.

> "Counsel for the 8th Respondent submits that the 8th 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 8th Respondent has not included a copy of any letter said to have been written by him. Subject to that, he submits that the affidavit is insufficient compliance with the undertaking given by the 8th Respondent. Mention on 15.12. 2008 as previously directed."

It was common ground in the submissions of both Mr. Musthapha P. C. and Mr. Sumanthiran that the words "insufficient compliance" in the Journal Entry of 20th October 2008 was a typographical error and that the words should instead read as "sufficient compliance."

Thereafter the 8th Respondent-Petitioner filed this instant application before this Court in which he stated that he had been requested by His Excellency the President by letter dated 25th May 2009 to resume duties as Secretary, Ministry of Finance and Planning for the reasons stated in that letter. In the circumstances the 8th Respondent–Petitioner sought the following relief in the amended petition dated 31st July

2009 filed in this instant application;

"(a) Vacate the Order dated 08.10.08 in so far as the 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.

(b) Make an order relieving the present petitioner of the undertaking contained in paragraph 13 of the said affidavit dated 16.10.08 tendered by the present Petitioner pursuant to the Order of Your Lordship's Court and produced marked 'D' to this application.

(c) Grant such other and further relief as to Your Lordships' Court shall seem fit and meet."

Mr. Musthapha P.C. representing the 8th Respondent – Petitioner urged the grant of the above relief on several grounds. Mr. Sumanthiran, who represented the Petitioner in the original Application, strongly opposed the grant of such relief.

As far as the relief prayed for in paragraph (a) in the amended Petition is concerned, a careful reading of the Journal Entry of 8th October 2008 will reveal that the 8th Respondent-Petitioner was never expressly ordered by this Court not to hold "any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions" as described by the 8th Respondent-Petitioner in paragraph (a) of the amended Petition. Indeed all that the Journal Entry dated 8th October 2008 stated was that the 8th 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 or

purport to exercise in any manner executive or administrative functions". The use of the words "may consider" in the Journal Entry dated 8th October 2008 makes it unambiguously clear that the making of such statement in the affidavit was optional on the part of the 8th Respondent-Petitioner and that the 8th Respondent-Petitioner was not under compulsion to do so. Therefore, in the absence of an explicit order in the Journal Entry of 8th October 2008 of the nature described by the 8th Respondent-Petitioner in paragraph (a) in the prayer to the amended petition, the necessity to vacate such an order dated 8th October 2008 does not arise and accordingly it is refused for this reason.

The next issue is the grant of the relief prayed for in paragraph (b) in the amended Petition by making an order relieving the 8th Respondent-Petitioner of the undertaking contained in paragraph 13 of the affidavit dated 16th October 2008 tendered by the 8th Respondent – Petitioner pursuant to the Order of this Court.

In the words of Sri John Donaldson M. R. in *Hussain v Hussain* (19) an undertaking to a Court is "as solemn, binding an effective as an order of Court in the like terms …." Consequently a breach of an undertaking to Court amounts to a contempt in the same way as a breach of an order. However a party may apply to Court for a release (as opposed to variation) from an undertaking, provided it is supported by evidence showing why that party should be released from an undertaking; vide *Cutler v Wandsworth Stadium Ltd.*(20) However this should only be allowed in exceptional cases usually where there has been a change in circumstances. An unrestricted license permitting parties to withdraw undertakings given to Court could open the floodgates and adversely affect the administration of justice.

Indeed the need to make out a strong case to be released from an undertaking is evident from the facts of *Cutler'*s case *(supra).* In that case, Culter filed action against Wandsworth Stadium Ltd. seeking an injunction preventing the Defendants from excluding the Plaintiff from the greyhound racing track. The Defendant gave an undertaking that they would admit the Plaintiff to the Wandsworth Stadium until the trial of the action or until further order. Thereafter, another litigant, Pearson, also filed action against Wandsworth Stadium and obtained an injunction restraining the Defendants from excluding Pearson from their track on fog racing days. However, there was an appeal against that order and the Court of Appeal dissolved the injunction on the basis that it had been granted in terms which were far too wide. Thereafter Wandsworth Stadium Ltd. sought a variation of the undertaking given in *Cutler'*s case. Morton L. J. (with Finlay L. J. agreeing) held that even if the application was treated in substance as an application for release from the undertaking, neither the mere effluxion of time nor the ground that the Court of Appeal had subsequently taken the view that the injunction was granted in wide terms was enough for the release from such undertaking.

The 8th Respondent-Petitioner was functioning as the Secretary of the Ministry of Finance under His Excellency the President shortly before making the impugned undertaking in the affidavit of 16th October 2008 presumably because his services were needed. Therefore, the mere necessity for the 8th Respondent-Petitioner's services once again for the same post as set out in the letter of His Excellency the President dated 25th May 2009 does not by itself constitute a sufficient basis for the 8th Respondent-Petitioner to withdraw from an undertaking. Therefore I hold that the 8th Respondent-Petitioner is not entitled to the relief prayed for in paragraph (b) in the amended Petition.

There remains another aspect which Mr. Musthapha PC invited this Court to consider. Mr. Muthapha PC drew the attention of this Court to Article 52 of the Constitution that empowers His Excellency the President to appoint a Secretary to a Ministry and therefore he submitted that His Excellency the President being the appointing authority should be free to consider appointing the 8th Respondent-Petitioner as Secretary of the Ministry of Finance if he so desired. There is no doubt that His Excellency the President is empowered by Article 52 of the Constitution to make such an appointment if he so desired in his discretion. However the issue in such a case would be whether the 8th Respondent-Petitioner would be committing contempt of this Court by breaching the undertaking contained in the affidavit of 16th October 2008 by holding office consequent to such an appointment being made by His Excellency the President.

It has been held that a breach of an undertaking is punishable with contempt if that undertaking is recorded in the written order of the Court; vide *Chatrubhujdas v. Natwarlal* (21) *Gour Gopal Dutt v Smt. Shantidata Mitra* (22) *B. Himmat Sinka v. M/s Kuldip industrial Corporation* (23) and also *Biba Ltd. v. Startford Investments Ltd* (24)

As noted above, when this case was taken up on 8th October 2008, this Court recorded in the Journal Entry of that day that a final order on the matter would be made on 20th October 2008. In the meantime the 8th Respondent-Petitioner filed the affidavit dated 16th October 2008. Thereafter, this case was called again on 20th October 2008. However, the matter regarding the affidavit was concluded without this Court making a final order on the matter. In particular the undertaking of the 8th Respondent-Petitioner was not set out in a written order of this Court on 20th October 2008 or any