

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

In the matter of an application for mandates in the nature of writs of certiorari, prohibition and mandamus in terms of Article 140 of the Constitution of the Republic of Sri Lanka.

Basil Rohana Rajapakse
Medamulana, Weeraketiya.

Petitioner

C. A. Writ Application 89/2017

Vs.

1. His Lordship Justice Preethi Padman Surasena
President
2. Hon. Wikum Kaluarachchi
Commissioner
3. Hon. Gihan Kulatunga
Commissioner
4. Hon. Priyasena Ranasinghe
Commissioner
5. Mr. B. A. Premathilake
Commissioner
1st to 5th Respondents abovenamed all of the
Presidential Commission of Inquiry to
investigate and inquire into serious acts of
Fraud, Corruption and Abuse of Power, State
Resources and Privileges (PRECIFAC)
Block No. 5, BMICH, Colombo 5.

6. H. W. Gunadasa
Secretary
Presidential Commission of Inquiry to
investigate and inquire into serious acts of
Fraud, Corruption and Abuse of Power, State
Resources and Privileges (PRECIFAC)
Block No. 5, BMICH, Colombo 5.
7. P. B. Jayasundera
No. 761/C, Pannipitiya Road,
Pelawatte, Battaramulla.
8. R. A. Amitha Kithsiri Ranawaka
No. 233/36, Medalanda Watta,
Kalapitiya, Pasyala.
9. Mrs. Chandra Wickremasinghe
No. 92, Atawana Mawatha,
Siddamulla, Piliyandala.
10. Shantha Bandara
No. 65/70, Kakadupatha,
Mattakuliya, Colombo 14.
11. W. A. Nihal Somaweera
XB/10/3/3, Edmonton Flats,
Kirulapona, Colombo 6.
12. Jude Roshan Nilantha Fernando
No. 218, Tudella, Ja-Ela.
13. Kande Eranga Dilrukshi
No. 91/5, Raassapana Road,
Ihala Bomiriya, Kaduwela.
14. W. Wimalasena
No. 5, Morupola, Gampaha.

15. H. P. Lalith Kumara
No. 45/3, Mihindu Mawatha,
Malabe.

16. The Government Printer
Department of Government Printing,
No. 118, Dr. Dannister De Silva Mawatha,
Colombo 8.

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

Respondents

Before: Janak De Silva J.

Priyantha Fernando J.

Counsel:

Gamini Marapana P.C. with Navin Marapana P.C. for the Petitioner

Prasanna De Zoysa for the 10th Respondent

Farzana Jameel P.C. for the 17th Respondent

Written Submissions tendered on:

Petitioner on 02.05.2019

17th Respondent on 02.05.2019

Argued on: 01.04.2019

Decided on: 24.05.2019

Janak De Silva J.

This is an application filed in terms of Article 140 of the Constitution. The Petitioner has sought several writs against the 1st to 6th Respondents arising from or in connection with the proceedings of the Presidential Commission of Inquiry to investigate and inquire into serious acts of Fraud, Corruption and Abuse of Power, State Resources and Privileges (PRECIFAC).

This application was filed on 10th March 2017. However, it was not supported until 01.04.2019 on which date the learned President's Counsel for the Petitioner submitted that this Court be pleased to refer the matter to the Supreme Court for further steps in terms of section 49(3) of the Judicature Act as the 1st Respondent is a sitting judge of the Supreme Court. The learned Additional Solicitor General objected to this application and parties made oral submissions and thereafter filed written submissions. On 09.05.2019, this Court sought a clarification from the learned President's Counsel for the Petitioner. This order is on the above application.

Section 49(3) of the Judicature Act reads:

“Where any Judge who is a party or personally interested, is a Judge of the Supreme Court or the Court of Appeal, the action, prosecution, proceeding or matter to or in which he is a party or is interested, or in which an appeal from his judgment shall be preferred, shall be heard or determined by some other Judge or Judges of the said court :

Provided that in every other case some other Judge of the High Court, the District Court, Small Claims Court and the Magistrates' Court and Primary Court, as the case may be, of any adjoining zone, district or division shall have jurisdiction to hear, try and determine such action, prosecution, proceeding or matter.”

The learned President's Counsel submitted that Article 140 of the Constitution must be read with section 49(3) of the Judicature Act and since the 1st Respondent is now a sitting judge of the Supreme Court this Court is deprived of jurisdiction in respect of the application and that it ought now be referred for determination by their lordships of the Supreme Court. He further submitted that the proviso to Article 140 of the Constitution allows the Parliament to “provide by law” that *in any such category of cases as may be specified in such law*, the jurisdiction of the Court of

Appeal shall be exercised by the Supreme Court and not by the Court of Appeal and that section 49(3) of the Judicature Act is an instance where Parliament has specifically provided for a particular "category" of case, i.e., cases in which a judge of the Supreme Court is a party. It was his contention that there can be no doubt that the words "shall be heard or determined by some other Judge or Judges of the said court" in section 49(3) of the Judicature Act refers to the "court" in which the party to the case is a judge which in this case is the Supreme Court.

Jurisdiction

In the Republic of Sri Lanka sovereignty is in the people and is inalienable [Article 3]. Except in the case of matters relating to the privileges, immunities and powers of Parliament and of its members, the **judicial power** of the people **shall be exercised by Parliament through courts, tribunals and institutions** created and established, or recognized, by the Constitution, or created and established by law [Article 4(c)].

Jurisdiction is the authority of a Court to exercise judicial power in a specific case and is, of course, **a prerequisite to the exercise of judicial power**, which is the totality of powers a Court exercises when it assumes jurisdiction and hears and decides a case. [per Sansoni C.J. in *P.A. Anthony Naide v. The Ceylon Tea Plantation Co. Ltd. of London* (68 N.L.R. 558 at 560). In *Garthwaite v. Garthwaite* [(1964) 2 W.L.R. 1108 at 1120], Diplock, L.J. held:

"in its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors."

Accordingly, jurisdiction must be vested with such courts, tribunals and institutions for them to exercise judicial power. Clearly the Constitution envisaged the vesting of judicial power in courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law and not on the holders of office of such courts, tribunals and institutions such as judges or members of different tribunals. Judges and members of different tribunals exercise the judicial power given to such courts, tribunals and institutions and not judicial power

they possess independently of such courts, tribunals and institutions. The reference to *inherent power of court* is a further illustration of this principle.

Hence, it is incumbent on the Petitioner to establish that the Supreme Court was vested with jurisdiction to hear and determine this writ application for him to succeed in his application.

Jurisdiction of the Supreme Court

Article 118 of the Constitution specifies the general jurisdiction of the Supreme Court and then Articles 119 to 131 elaborates the general jurisdiction so vested. Articles 118(a) to (f) of the Constitution does not deal with any writ jurisdiction of the Supreme Court. Article 118(g) of the Constitution refers to jurisdiction in respect of such other matters which Parliament may by law vest or ordain and is the only provision which may be of some assistance to the Petitioner.

Article 140 of the Constitution reads:

“140. Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo. mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person:

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be **exercised by the Supreme Court** and not by the Court of Appeal.” (Emphasis added)

The jurisdiction vested in this Court by Article 140 of the Constitution can be limited or ousted only by a constitutional provision [*Atapattu and others v. Peoples Bank* (1997) 1 Sri.L.R. 208]. The proviso to Article 140 is an instance where the Constitution allows the Parliament to transfer the jurisdiction of the Court of Appeal to the Supreme Court in specified category of cases by law which in terms of Article 170 of the Constitution means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order-in-Council. However, that proviso allows only a transfer of jurisdiction to the

Supreme Court and not to a judge or judges of the Supreme Court. For example, section 4(1) of the Urban Development Projects (Special Provisions) Act No. 2 of 1980 reads:

“4(1) The jurisdiction conferred on the Court of Appeal by Article 140 of the Constitution shall, in relation to any particular land or any land in any area in respect of which an Order under or purporting to be under section 2 of this Act has been made, be **exercised by the Supreme Court** and not by the Court of Appeal.” (Emphasis added)

Thus, both Article 118(g) and the proviso to Article 140 of the Constitution requires a vesting of jurisdiction on the Supreme Court. But section 49(3) of the Judicature Act is not a jurisdictional provision. It does not speak of transferring jurisdiction to the Supreme Court or the Court of Appeal. It provides only for another judge or judges of the Supreme Court or the Court of Appeal to hear and determine the matter when a matter in the ordinary course comes up before either of those courts. In other words, it mandates a pending case before either of those courts to be heard and determined by some judge or judges of that court where a sitting judge of that court is a party or is interested in the matter. No new jurisdiction is created in or transferred to such court. As the learned Additional Solicitor General correctly submitted it does not mean that the case must “follow the judge”.

This becomes clearer upon a closer examination of the proviso to section 49(3) of the Judicature Act which confers jurisdiction on a judge of another judicial zone, district or division to exercise jurisdiction. It is only in the proviso that the word “jurisdiction” is used and not in the main part. As the learned Additional Solicitor General submitted the language of the proviso clearly and unequivocally shows that the intention was to confer jurisdiction on some other Judge of the High Court, the District Court, Small Claims Court and the Magistrates’ Court and Primary Court, as the case may be, of any adjoining zone, district or division to hear and determine such action, prosecution, proceeding or matter, in every other case not contemplated by the main part of section 49(3) of the Judicature Act, and not to transfer jurisdiction to another court, which has no jurisdiction in regard to that subject matter.

Equality before law

Any provision of law should be interpreted so that it would apply in a manner consistent with the Constitution which is the Supreme Law of the land [*Ismalebbe v. Jayawardena, Assistant Commissioner of Agrarian Services and another* (1990) 2 Sri.L.R. 199].

The 1978 Constitution recognizes equality as an immutable republican principle. Article 12(1) states that all persons are equal before the law and are entitled to the equal protection of the law. Equality before the law is a negative concept implying the absence of any special privilege in favour of any individual. As Sharvananda J. (as he was then) held in *Palihawadana v. Attorney General and two others* [(1978-79-80) 1 Sri.L.R. 65 at 68]:

“The concept of equality is basic to man and evokes an immediate response amongst us all. **Nothing causes more resentment than a feeling that someone else is getting something which one is not getting.** As Thomas Payne said, "the true and only basis of representative Government is equality of rights". Justice is conceived on the basis that all human beings have equal rights, in the sense that they should be treated alike. The nation of equality underlies all religious and political philosophies. "Equality before the law means that among equals, the law should be equal and it should be equally administered, that like should be treated like." (Jennings: Law and the Constitution, 5th Ed. at p. 50)" (Emphasis added).

Accepting the contention of the learned President's Counsel for the Petitioner means that where a Judge of the Court of Appeal is a party to a section 66 application in the Primary Court, the learned Primary Court Judge will have to refer the matter to the Court of Appeal for determination. The learned President's Counsel for the Petitioner referred to this as the right of the Superior Court Judges of Sri Lanka to a "peer review". A land case pending in the District Court will have to be referred to the Supreme Court if one party is a sitting judge of that court. This will prevent the other party having recourse to his right of appeal provided at different stages simply because the other party is a sitting judge of the Supreme Court. A prosecution before the High Court will have to be referred to a superior court if the accused is a sitting judge of a superior court and in this instance too the other party is deprived of his right of appeal. Court sought a

clarification from the learned President's Counsel on whether the principle applies where a sitting judge of the Court of Appeal is a party to a fundamental rights application pending in the Supreme Court to which he replied by stating that since the jurisdiction of the Supreme Court was sole and exclusive the application cannot be referred to the Court of Appeal.

I have no hesitation in rejecting the submission of the learned President's Counsel. I hold that any judge of a superior court as a litigant is only entitled to the rights any ordinary person has as a litigant before any court and is not entitled to the privilege of having "peer review". Upholding the position advocated by the Petitioner would violate the right to equal protection recognized by our Constitution. Section 49(3) of the Judicature Act is not open to such an interpretation.

Absurdity

A court must always avoid as far as possible, giving an entirely absurd interpretation to a section drafted by the legislature, unless a court looking to the plain and grammatical language used has no other option except to give such a construction [Bindra, *Interpretation of Statutes*, 10th Ed., page 275].

Accepting the contention of the Petitioner leads to absurdity. For example, if a sitting judge of the Supreme Court is a party to a section 66 application under the Primary Courts Procedure Act, according to the Petitioner that application must be referred to the Supreme Court. However, in terms of section 74 of the Primary Courts Procedure Act an order made under Part VII shall not affect or prejudice any right or interest in any land or part of a land which any person may be able to establish in a civil suit. Still, even such a civil suit must be transferred to the Supreme Court according to the Petitioner although section 19 of the Judicature Act empowers and confines the District Court to all matters over which it has jurisdiction. The Supreme Court will then be exercising original jurisdiction, which is vested in the District Court, and making two orders of which one will take precedence.

To summarize, section 49(3) of the Judicature Act mandates a pending case before either the Supreme Court or Court of Appeal to be heard and determined by some judge or judges of that court if a sitting judge of the court before which the matter is pending is a party or is interested in the matter. It does not mean that the case must “follow the Judge”. It gives statutory recognition to the maxim *nemo iudex in causa sua potest* and provides an administrative arrangement to overcome it. Section 49(3) does not create a new jurisdiction in either the Supreme Court or the Court of Appeal. Neither does it transfer jurisdiction from any other court to either the Supreme Court or the Court of Appeal. Accepting the submission of the Petitioner violates the right to equality guaranteed by our Constitution and leads to absurdity. Any judge of a superior court as a litigant is only entitled to the rights any ordinary person has as a litigant before any court and is not entitled to the privilege of having “peer review”.

For the foregoing reasons, I reject the application of the Petitioner.

Judge of the Court of Appeal

Priyantha Fernando J.

I agree.



Judge of the Court of Appeal