

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

B. Deniswaran,
2nd Cross Street,
Pettah,
Mannar.
Petitioner

CASE NO: CA/WRIT/285/2017

Vs.

1. Hon. Justice C.V. Wigneswaran,
Chief Minister,
Northern Province,
No. 26,
Somasundaram Avenue,
Jaffna.
2. Hon. K. Sarveswaran,
Kaddaipirai Road,
Kopay South,
Kopay.
3. Hon. Ananthi Sasitharan,
Valakamparai,
Chulipuam,
Jaffna.
4. Hon. G. Gunaseelan,
Field Street,
Sinnakadai,
Mannar.

5. Hon. K. Sivanesan,
Kanukerny East,
Mulliyawalai,
Mullaitivu.
 6. Hon. P. Sathiyalingam,
Vairavapiliyankulam,
Vavuniya.
 7. Hon. Reginald Cooray,
Governor, Northern Province,
Governor's Secretariat,
Old Park, Kandy Road,
Chundukuli, Jaffna.
- Respondents

Before: Mahinda Samayawardhena, J.
K. Priyantha Fernando, J.

Counsel: Suren Fernando with Khyati Wikramanayake
for the Petitioner.
Dr. K. Kanag-Iswaran, P.C., with Lakshmanan
Jeyakumar for the 1st Respondent.
K.V.S. Ganesharajan for the 3rd Respondent.
M.A. Sumanthiran, P.C., with Niran Anketell for
the 6th Respondent.
Viveka Siriwardena, D.S.G., with Kanishka De
Silva Balapatabendi, S.S.C., for the 7th
Respondent.

Argued on: 19.07.2019 and 22.07.2019

Decided on: 05.08.2019

Mahinda Samayawardhena, J.

The Petitioner was the Minister of Fisheries, Transport, Trade and Commerce, Rural Development, Road Development and Motor Traffic of the Northern Province. He and the 6th Respondent were admittedly removed from their Ministerial Portfolios by the 1st Respondent Chief Minister of the Northern Province¹, and thereafter the 4th and 5th Respondents were appointed instead as new Ministers by the 7th Respondent Governor of the Northern Province².

The Petitioner filed this application in this Court seeking to quash by way of writ of certiorari the decision of the 1st Respondent to remove him as a Minister and the decision of the 7th Respondent to appoint the 4th and 5th Respondents as new Ministers.

Accordingly, the Petitioner prays *inter alia* the following substantive reliefs in the prayer to the petition.

- (i) *Issue a mandate in the nature of a writ of certiorari quashing P12 (by which the Petitioner was removed by the 1st Respondent from his Ministerial Portfolios)*
- (j) *Issue a mandate in the nature of a writ of certiorari suspending P13 (Gazette) to the extent that the portfolios of Fisheries, Transport, Trade and Commerce, Rural Development, Road Development and*

¹ Vide paragraphs 5 and 7 of the statement of objections of the 1st Respondent dated 06.10.2018, and P12.

² Vide 1R1, 1R2 and 1R7 tendered with the said statement of objections of the 1st Respondent. 1R7 Gazette has also been marked by the Petitioner as P13.

Motor Traffic have been allocated to persons other than the Petitioner

- (k) Issue a mandate in the nature of a writ of certiorari quashing the decision contained in P13 to appoint the 4th and 5th Respondents to the Board of Ministers of the Northern Province*
- (l) Issue a mandate in the nature of a writ of certiorari quashing the appointment of the 1st Respondent as Minister in charge of the subjects of Transport, Rural Development, Road Development and Motor Traffic*
- (m) Issue a mandate in the nature of a writ of certiorari quashing the appointment of the 3rd Respondent as Minister in charge of the subjects of Trade and Commerce*
- (n) Issue a mandate in the nature of a writ of certiorari quashing the appointment of the 5th Respondent as Minister in charge of the subject of Fisheries*

The short point to be decided in this case is whether the 1st Respondent Chief Minister had the authority to remove a Minister. If he did not, the appointments of new Ministers by the 7th Respondent Governor allegedly in place of the vacant portfolios become automatically null and void.

In the Privy Council case of *Macfoy v. United Africa Company Limited*³, Lord Denning stated:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the

³ [1961] 3 All ER 1169 at 1172

court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

Such new appointments would also violate the Constitutional ceiling to have maximum of five Ministers including the Chief Minister in the Board of Ministers in a Provincial Council.⁴

On what basis does the 1st Respondent state that he has the power to remove the Ministers? According to the 1st Respondent, that is on the basis of Article 154F(5) of the Constitution read with section 14(f) of the Interpretation Ordinance.⁵

Section 14(f) of the Interpretation Ordinance states that the person who has the power to appoint any officer shall have the power to remove him.

Article 154F(5) of the Constitution reads as follows:

The Governor shall, on the advice of the Chief Minister, appoint from among the members of the Provincial Council constituted for that Province, the other Ministers.

There cannot be a scintilla of doubt that, in terms of Article 154F(5) of the Constitution, it is the Governor who has the

⁴ Vide Article 154F(1) of the Constitution.

⁵ Vide P14. Also see paragraph 25 of the statement of objections of the 1st Respondent.

power to appoint Ministers, of course, on the advice of the Chief Minister.

I am firmly of the view that there is no room for a different interpretation.

This has in fact been acknowledged by the 1st Respondent by tendering *inter alia* 1R1, 1R2 and 1R7. This started with the 1st Respondent's letter to the 7th Respondent marked X.⁶ By that letter marked X dated 22.08.2017, the 1st Respondent has requested the 7th Respondent "*to kindly appoint*" the new Ministers. Then the 7th Respondent by 1R1 and 1R2 dated 23.08.2017 has appointed the 4th and 5th Respondents as new Ministers. Those two Appointment Letters declare that "*I, Reginold Cooray, Governor of the Northern Province, by virtue of the powers vested in me in terms of Article 154F(5) of the Constitution of democratic Socialist Republic of Sri Lanka, do hereby appoint*" the 4th and 5th Respondents as new Ministers. Thereafter those new appointments have been gazetted by the 7th Respondent in the Gazette dated 24.08.2017 marked 1R7. The heading of 1R7 is "*Appointments made by the Governor of Northern Province*". Then it says, "*I, Reginold Cooray, Governor of the Northern Province, by virtue of the powers vested in me in terms of Article 154F(1), (4) and (5) of the 13th Amendment to the Constitution of Democratic Socialist Republic of Sri Lanka, do hereby announce that I have made the following appointments.*"

Having thus made use of those documents to bolster up his case, the 1st Respondent in the same breath cannot now say

⁶ This was tendered by the Attorney-at-Law of the 7th Respondent with the motion dated 23.07.2018.

that he appoints the Ministers (probably in order to artificially create a situation for a Constitutional interpretation).

A party to a judicial proceeding cannot take up inconsistent positions to suit the occasion. A party cannot blow hot and cold, affirm and disaffirm and approbate and reprobate simultaneously. *Quod approbo non reprobo*—One cannot take the benefit of an instrument, and at the same time repudiate it.⁷

If the appointing authority is the Governor, the Chief Minister cannot, by any stretch of imagination, claim to have the power to remove the Ministers. The Constitution does not give any such power of removal to the Chief Minister.

Hence I cannot accept the argument of the learned President's Counsel for the 1st Respondent that "*the power of removal, as a matter of law and common sense, must necessarily vest with the Chief Minister.*"⁸ Nor can I accept the argument that the Governor indirectly removed the Petitioner and the 6th Respondent by appointing new Ministers.⁹

It is true that Constitution does not expressly provide for removal of Provincial Ministers. However, in this case, the question to be decided is not who can remove the Ministers or who can appoint the Ministers, but whether the Chief Minister has the power to remove the Ministers. The answer to that question, in my view, is emphatically in the negative.

⁷ Ceylon Plywoods Corporation v. Samastha Lanka G.N.S.M Rajya Sanstha Sevaka Sangamaya [1992] 1 Sri LR 157 at 163

⁸ Paragraph 15 of the written submission of the 1st Respondent dated 01.02.2019.

⁹ Vide paragraph 33 of the said written submission.

The main, if not sole, point urged by the learned President's Counsel for the 1st Respondent during the course of his entire submission before us was to refer this matter to the Supreme Court under Article 125 of the Constitution for a Constitutional interpretation.

Article 125(1) of the Constitution reads thus:

The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.

When there is no ambiguity that there is no power for the Chief Minister to remove Ministers appointed by the Governor, there is no necessity to such a course of action being followed. *Lex nil facit frustra, nil jubet frustra*—The law does nothing in vain, commands nothing in vain.

This Court shall refer a matter or a question to the Supreme Court for a Constitutional interpretation only if there is a real need for such a referral and not otherwise. The Court cannot be a party to prolong litigation, which is costly and time-consuming.

In *Billimoria v. Minister of Lands and Land Development & Mahaweli Development*¹⁰ Chief Justice Samarakoon observed:

Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court. What is contemplated in Article 125 is "any question relating to the interpretation of the Constitution" arising in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise the need for an interpretation of the provisions of the Constitution. The mere reliance on a constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution. There must be a dispute on interpretation between contending parties. It would appear that Article 125 is so circumscribed that it must be construed as dealing only with cases where the interpretation of the Constitution is drawn into the actual dispute and such question is raised directly as an issue between the parties or impinges on an issue and forms part of the case of one party, opposed by the other, and which the Court must of necessity decide in resolving that issue.

For the aforesaid reasons, I hold that the removal of the Petitioner from his Ministerial Portfolios of the Northern Provincial Council by the 1st Respondent Chief Minister is clearly *ultra vires* and made without jurisdiction and therefore is a nullity. The Chief Minister had no power to remove the

¹⁰ [1978-79-80] 1 Sri LR 10 at 15-16

Petitioner from his Ministerial Portfolios. On that premise, the appointments of the 4th and 5th Respondents as new Ministers by the Governor are also null and void *ab initio*. I quash the said decisions of removal and new appointments by way of writ of certiorari.

The reliefs prayed for in paragraphs (i)-(n) of the prayer to the petition, which I quoted above, are granted.

Application is allowed with costs payable by the 1st Respondent to the Petitioner.

Judge of the Court of Appeal

K. Priyantha Fernando, J.

I agree.

Judge of the Court of Appeal