IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALISTREPUBLIC OF SRI LANKA

In the matter of an Application for the grant of a mandate in the nature of a Writ of prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA (Writ) Application No. 52/2021

Sadda Vidda Rajapakse Palanga Pathira Ambakumarage Ranjana Leo Sylvester Alphonsu

Alias Ranjan Ramanayaka,

No. A5, Member of Parliaments Housing Scheme,
Madiwela,
Sri Jayawardenapura,
Kotte.

(Presently at Angunukolapelessa Prison)

PETITIONER

Vs

1. Secretary General of Parliament,
   Parliament of Sri Lanka,
   Sri Jayawardenapura,
   Kotte.

2. Hon. Attorney General,
   The Attorney General's Department,
   Colombo 12.

RESPONDENTS

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal**
Mayadunne Corea, J

Counsel: Faisz Musthapha, P.C., with M.A. Sumanthiran, P.C., Ashan Fernando, Suren Fernando, Keerthi Tillekeratne, Ms. Khyati Wikramanayake and Sanjit Dias for the Petitioner

Ms. Indika Demuni De Silva, P.C., Senior Additional Solicitor General with Nerin Pulle, Senior Deputy Solicitor General, Ms. Suharshi Herath, Senior State Counsel, Dr (Ms.) Avanti Perera, Senior State Counsel, Suren Gnanaraj, Senior State Counsel and Ms. Indumini Randeny, State Counsel for the Respondents

Supported on: 16th March 2021 and 18th March 2021

Written Submissions: Tendered on behalf of the Petitioner on 22nd March 2021

Tendered on behalf of the Respondents on 23rd March 2021

Decided on: 5th April 2021

Arjuna Obeyesekere, J., P/CA

Introduction

The Petitioner is a member of a political party by the name of *Samagi Jana Balawegaya* (SJB). Having contested the Parliamentary Election held in August 2020 from the Gampaha District, the Petitioner had secured the second highest number of preferential votes among those who contested from the SJB in the said district. The notification by the Election Commission declaring the Petitioner elected as a Member of Parliament has been published in Extraordinary Gazette No. 2187/26 dated 8th August 2020, marked '**P1**'. It is not in dispute that the Petitioner had been elected as a Member of Parliament at the Parliamentary Elections held in August 2015, as well.

Complaint to the Supreme Court

On 22nd August 2017, Ranawaka Sunil Perera had lodged a complaint with the Supreme Court stating that the Petitioner, during an interview which had been broadcast on the *Sirasa* TV Channel on 21st August 2017, had stated that "*Majority in Sri Lanka are corrupt Judges. Corrupt lawyers. About 95%. They work for money. They every day protect murderers, corrupt people and drug dealers for money.*" Perera alleged that the said statement was in contempt of Court.

By orders made on 21st November 2017 and 14th December 2017, the Supreme Court had called for a copy of the full recording of the said statement from MTV Channel (Private) Limited. Having viewed the recording and having taken cognizance of the said statement as being in contempt of Court, His Lordship the Chief Justice and the other Honourable Judges of the Supreme Court had directed that the Petitioner be issued with a Rule to show cause as to why the Petitioner should not be found guilty and punished under Article 105(3) of the Constitution for committing the offence of contempt of Court.[1]

The power of the Supreme Court to deal with acts which are in contempt of Court was considered in **A.M.E. Fernando vs. The Attorney General**,[2] where the Supreme Court stated as follows:

> "*Article 105(3) of the Constitution vests the Supreme Court, which is a superior court of record, in addition to the powers of such court, "the power to punish for contempt of itself whether committed in the court itself or elsewhere, with imprisonment or fine or both, as the court may deem fit"*
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> *This provision of the Constitution is based on the common law, which draws a distinction in what is described as criminal contempt between, those committed in the face of the Court "In facie curiae" and, those committed outside Court "ex facie curiae.*[3]

[1] SC Rule No. 1/2018; Ranawaka Sunil Perera vs Sadda Vidda Rajapakse Palanga Pathira Ambakumarage Ranjana Leo Sylvester Alphonsu alias Ranjan Ramanayaka; SC Minutes of 12th January 2021.
[2] [2003] 2 Sri LR 52.
[3] Ibid; page 58.

In Sri Lanka ***this power is given firm recognition in being written into the Constitution, the Supreme Law of the land."***[4]

In **SC Rule 1/2004**,[5] a Divisional Bench of the Supreme Court, having considered the power of the Supreme Court to punish for the offence of contempt of Court, held as follows:

"The present Constitution of 1978, unlike the previous Constitutions of 1948 and 1972 vests inter alia the Superior Courts with the power to punish offences of contempt of court. The power of the Supreme Court to punish an offence of contempt of court, previously contained in Section 47 of the Court Ordinance and after its repeal in Section 41(3) of the Administration of Justice Law No. 44 of 1973, is now contained in Article 105(3) of the Constitution....

It is seen that the power vested in this Court to take cognizance of and impose punishment for offences of contempt of court pertains to the exercise of jurisdiction as a superior court of record."

Proceedings before the Supreme Court

Proceedings before the Supreme Court commenced on 10th December 2018, with the Petitioner represented by President's Counsel. The evidence of the relevant witnesses had been led by the Attorney General. The Petitioner had availed himself of the opportunity afforded to him and had given evidence. By its judgment delivered on 12th January 2021, the Supreme Court had affirmed the Rule served on the Petitioner and held that the charge of contempt of court levelled against the Petitioner has been proved beyond reasonable doubt. The Supreme Court had thereafter held as follows:

"*For the aforementioned reasons, we convict him for the offence of contempt of Court punishable under Article 105(3) of the Constitution and sentence him to a term of four (4) years rigorous imprisonment. The Registrar of this Court is directed to issue a warrant committing the Respondent to prison to a term of four (4) years rigorous imprisonment*."

[4] Ibid; page 60.
[5] SC Minutes of 7th December 2004; Rule issued on D.M.S.B. Dissanayake.

Loss of the Parliamentary seat of the Petitioner

The Petitioner states that news reports appeared on 19th January 2021 that the Attorney General has advised the 1st Respondent, the Secretary General of Parliament that the Petitioner has vacated his seat in Parliament by virtue of the aforementioned conviction and sentence. The Petitioner has stated further that he has credible information that the Secretary General will take steps in terms of the Parliamentary Elections Act No. 1 of 1981, as amended (**the Act**), and inform the Election Commission that the Petitioner has vacated his Parliamentary seat.

The Petitioner states that he has been advised that a conviction for contempt of court will not result in the disqualification of a Member of Parliament from sitting and voting in Parliament, and therefore the Secretary General would be acting illegally if he proceeds to inform the Election Commission that the Petitioner has vacated his Parliamentary seat.

Relief sought by the Petitioner in this application

It is in the above circumstances that the Petitioner filed this application on 1st February 2021, seeking *inter alia* the following relief:

"(a) *A Writ of Prohibition restraining and/or prohibiting the 1st Respondent from taking any steps to inform the Election Commission and/or the Commissioner General of Elections that the Petitioner has vacated his seat as a Member of Parliament, and/ or from acting or taking steps on the basis that the Petitioner has vacated his seat as a Member of Parliament*.

(b) A*n Interim Order, restraining and prohibiting the 1st Respondent from taking any steps to inform the Election Commission and/or the Commissioner General of Elections that the Petitioner has vacated his seat as a Member of Parliament, and/ or from acting on the basis that the Petitioner has vacated his seat as a Member of Parliament, until the final determination of this Application."*

Order made by this Court to maintain the *status quo*

This matter was taken up for support on 5th February 2021, where an adjournment was sought on the personal grounds of the learned President's Counsel appearing for the Petitioner. The learned junior Counsel for the Petitioner however submitted that this application would be rendered nugatory if the Secretary General informs the Election Commission that the Petitioner has vacated his Parliamentary seat, and therefore moved that an order be made directing the Secretary General to maintain the *status quo* until this matter was supported. This Court, having taken into consideration the said submission, made order directing the Secretary General to maintain the *status quo* that prevailed as at 5th February 2021. The said direction has since been extended until today.

Reference to the Supreme Court

In terms of Article 125(1) of the Constitution:

> "*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*."

Neither the learned President's Counsel for the Petitioner nor the learned Senior Additional Solicitor General for the Respondents made an application for this Court to act in terms of the above provision.

It was the position of the learned President's Counsel for the Petitioner that the issue before this *Court is simply whether the Petitioner's conviction would attract the disqualification contained in Article 89(d) and involved a simple application of the very clear and precise wording of Article 89(d).*

The learned Senior Additional Solicitor General submitted that the provisions of Article 89(d) which are impugned in this application have already been interpreted by this Court in **S.B. Dissanayake v. Priyani Wijesekera, Secretary General of Parliament and others**.[6] It is clear from the written submissions filed on behalf of the Respondents and the comparator submitted to this Court during the course of the submissions by the learned Senior Additional Solicitor General, that the facts in the said case and the facts of this case are strikingly similar. It was the submission of the learned Senior Additional Solicitor General there is no basis to distinguish the two cases. She submitted further that the Supreme Court has refused to grant Special leave to appeal against the judgment of this Court[7] and that the said judgment is binding on this Court.

I am in agreement with the submission of the learned President's Counsel for the Petitioner and the submission of the learned Senior Additional Solicitor General that this issue has been considered previously by this Court, and take the view that the necessity of acting in terms of Article 125(1) of the Constitution does not arise.

Scope of the Writ of Prohibition

I shall commence by considering the scope of a Writ of Prohibition. When granting Writs of Certiorari or Prohibition, Courts will generally take into account similar considerations, which ultimately seek to control irregular administrative acts.

Lord Atkin in the case of **Rex v. Electricity Commissioners ex parte London Electricity Joint Committee Co**[8] held that:

> *"I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction."*[9]

[6] CA (Writ) Application No. 03/2005; CA Minutes of 26th May 2005.
[7] SC (Spl L/A) Application No. 92/2005; SC Minutes of 13th February 2006.
[8] [1924] 1 KB 171.
[9] Ibid; page 206.

> *"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these Writs."*[10]

Lord Atkin's words, although still widely cited, does not capture the scope of these remedies as they stand in modern law. As stated in **Administrative Law** by **Wade and Forsyth**:[11]

> "*Canonical though these words are, they require much interpretation. Though they overstate the true position in one respect, in almost every other respect they understate it, the scope of the remedies being in reality substantially wider."*[12]

> *"As the law developed, quashing and prohibiting orders have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions, whether individual or collective. The matter in question may be an act rather than a legal decision or determination, such as the grant or refusal of a license, the making of a rating list on wrong principles, the taking over of a school, the dismissal of employees who have statutory protection or the issue of a search warrant. They will lie where there is* ***some preliminary decision****, as opposed to a mere recommendation, which is* ***a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself****."*[13]

The most important aspect of a Writ of prohibition however, is that it is a '*remedy that is strictly concerned with excess of jurisdiction*.'[14] In that sense, it may be said that the scope of Prohibition is narrower than that of Certiorari. This position is set out by Dr. Sunil Coorey in '**Principles of Administrative Law in Sri Lanka**'[15] where he states as follows:

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[10] Ibid; page 205.
[11] H.W.R Wade & C.F. Forsyth, *Administrative Law* (11th Edition), Oxford University Press
[12] Ibid; page 514
[13] Ibid; page 517.
[14] Ibid; page 511.
[15] Sunil F.A. Coorey, *Principles of Administrative Law in Sri Lanka* (4th Edition, Volume II), page 911.

"*The writ of prohibition is available to prevent an officer or authority from proceeding, in a given matter, to exercise a power which it does not have under the law, or act in violation of the rules of natural justice where the law requires such officer or authority to observe them. The writ of prohibition is not a remedy to restrain the doing of a purely physical act, to restrain which the proper remedy is an injunction. Further, where it is necessary to restrain an official from purporting to exercise power which he does not have, it is an order in the nature of a writ of prohibition to restrain him that must be sought, and not a mandamus to compel him not to act*."

The position therefore is that a Writ of Prohibition is available to the Petitioner to prevent an illegal exercise of power by the Secretary General.

<u>The applicable provisions of the law</u>

Prior to considering the arguments of the learned President's Counsel for the Petitioner and the submissions of the learned Senior Additional Solicitor General for the Respondents, it would be useful to set out the provisions of law which would be relevant to a consideration of the said arguments.

I would start with the provisions of the Constitution.

While Article 91 specifies the disqualifications from being elected as a Member of Parliament, Article 91(1)(a) provides that:

"No person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament, if he is or becomes subject to any of the disqualifications specified in Article 89."

Article 89 contains the disqualifications to be an elector. Article 89(d), which is the sub-article relevant to this application, reads as follows:

"*No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to any of the following disqualifications, namely*

(d) if he is serving or has during the period of seven years immediately preceding completed serving of a sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded in lieu of execution of such sentence:

Provided that if any person disqualified under this paragraph is granted a free pardon such disqualification shall cease from the date on which the pardon is granted;"

Article 66(d) goes onto state that, "*The seat of a Member of Parliament shall become vacant if he becomes subject to any disqualification specified in Article 89 or 91;"*

The cumulative effect of the above provisions is twofold. The first is that a person who is subject to the disqualification in Article 89(d) is not qualified to be elected as a Member of Parliament or to sit and vote in Parliament. The second is that the seat of a Member of Parliament **shall become** vacant once he becomes subject to the disqualification specified in Article 89(d).

The consequential step upon the vacancy arising is set out in Section 64(1) of the Act, which reads as follows:

"*Where the seat of a Member of Parliament becomes vacant as provided in Article 66 of the Constitution (other than paragraph (g) of that Article) or by virtue of the provisions of paragraph 13 (a) of Article 99 of the Constitution, the Secretary-General of Parliament* ***shall*** *inform the Commissioner who shall direct the returning officer of the electoral district which returned such Member to fill the vacancy as provided for under paragraph 13 (b) of Article 99 of the Constitution within one month of such direction"*

Nature of the duty performed by the Secretary General

The learned Senior Additional Solicitor General submitted that:

(a) the vacancy in the Parliamentary seat as a result of the disqualification in Article 89(d) occurs by operation of law;

(b) the provisions of Article 66(d) and Section 64(1) are mandatory,

and for that reason:

(a) The Secretary General does not have a discretion in determining whether the Petitioner's seat has fallen vacant in terms of Article 89(d);

(b) The Secretary General does not exercise any discretion, or take a decision when he acts under Section 64(1);

(c) The Secretary General is only carrying out a ministerial function when he acts under Section 64(1) of the Act;

(d) The question of the Secretary General acting *ultra vires* his powers therefore does not arise,

She submitted therefore that any decision by the Secretary General in the above process does not attract a Writ of Prohibition.

The essence of the above submission is that the Secretary General is only acting in a ministerial capacity through the entire process starting with Article 89(d) and culminating with Section 64(1) of the Act. In order to better appreciate the above submission of the learned Senior Additional Solicitor General, it is perhaps appropriate to consider at this stage what is meant by a ministerial duty.

What is a Ministerial Duty

The terms "Ministerial", "Ministerial Act" and "Ministerial Duty" are defined in **Black's Law Dictionary**[16] as follows:

> "*Ministerial - Of, relating to, or involving an act that involves obedience to instructions or laws instead of discretion, **judgment**, or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance"*
>
> *Ministerial act – An act performed without the independent exercise of discretion or **judgment**. If the act is mandatory, it is also termed a ministerial duty.*
>
> *Ministerial duty – A duty that requires neither the exercise of official discretion nor **judgment**"*

In **Gamini Atukorale v. Dayananda Dissanayake, Commissioner of Elections and Others**,[17] Wijetunga, J quoted the following paragraph from **The Principles of Administrative Law** by Jain and Jain:[18]

> *"A ministerial function is one where the relevant law prescribes the duty to be performed by the concerned authority in certain and specific terms leaving nothing to the discretion or **judgment** of the authority. It does not involve investigation into disputed facts or making of choices. **The authority concerned acts in strict obedience to the law which imposes on it a simple and definite duty in respect of which it has no choice**."*

In **Seenithamby Palkiararajah v Dayananda Dissanayake, Commissioner of Elections and Others**,[19] Nawaz, J referring to the above passage from Jain and Jain held that, *"The thrust of the cases and the principle is that a ministerial function (performance of duty as prescribed by the law and not a discretionary function) is not amenable to the prerogative writ jurisdiction*."

[16] 11th Edition.
[17] [1998] 3 Sri LR 206 at 219.
[18] 4th Edition; page 325.
[19] CA (Writ) Application No. 674/2009 [CA Minutes of 19th July 2018]

As stated in **Principles of Administrative Law in Sri Lanka**:[20]

> "*To perform a merely ministerial act is not "to determine questions" affecting a party, and certiorari does not issue to quash a mere ministerial act.*
>
> *The phrase "to determine questions" earlier meant "to exercise power" by changing the legal position or legal relations of parties; from more recently, that phrase also means, "by otherwise adversely affecting them" by coming to adverse findings of fact or expressing adverse opinions. It is important to emphasise that the phrase does not include any ministerial act because a ministerial act contains no "determination" affecting anyone."*

I am therefore of the view that a distinction can be drawn between situations where the public authority is required to make a *judgment* as opposed to merely being obedient to instructions.

Application of the Ministerial duty

It is clear that the above argument of the learned Senior Additional Solicitor General involves the consideration of three provisions of law, namely Article 89(d) read together with Article 91(1)(a), Article 66(d) and Section 64(1)(c) of the Act.

It is also clear that the above three provisions involve two tiers of action or two stages in one process, namely:

(a) A *determination* by the Secretary General that an event has occurred that triggers the disqualification set out in Article 89(d); and

(b) The communication of such determination by the Secretary General to the Election Commission.

[20] Supra.; page 931.

The First tier

I shall start with the requirements of the first tier, namely, a determination by the Secretary General that an event which triggers the disqualification set out in Article 89(d) has occurred. In doing so, I must bear in mind that the events set out in Articles 89 and 91 that results in a disqualification are wide and varied. For example, in terms of Article 91(1)(c), a Member of Parliament is disqualified from being a Member of Parliament if he is or becomes the President. Whether the disqualification would apply in such a situation is straight forward and requires no further consideration.

Having closely examined the provisions of Article 89(d) and taking into consideration the facts of this application, it is clear that the following matters must be satisfied for the disqualification in Article 89(d) to apply to the Petitioner:

a) The Petitioner must be serving a sentence of imprisonment;

b) Such term of imprisonment must not be less than six months;

c) The said sentence must be imposed after conviction by any Court;

d) The said sentence must be imposed in respect of an offence;

e) The said sentence must be imposed in respect of an offence punishable with imprisonment for a term not less than two years.

It is common ground that wide publicity was given to the conviction of the Petitioner by the Supreme Court and the subsequent imprisonment to serve the sentence imposed by the Supreme Court. The question that I must consider is can or should the Secretary General act in terms of Section 64(1) on the basis that a vacancy has arisen, the moment he reads about the said conviction? I do not think so, for the reason that unlike some of the other events of disqualification set out in Articles 89 and 91, the disqualification in Article 89(d) is not triggered by a mere conviction for any offence. I say this for the reason that the Secretary General must form the opinion or be satisfied that each of the above elements of Article 89(d) which are relevant to this application has been satisfied. I must stress, however, that in doing so, the Secretary General is *not assessing the validity of the conviction*.

In other words, in this instance, prior to the obligation of the Secretary General in terms of Section 64(1) being triggered, he must form the opinion or judgment that the provisions of Article 89(d) have, in fact, been satisfied. In order to be satisfied, the Secretary General must examine the judgment of the Supreme Court and ensure that the requirements of Article 89(d) have been met by the conviction. Only once he is able to do this, can he form an opinion that a vacancy in terms of Article 66(d) has arisen.

The function the Secretary General performs when he arrives at the decision that Article 89(d) is operative, in my view, is not purely ministerial. While it is true that the Secretary General does not inquire into the validity of the conviction, he is nonetheless required to make a determination or exercise his judgment as to whether the Petitioner has in fact become subject to a disqualification. In my view, the latter requires the Secretary General to give his mind to the issue and the decision he arrives thereafter appears to me to be subject to judicial review. Therefore, it is not *so plain in point of law and so clear in matter of fact.* I must however admit that it is a very thin line that separates such a decision from being ministerial and therefore outside the scope of judicial review as opposed to a decision that is subject to judicial review.

Let me take a hypothetical situation where the Secretary General has acted in terms of Section 64(1) and informed the Election Commission of a vacancy. At that stage, if the Member of Parliament concerned is of the view that the decision of the Secretary General is illegal for the reason that his conviction is, for example, for a period of only three months, does that prevent that Member of Parliament from invoking the jurisdiction of this Court, seeking judicial review? I do not think so, for the reason that a conviction for a period of three months does not trigger the provisions of Article 89(d), and therefore any such decision by the Secretary General is clearly illegal.

If that be so, what difference does it make if that Member of Parliament, instead of allowing the Secretary General to proceed to act in terms of Section 64(1), seeks a Writ of Prohibition preventing the Secretary General from acting in terms of Section 64(1) on the basis that the provisions of Article 89(d) does not apply to him and for that reason, he has not vacated his seat? I see none.

The second tier

Let me now consider the second tier. In my view, once the Secretary General determines under the first tier that the seat of a Member of Parliament has fallen vacant as a result of any disqualification specified in Articles 89 or 91, then, Article 66(d) and Section 64(1) of the Act are triggered. It is **mandatory** for the Secretary General of Parliament at that stage to inform the Election Commission of such fact, thus enabling the Election Commission to take steps as provided in such Section.

I do agree with the submission of the learned Senior Additional Solicitor General that the *act of sending a communication to the Election Commission under Section 64(1) of the Parliamentary Elections Act would tantamount to a physical act by the 1st Respondent, short of an exercise of power*. In other words, with a vacancy staring in his face, the Secretary General has no option but is required by law to inform the Election Commission of such vacancy. In doing so, he is carrying out a purely ministerial act. I have already referred to the fact that the exercise of a purely ministerial act is not subject to be quashed by a Writ of Certiorari nor is such an exercise subject to any restriction by a Writ of Prohibition. If the Secretary General fails to act at that stage, a Writ of Mandamus would lie to compel him to perform his legal duty.

In these circumstances, I am of the view that this Court has the jurisdiction to consider whether the provisions of Article 89(d) have in fact been triggered.

Article 89(d) revisited

The learned President's Counsel for the Petitioner submitted that the conviction of the Petitioner by the Supreme Court does not attract the disqualification contained in Article 89(d), and therefore he is not disqualified from continuing as a Member of Parliament by virtue of the said conviction.

I have already stated that the following matters must be satisfied for the disqualification in Article 89(d) to apply to the Petitioner:

a) The Petitioner must be serving or should have completed serving during the period of seven years immediately preceding a sentence of imprisonment (by whatever name called;

b) Such term of imprisonment must not be less than six months;

c) The said sentence must be imposed after conviction by any court;

d) The said sentence must be imposed in respect of an offence;

e) The said sentence must be imposed in respect of an offence punishable with imprisonment for a term not less than two years.

There is no dispute with regard to (a), (b) and (c).

The first argument on behalf of the Petitioner

The first argument of the learned President's Counsel for the Petitioner was that although contempt of court is of a *criminal character* it is not an offence that attracts the disqualification in Article 89(d).

Whether contempt of Court is an offence has been addressed by the Supreme Court in **Ranawaka Sunil Perera vs Sadda Vidda Rajapakse Palanga Pathira Ambakumarage Ranjana Leo Sylvester Alphonsu alias Ranjan Ramanayaka**[21] in the following manner:

> "*Learned President's Counsel for the Respondent citing Section* 38[22] *of the Penal Code contended that the offence of contempt of Court has not been made punishable by any law. We now advert to this contention. Is the offence of contempt of court punishable by any law? To answer this question, we would consider Article 105 (3) of the Constitution. We would again like to state Article 105(3) of the Constitution. It reads as follows:*

[21] Supra.

[22] Section 38(1) – (3) reads as follows:

1) Except in the Chapter and sections mentioned in subsections (2) and (3), the word "offence" denotes a thing made punishable by this Code.
2) In Chapter IV and in the following sections, namely, sections 67, 100, 101, 101A. 102, 103, 105, 107, 108, 109, 110, 111, 112, 113.113A, 113B.184, 191, 192,200,208,210, 211, 216, 217, 218, 219, 220, 318, 319, 320. 321, 322, 338, 339, 377, 378, and 431, the word "offence" denotes a thing punishable in Sri Lanka under this Code, or under any law other than this Code.
3) And in sections 138, 174, 175, 198, 199, 209, 213, and 427, the word "offence" has the same meaning as in subsection (2) when the thing punishable under any law other than this Code is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

> "*The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1)(c) of this Article, whether committed in the presence of such court or elsewhere:*
>
> *Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution to punish for contempt of itself*."

The words ***"the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit"*** *in the above Article should be stressed. The above Article clearly states that a person who committed the offence of contempt of court can be punished with an imprisonment. In this regard we would like to consider the definition given to the 'offence' in the Criminal Procedure Code. Section 2 of the Criminal Procedure Code defines the offence as follows;*

> *'Offence means any act or omission made punishable by any law for the time being in force in Sri Lanka;'*

The ***act of contempt of court has been made punishable*** *by Article 105(3) of the Constitution. Therefore,* ***the act of contempt of court is an offence*** *and this offence is punishable* ***with an imprisonment or a fine****.*

Lord Denning MR in the case of In Re Bramblevale Ltd[23] *held as follows;*

> ***"*** *A contempt of court is an offence of a criminal character. A man may be sent to prison for it****."***

In the case of Croos vs. Daberera [1990] 1 SLR 205 Court of Appeal held as follows:

[23] *[1970] 1 Ch 128.*

"the offence of contempt of court under our law is a criminal charge and the burden of proof is that of proof beyond reasonable doubt."

When we consider all the aforementioned matters, I reject the above contention of the Learned President's Counsel for the Respondent."

The above conclusion has been reached by the Supreme Court in response to the argument raised by the learned President's Counsel for the Petitioner in that matter, that as per Section 38 of the Penal Code of Sri Lanka, the offence of contempt of court has not been made punishable by any law.

Once the Supreme Court has determined that contempt of Court is an offence, it is not open for this Court to take a contrary view. In **S.B. Dissanayake v. Priyani Wijesekera, Secretary General of Parliament and others**[24], Sripavan, J held as follows:

"*It is not open to this court to pronounce that a judgment of a five judge bench of the Supreme Court properly constituted and rendered in the exercise of its powers in a contempt matter brought before it is ineffective and the interpretation of the law shall be otherwise than as declared by the Supreme Court.*

It may be pertinent to quote Lord Hailsham from his judgment in Cassel & Co. Ltd Vs. Broome and Another (1972) AC 1027 at 1054:

"...it is not open to the Court of Appeal to give gratuitous advise to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable..... The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exits in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers."

Therefore, I am of the view that this Court cannot go into the question whether Contempt of Court is an offence.

[24] Supra.

In the written submissions filed on behalf of the Petitioner, it is admitted that while contempt of court *is of a criminal character*, *it is not an offence within the meaning of Article 89(d), and that the Supreme Court judgment should be considered in the context where the issue before Court was whether the Petitioner could be punished under Article 105(3) and NOT whether he would be disqualified under Article 89(d)*.

I do not see any difference between the two provisions. The Supreme Court has very clearly stated that contempt of court is an act **punishable by law with imprisonment** and therefore falls within the definition of an offence in terms of Section 2 of the Code of Criminal Procedure. A term of imprisonment can be imposed for the reason that contempt of Court is an offence. For Article 89(d) to be triggered, what is required is a conviction *inter alia* for an offence **punishable with imprisonment**. I therefore take the view that the offence of Contempt of Court provided for in Article 105(3) is an offence covered by Article 89(d) and that contempt of court is an offence for the purposes of Article 89(d).

The learned President's Counsel for the Petitioner submitted that even though the Supreme Court considered the provisions of Section 2 of the Code of Criminal Procedure it failed to consider the definition of 'law' in Article 170 of the Constitution and Section 4 of the Penal Code, and for that reason, the said judgment will not assist this Court to determine whether contempt of court is an offence within the meaning of Article 89(d). It was submitted further that in interpreting the word 'offence' in respect of Article 89(d), Section 2 of the Code of Criminal Procedure Act must be read together with the interpretation of "law" provided in Article 170 of the Constitution and Section 4 of the Penal Code.

Let me start with Section 4 of the Penal Code. Section 3 of the Penal Code provides that, "*So much of the Criminal Law heretofore administered in Ceylon as is known as the "Criminal Law of the United Provinces" or as "the Roman-Dutch Law" is hereby abolished."* Section 4 goes onto state that:

> *"Nothing in this Code is intended to repeal, vary, suspend, or affect any of the provisions of any special or local law, or to affect the power heretofore possessed by the Supreme Court or any Judge thereof of summarily punishing persons guilty*

of contempt of the said court, and attorneys-at-law guilty of misconduct in the exercise of their profession."

Thus, Section 4 of the Penal Code makes it clear that the powers of the Supreme Court to punish persons guilty of contempt of Court has not been taken away by the introduction of the Penal Code.

As already observed, in terms of Section 2 of the Code of Criminal Procedure, *"Offence means any act or omission made punishable by any **law** for the time being in force in Sri Lanka."* Article 170 of the Constitution contains the following definition of 'law' for the purposes of the Constitution:

"*law" 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."*

The argument of the Petitioner appears to be that while the power to punish for contempt has been provided for in Article 105(3), the Constitution is not a law contemplated by the definition of 'law' in Article 170 and for that reason, contempt is not an offence which is covered by the definition of '*offence*' in Section 2 of the Code of Criminal Procedure. This argument is misconceived for the reason that the Constitution is the supreme law of the land and therefore any act made punishable by the Constitution is an offence.[25]

I am therefore of the view that contempt of court is an offence contemplated by Article 89(d) of the Constitution and that the conviction of the Petitioner by the Supreme Court for the offence of contempt of Court attracts the disqualification imposed by Article 89(d) read together with Article 91(a).

[25] See A.M.E.Fernando vs The Attorney General; supra.

The second argument on behalf of the Petitioner

The second argument presented to this Court on behalf of the Petitioner is twofold, and revolves around the following words in Article 89(d):

> "…. *sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court* ***for an offence punishable with imprisonment for a term not less than two years****…..*"

It was the submission of the learned President's Counsel for the Petitioner:

(a) that for Article 89(d) to apply, the offence for which the Petitioner must be convicted must carry a minimum sentence of two years; and

(b) that Article 105(3) is silent with regard to the punishment that could be imposed,

and therefore a conviction for contempt of court does not trigger the disqualification in Article 89(d).

In considering this argument, I shall bear in mind the submission of the learned Senior Additional Solicitor General, with which the learned President's Counsel has agreed, that at the time the 1978 Constitution was introduced, offences under the Penal Code did not carry a minimum mandatory sentence of imprisonment, and that minimum mandatory sentences of imprisonment were introduced to the Penal Code in 1995 through the Penal Code (Amendment) Act No. 22 of 1995. What the Penal Code had provided until then is the ability for a Court to punish a person *for a term which may extend to ... years*. Even though the amendment in 1995 did provide for a minimum mandatory sentence, the Supreme Court, in **SC Reference No. 03/2008**[26] held that the imposition of a minimum mandatory sentence, for example in Section 364(2)(e) of the Penal Code, is in conflict with Articles 4(c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence stipulated by law.

[26] SC Minutes of 15th October 2008.

It is important to note that Article 89(d) contains two requirements with regard to sentence.

The first is that the sentence of imprisonment that is imposed by Court after conviction must not be less than six months. In other words, if a person is convicted for a period of five months, the disqualification in Article 89(d) is not triggered. The period of six months is the actual sentence that must be imposed by Court after conviction. This, then is the minimum sentence that must be imposed by Court.

The second is that the offence for which the elector is convicted must be punishable with imprisonment for a term not less than two years. In my view, the word **punishable** means that the period must be a period beyond two years. The words, *not less than two years* means that the offence must be punishable by a sentence over and above two years or which exceeds two years. It does not mean that the offence must carry a minimum mandatory sentence or punishment of two years. The learned Senior Additional Solicitor General submitted that *Article 89(d) does not contemplate the presence of a minimum mandatory sentence of two years imprisonment, but rather the absence of an upper limit of two years imprisonment*.

I agree with this submission, which is also supported by the Sinhala text of Article 89(d) of the Constitution, which reads as follows:

> "යම්කිසි තැනැත්තෙක් **අවුරුදු, දෙකකට නොඅඩු කාලයක් බන්ධනාගාරගත කිරීමෙන් දඬුවම් කළ හැකි වරදකට** කවර වූ හෝ අධිකරණයක් විසින් වරදකරු කරනු ලැබීමෙන් පසුව නියම කරන ලද, භය මාසයකට නොඅඩු කාලයකට කවර වූ හෝ ආකාරයක බන්ධනාගාරගත කිරීමේ දඬුවමක් විදිමින් සිට නම් නැතහොත් ගත වූ සත් අවුරුදු, කාලය තුළ ඒ දඬුවම සම්පූර්ණයෙන් ම විඳ සිටියේ නම් නැතහොත් මරණ දණ්ඩනයට යටත්ව සිට නම් නැතහොත් එවැනි දණ්ඩන නියමයක් ක්‍රියාවේ යෙදවීම වෙනුවට භය මාසයකට නොඅඩු කාලයකට බන්ධනාගාරගත කිරීමේ දඬුවමක් විදිමින් සිට නම් නැතහොත් ගත වූ සත් අවුරුදු, කාලය තුළ ඒ දඬුවම සම්පූර්ණයෙන් විඳ, සිටියේ නම් ඒ තැනැත්තා ජනාධිපතිවරයා තෝරා පත් කිරීමේ පන්ද, විමසිමක දී හෝ පාර්ලිමේන්තු මණ්ත්‍රිවරයන් තෝරා පත් කිරීමේ මැතිවරණයක දී හෝ පන්ද, හිමියකු වීමට හෝ ජනමත විචාරණයක දී පන්දය දීමට හෝ සුදුස්සෙක් නොවන්නේ යට

> එසේ වුව ද, මේ ඡේදය යටතේ නුසුදුස්සකු වූ කවර වූ හෝ තැනැත්තකුට කොන්දේසි රහිත සමාවක් දෙන ලද්දේ නම්, ඒ සමාව දුන් දිනයේ සිට ඒ නුසුදුසුකම නැති වී යන්නේ ය."

Therefore, a person who is convicted for a period of six months where the maximum punishment stipulated by law is one year is not disqualified by Article 89(d). However, a person convicted for a period of six months in respect of an offence which is **punishable** with a term of imprisonment over two years is caught up by Article 89(d).

The acceptance of the argument of the learned President's Counsel for the Petitioner that what is contemplated is an offence that carries a minimum mandatory sentence of two years would lead to an absurdity, quite apart from it not reflecting the position that prevailed until 1995. As admitted by the Petitioner in his written submissions, if the interpretation advanced on behalf of the Petitioner is accepted, as the law stood until 1995, only those who are convicted by a Court for a period not less six months for the following offences would be disqualified in terms of Article 89(d):

(a) Section 4(2) of the Offensive Weapons – causing injury with an offence weapon;

(b) Section 114 of the Penal Code – waging war against the State, where the punishment is death or imprisonment which may extend to twenty years.

(c) Section 296 – Murder, where the punishment is death.[27]

In other words, until 1995, those who were convicted of:

a) Attempted murder – imprisonment for a term which may extend to twenty years (Section 300);

b) Robbery – imprisonment for a term which may extend to ten years (Section 380);

c) Causing a miscarriage (abortion) - imprisonment for a term which may extend to three years (Section 303);

d) Kidnapping - imprisonment for a term which may extend to seven years (Section 354),

could continue to function as a Member of Parliament and sit and vote in Parliament.

[27] See the latter part of Article 89(d) for the application of Article 89(d) to a person under sentence of death.

In addition, a person convicted for an offence under Sections 188 to 201 (both inclusive) of the Penal Code would also be disqualified but in terms of Article 89(i)(i) and not under Article 89(d).

The amendment brought to the Penal Code in 1995 introduced a minimum mandatory sentence in respect of Offences relating to Procuration (Section 360A), Sexual Exploitation of children (Section 360B), Trafficking (Section 360C), Rape (Section 364) and Incest (Section 364A). The argument of the learned President's Counsel, if accepted would mean that it is only those who are convicted for the above offences who would be disqualified by Article 89(d). As noted previously, those who are convicted of:

a) Attempted murder – imprisonment for a term which may extend to twenty years (Section 300);

b) Robbery – imprisonment for a term which may extend to ten years (Section 380);

c) Causing a miscarriage (abortion) - imprisonment for a term which may extend to three years (Section 303);

d) Kidnapping - imprisonment for a term which may extend to seven years (Section 354),

could continue to function as a Member of Parliament and sit and vote in Parliament. That could not have been the intention of the drafters of the Constitution.

I shall now consider the second aspect of the second argument presented to this Court.

Article 105(3) does not place any limitation on the punishment that the Supreme Court can impose on a person found to be in contempt of itself, whether *"in facie curiae"* or *"ex facie curiae"*. What Article 105(3) has done instead is that it has conferred the Supreme Court with the power to impose a punishment ***as the Court may deem fit***. The discretion has therefore been vested entirely with the Supreme Court, and the Supreme Court has the power, in the exercise of the said discretion to impose a sentence even upto ten years or beyond.

In **SC Rule 1/2004**,[28] the Divisional Bench of the Supreme Court held as follows:

> *"Article 105(3) places no limitation on the punitive power of the Court and a person found guilty of an offence of contempt of Court would be liable to any term of imprisonment or fine as may be considered appropriate by Court. It is significant that the limitation of the punishment as contained in Section 41(3) of the Administration of Justice Law that the term of imprisonment shall not exceed 7 years and the fine shall not exceed Rs. 5,000/- has been removed by Article 105(3) of the Constitution."*

This position has been recognized by the Supreme Court in **Ranawaka Sunil Perera vs Sadda Vidda Rajapakse Palanga Pathira Ambakumarage Ranjana Leo Sylvester Alphonsu alias Ranjan Ramanayaka**[29] as follows:

> "*The words, "the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit" in the above Article should be stressed".*

In **S.B. Dissanayake v. Priyani Wijesekera, Secretary General of Parliament and others**,[30] Sripavan J held as follows:

> *"Learned President's Counsel argued that the offence must be under the provisions of the law that carries with it a mandatory minimum term of imprisonment of two years. As Article 105(3) failed to mandate the court to impose this minimum period of imprisonment, the Supreme Court could imprison a person for less than two years or more than two years at its discretion. On this basis, Counsel submitted that the finding of contempt under Article 105(3) does not therefore attract the pre-condition (c) referred to above.*[31]

[28] Supra.
[29] Supra.
[30] Supra.
[31] The pre-condition (c) referred to by Sripavan, J is to the following: '*that the person convicted must be serving a sentence of imprisonment for a term not less than six months and the law must make such offence punishable with imprisonment for a period of not less than two years*.'

In terms of Article 105(3) of the Constitution, the Supreme Court is vested with unlimited powers to punish persons for contempt. In imposing punishment, fine or both, it has unlimited jurisdiction ***as the court may deem fit****. The punishment imposed on the petitioner was a term of two years rigorous imprisonment. Thus, the offence for which the petitioner was found guilty attracts two years rigorous imprisonment. This, in my view satisfies the pre-condition (c) referred to above in Article 89(d). The petitioner therefore satisfies all three pre-conditions in Article 89(d) resulting in the disqualification."*

I agree with the submission advanced on behalf of the Respondents that if the Petitioner's argument is taken to its logical conclusion: (a) then, pre-1995, a Member of Parliament who had been convicted of an offence under the Penal Code [*except those set out in Article 89(i(i) and the offences referred to previously*] would not have lost his Parliamentary seat; (b) even as at today, the disqualification in Article 89(d) would only apply in respect of a conviction for one of the aforementioned offences introduced in 1995 attracting a minimum mandatory sentence of two years or more.

For the above reasons, I do not agree with the second argument of the learned President's Counsel for the Petitioner.

In the above circumstances, I do not see any legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed, without costs.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal