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

In the matter of an application under Article 140 of the Constitution for mandates in the nature of Writs of Certiorari prohibition and mandamus

**Case No. CA Writ 0035- 2023**

1. Dr. Nayake Bandaralage Dileepa Namal Bandara Balalle,
   President – High Court Judges Association
   High Court Judge,
   High Court Judge's Chambers,
   Colombo 12.

2. Wagoda Pathirage Sujeewa Nishshanka,
   Secretary - High Court Judges Association
   High Court Judge,
   High Court Judge's Chambers,
   Colombo 12.

**Petitioners**

**Vs.**

1. Chief Accountant,
   Ministry of Justice,
   No. 19, Sangaraja Mawatha,
   Colombo 10.

2. Secretary,
   Ministry of Justice,
   No. 19, Sangaraja Mawatha,
   Colombo 10.

3. Commissioner General of Inland Revenue,
   Sri Chittampalam A, Gardiner Mawatha,
   Colombo 2.

**Respondent**

**Before:** **N. Bandula Karunarathna J. (P/CA)**

**&**

**M. Ahsan A. Marikar J.**

| | |
|---|---|
| **Counsel**: | Dr. Romesh de Silva, PC with Sugath Caldera AAL, and Niran Anketell for the Petitioner.<br><br>N. Wigneswaran, DSG, with M. Jayasinghe, DSG and Shiloma David, SC for the Respondent |
| **Written Submissions:** | By the Petitioners – Not filed<br><br>By the Respondent – Not filed |
| **Supported on :** | 09.02.2023 |
| **Decided on :** | **16.03.2023.** |

**N. Bandula Karunarathna J. P/CA**

Motion dated 02.02.2023 filed by the petitioners, was supported by the learned President's Counsel Dr. Romesh de Silva under article 146 of the constitution.

The petitioners are the duly elected President and Secretary of the High Court Judges' Association, an association comprising of, and representing the interests of High Court Judges in the country. The Executive Committee of the High Court Judges' Association passed a resolution resolving to institute the instant application in this court. The petitioners states that the Executive Committee did so reluctantly but resolutely on the basis that no other alternative was available to vindicate the rights of Judges of the High Court and the independence of the judiciary.

The petitioner states that the petitioners are not liable to Income Tax from the income received as/qua Judicial Officers. The petitioners plead that the petitioners do not receive any money from employment in that they are not employed within the meaning of the Inland Revenue Act. The respondents are wrongly and/or unlawfully and/or in violation of the law taking up the position that the petitioners are liable to pay Income Tax. The petitioners states that, at present, High Court Judges' salaries are wrongfully and unlawfully treated by the respondents as income from employment within the meaning of the law. High Court Judges hold esteemed Judicial Office, and are not in any way or manner employed by anybody or person.

The petitioners state that the characteristics of employment such as, control by an employer are singularly absent in the case of Judges. It is trite law that Judicial Officers are not Public Officers. In the constitutional scheme, judicial officers exercise the judicial power of the people. Thus, and otherwise, the petitioners state that the income of judicial officers, qua judicial officer is not an income from employment. In the circumstances, the same does not constitute taxable income on which income tax could lawfully be charged.

The petitioners further states that the respondents are purporting to act in a wholly unlawful manner in deducting and/or contriving to deduct and/or retain the deduction of APIT from judicial officers inclusive of High Court Judges. In the circumstances, the 1st and 2nd respondents are purporting to act as employers of all the High Court wages in the country. The petitioners state that the 1st and 2nd respondents are not the employer of High Court Judges.

The petitioners state that it is entirely offensive to the constitution and to the independence of the judiciary for the 1st and 2nd respondents to purport to act as employers of High Court Judges. The 1st and 2nd respondents are not permitted in law to deduct APIT from the High Court Judges and remit the same to the 3rd respondent. In any event that neither the 1st and 2nd respondent nor their agents, servants or subordinates are authorized to deduct APIT from the allowances of High Court Judges, which do not in any event form part of taxable income. The petitioners state that the allowances are provided in lieu of services performed by the High Court Judges and are in any event not liable to tax.

The petitioner's state that some of the High Court Judges receives an official residence and they are not taxed in anyway or manner on the official residence. But some High Court Judges are not accorded residences and are thus taxed on what is termed 'housing allowance' assessed at Rs.50,000/-. Some High Court Judges who get official vehicles are not taxed. However, those who do not get official vehicles are given an allowance of Rs. 125,000/- which is taxed. The petitioners states that the said sum of Rs.125,000/- is in lieu of the vehicle and thus cannot be taxed. High Court Judges receive a drivers allowance of Rs.25,000/- which in most cases form's part of the drivers and thus cannot be taxed as forming the income of the High Court Judges.

The Petitioner's states further that the 3rd respondent is under a public duty to return to *inter alia* the High Court Judges' monies unlawfully deducted as APIT from the said Judges under and in terms of the Inland Revenue Act No.24 of 2017 as amended.

The petitioner's state that the impugned conduct of the respondents described above is;

(a) Unlawful, void ab initio and without force or effect in law;
(b) In breach of the rights of the members of the High Court Association and those similarly circumstanced;
(c) Ultra vires;
(d) Arbitrary, unreasonable, irrational and capricious;
(e) In breach of legitimate expectations;
(f) In breach of the rights of the petitioners to natural justice;
(g) In breach of the principles of proportionality and reasonableness.

The petitioners state that the respondents would, on or about 25.01.2023 and thereafter, cause through their servants, subordinates or otherwise, APIT to be deducted from the total income of High Court Judges based on the rates prescribed in the 2022 amendment Act. The petitioners state that grave and irreparable harm and damage would be caused to High Court Judges and in fact the rule of law, and thus the public at large, if the interim reliefs sought are not granted by this court.

The petitioners plead that as a matter of law, High Court Judges are not under a duty to pay taxes on income received qua Judges and/or in any event on the allowances for the reasons set out above. There has been a dramatic increase in income tax payable by tax payers under and in terms of the Act No.49 of 2022. The petitioners plead that the petitioners sought legal advice and have been advised that High Court Judges are not liable to pay income tax on the income received qua Judges and/or in any event on the allowances.

The petitioners further plead that as per the aforesaid Act No.45 of 2022 according to the respondents, High Court Judges would be liable to pay income tax of approximately Rs.1.8 million annually. The 3rd respondent has no right in law to continue to tax the income of Judges qua

Judges and/or their allowances and the 1st and 2nd respondents have no right in law to deduct and/or continue to deduct and/or cause to deduct APIT and the 1st and 2nd respondents has no right in law to continue to deduct and/or cause to deduct APIT.

When this matter was taken up for support on 09.02.2023 the learned President's Counsel Dr. Romesh de Silva moved for constitution of a numerically superior bench consisting of the 3 Justices already nominated and other Judges preferably in the order of seniority.

The said motion dated 02.02.2023 was supported before His Lordship the President of the Court of Appeal in Court No. 301 on the 21.02.2023. The learned Deputy Solicitor General who appeared on behalf of the respondent informed court that they have no objection for such application.

When this matter was taken up on the 01.03.2023 the learned Deputy Solicitor General for the respondents informed this court that under Article 146 (iii) of the Constitution, a party cannot make a request to have a numerically superior bench.

The learned President's Counsel for the petitioners argued that there is an important legal issue to be determined in the present case and therefore he requests from this court that it is appropriate this application be determined by a full bench of this court.

Acting in terms of Article 146 of the Constitution, the learned President's Counsel for the petitioners moved to nominate a full bench to hear and determine this application.

> According to the Eleventh amendment to the Constitution, Article 146 of the Constitution is amended by the repeal of paragraph (2) of that Article, and the substitution therefor, of the following paragraph: –
>
> " (2) The jurisdiction of the Court of Appeal may be exercised in different matters at the same time by the several Judges of the Court sitting apart:
>
> Provided that-
>
> (i) its jurisdiction in respect of
>
> (a) judgments and orders of the High Court pronounced at a trial at Bar shall be exercised by at least three Judges of the Court; and
>
> (b) other judgments and orders of the High Court shall be exercised by at least two Judges of the Court;
>
> (ii) its jurisdiction in respect of its powers under Article 144 shall be exercised by the President of the Court of Appeal or any Judge of that court nominated by the President or one or more of such Judges nominated by the President of whom such President may be one;
>
> (iii) its jurisdiction in respect of other matters shall be exercised by a single Judge of the Court unless the President of the Court of Appeal by general or special order otherwise directs."

Learned President's Counsel for the petitioners reiterates that as there is a serious legal issue to be decided in this Writ Application, it is appropriate for a full bench of this court to be nominated to hear and determine about this matter.

It is my view that as there is a serious legal issue to be decided in this Writ Application, under Article 146 (2) proviso (iii) of the Constitution the President of the Court of Appeal has the authority to nominate a full bench by general or special order otherwise directs.

Cases which deal with important matters or are likely to have a significant impact are usually heard by larger benches. However, there have been instances when smaller benches of two or three Judges have been assigned crucial issues with wide impact. Further, I wish to say that in terms of article 146 (iii) there is no legal barrier for the President of the Court of Appeal to nominate a full bench by general or special order.

Considering the circumstances of this case and the legal arguments raised by the learned Counsel for the respondents, I am of the view that this matter should be referred to a full bench which comprises 5 senior sitting Justices in the Court of Appeal. As there was no objection from both parties for nominating the present divisional bench, I wish to nominate one more senior justice for the full bench which also includes His Lordship the President of the Court of Appeal.

Both parties agreed that this matter could be supported before a full bench which comprises 5 Senior Justices in the Court of Appeal, on the next date.

**President of the Court of Appeal**

**M. Ahsan A. Marikar J.**

**I agree.**

**Judge of the Court of Appeal**