

To: Hon. Chamal Rajapaksa, M.P.
Speaker of Parliament

AFFIDAVIT

I, **NIHAL SRI AMERESEKERE** of 167/4, Vipulasena Mawatha, Colombo 10 in the Democratic Socialist Republic of Sri Lanka, being a Buddhist, do hereby solemnly, sincerely and truly affirm and declare as follows:

I place before Your Honour the following facts in the context of the Parliamentary Select Committee having been appointed in terms of Standing Orders of Parliament under Article 107(3) of the Constitution, to investigate into a Resolution for the removal of Hon. (Dr) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, entertained on 1st November 2012 by Your Honour, as per Article 107(2) of the Constitution, and placed on the Order Paper of Parliament on 6th November 2012.

The facts contained herein are also tendered to Your Honour in the context of the Application I made on 18th October 2012 to the Supreme Court in SC (SD) No. 2/2011 of which Your Honour was given notice in terms of the Constitution.

I set out below a *chronology* of events on my endeavours to have the Special Determination of 24th October 2011 *reviewed* and *re-examined* to bring out the salient facts of relevance.

14.11.2011 - I filed Fundamental Rights Application SC (FR) No. 534/2011 upon coming to know that the Bill generally referred to, as the 'Expropriation Bill', had been tabled in Parliament on 8th November 2011, *without being aware* that the Bill had already been certified into law by Your Honour on 11th November 2011.

With my aforesaid Application, I also tendered a Motion, seeking to Support my Application in the course of the ensuing week, attaching a Medical Certificate from the Cardiac Specialist, who has been treating me since 1994, recommending two weeks rest, since I was *indisposed*, having just returned from Morocco, after attending the Fourth Session of the Conference of State Parties on the UN Convention Against Corruption.

15.11.2011 Upon seeing in the *media* that other Fundamental Rights Applications on the same Bill had been listed to be Supported on 15th November 2011, I sent a Letter to the Registrar of the Supreme Court, together with an Officer of my Office, *confirming to him my indisposition*, and *intimating* that I had requested my said Officer to be present in Court, to know the date on which my aforesaid Application would be listed for Support.

Notwithstanding the above Motion, Medical Certificate and my said Letter, the Registrar of the Supreme Court *telephoned* and informed me, that Chief Justice, Shirani A. Bandaranayake, had *directed* that my Fundamental Rights Application, also be listed for Support on the very next day i.e. 15th November 2011, and he inquired from me, as to whether I could attend the Supreme Court and Support my said Application also on the said day ?

I intimated to him that I had been medically advised to bed rest, and that I had already sent a Medical Certificate, with my Motion, moving to Support my Application in the course of the next week. I requested the Registrar of the Supreme Court to submit my aforesaid Letter and the Medical Certificate to the presiding Judge of the following 5 Judge Bench of the Supreme Court, who were hearing the other Applications.

Justice N.G. Amaratunga,
Justice I. Imam,
Justice R.K.S. Sureshchandra,
Justice Sathya Hettige
Justice Dep, P.C.

All the other Fundamental Rights Applications had been dismissed *in-limine* on 15th November 2011 by the said 5 Judge Bench of the Supreme Court, *presumably* since the said Bill had been certified into law on 11th November 2011 by Your Honour.

The presiding Justice N.G. Amaratunga had announced in Open Court, that a Fundamental Rights Application had also been filed by me, tendering a Medical Certificate, and had directed the Clerk to the Court, to inform my Officer, that I had been permitted to file a Motion and seek a date to Support my aforesaid Fundamental Rights Application.

17.11.2011 - Accordingly, I filed a Motion seeking to support my Fundamental Rights Application SC (FR) No. 534/2011 on 25th November 2011.

On that day, I also filed a separate Application in SC (SD) No. 2/2011 seeking a *review* and *re-examination* of the Special Determination of 24th October 2011, in respect of which Chief Justice Shirani A. Bandaranayake had *minuted* thus –

'Any party that had wanted to intervene should have done so at the time, it was taken before the Supreme Court'.

The foregoing was an *impossibility*, since the 'Expropriation Bill' had been submitted, as an Urgent Bill, to Chief Justice Shirani A. Bandaranayake on Friday, 21st October 2011, and she had *minuted* the same to be heard on Monday, 24th October 2011, with the intervening weekend holidays, with no citizen having known the same. The said hearing had not even been listed in the List of Cases for Monday, 24th October 2011.

25.11.2011 - I supported on 25th November 2011 my said Fundamental Rights Application SC (FR) No. 534/2011 before the following 3 Judge of the Supreme Court

Justice N.G. Amaratunga,
Justice R.K.S. Sureshchandra
Justice Sathya Hettige

At the very outset, I, on my own, *expressly* admitted that I was not *impugning* or *putting in issue* the 'Expropriation Bill', or the Act, since I had come to know that Your Honour had announced to Parliament on 22nd November 2011 of the certification of the said Bill into law on 11th November 2012, and that thereby I was *ousted* from doing so under Article 80(3) of the Constitution. *viz:*

"80(3) Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, **no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever**" (*Emphasis added*)

However, I *expressly* pointed out that I am *impugning* the Special Determination of 24th October 2011, submitting that I was not *ousted* under Article 80(3) of the Constitution from doing so. In such circumstances, I sought and received approval to amend my Petition, and tendered my Amended Petition on 16th December 2011.

It is very *pertinent to note* that my Fundamental Rights Application No. 534/2011, unlike the other Fundamental Rights Applications *dismissed* previously on 15th November 2011, *was not dismissed* on 25th November 2011, *but was entertained by the said Supreme Court Bench.*

- 16.12.2011** - Accordingly on 16th December 2011, I tendered my Amended Petition, with Notices to be served by the Registrar of the Supreme Court on the Respondents, as had been directed by the Supreme Court previously on 25th November 2011.

The Registrar of the Supreme Court had accordingly issued Notices on the Respondents returnable on 26th January 2012.

- 18.1.2012** - In the meanwhile, I, by Motion dated 18th October 2012, made an Application under Article 132 of the Constitution to Chief Justice Shirani A. Bandaranayake, seeking that my aforesaid Amended Petition of 16th December 2011 be heard by a Fuller Bench of the Supreme Court, to *review* and *re-examine* the Special Determination of 24th October 2011 on the 'Expropriation Bill', *which had been made in violation of mandatorily deeming provision in Article 123(3) of the Constitution.*

My such Application had been sent directly by the Registrar of the Supreme Court to Chief Justice Shirani A. Bandaranayake, since such Application made under Article 132 of the Constitution, required the consideration *solely* and *exclusively* by the Chief Justice. *viz: (Emphasis added)*

132. (1) The several jurisdictions of the Supreme Court shall be ordinarily exercised at Colombo unless the Chief Justice otherwise directs.

- (2) The jurisdiction of the Supreme Court may be exercised in different matters at the same time by the several Judges of that Court sitting apart:

Provided that its jurisdiction shall, subject to the provisions of the Constitution, be ordinarily exercised at all times by not less than three Judges of the Court sitting together as the Supreme Court.

- (3) **The Chief Justice may –**

- (i) of his own motion ; or
- (ii) at the request of two or more Judges hearing any matter; or
- (iii) on the application of a party to any appeal,

proceeding or matter if the question involved is **in the opinion of the Chief Justice one of general and public importance, direct that such appeal, proceeding or matter be heard by a Bench comprising five or more Judges of the Supreme Court.**

- (4) The judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority

However, Chief Justice Shirani A. Bandaranayake, without having constituted a Fuller Bench, directed that my said Amended Petition be supported on 9th February 2012 before the same 3 Judge Bench of the Supreme Court, *who had heard my original Application on 25th November 2011. viz:*

Justice N.G. Amaratunga,
Justice R.K.S. Sureshchandra
Justice Sathya Hettige

9.2.2012 - Accordingly, my said Fundamental Rights Application SC (FR) No. 534/2011 was listed for Support on 9th February 2012 '*For Leave to Proceed*', as per the List of Cases issued by the Supreme Court Registry

I made *extensive* submissions, both orally and in writing, and I further *adduced* grounds of '*perceived judicial bias and disqualification*' on the part of Chief Justice Shirani A. Bandaranayake.

I annex marked "X" hereto copy of my further Written Submission dated 9.2.2012 on such aforesaid grounds of 'perceived judicial bias and disqualification' on the part of Chief Justice Shirani A. Bandaranayake.

I *cited* the House of Lords Judgment *re – Pinochet*, as an authority, where a Judgment by the House of Lords had been *rescinded and vacated* by the another Committee of House of Lords, on such grounds of '*perceived judicial bias and disqualification*', since the wife of one of the Lords, namely, Lord Hoffmann of such Committee had been employed by Amnesty International, who had intervened in such Appeal before the House of Lords.

I was informed by presiding Justice N.G. Amaratunga that for a *review and re-examination*, unlike in the UK, as borne out by the aforesaid House of Lords Judgment, the practice in Sri Lanka was that a *review and re-examination* must be by the same Bench, who had made the initial Determination.

Thereupon, *intimating that I was aware of such practice*, I drew attention to my aforesaid Motion made on 18th January 2012 under Article 132 of the Constitution to Chief Justice Shirani A. Bandaranayake, *vis-à-vis*, my said Amended Petition of 16th December 2011, but that it was she who had *minuted* directing that the matter be heard by the Bench presided by Justice N.G. Amaratunga, *who had heard my Application previously*.

I was taken *aghast* when Justice N.G. Amaratunga, whilst acknowledging the aforesaid Minute of Chief Justice Shirani A. Bandaranayake, intimated to me that '*they had been only asked to hear me and not for the grant of Leave to Proceed*'. This was contrary to the fact that my Application had been listed that day '*For Leave to Proceed*'.

Minuting that '*this Bench cannot entertain and deal with my Application*', my said Application was dismissed by the said Supreme Court Bench presided by Justice N.G. Amaratunga, citing the *dismissal* previously of the other Fundamental Rights Applications on 15th November 2011, notwithstanding my Fundamental Rights Application having been *subsequently entertained* as aforesaid on 25th November 2011, with permission granted for the amendment of my Petition, and Order made to issue Notices on the Respondents !

The aforesaid further Written Submission on '*perceived judicial bias and disqualification*' on the part to Chief Justice Shirani A. Bandaranayake, annexed marked "**X**" hereto was returned to me further *minuting* as follows:

“All papers submitted by the Petitioner in supporting this application to assist the Bench is returned to the Petitioner and those papers shall not form a part of record in this case.

The record consists only of the Petition and the amended petition filed by the Petitioner and no other material is to be considered as a part of the record.”

8.5.2012 - I filed Application to *reconsider* the above Fundamental Rights Application No. 534/2011, *annexing* the aforesaid further Written Submission on 9th February 2012 on ‘*perceived judicial bias and disqualification*’ on the part to Chief Justice Shirani A. Bandaranayake marked “X”, so that the said document would be a part of the record of the Supreme Court. My said Application was refused in the Chambers by Justice N.G. Amaratunga *minuting* that no Application could be entertained in a dismissed case.

18.10.2012 - In the context of the aforesaid advice given to me that for a *review* or *re-examination* I should go before the same Bench, which made the original Determination, and the aforesaid Minute made in the Order of 9th February 2012 that - ‘*this Bench cannot entertain and deal with my Application*’, I made a fresh Application in SC (SD) No. 2/2011 under Article 132 of the Constitution to Chief Justice Shirani Bandaranayake, for a *review* and *re-examination* of the Special Determination on 24th October 2011.

I *pointed out* that the previous Minute made on my Application on 17th December 2011 that I could have appeared on 24th October 2011 was an *impossibility*, and that the Supreme Court had *precedence* to *review* and *rectifying* its own decisions, and that in the instance of another Special Determination, *that Your Honour with the concurrence of all party leaders in Parliament had ruled on 9th October 2011, that a bona-fide error in making a Special Determination could and should be rectified.*

I expressly pointed out that in making the impugned Special Determination of 24th October 2011, that the following Supreme Court Bench

Chief Justice Shirani A. Bandaranayake
Justice P.A. Rathnayake and
Justice Chandra Ekanayake

had acted, *without jurisdiction* in contravention of the *entrenched* deeming provision in Article 123(3) of the Constitution; *and that this was a matter of paramount national and public importance* - viz:

“123.(3) In the case of a Bill endorsed as provided in Article 122, if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution, and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article.”

I asserted that at the *hearing* into the constitutionality of an Urgent Bill, the citizens of the country have no opportunity, whatsoever, of being heard before the Supreme Court. Hence it is due to such very reason that Article 123(3) of the Constitution has an *inbuilt estoppel* on the Supreme Court’s *jurisdiction* to determine, as consistent with the Constitution, an Urgent Bill, on the constitutionality of which, the *Supreme Court entertains any doubts*, whatsoever, *in which event, upon the very entertainment of a doubt, ipso facto the Urgent Bill is constitutionally deemed to have been determined to be inconsistent with the Constitution.*

I also *adduced* extensively updated additional facts to establish that there existed the premise of ‘*perceived judicial bias and disqualification*’ on the part, mainly of Chief Justice Shirani A. Bandaranayake, and also on the part of Justices P.A. Rathnayake and Chandra Ekanayake.

A copy of my said Application of 18th October 2012 having been forwarded to Your Honour, attention of Your Honour is very respectfully drawn to the averments contained therein on ‘*perceived judicial bias and disqualification*’ on the part of Chief Justice Shirani A. Bandaranayake .

19.10.2012 - My said Application under Article 132 of the Constitution to Chief Justice Shirani A. Bandaranayake had been forwarded by the Deputy Registrar of the Supreme Court to the Listing Judge, Justice K. Sripavan instead of having been forwarded to Chief Justice Shirani A. Bandaranayake.

22.10.2012 - Listing Judge, Justice K. Sripavan, without forwarding the same for the *sole and exclusive* consideration by Chief Justice Shirani A. Bandaranayake in terms of Article 132 of the Constitution, in *contravention* thereof had made his own observation *estopping* my such Application, and gone to the extent of *ridiculing* as ‘**frivolous**’, my factual averments on ‘*perceived judicial bias and disqualification*’.

In addition, Listing Judge K. Sripavan had *minuted* – ‘**frivolous** objection taken **after a long period of time without a firm foundation**’, whereas as aforesaid, I had adduced good, sufficient and valid grounds of ‘*perceived judicial bias and disqualification*’ in supporting my Fundamental Rights Application No. 534/2011 on 9th February 2012 as set out in annex marked “**X**”

Furthermore, the Listing Judge sitting in Chambers had gone on to interpret Article 80(3) of the Constitution, which I am advised, can be done only in Open Court, after hearing the parties showing interest in the matter, in this instance myself, and the Hon. Attorney General, who had been noticed in terms of the Constitution.

At the same time, Listing Judge K. Sripavan had chosen to ‘*turn a blind eye*’ to the *core issue* of my Application of the *contravention* of the *mandatorily deeming provision* of Article 123(3) of the Constitution, which governs Urgent Bills. *This alone warranted the interpretation of Article 80(3) of the Constitution, which is a matter of far more graver importance, than the Applications presently before the Supreme Court referred to hereinafter.*

23.10.2012 - Thereafter Chief Justice Shirani A. Bandaranayake had *minuted* that she agreed with the observations of Justice K. Sripavan, ‘*thereby acting as a Judge in her own cause*’, *vis-à-vis*, the ‘*perceived judicial bias and disqualification*’, on her part, as ‘**frivolous**’, and had forwarded the same for the observations of Justices N.G. Amaratunga, P.A. Rathnayake and Chandra Ekanayake.

24.10.2012 - Justice N.G. Amaratunga had agreed with the above observation of Chief Justice Shirani A. Bandaranayake and Listing Judge Justice K. Sripavan, stating there was no legal basis to entertain my said Application on 18th October 2012.

The foregoing renders, as a *fiction and nullity*, the direction made on 9th February 2012 by Justice N.G. Amaratunga, that an Application for a *review* and *re-examination* should be considered by the same Bench, which had made the initial Special Determination.

25.10.2012 - Justice P.A. Rathnayake had also agreed with the foregoing observations of Chief Justice Shirani A. Bandaranayake, Justice N.G. Amaratunga and K. Sripavan, thereby also ‘*acting as a Judge in his own cause*’, *vis-à-vis*, the ‘*perceived judicial bias and disqualification*’, on his part averred in my Petition.

07.11.2012 - Justice Chandra Ekanayake too had agreed with the foregoing observations of Chief Justice Shirani A. Bandaranayake and Justices N.G. Amaratunga, P.A. Rathnayake and K. Sripavan, thereby also ‘*acting as a Judge in her own cause*’, *vis-à-vis*, the ‘*perceived judicial bias and disqualification*’, on her part averred in my Petition.

I, myself, together with one member of my Office, went to the Supreme Court Registry on 20th November 2012, and personally verified the *correctness* of the following Minutes from the original Case Record.

“Hon. K. Sripavan, J

AAL for the Petitioner files Motion dated 18.10.2012 with :

1. Petition and Schedules “X”, “Y” & “Z”
2. Documents
3. Affidavit
4. Special Affidavit in support of the facts contained in “X”

AAL further moves Your Lordship’s Court be pleased that this Application be taken for Hearing on 16th, 19th & 20th November 2012, for a review and re-examination of Determination made on 24.10.2011. Submitted for Your Lordship’s directions please.

DRSC
19.10.2012

Hon. Chief Justice

The Petitioner by Motion dated 18.10.2012 seeks to review and re-examine the Special Determination dated 24.10.2011. In terms of paragraph 9(h) of the Petition, Hon. Speaker has certified the Bill on 11.11.2011. Upon certification being endorsed, the Bill becomes law and in terms of Article 80(3), the validity of such Act shall not be called in question thereafter upon any ground whatsoever.

This Article (Art 80 (3)) must be interpreted according to its true purpose and intent as disclosed by the phraseology in its natural signification.

If a party perceives “judicial bias & disqualification” against a member of the Bench, such party should have raised objections at the time the Bill was taken up for hearing. If no Objection is taken at the former stage, that party cannot thereafter complain of the matter disclose, as giving rise to a real danger of bias. Any **frivolous** objection taken **after a long period of time without a firm foundation** would not only impede the due administration of justice, but also undermines the work of Court. (*Emphasis added*)

In view of the foregoing, I do not see any legal basis to entertain the Motion dated 18.10.2012. The Motion may be rejected in limine.

Sgd. Sripavan, J
22.10.2012

Hon. Amaratunga, J, Hon. Ratnayake, PC, J, Hon. Ekanayake, J.

I agree with the Observations of Hon. Sripavan, J. The Bill in question was considered by this Court on 24.10.2011 and the certificate by the Hon. Speaker had taken place on 11.11.2011. In terms of Article 80(3) of the Constitution the validity of such an Act shall not be questioned on any ground whatsoever.

No Objection was raised on any one of the three Judges who heard the matter on 24.10.2011. For the aforementioned reasons the Motion dated 18.10.2012 should be rejected in limine.

Pls. consider the said Motion and tender your observations/concurrence.

Sgd. Chief Justice
23.10.2012

Hon. The Chief Justice

I agree with the observation of Your Ladyship and Hon. Sripavan J, set out above. Since there is no legal basis to entertain the Motion dated 18.10.2012, it should be rejected in limine. The Registrar of the Supreme Court should be directed not to entertain any further Motions/ Applications / Petitions in respect of this matter.

Sgd. Amaratunga, J
24.10.2012.

Hon. The Chief Justice

I agree with the observations and recommendations of Your Ladyship, Hon. Amaratunga J, and Hon. Sripavan, J.

Sgd. P.A. Ratnayake, J
25.10.2012

Hon. The Chief Justice

I agree with the observations and directions embodied in Your Ladyship's Order 23/10/2012, Hon. Justice Amaratunga's Order dated 24/10/2012, Hon. Justice Sripavan's Order dated 22/10/2012 and Hon. Justice P.A. Ratnayake's Order dated 25/10/2012.

Sgd. Ekanayake, J
7.11.2012 "

Upon reading the foregoing Minutes, *appallingly baffled*, in that, even in a *glaring* instance of *national significance* and *public importance*, when the Supreme Court had made a Special Determination on an Urgent Bill, *without jurisdiction ultra-vires* the *mandatorily deeming* provision in Article 123(3) of the Constitution, which *reigns supreme*, and as a consequence thereof, a Bill had been passed by Parliament and certified into law, *ironically* no means of *judicial redress or remedy*, whatsoever, was available to a party *affected* by such *patently unconstitutional* Special Determination made by the Supreme Court, that too *without constitutional jurisdiction; thereby reinforcing the necessity for the interpretation of Article 80(3) of the Constitution* being of greater importance than Article 107(3) of the Constitution.

In my said Petition dated 18th October 2012, I had, *inter-alia*, cited the following from the Supreme Court Judgment in SC Application Nos. 66 and 67 of 1995 in Jeyaraj Fernandopulle Vs Premachandra De Silva and Others by a 5 Judge Bench of the Supreme Court – *viz*:

- "The Supreme Court has inherent powers to correct decisions made *per-incuriam*. A decision will be regarded as given *per-incuriam* if it was in ignorance of some inconsistent statute or binding decision – wherefore some part of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong."
- "An order made on wrong facts given to the prejudice of a party will be set aside by way of remedying the injustice caused."


The aforesaid Resolution to impeach Chief Justice Shirani Bandaranayake, on which Your Honour has appointed a Parliamentary Select Committee, contains Charges, including on the very *perceived judicial bias and disqualification*' which I had adduced before the Supreme Court, as aforesaid on 9th February 2012, and later morefully on 18th October 2012.

Consequently, several Writ Applications had been made to the Court of Appeal and several Fundamental Rights Applications had been filed in the Supreme Court on the said matter of Resolution to impeach Chief Justice Shirani Bandaranayake. The Court of Appeal reportedly had referred under Article 125 of the Constitution, the said Applications to the Supreme Court for interpretation of Article 107(3) of the Constitution.


As reported in the media, a 3 Judge Bench of the Supreme Court, including Justices N.G. Amaratunga and K. Sripavan, I verily believe constituted by Chief Justice Shirani Bandaranayake, are reportedly hearing the said Applications. Under Articles 129 and 132 of the Constitution it is imperative that the matters of national and public importance be heard by a Fuller Bench of the Supreme Court. In October 2002 it was a 7 Judge Bench of the Supreme Court which *interpreted* the Constitution.

Justices N.G. Amaratunga and K. Sripavan, had already pre-judged, as **frivolous**', in Chambers, *without having heard me*, my averments on '*perceived judicial bias and disqualification*' on the part of Chief Justice Shirani Bandaranayake, which is a premise for some of the Charges contained in the aforesaid Resolution to impeach Chief Justice Shirani Bandaranayake. Hence do they not stand *disqualified* from hearing the aforesaid Applications ?

The foregoing Affidavit having been read and understood by the Affirmant within-named, affirmed to and signed at Colombo on this 5th day of December 2012



BEFORE ME



S. NAVARATNAM
Justice of the Peace (All Island)
No 2540 Wipulasena Mawatha,
Colombo 10.
Reg. No. ORIENT/AU/68

05/12/2012