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

In the matter of an Application for Relief pertaining to the undertaking in the Affidavit filed by the 8th Respondent-Petitioner dated 16th October 2008 pertaining to holding public office

Vasudeva Nanayakkara, Attorney-at-Law
Advisor to His Excellency the President
Secretary, The Democratic Left Front
49 1/1, Vinayalankara Mawatha
Colombo 10.

PETITIONER

SC FR Application No. 209/2007

VS

1. K.N. Choksy P.C., M.P.
   Former Minister of Finance
   23/3, Sir Ernst De Silva Mawatha
   Colombo 7.

2. Karu Jayasuriya, M.P.
   Former Minister of Power & Energy
   2, Amarasekera Mawatha
   Colombo 5.

3. Ranil Wickremesinghe M.P.
   Former Prime Minister
   115, 5th Lane
   Colombo 3.

4. Chandrika Bandaranaike Kumaratunga
   Former President of Sri Lanka
   Horagolla Walawwa
   Horagolla.

5. Milinda Moragoda M.P.
   Former Minister of Economic Reform
   3/2, Allen Methiniyarama Road
   Colombo 5.

6. Sripathy Sooriyarachchi, AAL, M.P.
   Former Minister, Public Enterprise Reforms
   22, Niwasa Mawatha
   Rilaulla
   Kadana.

7. Charitha Ratwatte, Former Secretary to the Treasury
   16, Jawatte Road
   Colombo 5.

8. P.B. Jayasundera
Secretary to the Treasury / Former Chairman,
Public Enterprises Reform Commission (PERC)
Secretariat
Colombo 1.

9. P. Weerahandi, Former Secretary
Ministry of Power & Energy
410/7, Baudhaloka Mawatha
Colombo 7.

10. Daham Wimalasena, Former Chairman
Ceylon Petroleum Corporation
Member, Technical Evaluation Committee
22/11, Subadra Mawatha
Madiwela.

11. Upali Dahanayake, Former Director, Ministry of Finance
Member, Technical Evaluation Committee
32, Peiris Avenue, Idama
Moratuwa.

12. A.W.C. Perera, Former Addl. Secretary
Ministry of Economic Reforms
Member, Technical Evaluation Committee
57/2, Rajamaha Vihara Road
Pita Kotte.

13. Shamalee Gunawardene, Attorney-at-Law
Former Director Legal, PERC
500/111, Thimbirigasyaya Road
Colombo 5.

14. DFCC Bank
73/5, Galle Road
Colombo 3.

15. Commissioner of Lands
Land Commissioner's Department
7, Gregory's Avenue
Colombo 7.

16. Sri Lanka Ports Authority
19, Church Street
Colombo 1.

17. Ceylon Petroleum Corporation
109, Rotunda Tower
Galle Road
Colombo 3.

18. John Keells Holdings Ltd.
130, Glennie Street
Colombo 2.

19. Lanka Marine Services Ltd.
69, Walls Lane
Colombo 15.

20. Susantha Ratnayake, Chairman
John Keells Holdings Ltd.
130, Glennie Street
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21. V. Lintotawela, Former Chairman
John Keells Holdings Ltd.
55, Abdul Caffoor Mawatha
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22. Nihal Sri Ameresekere, Former Chairman, PERC
167/4, Vipulasena Mawatha
Colombo 10.

23. W.M. Bandusena, Former Chairman, PERC
XB 1/2/2, Edmonton Houses
Kirulapona
Colombo 5.

24. W.A.S. Perera, Chairman, PERC
West Tower, 11th Floor
World Trade Center
Colombo 11

25. Channa De Silva,
Director General
Securities & Exchange Commission of Sri Lanka (SEC),
Level 11-01, East Tower
World Trade Center
Echelon Square
Colombo 1.

26. Lalith Weeratunga
Secretary to His Excellency the President
Presidential Secretariat
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27. Wijeyadasa Rajapakshe P.C., M.P.
Chairman, Parliamentary Committee on Public Enterprises (COPE)
17, Wijeba Mawatha
Off Nawala Road
Nugegoda.

28. Inspector General of Police
Police Headquarters
Colombo 1.

29. Deputy Inspector General of Police
Criminal Investigation Department
4th Floor, New Secretariat Building
Colombo 1.

30. Chairman
Commission to Investigate Allegations of Bribery or Corruption
36, Malalasekera Mawatha
Colombo 7.

31. Hon. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

32. Sri Lanka Shipping Company Limited
46/5, Nawam Mawatha
P.O. Box 1125
Robert Senanayake Building
Colombo 2.

33. Lanka Maritime Services Limited
3rd Floor, Robert Senanayake Building
46/5, Nawam Mawatha
Colombo 2.

34. Lanka Services (Pvt) Ltd.
1st Floor, Robert Senanayake Building
46/5, Nawam Mawatha
Colombo 2.

ADDED-RESPONDENTS

AND NOW BETWEEN

P.B. Jayasundera
No. 761/C, Pannipitiya Road
Pelawatte
Battaramulla

8TH RESPONDENT PETITIONER

VS

The Attorney General
Attorney General's Department
Colombo 12.

31ST RESPONDENT - RESPONDENT

TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS AND LADYSHIPS THE OTHER HONOURABLE JUSTICES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. WHEREAS

a) the Application/s made by the *former* 8th Respondent came up on 27.8.2009 before a 5-Judge Bench constituted by Your Lordship Chief Justice, the Counsel for the Petitioner made Submissions objecting to the Constitution of such Bench, *citing and relying on authorities on established precedents, law and practice in Your Lordships' Court.*

b) Your Lordships' Court having thereupon adjourned and re-assembled thereafter, postponed the matter for 24.9.2009 to be taken-up before a Bench, including also 2 Judges of Your Lordships' Court, who had made the Original Order/s in relation to the *former* 8th Respondent.

c) in the circumstances, the 22nd Respondent could not make any submissions.

NOW THEREFORE the 22nd Respondent very respectfully tenders herewith Written Submissions for due consideration by Your Lordship the Chief Justice and the other Hon. Judges of Your Lordships' Court, and very respectfully **MOVE** that the same be accepted

2. AND WHEREAS

a) the prayers to the Petition dated 7.7.2009 of the *former* 8th Respondent are as follows:

- 'to make order relieving the present Petitioner of the undertaking contained in paragraph 13 of the said Affidavit dated 16th October 2008 tendered by the present Petitioner **pursuant to the Order of Your Lordships' Court and produced marked "D" to this Application**'. (*Emphasis added*)

- 'to grant such other and further relief as to Your Lordships' Court shall seem fit and meet'.

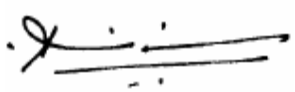
b) the prayers to the Petitions dated 21.7.2009 and 31.7.2009 of the *former* 8th Respondent, in addition to the above 'prayers' has the following prayer

- **'vacate the said Order dated 08.10.2008** in so far as it relates to the inclusion in the Affidavit of a firm statement that the present Petitioner "would not hold any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions." '(*Emphasis added*)

c) hence, admittedly the Application/s of the *former* 8th Respondent is to *re-consider / revise / review / vary* the Order of Your Lordships' Court **made as far back as 8.10.2008**, consequent to the Judgment dated 21.7.2008 and the *consequential Orders made thereafter.*

WHEREFORE *given the established precedent, law and the practice of Your Lordships' Court, as morefully set out in the Written Submissions* tendered herewith, the 22nd Respondent very respectfully Moves that Your Lordships' Court be pleased to submit the instant Application/s of the *former* 8th Respondent to *re-hear / re-consider / revise / review / vary* Order/s made against him, *if not rejected in-limine*, *in the first instance*, for consideration to the 3 Hon. Judges of Your Lordships' Court, Hon. Ms. S. Tilakawardane J, Hon. N. Amaratunga J, and Hon. P.A. Ratnayake J, second of whom was involved in delivering the Judgment dated 21.7.2008, and all 3 of whom were involved in the making of the consequential Orders / Directions in relation to the *former* 8th Respondent, as morefully set out in the said Written Submissions.

Colombo, on this 9th day of September 2009



22nd Respondent

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

In the matter of an Application for Relief pertaining to the undertaking in the Affidavit filed by the 8th Respondent-Petitioner dated 16th October 2008 pertaining to holding public office

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ADDED-RESPONDENTS

AND NOW BETWEEN

P.B. Jayasundera
No. 761/C, Pannipitiya Road
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8TH RESPONDENT PETITIONER

VS

The Attorney General
Attorney General's Department
Colombo 12.

31ST RESPONDENT - RESPONDENT

TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS AND LADYSHIPS THE OTHER HONOURABLE JUSTICES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

WRITTEN SUBMISSIONS OF THE 22ND RESPONDENT

ON THE MATTER
TO RE-HEAR / RE-CONSIDER / REVISE / RE-VISIT / VARY
AN ORDER MADE BY YOUR LORDSHIPS' COURT

PREAMBLE

When the instant Application/s made by the *former* 8th Respondent came up on 27.8.2009 before a 5-Judge Bench constituted by Your Lordship Chief Justice, the Counsel for the Petitioner made Submissions objecting to the Constitution of such Bench, **citing and relying on authorities on established precedents, law and practice in Your Lordships' Court.**

Your Lordships' Court thereupon adjourned and re-assembled and thereafter postponed the matter for 24.9.2009 to be taken-up before a Bench, including also 2 Hon. Judges of Your Lordships' Court, who had made the Original Order/s in relation to the *former* 8th Respondent.

In the circumstances, the 22nd Respondent could not make submissions. These Written Submission are therefore most respectfully being submitted for due consideration by Your Lordship the Chief Justice and the other Hon. Judges of Your Lordships' Court.

1. PRECEDENTS AND AUTHORITIES FOR THE CONSTITUTION OF A BENCH TO RE-HEAR / RE-CONSIDER / REVISE / RE-VISIT / VARY AN ORDER MADE BY YOUR LORDSHIPS' COURT

Subsequent to the aforesaid Proceedings in Your Lordships' Court on 27.8.2009, the 22nd Respondent on the next day 28.8.2009 attended the 2nd Annual Oration delivered by Mr. K. Kanag-Isvaran P.C., in memory of the 22nd Respondent's *School mate and friend*, the late Attorney General K.C. Kamalasabayson P.C., with Your Lordship the Chief Justice, as the Chief Guest, wherein he dealt with certain legal principles, which the 22nd Respondent wishes, with permission, to very respectfully place before Your Lordships' Court for consideration.

The 22nd Respondent very respectfully cites hereinbelow certain 'extracts' therefrom, namely:

"The Doctrine of *stare decisis*

The first and foremost is the importance of the principle of '*stare decisis*' – meaning – "to stand by things decided". (*Emphasis added*)

This springs from a principle which is embodied in another maxim – '*stare decisis et non quieta movere*' – to stand by things decided and not to disturb settled points. (*Emphasis added*)

The main object then of *stare decisis* is to ensure certainty and predictability of the law.

Rupert Cross in "Precedent in English Law" 104 (2nd Ed, 1968) says –

> "*The orthodox interpretation of stare decisis……is stare rationibus decidendis.* ('keep to the *rationes decidendi* of past cases')" "

……

"John Salmond in his treatise on Jurisprudence 181 (10th Ed. 1947) defines precedent as follows –

> "*A precedent……is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.*"

To follow the *ratio decidendi* of past cases is *stare decisis*. This is a relatively modern common law doctrine, developed in the 19th Century and is derived from, *stare decisis et non quieta movere*, …… "

.....

"The doctrine of *stare decisis* then is simply that when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudications." (*Emphasis added*)

.....

"The decision in Bandahamy *(i.e.* ***Bandahamy v Senanayake*** *62 NLR 313, a seven bench court presided by Basnayake CJ)* was before the 1st and 2nd Republican of Constitutions. However, despite the change in the Constitutions and consequently of the judicial hierarchy under the respective constitutions, the law on the subject remains the same. That this is so was affirmed by a five judge bench decision of the Supreme Court, under the present Constitution, presided by Thamotheram J. in **Walker Sons & Co UK Ltd. v Gunatilake and Others** BLR (1985) Vol. 1 Part V p. 205.

The point to be noted is that rules of precedent are therefore, in our country, based on the *cursus curiae* – namely the practice of the court."

.....

"The question of finality of judgments

There is often, with respect, a lack of appreciation of the true meaning of the phrase "finality of judgments". The maxim oft cited in this regard is "interest reipublicae ut sit finis litium". It is a public policy rule that it is in the interest of the public that there must be an end to litigation and that a litigant who has obtained a judgment (the concrete decision) is entitled not to be deprived of the fruits of it without solid grounds. **So that once a judgment is delivered, the court which delivered it cannot re-hear, review, alter or vary its own judgment, whether in fact or in law. It can only be done in appeal, subject to the court's power to clarify or to correct accidental slips or omissions. However if it is the Supreme Court, the matter is at an end.** (*Emphasis added*)

The public policy concern of finality of judgments is also reflected in the rule that courts are bound upon a question of law by its own previous decisions.

Thus a decision of court is final in both senses -namely as to its "concrete decision" as well as to its "abstract decision".

..... Supreme Court of the Philippines in the case of Gallardo-Corro v Gallardo. There the Court held,

> *"Nothing is more settled in law than that once a judgment attains finality it thereby becomes immutable and unalterable. It may no longer be modified in any respect, even if the modification is meant to correct what is perceived to be an erroneous conclusion of fact or law, and regardless of whether the modification is attempted to be made by the court rendering it or by the highest court of the land. Just as the losing party has the right to file an appeal within the prescribed period, the winning party also has the correlative right to the finality of the resolution of his his case. The doctrine of finality of judgment is grounded on fundamental considerations of public policy and sound practice, and that , at the risk of occasional errors, the judgments or orders of courts must become final at some definite time fixed by law; otherwise, there would be no end to litigations, thus setting to nought the main role of courts of justice which is to assist in the enforcement of the rule of law and the maintenance of peace and order by settling justiciable controversies with finality."*

……

"The doctrine of *per incuriam*

Rupert Cross – "Precedent in English Law" 136 (2nd Ed 1968) treats as a leading statement of the principle the following passage from **Morrelle Ltd v Wakeling** (1955) 2 QB 389 at 406, per Lord Evershed M.R.,

> "*As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some feature of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must, in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence.*" "

"…… the Supreme Court, in **Billimoria v Minister of Lands et al** (1978-79-80) 1 SLR 10, which adopts and follows the principle as enunciated in the Morrelle Ltd., case and also goes on to hold that it is competent for one court to set aside an order made *per incuriam* by another Bench of the same court, *but that the practice has been to go before the same judges, as a matter of courtesy*.

However in **Ganeshananthan v Vivienne Gunawardene and Three Others** (1984) 1 SLR 319 the court held additionally that "*As a Superior Court of record there is no doubt that it has inherent powers to make corrections* to *meet the ends of justice*" and proceeded to cite authorities in support thereof. However, an invitation to exercise revisionary jurisdiction was declined on the basis ***"The Supreme Court has no jurisdiction to act in revision of cases decided by itself……The Supreme Court is the Court of last resort in appeal and there is finality in its judgment whether it is right or wrong. That is the policy of the law and the purpose of Chapter XV of the Constitution."*** *(Emphasis added)*

……

"In **Jeyaraj Fernandopulle v De Silva and Others** (1996) 1 SLR 70, a 5 bench decision of the Supreme Court, which has the most exhaustive treatment of the subject of inherent jurisdiction in the judgment of Amerasinghe J, which is also important for the breadth of the issues he discusses, which time does not permit me to comment on as I would liked to have, but suffice it to note that here the Bench held that where the judges are available, reconsideration of the per incuriam decision ***"should be referred to the Court composed of the Judges who heard the case"*** – citing **Wickremasinge and Others v Cornel Perera and Others** S.C. Minutes of 21.3.1996, S.C. L.A. No. 49/96, and that the court has ***"advanced beyond graceful politeness and considerateness in intercourse as a justification of the practice"*** (*Emphasis added*)

It would therefore appear that where the judges are available it should go before the same Bench according to this decision. (*Emphasis added*)

On the question of finality of judgments it held that "*In general, a decision of the court is final; it is not subject to an appeal, revision, review, re-argument or reconsideration*". (*Emphasis added*)

"……. *when the Supreme Court has decided a matter, the matter is at an end*". – Fernandopulle v De Silva and Others (supra)." (*Emphasis added*)

However, the judgment did concede that the Court has inherent power in certain circumstances to "revise" an order made by it! The word used you will note is "revise" not "correct".

The court also proceeded to hold, that Article 132 (3) under which the Chief Justice is entitled to constitute a Bench of 5 or more Judges is an empowerment limited only to constitute such a Bench to hear an appeal, proceeding or matter which the Court has jurisdiction to entertain and decide or determine and is pending before it and not in respect, importantly, of a concluded matter. The judgment declared "*The Court had no statutory jurisdiction to rehear, reconsider, revise, review, vary or set aside its own orders*" " (*Emphasis added*)

……

"The Protection of Fundamental Rights

……

But first let us understand the nature of the jurisdiction, in a broad sense, as envisaged by the Constitution. A useful summary of it is to be seen in the judgment of the Supreme Court in Ganeshananthan v Gunawardene (supra).

There the Court opined, -

i. Under the jurisdiction granted by Article 126 the Court has to make a dual finding
   a. Whether there is an infringement or threatened infringement of a fundamental right,
   b. Whether such infringement or threat is by executive or administrative action.
ii. A proceeding under Article 126 is a proceeding against the State and the State has to bear the liability for unlawful executive or administrative action.
iii. The jurisdiction of the Court does not depend on the fact that a particular officer is mentioned by name nor is it confined to the person named. It is the unlawful act complained of which gives the Court jurisdiction to entertain the petition and make orders.
iv. **The Court has been given power to grant relief as it may deem just and equitable – a power stated in the widest possible terms**. *(Emphasis added)*

……. on the 3rd of August 2009, the Asoka de Silva Court affirmed the principle of finality of judgments in what is commonly referred to as the **"Water's Edge" case**- S.C. F.R. 352 of 2007. It also affirmed the breadth of the Court's power to grant relief and justified it on the basis that, - ***"Fundamental Rights applications <u>are qualitatively different</u> from other types of appeals heard before this Court and <u>warrant greater latitude</u> in their consideration and to grant redress in order to encompass the equitable jurisdiction exercised in these applications."*** (*Emphasis added*)

……

Given that the jurisdiction focuses the Court's enquiry at the culpability/liability of the State for unlawful executive or administrative action and that the power of granting relief was stated in the widest possible terms – i.e. ***"……to grant such relief or make such directions as it may deem equitable in the circumstances……"*** (*Emphasis added*)

……

The Court believed it to be a general jurisdiction, and as recently declared, ***"qualitatively different from other types"*** of jurisdiction, for correcting governmental action or inaction and asserted, (again as recently stated) a ***"greater latitude……to grant redress……to encompass the equitable jurisdiction"***. (*Emphasis added*)

"In **Vasudeva Nanayakkara v K. N. Choksy P.C and 30 Others** – S.C. F.R. 209/2007, S.C. Minutes of 21st July 2008 the Court observed that in the evaluation of facts,

> "*……this Court would be guided only by the sequence of events, relevant documents and the reasonable inferences that could be drawn by them.*"

Of course if the evidence is undisputed, or if the preponderance of evidence is in favour of a particular inference, there is no problem." (*Emphasis added*)

2. 22ND RESPONDENT'S *'OWN EXPERIENCE'* IN APPLYING FOR A *'RE-HEARING'* BY A FULLER BENCH OF YOUR LORDSHIPS' COURT - *IN SC / SD NO. 20/2003*

On 18.4.2003, the 22nd Respondent filed **SC / SD No. 11/2003** in terms of Article 121 of the Constitution, challenging Inland Revenue (Special Provisions) Bill, which provided for the making of 'Amnesty Declarations' by 30.6.2003.

After Argument on 29.5.2003, by Determination made on 4.8.2003, Your Lordships' Court declined to exercise jurisdiction, holding that the aforesaid Application had not been made, within the limited time of one week of the said Bill being placed on the Order Paper of Parliament, as stipulated in Article 121 of the Constitution.

In the meanwhile, with a further Bill titled – "Inland Revenue (Special Provisions) (Amendment) Bill being placed on the Order Paper of Parliament on 25.7.2003, seeking to extend the aforesaid date for making of 'Amnesty Declarations' upto 15.8.2003, the 22nd Respondent made an Application on 29.7.2003, *within the stipulated period of one weeks' time*, to challenge the said Bill, in **SC / SD No. 20/2003**, *on the premise that the provisions of the law were being re-enacted to apply to 'another group of persons'.*

A Bench of Your Lordships' Court, presided by Hon. Ameer Ismail J, with Hon. P. Edusuriya J and Hon. T.B. Weerasuriya J, on 7.8.2003 having heard the said Application **SC / SD No. 20/2003** made Determination that the said Amendment Bill, only extended the date for making of the 'Amnesty Declarations', which was not inconsistent with the Constitution, *without considering as to whether the provisions being re-enacted to apply to 'another group of persons' were inconsistent with the Constitution.*

Consequently on 12.9.2003, the 22nd Respondent made a prompt Application to Your Lordships' Court for a re-hearing of the said matter by a Fuller Bench of Your Lordships' Court, *it having been of utmost general and public importance.*

The 22nd Respondent made Application on 31.8.2009 to the Registry of Your Lordships' Court for a certified copy of the aforesaid Record in **SC / SD No. 20/2003**. However, the Registry only issued the Journal Entry in the said Application, and declined to issue certified copies of the aforesaid Minutes, ***which however had been permitted to be perused and notes made thereof, by a representative of the 22nd Respondent***.

The 22nd Respondent's said Application to be heard by a Fuller Bench, **had been referred by the former Hon. Chief Justice to the same aforesaid 3 Hon. Judges, who had heard the matter in the first instance. Consequently, the said Hon. Ameer Ismail J, with Hon. P. Edusuriya J and Hon. T.B. Weerasuriya J, had minuted that no useful purpose would be served in further hearing of the said matter.**

Accordingly, **based on the Minutes made by the 3 Hon. Judges**, ***who in the first instance had made the Determination***, **the 22nd Respondent's said Application to be heard by a Fuller Bench *was not entertained* by Your Lordships' Court.**

Your Lordship the Chief Justice and other Hon. Judges of Your Lordships' Court may be pleased to call for the said Record in **SC / SD No. 20/2003,** and verify the correctness of the aforesaid submissions made.

The 22nd Respondent very respectfully submits that**, the foregoing is in conformity with the aforesaid 'precedents' and the established 'practice for constitution of a Bench'** ***to re-hear / re-consider / revise / review / vary*** **an Order made by Your Lordships' Court**.

It is very respectfully submitted, that the aforesaid prompt Application of the 22nd Respondent *was on a matter of utmost general and public importance, whilst on the other hand*, the instant Application/s of the *former* 8th Respondent **made belatedly after one Year of the Judgment and over 10 Months after the relevant consequential Order/s** *is / are purely of a matter of private and personal nature.*

Hence, it is most respectfully submitted that the *former* 8th Respondent's instant Application/s should be referred, *in like manner,* to the very same Hon. Judges, who made Order/s in relation to the *former* 8th Respondent for their due consideration thereon.

It is most respectfully submitted, that to **entertain otherwise** such belated Application/s of the *former* 8th Respondent, give rise to **differential treatment** *vis-à-vis* the 22nd Respondent's aforesaid Application, ***which having been referred in the first instance to the very same 3 Hon. Judges, who made the original Order,* was declined to be re-heard, *based upon Minutes made by 3 Hon. Judges in their respective Chambers***.

It is noteworthy, *that the aforesaid matter of general and public importance*, pursued by the 22nd Respondent, and he persuading the then H.E. the President to refer the said matter, under Article 129 of the Constitution, for an Opinion of Your Lordships' Court, resulted in Your Lordships' Court *inter-alia* pronouncing in **SC Reference No. 1/2004**, that the said law was antithetic to the Rule of Law, and was violative of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, and had defrauded public revenue causing extensive loss to the State; *which was also so determined in* ***SC / SD No. 26/2004*** on the Bill presented to Parliament to repeal the said law.

3. IN SC (FR) NO. 209/2007 JUDGMENT DELIVERED ON 21.7.2008 & CONSEQUENTIAL PROCEEDINGS / ORDERS PERTAINING TO *FORMER* 8TH RESPONDENT

21.7.2008 ***(Before former Hon. Chief Justice, Hon. N. Amaratunga J and Hon. J. Balapatabendi J)***

Judgment delivered annulling the transaction and directing LMSL to vacate Bloemendhal Oil Storage Facility within 1 Month; and, *inter-alia*, holding that **- 'the findings in the judgment demonstrate that the action of P.B. Jayasundera, 8th Respondent has not only been arbitrary and ultra-vires but also biased in favour of John Keells Holdings Ltd. The allegation of the Petitioner that he worked in collusion with S. Ratnayake of John Keells to secure illegal advantages to the latter, adverse to the public interest is established. Accordingly 8th Respondent was directed to pay a sum of Rs. 500,000/- as compensation to the State'**.

In the said Judgment there were several grave and serious adverse findings made on the conduct and actions of the *former* 8th Respondent, *a very senior public servant*.

2.9.2008 Petitioner filed Motion, *inter-alia*, tendering Letters to the IGP (28th Respondent), DIG-CID (29th Respondent), Chairman, Commission to Investigate Allegations of Bribery or Corruption (30th Respondent), Director General, Securities Exchange Commission (25th Respondent) and Hon Attorney General (31st Respondent), stating that notwithstanding direction by the Supreme Court that ***'all parties to these proceedings will taken necessary action on the basis of the findings stated in the Judgment'*** that the Petitioner is unaware, as to what action has been taken under applicable laws, and therefore moved that further orders and/or direction be given.

8.9.2008 ***(Before former Hon. Chief Justice, Hon. Shirani Thilakawardene J and Hon. N. Amaratunga J)***.

The Counsel for the Petitioner submitted that the **'8th Respondent in respect of whose conduct adverse findings had been made by Your Lordship's Court is continuing to hold public office notwithstanding the fact that findings of Your Lordships' Court is that the 8th Respondent has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution and thus he is disqualified from holding public office. Court is of the view that there is merit in this submission and that the matter should be referred to the bench which heard the case for further orders'**.

Court also directed the Petitioner to tender notices to be served on the IGP (28th Respondent), DIG-CID (29th Respondent), Chairman Commission to Investigate Allegations of Bribery or Corruption (30th Respondent), Director General, Securities & Exchange Commission (25th Respondent), and Attorney General (31st Respondent), on a Complaint made by the Counsel for the Petitioner that notwithstanding the Judgment notified to them, no action had been taken pursuant thereto.

The *former* 8th Respondent was represented by the Addl. Solicitor General upto an on 8.9.2008.

29.9.2008 ***(Before former Hon. Chief Justice, Hon. Shirani Thilakawardene J and Hon. N. Amaratunga J)***

Court directed that the IGP (28th Respondent) and the Director CID (29th Respondent) should take note of the findings of the Judgment, and ascertain whether commission of any criminal offence is disclosed.

22nd Respondent tendered to Court written representations with regard to several statutes that had been infringed (*a copy of the said representations of the 22nd Respondent dated 29.9.2008 is attached hereto marked "A"*), and as directed by Court the representations of 22nd Respondent dated 29.9.2008 was furnished to the Addl. Solicitor General, to notify the Respondents on these matters with the Court observing that they are matters that should be within the knowledge of the respective authorities. The relevant Respondents were directed to take steps in terms of the laws that are applicable on the basis of findings made by Court, and whether any offences have been committed. **Addl. Solicitor General was directed to notify Court of the steps that were taken by the officials**.

Court noted that it had come to firm findings that the 8th Respondent had acted contrary to law against the public interest in the confirment of benefits to a private party. That there was firm finding that he has infringed the fundamental rights guaranteed by Article 12 (1) of the Constitution. The motion indicates that notwithstanding these findings, which clearly show that he had acted in fragrant violation of the Constitution, the 8th Respondent is yet continuing to hold public office.

Addl. Solicitor General submitted that the Attorney General has revoked the Proxy of the 8th Respondent.

In the circumstances, Court directed the Registrar to issue a notice directly on the 8th Respondent to be present in Court on the next date and reveal to Court;

(1) Whether he continues to hold office under the Republic and if so the nature of such office and the place at which he is functioning

(2) **Whether he is holding any office in any establishment in which the Government of Sri Lanka has any interest, purporting to represent the interest of the Government of Sri Lanka and if so the nature of such office**.

The *former* 8th Respondent *knowing that his Proxy had been revoked by the Hon. Attorney General* was not present in Court in person or through an Attorney-at-Law, as he ought to have, which resulted in the aforesaid direction being made to issue notice on him.

8.10.2008 ***(Before former Hon. Chief Justice, Hon. Shirani Thilakawardene J and Hon. P.A. Ratnayake J)***

Addl. Solicitor General informed Court that -

- the IGP (28th Respondent) through the CID (29th Respondent) had commenced investigations regarding this matter and recorded certain statements.

- the Chairman to Investigate Allegations of Bribery or Corruption (30th Respondent) has also commenced investigations

- Director General SEC had instructed that investigations are in progress. Court noted that Petitioner had made certain representations and that these should also be taken into account in the conduct of investigations.

New Counsel appearing for the 8th Respondent submitted that within 4 days of the judgment, the 8th Respondent tendered his resignation from the post of Secretary Ministry of Finance. However that he continued to function in that post to discharge official duties since the resignation was not accepted until much later. Further that the 8th Respondent resigned from the Chairmanship of Sri Lanka Airlines on 19.9.2008, accepted on 30.9.2008. Further that the 8th Respondent does not hold any office in any Government Establishment nor any Establishment in which the government has an interest.

That the 8th Respondent has interest in a company in which Government has interest, referring two such companies in which he holds a single share, and that he would sever links with these Companies.

New Counsel for the 8th Respondent submitted that the 8th Respondent tenders an unreserved apology to Court for having continued functioning after the judgment of the Court.

Hence, the 8th Respondent **was given time to file an appropriate Affidavit** in which he may consider including the said expression of regret and a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. Affidavit to be filed as early as possible. Mention for a final order on the matter on 20.10.2008.

25th, 28th and 30th Respondents to notify Court of action taken within 2 Months mention for this purpose on 15.12.2008.

Accordingly Registrar were directed list this matter to be mentioned first on 20.10.2008 and later on 15.12.2008.

20.10.2008 ***(Before former Hon. Chief Justice, Hon. Shirani Thilakawardene J and Hon. P.A. Ratnayake J)***

New Counsel for the 8th Respondent submitted that 8th Respondent had filed Affidavit dated 16.10.2008, together with annexures A to E.

Counsel for the Petitioner submitted that the annexures are only letters sent by respective parties and that the 8th Respondent had not included a copy of any letter said to have been written by him.

***Subject to that*, Counsel for the Petitioner submitted that the Affidavit is sufficient compliance with the undertaking given by the 8th Respondent**.

15.12.2008 ***(Before former Hon. Chief Justice, Hon. K. Sripavan J and Hon. P.A. Ratnayake J)***

Addl. Solicitor General tendered to Court;

- Letter dated 5.12.2008 of Chairman of the Commission to Investigate Allegations of Bribery or Corruption (30th Respondent) intimating that substantial progress has been made in the investigations carried out.

- Letter dated 15.12.2008 sent by the CID to the Attorney General seeking advice as to proceedings that may taken on the basis of the investigations carried out.

- Letter dated 15.12.2008 from the Department of Inland Revenue confirming that steps are being taken to recover taxes from LMSL from the Year 2002/03.

Having considered the respective reports, the Court was of the view that no further action was required in the matter, and with the Counsel for the Petitioner and the 22nd Respondent so agreeing, **the proceedings were terminated**.

22nd Respondent respectfully attaches a Schedule marked **"B",** setting out the **different Benches** of Your Lordships' Court that delivered Judgment and made consequential Orders / Directions in SC (FR) Application No. 352/2007 ('*Water's Edge Case'*), **thereby demonstrating that it is a normal practice in Your Lordships' Court, due to practical exigencies, and was not unusual procedure.**

It is respectfully submitted, that if the new Counsel for the *former* 8th Respondent, appearing on 8.10.2008 **specifically in consequence of the Proceedings of Your Lordships' Court on 29.9.2008**, *had on that very date objected to and moved that the same Bench referred to in the Proceedings of 29.9.2008 should hear the matter,* then Your Lordships' Court would have decided to do so.

Whereas, on the contrary, the new Counsel for the *former* 8th Respondent appearing on 8.10.2008 ***tendered most willingly and without any demur, whatsoever***, **an unreserved apology to Court on behalf of the *former* 8th Respondent**.

As a consequence, Your Lordships' Court **gave time to file an Affidavit** referred to in the instant Application/s of the *former* 8th Respondent, in which Your Lordships' Court intimated that – *"he (8th Respondent) may consider including the said expression of regret and a firm statement that he would hold any office in any governmental institutions either directly or indirectly of purport to exercise in any manner executive or administrative functions*".

Consequently, such Affidavit of the *former* 8th Respondent was tendered to Your Lordships' Court on 16.10.2008 and so confirmed to Your Lordships' Court by the new Counsel for the *former* 8th Respondent on 20.10.2008, **with Your Lordships' Court accepting the same, *thus concluding the matter***.

In the said Affidavit dated 16.10.2008 the *former* 8th Respondent at paragraphs 12 and 13 thereof had affirmed to and declared as follows:

> **"12. I regret having continued to exercise official functions after the delivery of Judgment by Your Lordships' Court in the circumstances referred to above and apologise for same."**

"13. I state that I do not hold office under the Republic or in any establishment in which the Government of Sri Lanka has an interest, purporting to represent the Government of Sri Lanka and I will not hold office in any Governmental institutions either directly or indirectly or purport to exercise in any manner executive or administrative functions".

In terms of Oath and Affirmations Ordinance Section 8 (3) – ***"the evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated***".

4. HON. JUDGES WHO DELIVERED THE JUDGMENT AND MADE CONSEQUENTIAL ORDERS IN RELATION TO FOR THE *FORMER* 8TH RESPONDENT

The SC (FR) Application No. 209/2007 was heard and the Judgment delivered on 21.7.2008 by the **former Hon. Chief Justice, Hon. N. Amaratunga J and Hon. J. Balapatabendi J. making several grave and serious adverse findings against the *former* 8th Respondent, *a very senior public servant***.

Proceedings had / consequential Orders in relation to the *former* 8th Respondent on 8.9.2008 and 29.9.2008 cited above were made by **former Hon. Chief Justice, Hon. Ms. Tilakawardane J and Hon. N. Amaratunga J.**

Proceedings had / consequential Orders in relation to the *former* 8th Respondent on 8.10.2008 and 20.10.2008 cited above were made by **former Hon. Chief Justice, Hon. Ms. Tilakawardane J and Hon. P.A. Ratnayake J.**

It is very respectfully submitted that the consequential **Order dated 8.10.2008 in relation to the *former* 8th Respondent** *sought to be re-visited / re-considered / revised / varied* **cannot be taken in isolation**, inasmuch as, **it arose from the several grave and adverse findings made against the *former* 8th Respondent in the said Judgment dated 21.7.2008, *and the consequential proceedings in relation thereto from 8.9.2008 referred to as aforesaid***.

Hence, there are 3 Hon. Judges of Your Lordships' Court, namely, Hon. Ms. S. Tilakawardane J, Hon. N. Amaratunga J, and Hon. P.A. Ratnayake J, who were involved in making of the aforesaid consequential Order/s in relation to the *former* 8th Respondent, which he has sought to *re-hear / re-consider / revise / review / vary*, now after a lapse of over 10 Months; and after the termination of proceedings on 15.12.2008.

5. APPLICATION/S BY *FORMER* 8TH RESPONDENT

Several Petitions & Affidavits, with one invalid / false Affidavit 'mysteriously' said to be 'missing' in the Registry of Your Lordships' Court

1. Original Petition and Affidavit were filed on 7.7.2009 i.e. **after lapse of 10 Months** of the Order sought to be *reconsidered / reviewed / revised / varied,* consequent to the Judgment dated 21.7.2008 and the consequential Orders made thereafter, as aforesaid.

2. On 14.7.2009, Court directed that Notice of the said Petition dated 7.7.2009 and Affidavit be given to all Respondents, *prior* to Support.

3. However on 23.7.2009, the Registry of the Court had been caused to issue Notice, not only of the Petition and Affidavit dated 7.7.2009, but also included therewith, an Amended Petition and Amended Affidavit dated 21.7.2009.

4. There has been no Application to Court seeking to amend the Petition dated 7.7.2009, disclosing the amendments proposed to be made, to have obtained *prior* permission of Court, to file an Amended Petition of 21.7.2009.

5. Order of Court of 14.7.2009 could not have covered the issue of Notice of the Amended Petition and Amended Affidavit dated 21.7.2009.

6. Also the Amended Affidavit dated 21.7.2009 has been signed on a Stamp, *without the signature of the Justice of Peace / Commissioner of Oaths,* whereby there is no due attestation of the said Affidavit.

7. Whilst on the other hand the *jurat* states – *'Read over and explained to the affirmant abovenamed and he having understood the contents thereof placed his signature before me on this 21st day of July 2009 at Colombo'.*

8. Therefore, such *purported* Amended Affidavit, *not being in conformity with the statutory requirements under the Oaths Ordinance,* is not an Affidavit; and furthermore, *the former 8th Respondent has knowingly signed a false statement vis-à-vis* the aforesaid contents of the *jurat*.

9. This *purported* Amended Affidavit of 21.7.2009 has been served on the Respondents prior to 3.8.2009 **and** has been served on the Petitioner's Counsel after 3.8.2009, *thereby disclosing that the 8th Respondent's Attorneys-at-Law did have a copy of the same without the mandated attestation*.

10. On 3.8.2009, Counsel of the *former* 8th Respondent submitted to Court that he had been informed that the copy of the *purported* Affidavit was 'missing' in the Registry of the Supreme Court, and therefore he had tendered a fresh set of papers dated 31.7.2009, **identical to those tendered on 21.7.2009**.

11. The Counsel of the *former* 8th Respondent did not disclose, as to when such copies filed in the Registry had gone 'missing', and as to who had so informed him; to the understanding of the 22nd Respondent *it being not the normal practice to check whether documents tendered to Court are in fact in the Record*.

12. The Amended Petition of 31.7.2009 is accompanied by an 'Affidavit', and not an 'Amended Affidavit', as in the instance of what had been tendered on 21.7.2009; *the former 8th Respondent significantly does not explain, as to why he had to sign a new Affidavit on 31.7.2009.*

13. Also, the Affidavit dated 31.7.2009 **is not identical** to the Amended Affidavit of 21.7.2009, in that, it is titled as an **'Affidavit'** and not '**Amended Affidavit'** as is titled in that of 21.7.2009, and also it is with the attestation by a Justice of Peace, *whereas the Amended Affidavit of 21.7.2009 had no such attestation.*

14. There has been no Application to Court seeking to amend the Petition disclosing the amendments proposed to be made*, to have obtained prior permission of Court to file an Amended Petition of 31.7.2009*.

15. Hence, in the circumstances, what is rightfully and lawfully before Court, is only the Petition and *purported* Affidavit of 7.7.2009.

16. Whilst the *purported* Amended Affidavit of 21.7.2009 is not duly attested and is falsely signed, the *purported* Affidavits of 7.7.2009 and 31.7.2009 do not state that the *former* 8th Respondent, as the Affirmant, **had affirmed** to the contents of the said *purported* Affidavits, *in the respective jurats*.

17. a) The prayers to the Petition dated 7.7.2009 of the *former* 8th Respondent are as follows:

- 'to make order relieving the present Petitioner of the undertaking contained in paragraph 13 of the said Affidavit dated 16th October 2008 tendered by the present Petitioner **pursuant to the Order of Your Lordships' Court and produced marked "D" to this Application**'. (*Emphasis added*)

- 'to grant such other and further relief as to Your Lordships' Court shall seem fit and meet'.

b) The prayers to the Petitions dated 21.7.2009 and 31.7.2009 of the *former* 8th Respondent, in addition to the above 'prayers' has the following prayer

- **'vacate the said Order dated 08.10.2008** in so far as it relates to the inclusion in the Affidavit of a firm statement that the present Petitioner "would not hold any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions." '(*Emphasis added*)

18. Hence, admittedly the Application/s of the *former* 8th Respondent is to *re-consider / revise / review / vary* the Order of Your Lordships' Court **made as far back as 8.10.2008**, consequent to the Judgment dated 21.7.2008 and the *consequential Orders made thereafter, as aforesaid*.

19. It is most respectfully submitted, that the questions arise, as to whether Your Lordships' Court could turn a blind eye to:

a) 'inclusion' of an amended set of papers, with the Notice issued by the Registry of Your Lordships' Court, consequent to the Order made on 14.7.2009, without having first sought and obtained the *prior* permission of Your Lordships' Court, to file amended papers.

b) the incident of the invalid / false Affidavit of 21.7.2009 going 'missing' in the Registry of Your Lordships' Court, and the subsequent replacement of the same, that too, without having first sought and obtained the *prior* permission of Your Lordships' Court, to have done so.

Performance of Fundamental Duties and Obligations to enjoy Rights and Freedoms

1. Article 28 of the 1978 Constitution, stipulates that the *enjoyment of rights and freedoms* **are inseparable** from the *performance of fundamental duties and obligations*, **which include the duty of the 8th Respondent, to have preserved and protected public property, and to have combated misuse and waste of public property as per Article 28 (d).**

2. Given the grave and serious adverse findings in the Judgment dated 21.7.2008, the ***former* 8th Respondent had very clearly, blatantly and knowingly violated his fundamental duties and obligations; *whereas to have entered upon such public Office, the former 8h Respondent had made Oath / Affirmation to uphold and defend the Constitution, as mandated in the Constitution*.**

3. It is well and truly disclosed that the *former* 8th Respondent had knowingly and deliberately acted contrary thereto, **and is thus and thereby disentitled from the exercise and enjoyment of rights and freedoms**, inasmuch as they are **inseparable** from the performance of fundamental duties and obligations in terms of Article 28 of the Constitution.

4. Punishments for Offences stipulated in the **Offences Against Public Property Act No. 12 of 1982**, enacted after the 1978 Constitution, ***are fines of upto 3 times the value of the public property in respect of which Offence was committed and imprisonment not exceeding 20 years***.

5. Upon mere allegations of misdemeanor, ***and not grave and serious adverse findings by the Supreme Court***, Public Servants, are suspended / interdicted, and kept away from such post / place of work, pending conclusion of investigations; and restored only upon if being *absolved*.

6. **To entertain the instant Application of the *former* 8th Respondent would only open a 'flood-gate', entitling other such Public Servants to so similarly come before Your Lordships' Court**.

The 22nd Respondent very respectfully cites a Singapore Case (*copy attached)*, where a Senior Public Officer, was dealt with by the Judiciary of Singapore, for minor offences, whereas in this Case, the offences are of a far graver and serious nature – *vide* **Knight Glenn Jeyasingam v. Public Prosecutor**.

'Confidential Affidavit' of the *former* 8th Respondent

1. On 12.8.2009, the *former* 8th Respondent has filed a further *purported* Affidavit, with his Counsel having intimated that it is of a 'sensitive' and 'confidential' nature.

2. The said *purported* Affidavit is also similarly flawed, inasmuch as the *former* 8th Respondent has not affirmed to the contents thereof in the *jurat.*

3. Also, it is flawed since serious allegations of 'bias' against the former Hon. Chief Justice is made, ***after over a year,*** after the above Judgment delivered on 21.7.2008, ***and that too, after he has retired***

4. Such allegation is completely out of time, baseless and a futile / desperate attempt made by the *former* 8th Respondent.

5. Significantly, it is an *'after thought'*, even after a lapse of 2 Months, after the *former* 8th Respondent's Petition and *purported* Affidavit of 7.7.2009, ***wherein no such 'bias' has been alleged***.

6. The foregoing is well and truly borne out by paragraph 12 of the *purported* Affidavit dated 12.8.2009 of the *former* 8th Respondent which states that – "**In or about the latter half of July 2009 I became aware ……** " (*Emphasis added*).

7. If at all, such issue of 'bias' should have been taken up at that very time, before the former Hon. Chief Justice, when the Case was being heard; furthermore, **the same Counsel of the *former* 8th Respondent appeared** at that particular time, when a consequential Order was made on 8.10.2008**, *and tendered an unreserved apology on behalf of the former 8th Respondent to Court,* without any demur, whatsoever**, **which was later affirmed** by the *former* 8th Respondent by an Affidavit dated 16.10.2008, and **confirmed by Counsel to Court on 20.10.2008**.

8. The former Hon. Chief Justice had delivered Judgment and made consequential / incidental Orders / Directions, as unanimously decided together with 4 other sitting Hon. Judges of the Supreme Court, in sitting as 3 Judge Benches. *Hence, the allegation of bias would also stand against the said 4 other sitting Hon. Judges of the Supreme Court too.*

9. The attempt to file *surreptitiously* an Affidavit, as of a 'confidential nature', behind the back of the former Hon. Chief Justice, ***long after he had retired***, in an unacceptable cowardly act, *devoid of any credibility*.

On the aforesaid allegation of 'bias', the attention of Your Lordships' Court is respectfully drawn to the following *'dicta'* in **Shell Gas Lanka v. All Ceylon Commercial and Industrial Workers Union & Others** (2000) 3 SLR @ Page 170 *(copy attached).*

> "Regard to this matter it is important to state here that, it is not open to the petitioner to file a self-serving affidavit for the first time before the Court of Appeal and thereby seek or attempt to contradict a judicial or quasi judicial record. If a litigant as the petitioner in this case intended to contradict the record, he should have filed the necessary papers before the Court or tribunal as the case may be and initiated an inquiry before such authority and obtained an order from such authority in the first instance. It is thereafter that he should raise the matter in the appropriate proceedings before the Appeal Court so that such Court would be in a position on the material before it to make a proper determination with the benefit of the order of the deciding authority in the first instance. Therefore it is irregular for the petitioner to file a self serving affidavit in the Court of Appeal with a view to add and to amplify the record or to contradict the record. Vide *King v. Jayawardena* at 503, *Gunawardana v. Kelaart* and *Seebert Silva v. Aronona Silva*
>
> In the case of *Daya Weththasinghe v. Mala Ranaweke* it was held that a party seeking to establish bias undertakes a heavy burden of proof. Mere reasonable suspicion is not enough. A Judicial Officer is a person with a legally trained mind and Court will not lightly entertain an allegation of bias. The petitioner had failed to establish bias. Therefore learned Counsel contended that in the present case also the 2nd respondent arbitrator who has a trained judicial mind will be in a position to examine the evidence presented with an open mind.
>
> In the case of *Perera v. Hasheeb I Sriskantha at 145 G.P.S. De Silva, J.* (as he was then) observed as follows. "It must be remembered, that a judicial officer is one with a trained legal mind. It is a serious matter to allege bias against a judicial officer and that this Court would not lightly entertain such an allegation."
>
> As Lord Denning observed in the case of *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and others (Supra)* at page 310 "The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; the judge was biased." In the present case, one cannot come to such a conclusion. ..... Therefore the petitioner's case regarding bias against the 2nd respondent arbitrator is based on surmise and conjecture which is not sufficient."

False statements made by *former* 8th Respondent in Affidavit/s tendered to Your Lordships' Court with his Application/s

The 22nd Respondent particularly by his Statement of Objections and supporting Affidavit both dated 27.7.2009 has well and truly demonstrated, that the *former* 8th Respondent in his Affidavit tendered to Your Lordships' Court has made statements, false and false to his knowledge, on which premise alone, his such Affidavit ought be rejected *in-limine* and he be dealt with therefor, *as warranted in terms of the law*.

6. 22ND RESPONDENT'S FURTHER *'OWN EXPERIENCE'* IN APPLYING FOR A 'RE-HEARING' BY A 'FULLER BENCH' OF YOUR LORDSHIPS' COURT IN SC (SPL) LA NO. 49/1996

In **SC (Spl) LA No. 49/1996** referred to as **Suren Wickramasignhe & Others v. Cornel Perera & Others,** the 22nd Respondent, as the 2nd Defendant-Petitioner-Petitioner, together with others, (*significantly with the former 8th Respondent, as the 6th Defendant-Petitioner-Petitioner therein*) filed a prompt Application on or about 13.3.1996 **for Hearing by a Fuller Bench** of an Order made on or about 28.2.1996, in the matter of granting Special Leave to Appeal (*not an Order made in a Final Appeal*).

Then Hon Chief Justice did not constitute a Fuller Bench, but directed that the matter be submitted to the same Bench that made the aforesaid Order in granting Special Leave to Appeal.

Upon Hearing by the same Bench, Judgment was delivered on 21.3.1996, *inter-alia,* stating as follows – *vide* **SC Minutes of 21.3.1996** *(Emphasis added*)

"The Chief Justice did not constitute either a larger or a different bench, and directed instead that the matter be submitted to the same bench, which was accordingly constituted.

REQUEST FOR A FULLER BENCH

Apart from instances where the law expressly provides otherwise, a bench of more than three Judges can only be constituted under Article 132(3) of the Constitution, and the power to do so is vested in the Chief Justice alone. **Article 132(3) shows, *ex facie,* that that power can only be exercised in respect of a pending appeal, proceeding or matter - but not in respect of a concluded matter. SC (SLA) Application No. 49/96 is a concluded matter**. **Further, in terms of Article 132(2) a judgment or order delivered by a bench of three Judges is the judgment or order of the Supreme Court, and not of "some fragmented part of the Court"; it is final (cf Article 127(1)), and is not subject to appeal to another bench of the Court, even if it were to consist of five, or seven , or nine, or even all the Judges**: **Hettiarachchi v Seneviratne (No. 2), [1994] 3 Sri LR 293, where it was also pointed out that;**

> **"It is quite wrong to assume . . . . that the power of the Chief Justice under Article 132(3) to direct that an appeal, proceeding or matter be heard by a bench of five or more Judges . . . . makes any difference. That provision confers no right of appeal, revision or review."**

To use Article 132 in that way would be to usurp legislative power, in order to create an additional right of appeal which the Constitution did not confer; and, indeed, in effect to create a right of appeal with leave from the Chief Justice, sitting alone.

Although the Chief Justice did not expressly refuse that request for a fuller bench, he has not acceded to it. We consider that request to be outside the scope of Article 132(3), and see no reason to refer the matter to the Chief Justice to reconsider making an order under that Article.

REVIEW ONLY BY THE SAME BENCH

Hettiarachchi v Seneviratne (No. 2) re-affirmed the well-established principle that although there is no right of appeal against a judgment or order of the highest Court, that Court does have an inherent power, in the interests of justice, to review its own judgment or order - but only in exceptional circumstances, and upon limited grounds. Traditionally that power is exercised only by the same bench which delivered the judgment or order in question. Consistently with law, practice and tradition, in Hettiarachchi v Seneviratne (No. 2), a similar application for review was referred by the Chief Justice, not to a fuller bench or to a different bench, but to the same bench. Beyond question, that is the position if an application for review is made by one of the parties to a matter. (It must be mentioned, however, that the same practice seems to have been followed even where a person who was not a party to a matter, made an application seeking review of the judgment in that matter, which he claimed affected him adversely: thus in Ganeshanathan v Goonewardene, [1984] 1 Sri LR 319, the application for review was considered by the same bench, and it later came before a fuller bench, only because that bench requested a reference to a fuller bench, as in their view an important question of jurisdiction arose.)

Consistently with these principles, applications for interpretation, clarification, and correction of errors and omissions in judgments and orders have been referred by the Chief Justice to the same bench.

The matter having been duly referred by the Chief Justice to this bench, we are therefore called upon now to consider whether there is any ground for review by us of our previous order."

The 22nd Respondent very respectfully submits that**, the foregoing is another clear instance of being in conformity with the aforesaid 'precedents' and the established 'practice for constitution of a Bench'** ***to re-hear / re-consider / revise / review / vary*** **an Order made by Your Lordships' Court**.

It is very respectfully submitted, that the aforesaid was a prompt Application, *whilst on the other hand*, the instant Application/s of the *former* 8th Respondent id **belatedly made after one Year of the Judgment and over 10 Months after the relevant consequential Order/s, and after Proceedings had been terminated, as far back as 15.12.2008**.

Hence, it is most respectfully submitted that the *former* 8th Respondent's instant Application/s, if not rejected *in-limine* should be referred, *in like manner,* to the very same Hon. Judges, who made Order/s in relation to the *former* 8th Respondent for their due consideration thereon.

It is most respectfully submitted, that to **entertain otherwise** such belated Application/s of the *former* 8th Respondent, would give rise to **differential treatment** *vis-à-vis* the 22nd Respondent's aforesaid Application, *which having been referred in the first instance to the very same 3 Hon. Judges, who made the original Order,* **was declined to be re-heard by a Fuller Bench as stated above.**

7. INTERPRETATION OF ARTICLE 132(3) OF THE CONSTITUTION WAS FURTHER UPHELD IN THE JUDGMENT ON 10.6.1996 BY A 5-JUDGE BENCH OF THE SUPREME COURT IN JEYARAJ FERNANDOPULLE V. PREMACHANDRA DE SILVA & OTHERS – SC APPLICATION NOS. 66 & 67/1995 (*1996 1SLR @ 70*)

In the subsequent Judgment delivered on 10.6.1996 by a 5-Judge Bench of the Supreme Court in Jeyaraj Fernandopulle v. Premachandra De Silva & Others in SC Application Nos. 66 & 67/1995, it was, *inter-alia*, held as follows:

> **"7. Article 132(3) does not confer any right of appeal, revision or review. It has always been taken for granted that a matter is referred to a Bench of five or more judges by the Chief Justice, whether of his own motion, or at the request of two or more judges hearing the matter, or on the application of a party, because the question is one of general and public importance. Article 132 provides for the manner in which the jurisdiction of the Court may be ordinarily exercised. It does not confer any *jurisdiction* on the Court nor does it empower the Chief Justice to refer any matter of public or general importance to a Bench of five or more judges. It empowers him to constitute a Bench of five or more judges to hear an appeal, proceeding or matter which the Court has jurisdiction to entertain and decide or determine. The Court has no statutory jurisdiction to re-hear, reconsider, revise, review, vary or set aside its own orders. Consequently, the Chief Justice cannot refer a matter to a Bench of five or more judges for the purpose of revising, reviewing, varying or setting aside a decision of the Court. The fact that in the opinion of the Chief Justice the question involved is a matter of general or public importance makes no difference"**

8. RELEVANT *'EXCERPTS'* FROM THE ORDER DELIVERED ON 3.8.2009 BY YOUR LORDSHIP THE CHIEF JUSTICE, TOGETHER WITH HON. Ms. S. THILAKAWARDANE J, AND SRIPAVAN J IN SC (FR) NO. 352/2007 *('WATER'S EDGE CASE')* (*Emphasis Added*)

"The *Fernandopulle* judgment enumerated some of the instances under which inherent power of this court could be exercised. It is patently clear that the Court in *Fernandopulle* envisaged such a review power to be a seldom-effectuated exception to the general rule that **"when the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other judges to be called upon to review or revise a matter."**

Assuming without conceding that such a review would be deemed necessary after giving due consideration to the need to respect the finality of the impugned judgment, **this Court is unable to entertain any request to revisit the judgment and / or the incidental Orders for one of the reasons, namely, the delayed manner in which they have brought their claim.** Though the Court in *Fernandopulle* admittedly carves out a limited exception for the review of judgment, and extends the scope of review in that regard to divisions other than the one issuing the judgment to be revised when conditions render it impossible (i.e. the aforementioned retirement situation), it is to be noted that **"such matters should be considered by the same"** where Justices are, in fact, available. The Court notes in this regard "it has been the practice of our Courts for parties or their Counsel to bring the error to the notice of the judge or judges who made the order so that he or they can correct the order." **The simple fact of the matter is that Counsel for the Intervenient Petitioners have filed their objections to the judgment nearly nine months to the day after the issuance of the judgment they seeks to impugn, and after the retirement of the former Chief Justice who was one of the members of the bench that had delivered the judgment**.

If the Counsel desired that incidental directions too are to be made by the same bench that delivered the final judgment in an application, counsel was free to make an application before Court and to have the matter referred to the division composed of the judges who had heard the case and delivered the judgment. The counsel made no such applications when such incidental Orders were made. Having participated in the proceedings without raising any objections, the Court is of the view that the parties are now precluded from taking any objections with regard to the incidental Orders subsequently made."

……

"While we do not attempt to precisely delineate the scope of the Court's powers with respect to the protection of fundamental rights, it suffices to say for the present context that the ability of the Court to issue incidental orders pertaining to the granting of relief falls squarely within its right to "make such directions" or incidental orders to the extent that the Court considers them necessary to ensure the effective, timely and efficient execution of the remedy being offered.

The jurisdiction of the Court to make such orders is not extinguished by the issuance of a judgment in any particular matter if such further directions – as they were in the present case - are necessary to the equitable dispensation of justice. As such, the issuance of such subsequent directions cannot be considered "revisions" of the judgment or violations of finality. To hold otherwise would make Fundamental Rights judgments delivered by this Court impotent and the Supreme Court a toothless watchdog of Fundamental Rights of the people.

Ameresinghe J, in Fernandopulle's case (supra) was careful to implicitly recognize the existence of divisions in the Supreme court as a product of administrative expediency and nothing more. In this regard, the Ameresinghe, J., referring to Article 132(2) noted that "when any division of the Court constituted in terms of the constitution sits together, it does so 'as the Supreme Court'" and that " it is one Court though it usually sits in several divisions... each division has co-ordinate jurisdiction".

Furthermore in *Hettiarachchi Vs Seneviratne and others* (1994) 3 S.L.R 293, Mark Fernando J held "it is a well established rule that in general a court cannot re-hear, review, alter or vary its own judgment once delivered. The rationale of the rule is that there must be finality to litigation..."

In *Ganeshanathan Vs Vivivan Goonawardane and three others* (1984 1 S.L.R 319) Samarakoon CJ observed,

"On the other hand the language in certain Articles indicates to my mind, not only that it is the court of last resort in Appeal, {Article 118 (c) } but also that there is finality in its judgment whether it be right or wrong. Article 126 (5) stipulates that the Courts shall finally dispose of the petition.

Quoting Harmon J (Re Exchange Street Manchester 1956 3 AER 490, at 493) who stated that "The thing is over. There is nothing more that can be done. There must be certainty in the Law."

For the reasons stated above, the Applications of the Respondents and all the intervenient Petitioners to reconsider review and / or set aside the judgment and / or incidental Orders is refused and accordingly dismissed. No Costs."

9. CONCLUSIONS

In the foregoing facts and circumstances, it is most respectfully submitted that;

1. as disclosed above, consequential Orders / Directions have been made by Your Lordships' Court, directing the law enforcement authorities to conduct investigations and to take warranted action thereon, which would also involve the *former* 8th Respondent, *in the face of the several grave and serious adverse findings made against him in the Judgment of Your Lordships' Court dated 21.7.2008*; and the progress of which investigations had been reported in the interim to Your Lordships' Court.

2. in the context of the foregoing investigations directed by Your Lordships' Court, *in the face of the several grave and serious adverse findings made against the former 8th Respondent by Your Lordships' Court*, which are yet pending, *he stands debarred from making the instant Application/s he has made to Your Lordships' Court,* and thereby the same ought be rejected *in-limine*; otherwise any Public Servant interdicted / suspended would stand entitled to make such Application to Your Lordships' Court for re-instatement.

3. furthermore, the 'transaction put in issue' in this Case was annulled, *as wrongful, unlawful and illegal* by Your Lordships' Court, and in no uncertain terms was found by Your Lordships' Court to have been perpetrated, without any lawful authority, whatsoever, by the *former* 8th Respondent; and hence any revision, whatsoever, of any Order made against the *former* 8th Respondent, who it was disclosed had played the ***'pivotal role'*** therein, would have an impact *in toto* to undermine the Judgment delivered by Your Lordships' Court, annulling the said transaction put in issue, *as wrongful, unlawful and Illegal*.

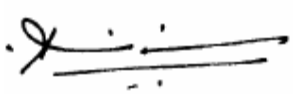
4. in any event, without prejudice to the foregoing, given the established precedent, law and the practice of Your Lordships' Court, as morefully set out hereinbefore, *it is very respectfully submitted that* the instant Application/s of the *former* 8th Respondent to *re-hear / re-consider / revise / review / vary* Order/s made against him, if not rejected *in-limine*, ought be submitted, *in the first instance*, for consideration to the 3 Hon. Judges of Your Lordships' Court, Hon. Ms. S. Tilakawardane J, Hon. N. Amaratunga J, and Hon. P.A. Ratnayake J, second of whom was involved in delivering the Judgment dated 21.7.2008, and all 3 of whom were involved in making of the consequential Orders / Directions in relation to the *former* 8th Respondent, as morefully set out in Section 4 hereinabove.

5. in the context of the established precedent, law and practice of Your Lordships' Court, as morefully set out hereinbefore, *it is very respectfully submitted that* the **Order made** to fix the instant Application/s of the *former* 8th Respondent to *re-hear / re-consider / revise / review / vary* Order/s made against him, before a 5-Judge Bench of Your Lordships' Court on 27.8.2009, **is *per-incuriam***, *and hence could not have been so proceeded with.*

6. also in the context of the established precedent, law and practice of Your Lordships' Court, as morefully set out hereinbefore, *it is very respectfully submitted that* the **Order made on 27.8.2009** by the said 5-Judge Bench to fix the instant Application/s of the *former* 8th Respondent to *re-hear / re-consider / revise / review / vary* Order/s made against him, before a 7-Judge Bench of Your Lordships' Court, **is also *per-incuriam*,** inasmuch as the aforesaid 5-Judge Bench of Your Lordships' Court had been constituted, as **per an Order made *per-incuriam***, as aforesaid.

7. the 22nd Respondent very respectfully submits that in any event**,** the Order made on 3.8.2009 by Your Lordships' Court, presided by Your Lordship the Chief Justice, in SC (FR) No. 352/2007 ('*Water's Edge Case*'), *refusing and dismissing several similar Applications for the reasons morefully cited hereinbefore*, stands equally applicable to and binding on the instant Application/s of the *former* 8th Respondent, *and which therefore ought be likewise refused and dismissed*; it being also noted that the said Applications in the *Water's Edge Case* have been made, whilst the Case was still pending before Your Lordships' Court, *whereas the Proceedings in this Case SC (FR) No. 209/2007 had been terminated, as far back as 15.12.2008*.

On this 9th day of September 2009



22nd Respondent