

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Petitioner

Vs.

SC/FR No. 209/2007

1. K.N. Choksy P.C. M.P.
Former Minister of Finance,
23/3, Sir Emst De Silva
Mawatha, Colombo 7.
And 30 others.

Respondents

32. Sri Lanka Shipping Company
Limited, 46/5, Nawam
Mawatha, P.O.Box 1125,
Robert Senanayake Building,
Colombo 02.



S.C. Application No.209/2007

24.09.2009

Before J.A.N. de Silva, CJ.
Bandaranayake, J.
Shiranee Tilakawardane, J.,
S. Marsoof, J.
Balapatabendi, J.
K. Sripavan, J.
P.A. Ratnayake, J.

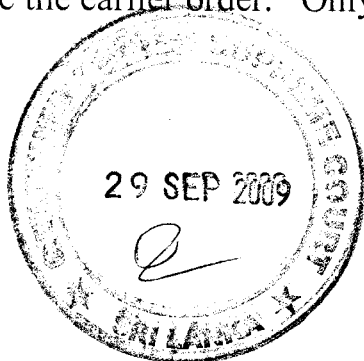
M.A. Sumanthiran with Viran Corea for Petitioner.

Faiz Mustapha Pc with Anura Meddegoda and Lakdini Perera for 8th
Respondent -Petitioner.

Mohan Pieris for Attorney General with J. Wijetilleke ASG, Sanjaya
Rajaratnam DSG and Nerin Pulle SSC as amicus.

Nihal Sri Amarasekera for 22nd Respondent appearing in person.

Mr. Sumanthiran submits to Court that the Petitioner 8th Respondent
in this case seeks to vacate the order dated 08.10.2008. In that context, this
application should be heard by the same Bench or as far as possible the same
Bench, that made the earlier order. Only if that Bench is of that opinion,



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can H/L the Chief Justice constitute a fuller Bench for clarification or for continuation.

However, this Court holds that in terms of Article 132(1)(iii) where H/L the Chief Justice is of the opinion that the matter raised is of general and public importance, he may constitute a Bench of 05 or more Judges to hear the matter.

Accordingly, Court over-rules the preliminary objection and permits Mr. Mustapha to make his submissions.

Court having considered the submissions of Counsel and Mr. Nihal Sri Amarasekera who appeared in person, refuses the reliefs sought in paragraphs (a) and (b) of the prayer to the amended petition dated 31.7.2009. However, the Court is inclined to grant other relief under paragraph (c) of



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the prayer to the said amended Petition. Accordingly, by majority decision (Hon. Tilakawardena, J. dissenting) the Court decides that His Excellency the President, being the appointing authority in terms of Article 52 of the Constitution, would be free to consider appointing the 8th Respondent-Petitioner to the post of Secretary to the Ministry of Finance, notwithstanding the undertaking given to Court by the said 8th Respondent – Petitioner.

Reasons for the decisions would be given in due course.

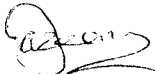
DG.

I do hereby certify that the foregoing is a true copy of the journal entry dated 24.9.2009 is filed of record in SC. Application No.209/2007.

Typed By: 

Comp. with 




M. L. S. DE SILVA
JUDICIAL REGISTRAR II
SUPREME COURT

R 195910
21
29/9/09

OBSERVATIONS

1. Counsel for the Petitioner, Vasudeva Nanayakkara submitted that P.B. Jayasundera is seeking to have the Order of Court dated 8.10.2008 vacated, and as such, the Application should be heard by the same Bench or as far possible by the same Bench that made the earlier Order, based on established precedents. Only if that Bench is of the opinion, that the matter should be viewed by a Fuller Bench, could the Chief Justice constitute a fuller Bench for clarification or continuation.
2. However, Court held that in terms of Article 132 (1) (iii) where the Chief Justice is of the opinion that the matter raised is of general and public importance, he may constitute a Bench of 5 or more Judges to hear the matter, and accordingly over-ruled the preliminary objection and permitted P.B. Jayasundera's Counsel to make submissions.
3. Having considered the Submissions made in opposition, by Counsel for Petitioner, Vasudeva Nanayakkara and Nihal Sri Ameresekere, who appeared in person, the Court **refused** both main reliefs sought by prayers (a) and (b) of the Amended Petition dated 31.7.2009 of P.B. Jayasundera, which were to vacate an Order of Court, and relieve him from the undertaking given to Court by an Affidavit - viz *the prayers (a), (b) and (c) of the Petition*
 - "(a) 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".
 - (b) 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;
 - (c) to grant such other and further relief as to Your Lordships' Court shall seem fit and meet."
4. However, the Court was inclined to grant other relief under the above prayer (c) of the said Amended Petition. Is not such relief granted, not to the Petitioner, P.B. Jayasundera, but to H.E. the President. Pointedly, Secretary to the President being a Respondent had not sought such relief.
5. Accordingly, the 7 Judge Bench (6 to 1) decided that His Excellency the President, being the appointing authority in terms of Article 52 of the Constitution, **would be free to consider appointing** P.B. Jayasundera to the post of Secretary, Ministry of Finance, *notwithstanding the undertaking given to Court by P.B. Jayasundera, of which undertaking P.B. Jayasundera had been refused to be relieved by a 7 Member Bench of the Supreme Court, thereby further endorsing, re-enforcing and fortifying the same.*
6. Reasons are to be given later by the Supreme Court.
7. It would appear that Court interpreted Article 52 of the Constitution, making decision that the President, as the appointing authority in terms of Article 52 of the Constitution **would be free to consider appointing** P.B. Jayasundera to the post of Secretary, Ministry of Finance, *notwithstanding the undertaking given to Court by P.B. Jayasundera*
8. On the other hand, P.B. Jayasundera at the same time has been **refused** by the 7 Member Bench **to be relieved** of the undertaking given to Court by such Affidavit, **by the refusal by Court of both his main prayers (a) and (b) above.** Court has not made an express pronouncement that P.B. Jayasundera could hold public Office. Is it to be implied ?
9. Otherwise, would not the question, as to whether P.B. Jayasundera could **accept to hold** Public Office, be an issue in the teeth of the refusal of both main prayers (a) and (b) ? i.e. since he has been **refused** by Court to be relieved of the undertaking given by him to Court ? Hence would he not violate and act in contempt of such Order ? Could an Order of Court make lawful, what is re-enforced to be unlawful ?
10. It appears that the Supreme Court has **refused** P.B. Jayasundera's Application, and decided that the President is **free to consider** to appoint P.B. Jayasundera. Ought not a **considered** decision to make appointment, *be procedurally, legally and constitutionally correct ?*

ISSUES

1. Can Supreme Court give relief under prayer (c), when both main prayers have been refused ? Should not the Application have been dismissed ?
2. Could such other and further relief prayed for be granted, when the main reliefs prayed for have been refused ? Does not 'such other and further' relate to the two main prayers ?
3. **Would not the prayer (c) for 'such other and further relief' become defunct, when both main reliefs are refused ?**
4. Relief has been granted to the President, who was not the Petitioner, stating that he is free to **consider** appointing the Petitioner, notwithstanding the undertaking given to Court by Affidavit and further re-enforced and validated.
5. The Secretary to the President, who had given the Letter to Petitioner, having been a Respondent in this Case, did not seek such relief, nor make any submissions in support for such relief.
6. By refusing prayers (a) and (b), have not the 7 Member Bench further validated, re-endorsed and fortified the Order of 8.10.2008, and the undertaking given by Affidavit, and refused to relieve the Petitioner from such undertaking ?
7. Can the Petitioner accept to hold public office ? Would it not be unlawful and/or contempt in the context of the above ? The Court had not expressly stated that he could hold public office.
8. That the President was free to consider, does not require a Supreme Court Order. But in **considering** should he not take in to account the practice and procedure in the public service *vis-à-vis* public officers suspended / interdicted pending completion of investigations, the unlawfulness in the face of the undertaking in the Affidavit, further re-enforced, validated, fortified, and the constitutional issue of senior public officer, (the principal officer in charge of public finance) having violated Article 28 of the Constitution, as disclosed by the grave and serious findings by the Supreme Court ?
9. Has not the Supreme Court held previously, that an act of the President can be put in issue in Court ?