

**SUPREME COURT ORDERS DATED 29.9.2008 & 8.9.2008**

**AND**

**22ND RESPONDENT'S NOTE DATED 29.9.2008**

**References** - **25<sup>th</sup> Respondent** - Director General, SEC

**28<sup>th</sup> Respondent** - Inspector General of Police

**29<sup>th</sup> Respondent** - Deputy Inspector General, CID

**30<sup>th</sup> Respondent** - Chairman, Bribery Commission

**31<sup>st</sup> Respondent** - Hon. Attorney General

**8<sup>th</sup> Respondent** - Former Secretary, Ministry of Finance/ Treasury

**22<sup>nd</sup> Respondent** - Nihal Sri Ameresekere

**Petitioner** - Vasudeva Nanayakkara

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**

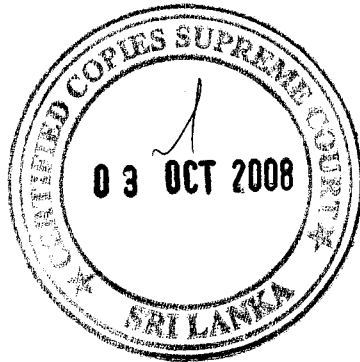
Vs.

No.SC/FR 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.



SC. Application No.209/2007

29.09.2008

Before

S.N. Silva, C.J.

Shiranee Tilakawardane, J.

Amaratunga, J.

Counsel

M.A. Sumanthiran for Petitioner.

Y.J.W. Wijeyatilake PC ASG. with Viraj Dayaratne SSC.  
for 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 25<sup>th</sup> 26<sup>th</sup>, 28th, 29th, 30th and 31<sup>st</sup>  
Respondents.

Nihal Sri Amerasekera 22<sup>nd</sup> Respondent in person.

Upul Jayasooriya for Trade Union of the Employees.

This case comes up today on the basis of the proceedings of 08.9.2008.

The case was mentioned on 08.9.2008, on the motions of the 19<sup>th</sup> Respondent and the Petitioner. The concern of the 19<sup>th</sup> Respondent was with regard to the vacation of the premises within the Port of Colombo and removal of the marine oil and lubricants of the 19<sup>th</sup> Respondent that were stored there. The Court made several orders with regard to the removal of the stock of marine oil and lubricants. Counsel submits that these orders



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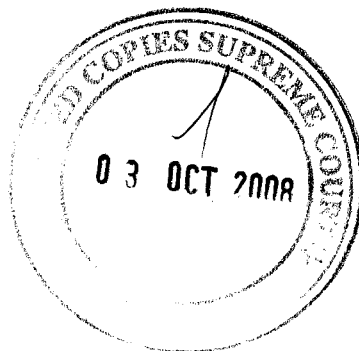
have been given effect to and the land has been restored to possession of the Sri Lanka Port Authority in compliance with the judgment of this Court.

Counsel raised the matter with referred to the employees of the 19<sup>th</sup> Respondent. The Court made an interim order directing the deposit of money by the 19<sup>th</sup> Respondent, to cover any claims of the employees, without going into the merits of any dispute as to employment or termination. Mr. Upul Jayasooriya, Counsel representing the Trade Union of employees submits that according to his instructions no application was made by the employees to the Commissioner of Labour on the basis of termination of employment. It appears that the 19<sup>th</sup> Respondent has also not made any application. However, since the Commissioner, is now in the process of conducting any inquiry, Additional Solicitor General to instruct the Commissioner to conclude whatever inquiry that he is now in the process of conducting and notify the parties of the decision made in regard to this matter. This Court will not make any further orders on these aspects.



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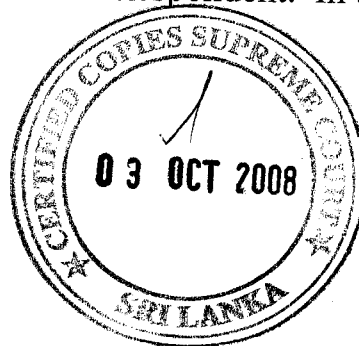
Counsel for the Petitioner has in his motion requested that notices be issued on the 28<sup>th</sup>, 29<sup>th</sup>, 25<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> Respondents, since these Respondents were parties to this application and the Court has directed these Respondents to take steps on the basis of the judgment. Counsel submits that no steps have been taken by any of these Respondents and that the Director C.I.D. has issued a notice on the Petitioner and requested the Petitioner and Mr. Nihal Sri Amerasekera to make a statements. Court notes the steps taken by the Director C.I.D. are not warranted. The Petitioner and the 22<sup>nd</sup> Respondent brought matters to the notice of Court in the public interest since no action was being taken by the relevant authorities to enforce the rule of law and the equal protection of the law, guaranteed by Article 12(1) of the Constitution. The action of the Director C.I.D. appears to be harassment of public spirited citizens who have invoked the jurisdiction of this Court. The I.G.P. and the Director C.I.D. should take note of the findings in the judgment and ascertain whether the commission of any criminal offence is disclosed. The 22<sup>nd</sup> Respondent tenders to Court certain representations with regard to the several statutes that had been infringed. The representation of the 22<sup>nd</sup> Respondent is dated 29.09.2008; a copy to be



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furnished to the Additional Solicitor General who will notify the Respondents of these matters although they are matters that should be within the knowledge of the respective authorities. In the circumstances, these Respondents are directed to take steps in terms of the laws that are applicable on the basis of the findings made by Court and ascertain whether any offences have been committed. Additional Solicitor General should notify Court of the steps that are taken by these officials.

The other matter concerns the conduct of the 8<sup>th</sup> Respondent. This Court has come to firm findings that the 8<sup>th</sup> Respondent has acted contrary to law against the public interest in the conferment of benefits to a private party. There is firm finding that he has infringed the fundamental rights guaranteed by Article 12(1) of the Constitution. The motion indicates that notwithstanding with these findings which clearly show that he has acted in flagrant violation of the Constitution the 8<sup>th</sup> Respondent is yet continuing to hold public office. Additional Solicitor General submits that the Attorney General has revoked the proxy of the 8<sup>th</sup> Respondent. In the circumstances,



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the Court directs the Registrar to issue a notice directly on the 8<sup>th</sup> Respondent to be present in Court on the next date and to reveal to Court;

- (1) whether he continues to hold any 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 in 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.

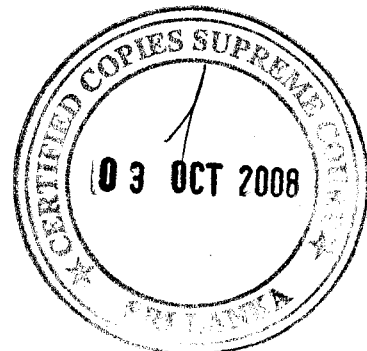
The Attorney General to assist Court on this matter since he is not appearing for any particular party now.

Mention on 08.10.2008.

Registrar to issue notice on the 8<sup>th</sup> Respondent to appear in Court on 08.10.2008. This matter to be resumed before the same Bench on 08.10.2008.

(Approved by H/L Chief Justice)

DG.

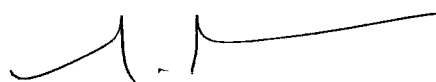


SC. Application No.209/2007

I do hereby certify that the foregoing is a true copy of the journal entry dated 29.9.2008 is filed of record in SC. Application No. 209/2007.

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Comp. with *Sur.*



W. A. PRIYANI S. PERERA  
REGISTRAR 111  
CHIEF CLERK (S/C) IN CHARGE  
SUPREME COURT.



*CF 956143 )*  
*21 03/10/2008*



## SC FR APPLICATION NO. 209/2007

### 1. PREAMBLE

1. At the very end of the Judgment delivered on 21.7.2008 by Your Lordships' Court, it was *expressly* stated as follows:

**“All parties to the proceedings will take necessary action on the basis of the findings stated above”**

2. The following law enforcement authorities / functionaries were *'parties to the proceedings'*, as Respondents named therein, and on whom the Petitioner had served the Petition. **Thus and thereby they were aware of the facts disclosed.**

- 28<sup>th</sup> Respondent, Inspector General of Police (IGP)
- 29<sup>th</sup> Respondent, Deputy Inspector General of Police, Criminal Investigation Department (DIG-CID)
- 30<sup>th</sup> Respondent, Chairman, Commission to Investigate Allegations of Bribery or Corruption,
- 25<sup>th</sup> Respondent, Director General Securities & Exchange Commission of Sri Lanka
- 31<sup>st</sup> Respondent, Hon Attorney General

3. **As Respondents they stood and stand bound by the Judgment of Your Lordships' Court.**

4. Nevertheless, it would appear that these Respondents **chose not to take any action**, notwithstanding the aforesaid 'dicta', and the grave, serious and adverse findings in the Judgment of Your Lordships' Court.

5. By Letters all dated 14.8.2008 i.e. (P38), (P39), (P40), (P41) and (P42), respectively, these Respondents had been put on notice by the Registered Attorneys-at-Law of the Petitioner, forwarding a copy of the Judgment of Your Lordships' Court, drawing specific attention to the aforesaid 'dicta' in the Judgment, ***expressly stating that it warranted immediate action in terms of the applicable law***, cited in the said respective Letters.

6. The matter of ***'inaction'*** by these Respondents was brought to the Notice of Your Lordships' Court by the Petitioner stating as follows in Motion dated 2.9.2008, with Notice given to these Respondents, **who regardlessly apparently chose not to take any action:**

**“Notwithstanding the direction by Your Lordships' Court that 'all Parties to these proceedings will take necessary action on the basis of the findings stated in the Judgment', and notwithstanding the aforesaid Respondents having been specifically put on notice thereof, the Petitioner is unaware of any action, whatsoever, which had been taken, as ought to have been taken under and in terms of the applicable laws referred to in the aforesaid Letters.**

**“In the premises, the Petitioner respectfully Moves that Your Lordships' Court be pleased to make further orders and/or give directions in terms of the jurisdiction vested in Your Lordships' Court.”**

7. In the circumstances, on 8.9.2008, Your Lordships' Court directed that Notices be issued by the Registrar of Your Lordships' Court on these Respondents, returnable on 29.9.2008.

## 2. OFFENCES AGAINST PUBLIC PROPERTY ACT NO. 12 OF 1982 AND OFFENCES UNDER AND IN TERMS OF THE PENAL CODE

1. In terms of Article 28 of the Constitution it is a ‘**fundamental duty**’ of **every person** to **preserve and protect public property**, and to **combat the misuse and waste of public property**.
2. Both ‘**elected**’ and ‘**selected**’ public officers have made an affirmation / taken an oath to uphold and defend the Constitution.
3. a) In Judgment in SC (FR) Applications Nos. 10/07, 11/07, 12/07 and 13/07, Your Lordships’ Court, *inter-alia*, held as follows:

“The limitation in Article 29 which states that the provisions of Chapter VI (*i.e. which included Article 28*) are not justiciable **would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution.** (*Emphasis added*)

- b) The following ‘**fundamental duties**’ are, *inter-alia*, obligated to be performed by every person, under Article 28 of the Constitution.

“(a) to uphold and defend the Constitution and the law;

(d) **to preserve and protect public property, and to combat misuse and waste of public property**

(e) to respect the rights and freedoms of others”

4. The Offences Against Public Property Act No. 12 of 1982, as amended by Act No. 28 of 1999, stipulates that any person, whether public servant **or otherwise**, is liable for the following Offences:

1. **Mischief to public property.**
2. **Theft of public property**
3. **Robbery of public property**
4. **Misappropriation or criminal breach of trust of public property**
5. **Cheating, forgery or falsification in relation to public property**
6. **Attempting to commit any one of the above offences**

5. Punishment for any one of the above Offences is a **fine of 3 times (i.e. 300%) the value of the public property in respect of which such offence was committed and imprisonment not exceeding 20 years.**
6. “**Public property**” is defined in the said Act No. 12 of 1982 thus – “ *‘Public property’ means the property of the Government, any department, statutory board, public corporation, bank, co-operative society or co-operate union.* ”

7. a) In the Judgment of Your Lordships' Court, in granting the reliefs at prayers (g), (h) and (i) of the Petition, Your Lordship's Court;
- “g) made Order declaring that the execution of the Instrument of Grant (**P30**) purporting to transfer the Bloemendhal Land 8A 2R 21.44P to Lanka Marine Services Ltd., (19<sup>th</sup> Respondent) **had been carried out in a wrongful, unlawful and fraudulent manner,**
- h) made Order declaring that the execution of the Instrument of Grant (**P30**) purporting to transfer the Bloemendhal Land 8A 2R 21.44P to Lanka Marine Services Ltd., (19<sup>th</sup> Respondent)) **is fraudulent and *ab-initio* invalid, null and void and of no force or avail in law,**
- i) made Order **cancelling, annulling and making void** the Instrument of Grant (**P30**) purporting to transfer the Bloemendhal Land 8A 2R 21.44P to Lanka Marine Services Ltd., (19<sup>th</sup> Respondent)”
- b) In addition, by the Judgment, Your Lordships' Court **declared** the Common User Facility Agreement dated 20.8.2002 (P19(a)), and all Agreements entered into with the Board of Investment **to be null and void.**
8. Since the Offences Against Public Property Act No. 12 of 1982 **is applicable to any citizen**, it would apply also to those from the **private sector**, and in the case of **corporate bodies, *the Directors of such corporate bodies would be liable.***
9. It is respectfully submitted that, on the basis of the several grave, serious and adverse findings made in the Judgment of Your Lordships' Court, the Offences referred to in the **Penal Code**, more particularly in **Chapters X and XI** thereof re - '**Of Contempt of the Lawful Authority of Public Servants**' and '**Of False Evidence and Offence Against Public Justice**', would also be relevant and applicable.
10. Both '**elected**' and '**selected**' **public officers**, and **those of the private sector** would be liable for punishment in terms of the Offences Against Public Property Act No. 12 of 1982, and the applicable Sections of the Penal Code, for any proven commission of any offences, on the basis of the aforesaid findings by Your Lordships' Court.
11. **It is respectfully submitted that the perpetration of fraud on the State and the public and/or the misappropriation of public property and/or collusion therewith, or any attempt to have done so, warrant deterrent punishment, and any attempt to have covered-up the same would be a far graver crime, also warranting deterrent punishment.**
12. Those Respondents, who have held and/or are holding '**elected**' and/or '**selected**' public office, and some of whom, ***who have evaded filing Affidavits in these proceedings to assist Your Lordships' Court and/or to explain their conduct and actions,*** ought also to be held accountable, responsible and liable, **amongst others**, who are not Respondents, for any of the offences aforesaid, under and in terms of the law, and dealt with severely and punished, as a stringent deterrent to those others, ***to prevent the pillage and plunder of public resources, which rightfully belong to the people.***
13. **The 28<sup>th</sup> Respondent IGP, 29<sup>th</sup> Respondent DIG-CID and 31<sup>st</sup> Respondent Hon. Attorney General ought to have taken / ought to take warranted action under and in terms of the applicable law against those persons, who had committed offences and those persons who had aided and abetted therewith.**

### 3. OFFENCE OF 'CORRUPTION'

1. The Offence of '**Corruption**' is defined in Section 70 of the Bribery Act, as amended by Act No 20 of 1994 as follows:

**"Corruption.70. Any public servant who, with intent, to cause wrongful or unlawful loss to the Government, or to confer a wrongful or unlawful benefit, favour or advantage on himself or any person, or with knowledge, that any wrongful or unlawful loss will be caused to any person or to the Government, or that any wrongful or unlawful benefit, favour or advantage will be conferred on any person -**

- (a) **does, or forbears to do, any act, which he is empowered to do by virtue of his office as a public servant ;**
- (b) **induces any other public servant to perform, or refrain from performing, any act, which such other public servant is empowered to do by virtue of his office as a public servant;**
- (c) **uses any information coming to his knowledge by virtue of his office as a public servant;**
- (d) **participates in the making of any decision by virtue of his office as a public servant;**
- (e) **induces any other person, by the use, whether directly or indirectly, of his office as such public servant to perform, or refrain from performing, any act,**

**shall be guilty of the offence of corruption and shall upon summary trial and conviction by a Magistrate be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one hundred thousand rupees or to both such imprisonment and fine."**

2. Several findings in the Judgment of Your Lordships' Court, disclose the commission of the offence of '**Corruption**' as defined as aforesaid, and the offence of 'aiding' and 'abetting' therewith; including, but not limited to, the 'tailor made' concessions granted by the Board of Investment, which Your Lordships' Court cancelled and annulled, directing the Commissioner General of Inland Revenue to collect cognisable revenue caused to be lost to the Government.
3. 30<sup>th</sup> Respondent, Chairman, Commission to Investigate Allegations of Bribery or Corruption, **ought to have taken / ought to take warranted action in terms of the applicable law against those persons involved in the commission of the offence of corruption and those persons who had aided and abetted therewith.**

#### 4. OFFENCES OF FRAUD AND CORRUPTION BY A COMPANY / ITS DIRECTORS

1. The Securities & Exchange Commission of Sri Lanka (SEC) established by the Securities & Exchange Commission of Sri Lanka Act No. 36 of 1987, as amended by Acts Nos. 26 of 1991 and 18 of 2003 (SEC Act), as per Section 3 thereof, stipulates the following persons to be *ex-officio* Members of the Commission:
  - (i) Deputy Secretary to the Treasury
  - (ii) Registrar General of Companies, *empowered under the Companies Act*
  - (iii) President, Institute of Chartered Accountants of Sri Lanka, *established by Act No. 23 of 1959*
2. In terms of Section 42 of the SEC Act, the 25<sup>th</sup> Respondent, Director General of the SEC is its *Chief Executive Officer*.
3. In terms of the Section 47 of the SEC Act, all Members and Officers of the Commission are deemed to be **'public servants'** for the purpose of the **Penal Code and the Code of Criminal Procedure Act No. 15 of 1979**.
4. For the purpose of carrying out its objects, Section 13 of the SEC Act, empowers the Commission, in terms of Sub-Sections (i) and (j) thereof, **to inquire and to conduct investigations into any listed public company**, and publish findings of **malfesance** by any listed public company.
5. Section 46, Sub-Sections (1), (2) and (3) of the SEC Act, provides for the Commission to establish a Committee, **to inquire into and determine on complaints by any person, *inter-alia***, relating to the **professional conduct or activities of any listed public company**, and for the Committee to recommend to the Commission the nature of the action to be taken against the listed public company, with the Commission having the discretion, either to take appropriate action to give effect to such recommendations **or to refer the matter for further investigation to the appropriate authority.**
6. Section 46 (3A) of the SEC Act, stipulates thus:

**“Notwithstanding the preceding provisions of this section, the Committee shall also have power to inquire into any matter referred to it by the Commission and upon the conclusion of such inquiry recommend to the Commission the nature of action that may be taken in relation to such matter.”** (*Emphasis added*)
7. Section 46(4) of the SEC Act stipulates that the Commission shall upon the receiving such recommendations made by the Committee, take such action as it may deem expedient, in accordance with the provisions of the Act, **including to refer the matter for further investigation to the appropriate authority.**
8. Section 46(A) of the SEC Act provides for the manner of conducting of such inquiries, whilst Section 51 thereof provides for the actions to be taken in respect of Offences.
9. The SEC regulates the Colombo Stock Exchange, which has stipulated Rules for listed public companies, including, **'Rules of Corporate Governance'**, which provides for **'non-executive Directors'**, **'independent Directors'** and **'Audit Committees'** for listed public companies.

10. Sections 187, 188, 189 and 190 of the Companies Act No. 7 of 2007 (Companies Act), which came into operation on 3.5.2007, statutorily stipulates the ‘**duties of directors**’, *inter-alia*, that:
- (i) **a Director of a company shall not act in a manner, which is reckless or grossly negligent; and**
  - (ii) **shall exercise a degree of skill and care that may be reasonably expected of a person of his knowledge and experience – vide Section 189.**
11. In terms of Section 190 of the Companies Act, **a Director may rely on professional or expert advice, only if a Director acts in good faith, makes proper inquiry where the need for inquiry is indicated by the circumstances, and has no knowledge that such reliance is unwarranted.**
12. The provisions of the Companies Act are in addition to, and not in derogation of any provision contained in any other law relating to the duty or liability of Directors or Officers of a company – *vide Section 190(3)*
13. Section 213 of the Companies Act stipulates the disqualification of Directors, *inter-alia*, **prohibiting a person to be a Director, if he has been convicted of an offence involving dishonest or fraudulent acts**, the contravention of which is an offence liable to a fine not exceeding one million rupees or to a term of imprisonment not exceeding 5 years, or both such fine and imprisonment.
14. Given the facts disclosed by the Petition and the documents filed therewith, ought not the Board of Directors of the 18<sup>th</sup> Respondent, John Keells (a listed public company) and 19<sup>th</sup> Respondent, LMSL (a subsidiary of a listed public company), have conducted their own inquiries, made findings and taken actions thereon, without awaiting a judgment of Your Lordship’s Court, **in terms of the onus and responsibility cast on Directors by the Companies Act ?**
15. On the basis of the grave, serious and adverse findings and the severe castigations in that behalf made in the Judgment of Your Lordships’ Court, the ‘apex’ Court of the country, the cogent question arises, as to whether;
- (i) the 8<sup>th</sup> Respondent, P.B. Jayasundare could continue to be Chairman of Air Lanka (*a majority state owned company*), and
  - (ii) the 20<sup>th</sup> Respondent, could continue to be the Chairman of John Keells (*a listed public company*), and
  - (iii) of any other companies,
- moreso also in terms of the stipulations in the Companies Act, and Codes of Conduct for ‘Good Governance’ and ‘Business Ethics & Integrity’ ?
16. Being an *ex-officio* Member of the SEC in terms of Section 3(b) of the SEC Act, ought not the foregoing have been of concern to the;
- (a) Registrar General of Companies to have taken action in terms of the Companies Act ?
  - (b) President, Institute of Chartered Accountants of Sri Lanka, to have caused inquiry to be conducted by the SEC ?

17. The 25<sup>th</sup> Respondent, Director General, SEC, **ought to have taken / ought to take warranted action and/or have caused/cause action to be taken in terms of the applicable law against those persons involved in wrongful, unlawful, illegal and fraudulent activity, and those persons who had aided and abetted therewith.**

## 5. CONSTITUTIONAL AFFIRMATION / OATH

1. Article 52 (1) of Chapter VIII of the Constitution stipulates:

“There shall be for each Ministry a Secretary who shall be appointed by the President”

2. Article 53 of Chapter VIII of the Constitution stipulates:

“A person appointed to any office referred to in this Chapter **shall not enter upon the duties of his office** until he takes and subscribes the oath or makes and subscribes the affirmation set out in the Fourth Schedule” (*Emphasis added*)

3. The affirmation / oath stipulated in the Fourth Schedule to the Constitution, that ‘**elected**’ and ‘**selected**’ public officers ought to have made / taken **to enter upon the duties of such office**, including, as Secretary of a Ministry, is as follows:

“I, ..... do solemnly declare and affirm / swear that **I will faithfully perform the duties and discharge the functions of the office** of ..... **in accordance with the Constitution** of the Democratic Socialist Republic of Sri Lanka **and the law**, and that I will be faithful to the Republic of Sri Lanka and that **I will to the best of my ability uphold and defend the Constitution** of the Democratic Socialist Republic of Sri Lanka” (*Emphasis added*)

4. The ‘**fundamental duties**’ stipulated in Articles 28(a), 28(d), and 28(e) of the Constitution are as follows: (*Emphasis added*)

“..... **it is the duty of every person** in Sri Lanka -

(a) to uphold and defend the Constitution and the law;

(d) **to preserve and protect public property, and to combat misuse and waste of public property**

(e) to respect the rights and freedoms of others”

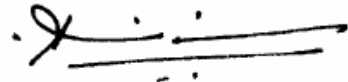
5. In Judgment in SC (FR) Applications Nos. 10/07, 11/07, 12/07 and 13/07, Your Lordships’ Court, *inter-alia*, held as follows:

**“The limitation in Article 29 which states that the provisions of Chapter VI (i.e. which includes Article 28) are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. (Emphasis added)**

6. Hence, **it would not be a bar to use the provisions of Article 28 to interpret other provisions of the Constitution**, in this instance, the affirmation made / oath taken, to **faithfully perform the duties and discharge the functions of public office**, and to **uphold and defend the Constitution – as per Article 53, read with the Fourth Schedule to the Constitution**.
7. (a) Thus the **‘fundamental duties’** obligated on the part of the 8<sup>th</sup> Respondent, Secretary Ministry of Finance / Secretary to the Treasury, P.B. Jayasundare, to be performed under Article 28 of the Constitution, more particularly, (*Emphasis added*)
- “(a) to uphold and defend the Constitution and the law;
- (d) to preserve and protect public property, and to combat misuse and waste of public property**
- (f) to respect the rights and freedoms of others”
- had been *knowingly, deliberately, contumaciously and brazenly violated by him*, as disclosed by the grave, serious and adverse findings and severe castigations made in the Judgment of Your Lordships’ Court.
- (b) Accordingly, it is respectfully submitted that, it is patently evident, that the 8<sup>th</sup> Respondent, P.B. Jayasundare, holding the Office of Secretary, Ministry of Finance & Secretary to the Treasury, i.e. as the Chief Accounting Officer of the State, having reneged on the affirmation made under and in terms of Article 53 of the Constitution to have entered upon the duties of such Office, **has abdicated and/or vacated and/or ceased to hold such Office, and thus and thereby also stands disqualified and unfit to hold any other public office, particularly those with any financial / fiduciary responsibility..**
- (c) **It is respectfully submitted that the law prohibits a person from doing a prohibited act indirectly, what cannot be done directly. To do so would subvert the ‘rule of law’.**
8. (a) In terms of Article 54, a person appointed to public office by the President as required by the Constitution or other written law are also required to make affirmation / take oath, set out in the Fourth Schedule, in terms of Article 61.
- (b) Thus, even appointment as an **Advisor**, is a **public office** warranting as per the Constitution the making of an affirmation / taking of an oath in terms of the Fourth Schedule to the Constitution.
- (c) Ministers, Deputy Ministers *et al* appointed under and in terms of Chapter VIII of the Constitution are also required to make affirmation / take oath, set out in the Fourth Schedule in terms of Article 53.
- (d) **In terms of Section 19 of the Penal Code, a ‘public servant’ includes, every person holding any office by virtue of an act of appointment made by the President or under the President’s authority.**
9. The foregoing will apply to **‘elected’ / ‘selected’** public officers, in that, they have to make an affirmation / take oath in terms of the Fourth Schedule to the Constitution *vis-à-vis* Articles 32, 61, 107, 165 of the Constitution, whilst Members of Parliament make a similar affirmation / take oath in terms of Article 63 of the Constitution.



10. It is respectfully submitted, that should Your Lordships' Court uphold the foregoing submissions, and seem meet to make a pronouncement covering **'elected'** and **'selected'** public officers, **it would augur well to ensure, that the public officers, will then be apprehensive to act in a manner, which is detrimental to the public interest, either on their own volition, or at the behest of socio-political pressures and influences, and thereby minimize 'corruption', ensuring 'good governance', and enforcing the 'rule of law'; akin to the pronouncements made, by Your Lordships' Court in the public interest vis-a-vis 'noise pollution' and 'sand mining'.**

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22<sup>nd</sup> Respondent

29<sup>th</sup> September 2008

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.

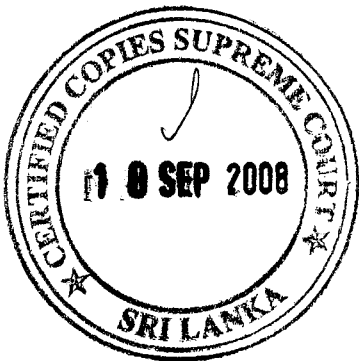
No.SC/FR 209/2007

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.

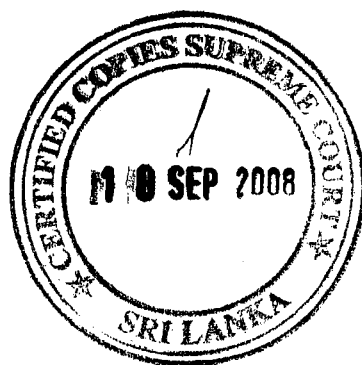


No.SC/FR 209/2007

8.9.2008

Before: S.N. SILVA, C.J.  
MS. TILAKAWARDANE, J. &  
AMARATUNGA, J.

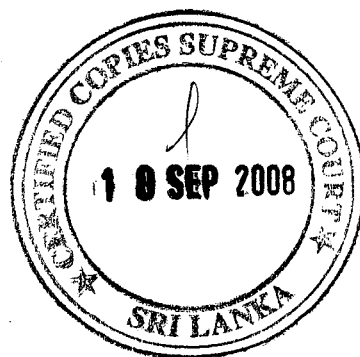
This matter comes up today on a motion of the 19<sup>th</sup> Respondent who has been directed to vacate the extent of land referred to in the judgment which



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includes oil tanks and other fixtures. 19<sup>th</sup> Respondent represented to Court that there is a stock of bunker oil in the tanks and lubricants on this land. On the basis of that representation, Court granted time till 10.9.2008 to the 19<sup>th</sup> Respondent to remove the bunker oil and the lubricants and vacate the premises. It is now submitted by Counsel for the 19<sup>th</sup> Respondent that the workmen employed in the 19<sup>th</sup> Respondent Company have not assisted in the process of removal and as such it has not been possible to complete the removal of bunker oil and the lubricants. Counsel for the Petitioner submits that he has received instructions from his client who filed this application in the public interest that the workmen are concerned with the payment of their dues under the applicable laws. In these circumstances Court makes the following directions.

1. The 19<sup>th</sup> Respondent is granted time until 12.9.2008 to remove the oil and the lubricants that are referred to;
2. The workmen will assist in this process of removing the oil and the lubricants on the following conditions.

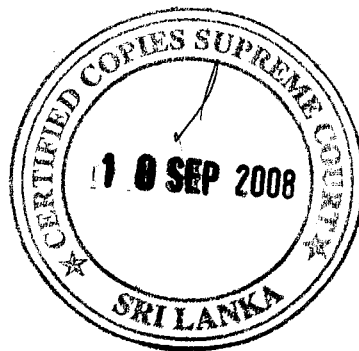


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- (i) that the 19<sup>th</sup> Respondent will deposit in a bank on terms and conditions to be determined by the Commissioner of labour an amount calculated at the rate paid in respect of employees whose services were previously terminated by the 19<sup>th</sup> Respondent whether on a voluntary retirement basis or otherwise, in respect of the current employees who have made applications for terminal benefits to the Commissioner to meet any ultimate order that will be made by the Commissioner of Labour in this regard according to law.
- (ii) the said amount will be held as a deposit to be disbursed on the basis of an order made by the Commissioner of Labour subject to the legal rights of the parties.

3. If for any reason the oil or lubricants are not removed by 12.9.2008 whatever remains will be the property of the Srilanka ports Authority.

Assistant Solicitor General to notify the Commissioner to quantify the amount to be deposited within a day and to inform the 19<sup>th</sup> Respondent.



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Court has heard Counsel for the Petitioner on motion dated 2.9.2008. Counsel submits that notwithstanding the judgment made by this Court and the notification of that judgment to the 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 25<sup>th</sup> and 31<sup>st</sup> Respondents, no action has been taken pursuant to the judgment. Counsel further submits that the officer in respect of whose conduct adverse findings have been made by Court is yet continuing to hold public office notwithstanding the fact that finding of this Court is that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution. Thus he is disqualified for 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.

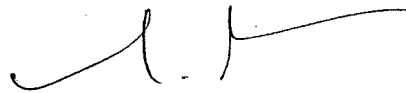
Petitioner to tender notices to be served on 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 25<sup>th</sup> and 31<sup>st</sup> returnable on 29.9.2008.

Mention on 29.9.2008 before the same Bench that heard the main case.

CF/-

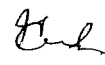



I do hereby certify that the foregoing is a true copy of the journal entry dated 8.9.2008 in Case No.SCFR 209/2007 filed of record in this Court.



W. A. PRIYANI S. PERERA  
REGISTRAR 111

CHIEF CLERK/COURTS BRANCH  
SUPREME COURT

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