

HEBTULABHOY & Co. LTD.

v.

A. L. M. FERNANDO, HIGH COURT JUDGE & OTHERS

SUPREME COURT.

ATUKORALE, J., H. A. G. DE SILVA, J. AND G. P. S. DE SILVA, J.

S. C. REFERENCE No. 2/87; C. A. APPLICATION No. 875/87,

D. C. COLOMBO No. 2316/Spl.

JANUARY 12, 13, 14 AND 22, 1988.

Constitution, Articles 111(2), 114, 125(1) - High Court Judge appointed by the Judicial Service Commission as Additional District Judge to hear specified cases - Validity of such appointment.

The 1st respondent as District Judge heard and reserved order in a case where the petitioner was plaintiff. Before the order was delivered the 1st respondent was appointed as a High Court Judge by His Excellency the President. Subsequently, the Judicial Service Commission appointed the 1st respondent as an Additional District Judge to deliver judgment in certain cases heard by him as District Judge. The petitioners' case was that when the 1st respondent was already functioning as a High Court Judge, the Secretary to the Commission (5th respondent) communicated the decision to the 1st respondent stating, "I hereby appoint you as Additional District Judge, Colombo to deliver judgment in cases No. in addition to your other duties as pleased by the Judicial Service Commission." The 1st respondent subsequently delivered judgment in the petitioner's case making an order against him. He applied to the Court of Appeal to quash the order on the ground that the appointment by the J.S.C. was invalid.

Since matters relating to the interpretation of the Constitution were involved, the Court of Appeal referred the following questions to the Supreme Court for determination under Article 125(1) of the Constitution:

- (i) "As the 1st respondent at the material time was holding the office of Judge of the High Court having been so appointed previously by His Excellency the President under Article 111(2) of the Constitution, was the Judicial Service Commission, vested with power under the Constitution to appoint the 1st respondent as an Additional District Judge of Colombo as well in order to deliver judgment in District Court Colombo case No. 2316/Spl or was the said Judicial Service Commission precluded from doing so?
- (ii) Could the 5th respondent by virtue of the provisions of Article 114(4) of the Constitution have appointed the 1st respondent at that time holding the post of a Judge of the High Court, also Additional District Judge of Colombo as he purports to have done by letter of appointment dated 11th September 1986?
- (iii) Having regard to the provisions of the Constitution is it legally competent for a holder of the office of High Court Judge duly appointed to that office by His Excellency the President under the provisions of Article 111(2) of the Constitution to function as a 'Judicial officer' as that expression is used in Article 114 of the Constitution upon appointment to such office by the Judicial Service Commission for the ad hoc purpose of continuing and concluding any case commenced by him previously as such judicial officer?"

Held—

(1) The Judicial Service Commission was vested with power under Article 114(1) read with Article 114(6) of the Constitution to appoint the 1st respondent, who at the time had been appointed and was holding the office of a Judge of the High Court, as Additional District Judge of Colombo in order to deliver judgment in case No. 2316/Spl. of the District Court of Colombo.

(2) The 5th respondent has no such power under Article 114(4) of the Constitution. In the instant case, however, the appointment of the 1st respondent was made not by him but by the Judicial Service Commission which appointment was communicated by him to the 1st respondent by letter XI.

(3) It is legally competent for the holder of the office of Judge of the High Court to function as a 'judicial officer' upon being appointed as such by the Judicial Service Commission to enable him to deliver judgment and/or to continue and conclude a case commenced by him previously as a 'judicial officer'.

Cases referred to:

- (1) *Saravanamuttu v. Saravanamuttu* (1960) 61 NLR 1.
- (2) *Bilimoria v. Commaraswamy C.A.* Application No. L/A 89/79 – D.C. Colombo No. 2579/RE – C.A. Minutes of 16.01.1980.

REFERENCE to the Supreme Court under Article 125(1) of the Constitution.

Dr. H. W. Jayewardene Q.C. with *G. F. Sethukavaler P.C.*, *L. C. Seneviratne P.C.*, *K. Kanag Iswaran P.C.*, *K. M. B. Ahamed*, *A. A. M. Iliyas* and *Harsha Amerasekera* for the Petitioner.

S. Marsoof, Senior State Counsel, as amicus curiae for A.G.

Tony Fernando, State Counsel, for the 5th Respondent.

H. L. de Silva P.C. with *Nihal Fernando* with *Miss L. N. A. de Silva* for the 6th Respondent.

Cur. adv. vult.

March 21, 1988.

ATUKORALE, J.

This is a reference made to this Court by the Court of Appeal in terms of Article 125 of the Constitution seeking a determination of three questions relating to the interpretation of the Constitution arising out of a proceeding filed by the petitioner in the Court of Appeal for an order in the nature of a writ of Certiorari. Upon the material placed before us the following facts emerge: The petitioner on or about 21.7.1983 filed action No. 2316/Spl. in the District Court of Colombo against the 6th and 7th respondents alleging an infringement by them of his rights in respect of the trade mark No. 31953 "RABEA" of which he was the registered owner. In his plaint he prayed for, inter alia, a permanent and an interim injunction restraining the two respondents from applying or using the said word "RABEA" in any form of packet or bag for sale, distribution and/or export of tea. The District Court issued, ex parte, an interim injunction as prayed for by the petitioner and later on made order refusing the 6th respondent's application to suspend the interim injunction for the limited purpose of enabling him to export a specified quantity of tea to Egypt. The validity of this order of refusal was challenged by the 6th respondent in the Court of Appeal by way of Revision – C.A. No. 1052/83 – as well as by way of Leave to Appeal – C.A./L.A. No. 86/83. The Court of Appeal made, ex parte, order in the Revision

application to suspend the operation of the interim injunction to the extent and purpose sought for by the 6th respondent. The petitioner then moved the Court of Appeal to have this order revoked. Having failed in this attempt he moved this Court by way of Special Leave to Appeal—S.C. Spl. L/A No. 59/83—to have the same revoked. On 5.12.1983 at the hearing into this application this Court directed the Court of Appeal to hear and determine the two applications which were pending before it i.e., the Revision and the Leave to Appeal Applications. The Court of Appeal after hearing the parties made order on 23.1.1984 refusing both applications—vide [1984], 1 Sri L.R. 129. The 6th respondent then appealed from this order of the Court of Appeal to this Court which, without proceeding to hear the appeal on the merits, made order directing that the inquiry into the application to dissolve the interim injunction and the trial of the action which were both then pending in the District Court be proceeded with. The two orders made by this Court were, no doubt, with a view to expeditiously terminating the proceedings that were then pending in the District Court. The inquiry and trial came up before the 1st respondent who was the Additional District Judge of Colombo, having been duly appointed thereto by the Judicial Service Commission in terms of Article 114 of the Constitution. After several dates of hearing the 1st respondent on 20.6.1986 made order reserving his judgment and order for 15.9.1986. On 26.6.1986 the 1st respondent was duly appointed a Judge of the High Court by His Excellency the President in terms of Article 111(2) of the Constitution. Consequent on this appointment the 1st respondent was posted as High Court Judge, Badulla. The 1st respondent on all relevant dates thereafter continued to hold office of a Judge of the High Court. According to document 5 R 1 (an extract of the minutes of the meeting of the Judicial Service Commission—hereinafter called the Commission—held on 29.8.1986 bearing the sub-heading “Part-heard cases of Judicial Officers” the Commission decided on that date to appoint the 1st respondent as Additional District Judge of Colombo to deliver order, amongst others, in the said action No. 2316/Spl. of the District Court of Colombo. On 11.9.1986 the 5th respondent, the Secretary to the Commission, addressed the following letter to the 1st respondent:

“Appointment

I hereby appoint you as Additional District Judge Colombo to deliver judgment in the cases No. 2316/Spl. in addition to your other duties as pleased by the Judicial Service Commission.”

On 15.6.1987 the 1st respondent delivered judgment and order in the said case. He dismissed the petitioner's action and awarded the 6th respondent compensation in a sum of Rs. 8 million by way of reconvention.

The petitioner appealed to the Court of Appeal from this judgment of the 1st respondent (X4) and further applied to have the same revised (X5). On 12.8.1987 he also filed in the Court of Appeal an application (No. 875/87) praying for the issue of an order in the nature of a writ of Certiorari quashing the judgment and decree and for an order directing that the action be heard de novo before a duly appointed District Judge who is a judicial officer within the meaning of Article 114 of the Constitution. The ground urged in the writ application for quashing the judgment and decree is that the appointment of the 1st respondent as Additional District Judge of Colombo by letter X1 was contrary to law and null and void and of no legal effect mainly for the reason that a Judge of the High Court cannot in law be appointed at the same time to be or to function as a District or Additional District Judge and/or be empowered to exercise two jurisdictions concurrently. This has also been averred as one of the grounds for setting aside the judgment of the 1st respondent both in the petition of appeal as well as in the Revision application pending in the Court of Appeal. Mr. A. L. M. Fernando, Judge of the High Court, Badulla, is the 1st respondent to the writ application; the Honourable members of the Commission are the 2nd, 3rd and 4th respondents; the Secretary to the Commission is the 5th respondent; the party in whose favour the award of compensation was made is the 6th respondent and the 7th respondent is the other defendant in the said action who only blended and packetted the tea of the 6th respondent and made no appearance and took no part at the trial.

No notice of the writ application appears to have been ordered by the Court of Appeal to issue on the 2nd, 3rd and the 4th respondents. Notice was ordered to be issued on the other respondents and on the Attorney-General as amicus curiae. On the notice returnable date learned State Counsel appeared for the 5th respondent and stated to court that he does not intend to file objections. Learned Senior State Counsel appeared as amicus on behalf of the Attorney-General. Learned President's Counsel appeared for the 6th respondent. On this day learned President's Counsel for the petitioner intimated to court that it was necessary for both the petitioner as well as the 6th respondent to submit to court the constitutional matters upon which a

determination by the Supreme Court would be required. On 24.11.1987 learned President's Counsel for the 6th respondent tendered in open court a written statement containing 3 questions which he submitted should be referred to the Supreme Court for determination. On 30.11.1987 the Court of Appeal made the following reference to the Supreme Court in terms of Article 125(1) of the Constitution:

**"TO HIS LORDSHIP THE CHIEF JUSTICE AND THE OTHER
HONOURABLE JUDGES OF THE SUPREME COURT**

1. This is an application for an order in the nature of a writ of certiorari to quash a judgment and decree of the 1st respondent dated 15th June 1987 delivered by him as Additional District Judge of Colombo in District Court Colombo Case No. 2316/Spl.
2. For the purposes of this reference we consider it useful to set down here the facts enumerated below which are to be gathered from the papers filed by the plaintiff petitioner in this Court.
 - (a)
 - (b)
 - (c)
 - (d)
 - (e)
3. The petitioner upon a writing filed in these proceedings has suggested two questions to be referred to the Honourable Supreme Court for determination under Article 125(1) of the Constitution and the 6th respondent likewise has suggested three questions.
4. Submissions have been made to us by Dr. H. W. Jayewardene Q.C. Counsel for the plaintiff-petitioner and Mr. H. L. de Silva P.C. Counsel for the 6th respondent. We have also heard Mr. Marsoof, Senior State Counsel, appearing for the Attorney-General as amicus curiae and Mr. Fernando, State Counsel, appearing for the 5th respondent. The contention of Messrs Marsoof and Fernando is to the effect that this application is untenable in law and that therefore any questions relating to the interpretation of the Constitution cannot be thought to arise in the course of proceedings in any such untenable application.

5. We are, however, of the considered view that there are questions here relating to the interpretation of the Constitution and that they arise in the course of proceedings in this Court within the meaning of Article 125(1) of the Constitution. In terms of Article 125(1) of the Constitution the questions set out below are respectfully referred for determination to Your Lordships' Court and we respectfully request that upon a determination of such questions Your Lordships' Court do make any consequential order as the circumstances of the case may require in terms of Article 125(2) of the Constitution:—

- (i) As the 1st respondent at the material time was holding the office of Judge of the High Court having been so appointed previously by His Excellency the President under Article 111(2) of the Constitution, was the Judicial Service Commission vested with power under the Constitution to appoint the 1st respondent as an Additional District Judge of Colombo as well in order to deliver judgment in District Court Colombo case No. 2316/Spl. or was the said Judicial Service Commission precluded from doing so?
- (ii) Could the 5th respondent by virtue of the provisions of Article 114(4) of the Constitution have appointed the 1st respondent at that time holding the post of a Judge of the High Court, also Additional District Judge of Colombo as he purports to have done by letter of appointment dated 11th September 1986?
- (iii) Having regard to the provisions of the Constitution is it legally competent for a holder of the office of High Court Judge duly appointed to that office by His Excellency the President under the provisions of Article 111(2) of the Constitution to function as a 'judicial officer' as that expression is used in Article 114 of the Constitution upon appointment to such office by the Judicial Service Commission for the ad hoc purpose of continuing and concluding any case commenced by him previously as such judicial officer?"

It would appear from the submissions made before us by learned Senior State Counsel that his contention in the Court of Appeal was that the writ application is untenable in law for the reason that it is not open to the petitioner to challenge collaterally the validity of acts done by a de facto judge under colour of office and that therefore the

reference to this Court of the constitutional questions would be premature and unnecessary. It is also pertinent at this stage to note that although in the statement of objections filed in the Court of Appeal on behalf of the 6th respondent it was stated that the writ application did not constitute in law a direct challenge to the 1st respondent's appointment by the Commission but that it merely averred its invalidity as a ground for quashing the 1st respondent's judgment which in law, in the absence of an application to declare the appointment itself null and void or to quash the same or challenging at the appropriate time the 1st respondent's authority to function as Additional District Judge, was tantamount to not a direct but only a collateral attack upon the appointment and jurisdiction of the 1st respondent and that for this reason the writ application was not maintainable in law, yet no objection was raised on behalf of the 6th respondent in the Court of Appeal at any stage to a reference of constitutional matters arising out of the writ application to the Supreme Court for its determination. On the contrary the 6th respondent in his statement of objections enumerated 3 matters as requiring to be referred to the Supreme Court for determination. I make reference to this fact at this stage of my judgment in view of the suggestion made by learned President's Counsel for the 6th respondent as well as learned Senior State Counsel for the 5th respondent that we should, without proceeding to make our determination upon the reference, direct the Court of Appeal, in the first instance, to hear and determine the issue regarding the maintainability of the writ application, a course which, it was urged on their behalf, would obviate this Court from making constitutional pronouncements unless they were absolutely necessary. Several decisions (American, Indian and local) were cited in support of this contention. Whilst appreciating the force of this submission I do not, however, think it prudent, in the special circumstances of this case, to agree to such a course of action. Bearing in mind the voluminous nature of the evidence recorded in this action and the multitude and diverse nature of the legal proceedings filed that have been either disposed of or are still pending, the latter of which have been mainly directed at showing that the judgment of the 1st respondent is devoid of any legal effect because of his allegedly defective appointment, and taking into account the delay and expense already incurred and are likely to be further incurred in the event of this court, at this stage, refraining from making a determination on the constitutional issues and also considering the fact that the parties to the dispute regarding the alleged infringement of trade mark had

agreed in the Court of Appeal that certain constitutional issues do arise for determination by this Court, I think it eminently desirable and even necessary that we should proceed to make our determination upon the 3 constitutional questions referred to this Court by the Court of Appeal.

Adverting, firstly to the second formulation aforementioned by the Court of Appeal it appears to me that whilst on the material placed before the Court of Appeal, namely document X1, the question so formulated by it is correct, yet in view of documents 5R1 and 5R2 which have for the first time been produced before us it now transpires that there is a factual inaccuracy in this formulation. 5R1 which is an extract of the meeting of the Commission held on 29.8.1986 and the authenticity of which I have no reason to doubt establishes quite clearly that it is the Commission that decided to appoint the 1st respondent as Additional District Judge to deliver judgment in the said District Court action. This is supported by 5R2, the extract of the Gazette notification dated 21.8.1987 in which the appointment was published. As the genuineness of these two documents was not challenged I accept them as constituting proof of the fact that the 1st respondent's appointment as Additional District Judge, Colombo, to deliver judgment in the said action was made by the Commission and not the 5th respondent. X1 communicating the appointment to the 1st respondent has been worded very unhappily, the appointment purporting to have been made by the 5th respondent, who as Secretary of the Commission enjoyed no power of appointment other than a power of appointment delegated to him by the Commission in terms of Article 114(4) of the Constitution prior to its amendment by the 11th Amendment to the Constitution of 6th May 1987. Under Article 114(4), whether before or after the 11th Amendment, the 5th respondent had no power to appoint a person to the substantive post of an Additional District Judge. The appropriate wording of the Secretary's letter communicating an appointment duly made by the Commission has been reproduced by Basnayake C.J. in his judgment in *Saravanamuttu v. Saravanamuttu* (1) which, I think, could still be followed in the case of such appointments. Properly worded X1 should have read that the Judicial Service, has been pleased to appoint the 1st respondent as Additional District Judge, Colombo to enable judgment to be delivered in case No. 2316/Spl. of the District Court of Colombo. In the context of the foregoing facts the 2nd question, as formulated by the Court of Appeal, would not arise for our determination.

I shall now turn to the 1st question in the reference, namely, the constitutional legality or otherwise of the 1st respondent's appointment by the Commission, of which, in view of the Gazette notification 5R2, this Court must take judicial notice. This is the substantial matter arising for our determination. Article 114(1) of the Constitution vests in the Commission the power, inter alia, of appointment of 'judicial officers' which expression, for the purposes of Article 114, is defined in sub-Article (6) as follows:

"judicial officer" does not include a judge of the Supreme Court or of the Court of Appeal or of the High Court.

In contrast to the definition of the expression 'judicial officer' contained in Article 170 which includes persons who hold office as Judge of the Supreme Court, of the Court of Appeal and of the High Court, sub-Article (6) of Article 114 gives a restrictive meaning to the same expression for the purposes of that Article. It excludes from the purview of Article 114 the Judges of the Supreme Court, of the Court of Appeal and of the High Court. The contention of learned Queen's Counsel for the petitioner is that the power of appointment conferred on the Commission under Article 114 does not extend to the power of appointing as a 'judicial officer' a person holding the office of a Judge of the Supreme Court or of the Court of Appeal or of the High Court and that, therefore, the Commission had, in the circumstances of this case, no power to appoint the 1st respondent, who at the time of such appointment on 11.9.1986 was a Judge of the High Court, as a 'judicial officer', namely, as Additional District Judge. Placing very much reliance on the definition of judicial officer in Article 114(6) which seeks to exclude, inter alia, a Judge of the High Court he maintained that the Commission is powerless to appoint a Judge of the High Court as a judicial officer, and that, therefore, the 1st respondent's appointment was bad. I am unable to accept this contention. There can be no doubt that a District or Additional District Judge is a judicial officer within the meaning of Article 114(6). Thus undoubtedly the appointment of the 1st respondent as an Additional District Judge (prior to his appointment as a Judge of the High Court) by the Commission was a valid appointment. It is equally clear that the Commission has no power to appoint a person (whether already a judicial officer within the meaning of Article 114(6) or not) to the office of a Judge of the High Court or of the Court of Appeal or of the Supreme Court. Such an appointment can only be made by His Excellency the President under Article 111(2) or Article 107(1) as the

case may be. The question then is whether the Commission is empowered to appoint or precluded from appointing the 1st respondent as an Additional District Judge of Colombo in terms of Article 114(1) while he was holding the office of Judge of the High Court having been appointed thereto by His Excellency the President under Article 111(2). In my view the definition of judicial officer in Article 114(6) does not, expressly or impliedly, prohibit the Commission from making the appointment. In the case of a Judge of the Supreme Court or of the Court of Appeal Article 110(2) of the Constitution expressly prohibits him from performing any other office (whether paid or not) or accepting any place of profit or employment. But in the case of a Judge of the High Court there is no similar prohibition in the Constitution. It is, in my view, erroneous to construe the definition of 'judicial Officer' in Article 114(6) as precluding the Commission from appointing a person already holding the office of a Judge of the High Court as a judicial officer. The definition does not purport to prescribe the categories or classes of persons who are ineligible for appointment as judicial officers by the Commission but only stipulates the categories of judicial office to which the Commission may not make appointments. Whilst Article 107(1) deals with the appointment of Judges of the Supreme Court and of the Court of Appeal and Article 111(2) deals with the appointment of Judges of the High Court, Article 114(1) deals with the appointment of judicial officers other than those referred to in Articles 107(1) and 111(2). This construction gains support from the marginal note to Article 114 which reads 'appointment to *other judicial offices*' which in the context of Articles 107(1) and 111(2) can only mean to judicial offices other than those referred to in those two Articles. The purpose and effect of the definition of judicial officer in Article 114(6) is to circumscribe the classes of judicial office to which the Commission could lawfully make appointments. This object has been achieved by excluding from the definition the offices of Judges of the Supreme Court, of the Court of Appeal and of the High Court, appointments to which could only be made by His Excellency the President. Whilst the definition of 'judicial officer' contained in Article 170 embraces every type of judicial office the distinction sought to be drawn in the definition of this expression in Article 114(6) is between two categories of judicial office, namely, the offices in respect of which His Excellency the President is the appointing authority and those in respect of which the Commission is the appointing authority. There is no constitutional impediment to His Excellency the President

appointing, for instance, a District or Additional District Judge as a Judge of the Supreme Court or of the Court of Appeal or of the High Court. Equally there seems to me to be no such impediment to the Commission appointing a Judge of the High Court to be a District or Additional District Judge although in the case of Judges of the Supreme Court and the Court of Appeal the provisions of Article 110(2) would operate as a constitutional bar to the Commission making such appointments. I am therefore of the view that the contention of learned Queen's Counsel for the petitioner that the power of appointment vested in the Commission by virtue of Article 114(1) does not extend to the power to appoint a Judge of the High Court as a judicial officer is unsustainable. In my view the Commission was vested with the power under the Constitution to appoint the 1st respondent as an Additional District Judge and Article 114(1) read with Article 114(6) did not preclude the Commission from making the appointment. I answer the 1st question referred for our determination accordingly. I may add this identical question arose for consideration by the Court of Appeal in *Bilimoria v. Coomaraswamy* (2). In that case after the trial commenced in the District Court before the District Judge he was appointed a Judge of the High Court by His Excellency the President. Thereafter on 23.11.1978 the Judicial Service Commission appointed him as Additional District Judge for the purpose of hearing and concluding that particular case. Objection was taken before him on the ground that he had no jurisdiction to hear and conclude the case. He overruled the objection. On an application for leave to appeal from this order of the Additional District Judge, it was urged on behalf of the petitioner by Mr. H. L. de Silva (learned President's Counsel appearing for the 6th respondent in the present proceedings before us) that a question relating to the interpretation of the Constitution arose in relation to the validity or otherwise of the appointment of the Additional District Judge by the Judicial Service Commission. The Court of Appeal rejected this submission and held that the application of Article 114 would lead to the conclusion that the appointment was a valid one. Accordingly leave to appeal was refused. Learned Queen's Counsel appearing for the petitioner in the present proceedings before us appeared for the respondent in that application before the Court of Appeal. Having myself associated with that judgment in the Court of Appeal I am happy to be able to state that a fuller consideration of the issue in this case has convinced me that the view expressed by the Court of Appeal upholding the validity of the appointment is correct.

I now turn to the last question in the reference. What is sought to be ascertained there is the legal competence of the holder of the office of a Judge of the High Court to function as a 'judicial officer' upon an appointment made thereto by the Commission having regard to the provisions of the Constitution. The specific constitutional provisions, if any, which relate to this matter have not been specified in the reference. Nor has our attention been invited at the hearing to any constitutional provision pertaining thereto other than those which have already been considered by me in relation to the 1st question aforementioned. It seems to me that the ambit of the two questions (the 1st and the 3rd) and the constitutional provisions applicable thereto are the same. I would therefore, in accordance with my answer to the 1st question, answer the last question in the affirmative. It was urged upon us by learned Queen's Counsel that the Commission had no power to limit judicial power or its exercise when appointing a 'judicial officer' which, he alleged, was what the Commission precisely did by appointing the 1st respondent to deliver judgment in specified cases. Objection was taken by learned President's Counsel to this question being raised for the first time in this Court without it being referred by the Court of Appeal for a determination. I think this objection is sound and must be upheld. However upon a perusal of the appointment of the 1st respondent by the Commission I can perceive no such limitation or curtailment of judicial power or any kind of restriction in its exercise. I agree that the Commission can neither limit nor extend, in the terms of the appointment or otherwise, powers which the law confers on or vests in the office to which a 'judicial officer' is appointed. The appointment carries with it all the powers and jurisdictions which the law vests in the office to which the appointment is made. Any purported limitation or extension of power in the appointment is thus bad and of no legal consequence. The note in the remarks column of the 1st respondent's appointment to the effect that the appointment is to enable him to deliver judgment in certain cases is only explanatory of the appointment and does not, in any way, constitute a limitation of the powers of or their exercise by the 1st respondent.

On the basis of the above reasoning this Court determines the questions referred to it by the Court of Appeal in the following manner:

1. The Judicial Service Commission was vested with power under Article 114(1) read with Article 114(6) of the Constitution to appoint the 1st respondent, who at the time had been

- appointed and was holding the office of a Judge of the High Court, as Additional District Judge of Colombo in order to deliver judgment in case No. 2316/Spl. of the District Court of Colombo.
2. The 5th respondent has no such power under Article 114(4) of the Constitution. In the instant case, however, the appointment of the 1st respondent was made not by him but by the Judicial Service Commission which appointment was communicated by him to the 1st respondent by letter X1.
 3. It is legally competent for the holder of the office of Judge of the High Court to function as a 'judicial officer' upon being appointed as such by the Judicial Service Commission to enable him to deliver judgment and/or to continue and conclude a case commenced by him previously as a 'judicial officer'.

In the light of the aforesaid determination made by this Court, the Court of Appeal is directed to make order dismissing the application of the petitioner bearing No. C.A. Application No. 875/87 for a Writ of Certiorari with costs therein payable by the petitioner to the 5th and 6th respondents. The Registrar of this Court will forward this determination and the consequential order to the Court of Appeal.

H. A. G. DE SILVA, J.—I agree.

G. P. S. DE SILVA, J.—I agree.

Case sent back with answers to questions referred.
