EDWARD FRANCIS WILLIAM SILVA,
PRESIDENT'S COUNSEL AND THREE OTHERS
v.
SHIRANI BANDARANAYAKE AND THREE OTHERS

SUPREME COURT.
FERNANDO, J.
AMERASINGHE, J.
RAMANATHAN, J.
WADUGODAPITIYA, J.
PERERA, J.
WIJETUNGA, J. AND
ANANDACOOMARASWAMY, J.
S. C. (F. R.) APPLICATIONS
NOS. 832, 833, 834 AND 842 OF 1996
DECEMBER 4, 6 AND 9, 1996

Fundamental rights – Appointment of a Judge of the Supreme Court, Article 107 of the Constitution – Nature and extent of the power of the President – Necessity for co-operation between the Executive and the Judiciary – Articles 12(1), 14(1) (a) and 14(1) (g) of the Constitution.

Held:

(1) The President in exercising the power conferred by Article 107 of the Constitution has a sole discretion. The power is discretionary and not absolute. It is neither untrammelled nor unrestrained, and ought to be exercised within limits.

(2) Article 107 does not expressly specify any qualifications or restrictions. However, in exercising the power to make appointments to the Supreme Court there should be co-operation between the Executive and the Judiciary, in order to fulfil the object of Article 107.

Cases referred to:

1. *Premachandra v. Jayawickreme* S.C. (1994) 2 Sri L.R. 90, 105.
2. *Premachandra v. Jayawickreme* C.A. (1993) 2 Sri L.R. 294.
3. *Bandara v. Premachandra,* S.C. (1994) 1 Sri L.R. 301, 312.
4. *Mallikarachchi v. Attorney General* (1985) 1 SLR 74.

APPLICATIONS for relief for infringement of fundamental rights.

R. K. W. Goonesekera with *Gamini Jayasinghe, Rohan Sahabandu, Ari Perera, K. S. Ratnavel, Geoffrey Alagaratnam, J. C. Weliamune, Manohara de Silva* and *Champaka Laduwahetty* for the petitioner in application No. 832/96.

M. S. Aziz, P.C. with *Ajantha Cooray, Lakshman Perera, Kalinga Indatissa, Hemasiri Withanachchi, Lilanthi de Silva* and *A.R. Benedict* for the petitioner in application No. 833/96.

D. S. Wijesinghe, P.C. with *Hemantha Warnakulasuriya, Upul Jayasuriya, Dhammika Dharmadasa, Shiranthi Jayatilleke, Methsiri Paranavithana, Nissanka Nanayakkara* and *Inoka Senadheera for the petitioner in Application No. 834/96.*

L. C. Seneviratne, P.C. with *Nehru Gunatilleke, P.C., Desmond Fernando, P.C., M. D. K. Kulatunga, Ronald Perera* and *Gamini Silva* for the petitioner in application No. 842/96.

S. N. Silva P.C., A. G. with *K. C. Kamalasabayson, P.C. Addl. S.G., Anusha Navaratne, S.S.C., U. Egalahewa, S.C.* and *N. Pulle, S.C.* for the respondents in each application.

Cur. adv. vult.

December 16, 1996
FERNANDO, J.

This Judgment sets out the views of Amerasinghe, J. Wadugodapitiya, J. Wijetunga, J. and myself.

These four identical applications were referred by the Chief Justice under Article 132(3) to this bench of seven Judges because they involved questions of general and public importance. In each case the petitioner is an Attorney-at-Law, who claims that his fundamental rights under Articles 12(1), 14(1) (a) and 14(1) (g) have been infringed by reason of the appointment of the 1st respondent by the President as a Judge of this Court.

Having regard to the complexity and the gravity of the questions involved, instead of permitting the applications to be supported ***ex parte*** in the usual course, the Respondents were all given notice,

and represented, and heard in opposition to the grant of leave to proceed.

The principal question concerns the interpretation of Article 107 of the Constitution: whether that Article confers on the President a power, without any need for consultation or any other form of co-operation.

Article 4 of the Constitution shows that the Sovereignty of the People is exercised by Parliament, by the President, and through the Judiciary. Comity among these three organs of government is an essential, underlying assumption. The Constitution contemplates that the three organs of government, in the exercise of the legislative, executive and judicial powers of the People, on behalf of the People, would co-operate with each other in order to realise the aims of the Constitution.

Admittedly, Article 107 confers on the President the power of making appointments to the Supreme Court, and does not expressly specify any qualifications or restrictions. However, considerations of comity require that, in the exercise of that power, there should be co-operation between the Executive and the Judiciary, in order to fulfil the object of Article 107.

Apart from considerations of comity, those appointments are of such a nature that co-operation between the Executive and the Judiciary is vital. The President, naturally, would be anxious to appoint the most suitable person available. But it is not easy, except in broadly stated terms, to spell out the qualifications needed for high judicial office, nor is it easy to determine with any degree of certainty whether a person has all those qualifications. The Chief Justice, as the head of the Judiciary, would undoubtedly be most knowledgeable about some aspects, while the President would be best informed about other aspects. Thus co-operation between them would, unquestionably, ensure the best result. Of course, the manner, the nature and the extent of the co-operation needed are left to the President and the Chief Justice, and this may vary depending on the circumstances, including the post in question. Constitutional law and practice are not static. Whatever the position earlier, ***prima facie*** by 1994 there had developed a practice, in proof of which Mr Goonesekera relied on the explanation given by S. N. Silva, P/CA, as he then was, to the question **"what is the process by which judges of the higher courts are selected?".**

"Under the Constitution the President of the Republic has the **sole** prerogative to appoint Judges of the High Court, the Court of Appeal and the Supreme Court. **In practice** Judges are selected **through a process of nomination** by the Chief Justice, the Attorney-General and the Minister of Justice." (emphasis added) **DANA**, Vol XIX, Nos. 1-4, Jan-April 1994.

The learned Attorney-General submitted that the President in exercising the power conferred by Article 107 had a "sole discretion". I agree with this view. This means that the eventual act of appointment is performed by the President and concludes the process of selection. It also means that the power is neither untrammelled nor unrestrained, and ought to be exercised within limits, for, as the learned Attorney-General said, the power is discretionary and not absolute. This is obvious. If, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed: because it is the will of the People, which that provision manifests, that such a person cannot hold that office. Article 125 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude.

In common with Courts in other democracies founded on the Rule of Law, this Court has consistently recognised that powers of appointment are not absolute:

"There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted." *Premachandra v. Jayawickreme*.[1] That principle was then applied by the Court of Appeal to strike down the appointments of two Chief Ministers by the respective Provincial Governors: *Premachandra v. Jayawickreme* [2]. See also *Bandara v Premachandra*.[3]

The question then is whether the petitioners have established, ***prima facie***, that there was no co-operation between the President

and the Chief Justice. The petitioners case is that the Chief Justice did make recommendations that two others be appointed to fill the two vacancies that existed during the relevant period. Their grievance is that the Chief Justice's recommendations were not accepted; that the Chief Justice did not recommend the 1st respondent; and that because he was informed only after the 1st respondent's appointment had been made, he had no opportunity to express his views. They make no complaint of any failure to communicate with any one else. While all four petitioners make these allegations, they neither claim personal knowledge of the facts nor state the sources or grounds of their belief. They did not, in their petitions or in their submissions, indicate any possible source or any means of establishing these matters; nor did they ask (as is often done) for an adjournment to amend or supplement their pleadings before proceeding further with their applications for leave to proceed; and they did not seek an order from this Court to secure the production of any relevant material. Learned Counsel for the petitioners did suggest in the course of their submissions that there was some obligation on the Attorney-General to produce the necessary material. However, the Attorney-General stated (both in his oral and in his written submissions) that he was not in a position to produce any material relating to the 1st respondent's appointment because, he said, that would be with the President and/or the Chief Justice, and he had no access to that material – which, he also claimed, was confidential.

It must be noted that the Chief Justice declined to hear these four applications partly "in view of some of the averments in the petition(s)". Presumably, those were the averments relating to communications by him. Nevertheless the Petitioners did not even ask that a request be made to the Chief Justice to furnish any relevant correspondence.

In these circumstances, where the petitioners have not only failed to establish, ***prima facie***, the absence of the necessary co-operation, but have also failed to indicate how they propose to supply that deficiency, it would be futile to grant leave to proceed in respect of the alleged infringement of their fundamental rights under Article 14(1) (g), which they say resulted from that alleged want of co-operation. The presumption that official acts were regularly performed, particularly at the level of the head of the Executive and the head of the Judiciary, cannot lightly be disregarded.

The Petitioners do not claim to have been contenders for the office to which the 1st respondent was appointed. They are not entitled in these applications under Article 126 to raise issues of alleged unequal treatment of third parties. Thus the petitions do not disclose any relevant allegation of the infringement of Article 12(1). They have also failed to make out any case that their fundamental rights under Article 14(1) (a) were infringed.

Finally, the petitioners contend that the 1st respondent was disqualified for appointment by reason of (a) her views and conduct in relation to the Government's devolution proposals, and her links and association with the 2nd respondent, and (b) the support extended to her appointment, after it was made, by a group of lawyers with political affiliations. Her views and conduct, even if they related to political issues, were neither illegal nor improper, and did not constitute a disqualification for office, although, as the learned Attorney-General pointed out, they may disqualify her from hearing particular cases. As for the second allegation, not only is there no suggestion that she was in any way involved with a particular group of lawyers, but it relates to a matter subsequent to her appointment, and so cannot retroactively invalidate it.

For the above reasons, leave to proceed is refused, without costs. I would like to express our appreciation of the assistance rendered by all Counsel.

AMERASINGHE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

WIJETUNGA, J. – I agree.

PERERA, J.

The present application was taken up for hearing together with Applications Nos. 833/96, 834/96 and 842/96 as the subject-matter, the averments and the reliefs claimed, are identical.

The petitioners in this case have sought leave to proceed against the 1st, 2nd and 3rd Respondents whom they state have acted in violation of their fundamental rights guaranteed by Articles 12(1), 14(1) (a) and 14(1) (g) of the Constitution.

We have had the advantage of comprehensive argument by Counsel on this matter and we have given careful consideration to the submissions made by learned Counsel on behalf of the petitioners and the learned Attorney-General. We thereafter reserved our Order on the question whether leave to proceed be granted or refused in this matter.

The petitioners in their applications are seeking, *inter alia*, a declaration that their fundamental rights guaranteed by Articles 12(1), 14(1) (a) and 14 (1) (g) have been infringed and/or that there is an imminent infringement of same in the event the 1st respondent is permitted to discharge the functions of a Judge of this Court. They have also sought a declaration that the appointment of the 1st respondent as a Judge of the Supreme Court is contrary to law and/or the Constitution.

In the present proceedings, therefore, the petitioners are challenging the appointment of the 1st respondent as a Judge of the Supreme Court by Her Excellency the President – the basis of the appointment which clearly under the provisions of the Constitution, is a matter which falls within the purview of the President.

Article 35(1) provides that while any person holds office as President, no proceedings shall be instituted or continued against him in any Court or Tribunal in respect of anything done or omitted to be done by him either in his official capacity, or private capacity. This, in our view, necessarily contemplates all acts and omissions of the President, and provides a blanket immunity to him from having proceedings instituted or continued against him in any Court in respect of any act or omission on his part. In other words, it confers an absolute immunity and protects the President form legal proceedings. In fact, it protects the act or omission of the President which is inbuilt into the said Article, thereby conferring immunity on the President, who so acts or omits to act.

On the other hand, Article 35(3) whilst excluding certain categories of powers exercised by the President from the immunity conferred under Article 35(1), contains a proviso which enables a party to institute proceedings against the Attorney-General. This proviso is restricted to the exercise of power pertaining to the subject or function contemplated in Article 35(3). In our view, therefore, by virtue of Article 35(1) read with Article 35(3), all acts and omissions of the President are protected, except those specified in Article 35(3).

In the case of *Mallikarachchi v. Attorney-General* [4], it has been held by a Divisional bench of this Court that the Attorney-General is not competent to represent the President in proceedings not covered by the proviso to Article 35(3). At page 78 of this Judgement, it was held as follows:-

> "It is very necessary that when the Executive Head of State is vested with paramount powers and duties, he should be given immunity in the discharge of his functions."

We are of the view, therefore, that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of law, more-so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party. There is no doubt that the averments in the petitions flow from the act of appointment made by the President. It is only the President who could furnish details relating to the said appointment. Where the Constitution specifically prohibits the institution of proceedings against the President, a challenge to the appointment cannot be isolated from the President in proceedings against the 1st respondent (the person appointed) where the basis of the appointment which is a matter which in terms of the Constitution falls within the purview of the President. Such matter cannot be canvassed in any Court. Accordingly, we are of the view that this application cannot be entertained by this Court and must be dismissed in limine.

We propose now to examine the proposition whether the petitioners in these cases have placed before this Court sufficient material to establish a *prime facie* case of violation of their fundamental rights guaranteed under Articles 12(1), 14(1) (a) and 14(1) (g) which are the main reliefs prayed for by the petitioners. At the outset, we must state that in our view the petitioners cannot seek to question the validity of the appointment of the 1st respondent as a Judge of the Supreme Court by alleging such infringement or imminent infringement.

ARTICLE 12(1):

The violation of Article 12(1) involves two or more persons who are similarly placed or circumstanced. The grievance of the petitioner in

relation to the respondent must be directly related to the impugned act. A petitioner will not have *locus standi* if he is not one who could have claimed a right in relation to this particular respondent. In this case, the petitioners do not allege discrimination in relation to the 1st respondent and therefore he is not entitled to any relief under Article 12(1).

ARTICLE 14(1) (a):

We are also of the view that the Freedom of Speech and Expression as set out in Article 14 (1) (a) has no application for the reason that the petitioner has not been deprived of this freedom at all. Further, it cannot have a bearing in relation to the appointment of the 1st respondent in an application under Article 126.

ARTICLE 14(1) (g):

The appointment of the 1st respondent in our view cannot infringe the freedom of the petitioner to practice his profession. This provision becomes operative only on the petitioner engaging himself in the practice of his profession and not at this stage. No person has prevented the petitioner from exercising that right. The petitioner cannot anticipate partiality or bias purely upon the appointment of the 1st respondent. Thus the petitioner is not entitled to any relief under Article 14(1) (g).

Counsel on behalf of the petitioner submitted that the appointment of the 1st respondent by her Excellency the President has been done contrary to convention/practice of appointing Judges to the Supreme Court upon recommendation and consultation with his Lordship the Chief Justice. It would therefore become necessary to examine the relevant provisions of the Constitution relating to the appointment of Judges to the Supreme Court, namely, Article 107.

On a plain reading of this Article, it is clear that Article 107 (1) does not provide for a consultation or recommendation in relation to the appointment of Judges referred to in that Article. In this connection, it is indeed significant that the Constitution contains specific provisions in Articles 44, 45 and 46 where the President is required to act on consultation. Thus in certain situations,

consultation has been specifically contemplated in the Constitution. In the absence of such qualification, Article 107 (1) must necessarily be given its plain and literal meaning where the manner of appointing a Judge is left to the sole discretion of the President. In this connection, it is in our view apposite to cite an extract from an address made by Dr. A. R. B Amarasinghe J. on **"JUDICIAL ETHICS"** to District Judges and Magistrates referring to the appointment of Judges to the Supreme Court. Court of Appeal and the High Court. (Published in the Judges Journal of 1991) as follows:

> "Moreover, such statements overlook the fact that such appointments are at the sole discretion of His Excellency the President who must surely be presumed to know what ought to be done."

Further, Article 107 (1) does not contain any objective guidelines or criteria as in the case of the Indian and Pakistan Constitutions. In the circumstances, it would not be permissible in our view to read into this Article any guidelines or criteria, as it could then have the effect of limiting or restricting the ambit of this Article and the powers of the President. It is also significant that in Chapter XV, and particularly, under the heading **"Independence of the Judiciary,"** in Article III, the president is conferred with the power of removal, etc., of a High Court Judge on the recommendation of the Judicial Service Commission. Thus the Constitution has specifically contemplated situations where recommendation is specified as a requirement. In the absence of such requirement, in our view, Article 107 (1) must necessarily be regarded as self-contained.

It is also noteworthy that the petitioner has failed to place any evidence of convention applicable to the appointment under Article 107 (1). An examination of the Republican Constitution of 1978 would reveal the conventions that were previously recognized. The various provisions in Chapter III of the Constitution have incorporated such conventions. These relate to the collective responsibility and the answerability of the Cabinet of Ministers and the appointments of Ministers. This is a departure from Section 4 (2) of the Soulbury Constitution which provided for the applicability of conventions in certain circumstances.

The learned Attorney-General rightly submitted in the course of his submissions that since all Judges of the Supreme Court ceased to hold office on the commencement of the present Constitution, by virtue of Article 163, the appointments made thereafter in terms of Article 107 (1) could not have been based on any convention relating to consultation or recommendation of the Chief Justice. We are entirely in agreement with this submission. In point of fact, the petitioners have failed to adduce any evidence supportive of the existence of any such convention. I must also observe in this connection that no material has been placed before this Court to show whether there has been any consultation with the Hon. Chief Justice or not in regard to this particular appointment.

The petitioners have in their petitions and affidavits stated that they believe that the 1st respondent's appointment was contrived by the 2nd and 3rd respondents, and more particularly by the 2nd respondent, who usurped the rightful authority of the Chief Justice to have a voice in this matter. We wish to observe that apart from the mere *ipse dixit* of the petitioners in regard to this allegation, no cogent material has been placed before this Court in support of this statement.

In view of the material set out above, we refuse the petitioners applications for leave to proceed in respect of all four applications. The applications are accordingly dismissed without costs.

RAMANATHAN, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Leave to proceed refused.