SENERATH
v.
CHANDRARATNE,
COMMISSIONER OF EXCISE AND OTHERS

SUPREME COURT.
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
WIJETUNGA, J.
AUGUST 03, 1995.

Fundamental Rights – (1) Constitution, Article 12(c) and (2) – Discrimination – Can Supreme Court review its order granting leave to proceed ? – Presidential immunity under Article 35 of the Constitution – Burden of proof – Per incuriam

The petitioner alleged that the respondent had not renewed his liquor licence at the instigation of Mrs. Chandrika Bandaranaike Kumaratunga, President of the Republic. Leave to proceed was granted by the Supreme Court on 21st July 1995. On a preliminary objection being taken that the proceeding was barred by provisions of Article 35 conferring immunity on the President and should have been dismissed *in limine* –

Held:

The decision granting or refusing leave to proceed is final as far as the case is concerned. In general the Court cannot re-hear, review, alter or vary such decision. However the Court has limited power to clarify its judgment and to correct accidental slips or omissions. The Court has also the power to correct manifest error or an order made *per incuriam.* A Court has also the power "to open up a judgment given in the absence of one of the parties." (*ex parte* order). But the order which is being sought to be varied is not an *ex parte* order in that sense, for neither Article 126(2) nor the Rules of the Supreme Court confer a right to the respondents to be heard before leave to proceed is granted. It is an order *sui generis,* not having the character of an *ex parte* judgment, which may re-open the exercise of the inherent power of the Court or otherwise set aside, as may be provided by the statute.

Article 35(3) states that the immunity conferred by Article 35(1) shall not apply to any proceedings in Court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under Article 44(2) or to proceedings in the Supreme Court under Article 129(2) (proceedings for impeachment) or Article 130(a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of

Parliament. Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General. Parliament has thereby narrowed down the President's immunity in areas in which it may become necessary to implead his political conduct in seeking reliefs provided for by the Constitution.

The Supreme Court has inherent powers to correct its errors which are demonstrably and manifestly wrong and where it is necessary in the interests of justice. Decisions made *per incuriam* can be corrected. These powers are adjuncts to existing jurisdictions to remedy injustice – they cannot be made the source of new jurisdictions to revise a judgment rendered by that Court. Whether the question is one of interpretation the order cannot be one made *per incuriam.* Hence the order of 21st July 1995 was not made *per incuriam.* Article 35 of the Constitution provides for the personal immunity of the President during his tenure of office. It bars the institution of proceeding, against him in any Court. The reference is to proceedings in which some relief is claimed or liability is alleged, by way of an action or a prosecution. In the instant case the petitioner has not filed proceedings in a Court seeking relief against the President. The respondents to the application are officials. Relief has been sought against the officials only.

There is no legal obligation for the President to file an affidavit. The burden is clearly on the petitioner. The respondents are at liberty to decide what material they will place before this court, as advised. As such no question of evasion of Article 35 arises. The rule of construction against evasion that what a person or Court may not do directly, it may not do indirectly or in a circuitous manner does not apply.

There are no exceptional circumstances for reversing the order of 21st July 1995 by the exercise of the inherent powers of court.

Cases referred to:

1. *Hettiarachchi v. Seneviratne* S.C. Application No. 127/94 Supreme Court Minutes of 04th July 94.
2. *Gargial v. Somasunderam Chetty* 9 NLR 26, 29.
3. *Kumaratunga v. Jayakody* (1985) 2 Sri LR 124.
4. *Alasupillai v. Yapetipullai* 39 CLW 107.
5. *Huddersfield Police Authority v. Watson* (1947) 2 All ER 193.
6. *Morelle Ltd. v. Wakeling* (1955) 1 All ER 708, 718.
7. *Ganeshananthan v. Goonewardena* (1984) 1 Sri LR 321.
8. *Magdalen College Case* (1616) 11 Rep. 661.
9. *Cross v. Watts* (1863) 32 LJMC 73.
10. *Kodakan Pillai v. Mudannayake* 54 NLR 433, 438.

11. *Bandaranaike v. Weeraratne* (1981) 1 Sri LR 10.
12. *Hirdaramani v. Ratnavale* 75 NLR 67, 113.
13. *Ashutosh v. State of Delhi* A1R 1953 SC 451.

PRELIMINARY objection to maintenance of fundamental rights application.

T. G. Marapone, P.C. with *D. Weerasuriya* and *N. Ladduwahetty* for petitioner.

Shibly Aziz, P.C. Attorney-General with *A. S. M. Perera, Addl. S.G.* and *Tony Fernando, S.C.* as *amicus curiae.*

Cur. adv. vult.

August 24, 1995.

G. P. S. DE SILVA, C.J. read the following Order of Court.

The petitoners sought relief against the 1st respondent (Commissioner of Excise) and other officials on the ground that by reason of their failure to renew the petitioner's licences for 1995 to sell liquor, his rights under Articles 12(1), 12(2) and 14(1) (g) have been infringed. The petitioner has joined as parties to this application for persons to whom liquor licences have been issued. He alleges that such issue establishes unlawful discrimination. He also applied for an interim order for the renewal of his licences pending the determination of this application, to avoid "irreparable loss" to his business which would otherwise result from the failure to grant the licences sought by him.

On 21.07.95 we granted the petitioner leave to proceed in respect of the alleged infringements of Articles 12(1) and 12(2); the Counsel for the petitioner did not press for relief in respect of Article 14(1) (g). We issued the interim order sought until 28.07.95 and directed that this case and a few similar cases be listed on 28.07.95 for a decision on the question of the interim order. The Attorney-General was requested to assist the Court on that matter.

On 28.07.95 the Attorney-General himself appeared and objected to the extension of the interim order sought in this case and further submitted that leave to proceed should not have been granted in view of certain averments in the petition wherein the petitioner alleges that the respondents had not renewed his licences, at the instigation

of Mrs. Chandrika Bandaranaike Kumaratunga who had not recommended the renewal of licences for his liquor shop situated at Nittambuwa. It was submitted that this application should have been dismissed *in limine*, presumably on the ground that this is a proceeding against the President of the Republic in breach of Article 35 of the Constitution; whereupon, the Bench which heard the matter directed that it be listed before the Bench which gave leave to proceed. Consequently, we heard the Attorney-General and Counsel for the petitioner on the aforesaid objection and reserved our order thereon.

The Attorney-General submitted that we should set aside our order dated 21.07.95, refuse leave to proceed and dismiss this application. On behalf of the petitioner, Mr. Weerasuriya submitted that there is no basis on which the said order may be set aside.

The impugned order is an order of the Supreme Court made under Article 126(2) of the Constitution which requires a petitioner seeking relief thereunder to obtain leave from the Court to proceed with the application "which leave may be granted or refused". It has been held that such decision is final, as far as the case is concerned; and that in general the Court cannot re-hear, review, alter or vary such decision. However, the Court has limited power to clarify its judgment and to correct accidental slips or omissions. The Court also has the power to correct manifest error or an order made *per incuriam*. *Hettiarachchi v. Seneviratne* [1].

A Court also has the power "to open up a judgment given in the absence of one of the parties" (*ex parte* order) *Gargial v. Somasundram Chetty* [2]. But the order which is sought to be varied is not an ex *parte* order in that sense; for neither Article 126(2) nor the Rules of the Supreme Court, confer a right to the respondents to be heard before leave to proceed is granted. It is an order *sui generis*, not having the character of an *ex parte* judgment, which may be reopened in the exercise of the inherent power of the Court or otherwise set aside, as may be provided by statute.

We have to decide (a) whether this application should have been dismissed *in limine*; (b) whether we may set aside the order made on

21.07.95; and (c) if so, what is our power to vary that order? The main submission advanced by the Attorney-General was that the Court has overlooked Article 35(1) of the Constitution which reads:

> *"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 or private capacity".*

Article 35(3) states that the immunity conferred by Article 35(1) shall not apply to any proceedings in Court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under Article 44(2) or to proceedings in the Supreme Court under Article 129(2) (proceedings for impeachment) or Article 130(A) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament. Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

It is to be noted that in terms of the above provisions the President can be personally sued in proceedings for his impeachment or in proceedings for challenging his own election as President or a referendum or the election of a Member of Parliament. It is significant that the provision for personal suit against the President in respect of a referendum or the election of a Member of Parliament was added by the 14th Amendment to the Constitution. Parliament has thereby narrowed down his immunity in areas in which it may become necessary to implead his political conduct in seeking reliefs provided for by the Constitution. Prior to this amendment, an election petition could not be validly filed making the President a respondent. *Kumaratunga v. Jayakody* [3].

The immunity conferred by Article 23(1) of the 1972 Constitution on the President was identical with the immunity conferred by Article 35(1) of the 1978 Constitution. However, the President under that Constitution was a constitutional figure head who was required to act on the advice of the Prime Minister.

Even after the amendment of Article 35, the immunity conferred thereby remains very wide especially when it is compared with the immunity of the President of India under Article 361 of the Indian Constitution. In India, the immunity protects the President against criminal proceedings only whilst civil proceedings in respect of his personal acts can be instituted in a Court, two months next after a notice of such action in writing delivered to him.

During a period of about two months, about 184 applications have been filed before this Court complaining of similar infringements of fundamental rights arising out of the failure of the respondents to renew liquor licences for the year 1995. The petitioners allege that although their applications for fresh licences have been recommended by the Divisional Secretary, the Officer-in-Charge of the Police Station, the area Superintendent of Excise and the Assistant Commissioner of Excise for the district, licences have been issued only to persons recommended by the People's Alliance Member of Parliament of the area or in the absence of a People's Alliance Member of Parliament, to persons recommended by the People's Alliance area organiser. They add that such recommendations are monitored by an Addl. Secretary to the President operating from the Presidential Secretariat (the 9th respondent in this case). He sends down a list of such eligible applicants to the 1st respondent who then issues licences to them.

The generality of the petitioners in the above cases claim to be supporters of the United National Party. But the petitioner in this case claims to have been an active Member of Sri Lanka Freedom Party from 1965. After the reorganisation of the party hierarchy and the formation of the P.A., he desisted from working for the S.L.F.P. and the P.A. He states that this displeased Mrs. Chandrika Bandaranaike Kumaratunga whose recommendation was required for the renewal of his licences. Due to such displeasure, he avers, she did not recommend the renewal sought by him; and that on her instigation, the 1st and 4th respondents refused to renew his licences and thereby subjected him to hostile discrimination.

The Attorney-General argued that the allegation made by the petitioner impinges on the private conduct of the President which in turn would compel the President to file an affidavit (denying the allegation); that in default, the Court may find her culpable; that Article 35 protects the President from such treatment; that the immunity under that Article is very wide; that the Court should not permit the petitioner to make allegations against the President which would be tantamount to doing in an indirect or circuitous manner that which it has prohibited or enjoined; that "a Constitution must not be construed in a narrow or pedantic manner, and that construction most beneficial to the widest possible amplitude of its powers, must be adopted". He cited in support Maxwell 12th Edt. Chapter 6 Bennion "Statutory Interpretation" pages 347-350, 714, 715 and 718-720. Seervali "Constitutional Law of India" 4th Edt. Chapter II.

In the alternative, the Attorney-General relied on *Hettiarachchi's* case (*supra*) as an authority for justifying the review of the order of this Court made on 21.07.95.

Mr. Weerasuriya argued that there is no legal basis for canvassing the order of this Court; that the Attorney-General has sought to give an interpretation to Article 35 which, on a plain reading, only gives a personal immunity against instituting proceedings in a Court; that being so, the question which has been raised is merely one of interpretation; hence there is no order made *per incuriam*. Counsel argued that in any event the petitioner has sought relief against officials and not against the President.

In the case of *Alasupillai v. Yapetipillai* [4] Basnayake, J. (as he then was), following the case of *Huddersfield Police Authority v. Watson* [5] stated "A decision *per incuriam* is one given when a case or a statute has not been brought to the attention of the Court and it has given the decision in ignorance or forgetfulness of the existence of that case or statute". In *Morelle Ltd. v. Wakeling* [6] the Court observed:

> *"As a general rule the only cases in which decisions should be held to have been given per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the Court concerned;*

so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within which can properly be held to have been decided per incuriam must consistently with the stare decisis rule which is an essential feature of our law, be ... of the rarest occurrence" (per Evershed MR)

In *Ganeshananthan v. Goonewardena* [7] (a Bench of seven Judges) this Court held that as a superior Court of record the Supreme Court has inherent powers to correct its errors which are demonstrably and manifestly wrong and where it is necessary in the interests of justice. Decisions made *per incuriam* can be corrected. These powers are adjuncts to existing jurisdiction to remedy injustice – they cannot be made the source of new jurisdictions to revise a judgment rendered by that court.

In the light of the above principles and the language of Article 35, it cannot be said that our order is one made *per incuriam*. We agree with Mr. Weerasuriya that the question which has been raised is merely one of interpretation; hence there is no order *per incuriam*. We are, therefore, left with the question whether there are circumstances which empower the Court to vacate the impugned order in the exercise of its inherent powers as set out above and in the light of the decision in *Hettiarachchi's* case (*supra*).

In *Hettiarachchi's* case, the petitioner complained that by appointing another officer to the post of Bribery Commissioner overlooking his claims to that post, his rights under Article 12(1) were infringed. This Court was constrained to refuse leave to proceed in the first instance by reason of the fact that counsel failed to support the application on relevant grounds, notwithstanding an indication by the Court to do so but persisted in urging a ground which was rejected by the Court. On a motion filed in the same case, the matter was heard by the same Bench which permitted Counsel to make further submissions. The Court decided that its previous order was not *per incuriam*. However, in the exceptional circumstances of the case, the Court granted leave to proceed on a limited ground.

We are of the opinion that *Hettiarachchi's* case has no application to the case before us. That was a case in which the Court granted relief to the petitioner, on further submissions being made, based on the petition, in the exceptional circumstances of the case. Here the application is to vacate an order by which relief was granted. That order was not made *per incuriam* and there are no exceptional circumstances for reversing the order. On this basis, the objection raised by the Attorney-General fails. However, in deference to the submissions addressed to us, we consider it appropriate to express our views on the points raised, as to the nature and scope of the immunity conferred by Article 35.

The Attorney-General relied on the rule of construction against evasion. It has been held that "the office of the Judge is, to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief" – *Magdalen College Case*[8]. In this connection, it is observed that the rule that you cannot do in an indirect or circuitous manner that which the statute has prohibited or enjoined, applies to persons, the Legislature and even a Court.

Thus, a shopkeeper who was licensed only to sell beer for consumption off the premises was held to be in breach of the relevant statute if he sold beer to be drunk on a bench which he provided for his customers close to the shop, the intention making it, virtually, a sale for consumption on the premises *Cross v. Watts* [9]. As regards the Legislature, in *Kodakan Pillai v. Mudannayake* [10] the Privy Council observed:

> *"... there may be circumstances in which legislation so framed so as not to offend directly against a constitutional limitation of the power of the legislature may indirectly achieve the same result, and that in such circumstances the legislation would be ultra vires".*

In *Bandaranaike v. Weeraratne* [11] this Court dismissed *in limine* an application for a writ of certiorari to quash a recommendation for imposition of civic disability made under S. 9 of Law No. 7 of 1978 in

view of the fact that Parliament had already passed a resolution under Article 81 of the Constitution subjecting the petitioner to civic disability; and Article 81(3) provided, *inter alia;*

> "No Court or tribunal shall ... in any manner call in question the validity of such resolution on any ground whatsoever".

At page 16, Samerawickrama, J. said that if the Court were to entertain the application it would be acting in violation of the preclusive clause. He also said:

> *"There is a general rule in the construction of statutes that what a Court or a person is prohibited from doing directly, it may not do indirectly or in a circuitous manner"*

Article 35 of the Constitution provides for the personal immunity of the President during his tenure of office. It bars the institution of proceedings against him in any Court. The reference is to proceedings in which some relief is claimed or liability is alleged, by way of an action or a prosecution. The mode of institution of an action is set out in Chapter VII of the Civil Procedure Code whilst the procedure for institution of a prosecution is set out in S. 136 of the Code of Criminal Procedure Act.

In the instant case, the petitioner has not filed proceedings in a Court seeking relief against the President. The respondents to this application are officials. Relief has been sought against the officials only. The complaint is that the refusal by the 1st and 4th respondents to renew the petitioner's liquor licences was *mala fide,* capricious and due to extraneous considerations to wit, the policy of issuing licences only to persons recommended by a P.A., M.P. or P.A. Organiser for the area. In the context, it is also alleged that Mrs. Chandrika Bandaranaike Kumaratunga who is the political authority whose recommendation is required for issuing licences for the Nittambuwa area is displeased with the petitioner; and it is further alleged that the respondents refused to renew the licences of the petitioner, acting on her instigation. As observed by Samerawickrama, J. in *Hirdaramani v. Ratnavale* [12]. The burden of proving such an allegation is on the

party who makes it and it is a very heavy burden to discharge. The raising of mere suspicion is not sufficient – Vide *Ashutosh v. State of Delhi* [13].

There is, therefore, no warrant for the opinion expressed by the Attorney-General that the President is obliged to "answer the allegation" and that in the instant case, the President has to file an affidavit. We are of the view that there is no such legal obligation. The burden is clearly on the petitioner. The respondents are at liberty to decide what material they will place before this Court, as advised. As such, no question of evasion of Article 35 arises. The petition does not contain any averment referring to the President. As such the reference to the President is but a natural consequence of the fact that the President is also a leader of the ruling political party, a factor which Parliament has already taken cognizance of in amending Article 35.

We are also confident that the interpretation of Article 35 which we have given is supported by the plain meaning of its language. There is no need to give a wider meaning to that Article, especially in the light of Article 4(d) which reads:

> *"The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of the government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided".*

The objection raised by the State is accordingly rejected. The petition is set down for hearing on the merits.

Preliminary objection overruled.