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M. N. D. PERERA

vs

BALAPATABENDI, SECRETARY TO THE PRESIDENT AND OTHERS

SUPREME COURT

WIGNESWARAN, J.

TILAKAWARDENA, J. AND

DISSANAYAKE, J.

S. C. (F.R.) NO. 27/2002

APRIL 28TH AND SEPTEMBER 8, 2004

*Fundamental Rights – Appointment of the Prime Minister – Article 43(3) of the Constitution – Whether the function at the President's House for the taking of the Prime Minister's oaths was a public function – Prohibition of petitioner from attending the function – Articles 12(1), 12(2) and 14(1) (a) of the Constitution.*

The petitioner was the news Editor of the Teleshan Television Net Work (Pvt.) Ltd. (TNL).

After the General Election of 5th December 2001 Mr. Ranil Wickremasinghe was appointed Prime Minister (PM) by the President under Article 43(3) of the Constitution and he was to be sworn in as PM on 9.12.2001.

The petitioner informed the Director of Information (3rd respondent) particulars of his identity (NIC) and others who were due to accompany him to cover the event.

When the petitioner and his party visited the President's House they were body searched along with their equipment by the security division of which the 2nd respondent was the Superintendent of Police and were taken to the President's House ; but the Deputy Inspectors-General of Police of the Presidential Security Division told them that the President had instructed that media personnel from the "TNL", "Ravaya" newspaper and "The Leader" Newspaper should not be allowed in the President's House that afternoon.

In the result the petitioner and his crew were precluded from covering the swearing in of the Prime Minister.

**Held (Dissanayake, J dissenting) :**

1. The President's House is not merely the private living quarters of the President, and for the swearing in of the Prime Minister the occasion was a public function at the President's House to which the media was entitled access.
2. By excluding the petitioner and his crew from attending the said function their rights under Articles 12(1), 12(2) and 14(1)(a) (Equality and freedom of speech and expression including publication) were infringed. Those provisions were not restricted under Articles 15(2), 15(7) or 15(8). Hence the order of the President to exclude them was illegal. Notwithstanding Article 35 which conferred personal immunity on the President, the respondents who complied with such illegal order had to defend their action. This they failed to do.

*Per* Wigneswaran, J.

"Decisions with regard to the personnel to be allowed to enter, the number to be accommodated should have been professionally decided not on the pique and punctilio of the President".

**Cases referred to :**

1. *Bernard Soysa and Others v AG*. (1991) Sri LR 56, 58
2. *Victor Ivan v Silva* (1998) 1 Sri LR 340, 347
3. *Prabha Dutt v Union of India AIR* (1982) SC 6
4. *Visuvalingam and Others vs Liyanage and Others No (1)* (1983) 1 Sri LR 203, 240.
5. *Wijesuriya v The State* 77 NLR 25, 56
6. *Sunila Abeysekera v Ariya Rubasinghe Competent Authority and Others* (2000) 1 Sri LR 314, 361

7. *Azam Khan v State of Andhra Pradesh* (1972) 2 ANDH WR 288
8. *State of Maharashtra v Namdeo Dhanu* (1972) Bom. L. R. 583
9. *Perry Education Association v Perry Local Educators Association* (46) US 37.74L Ed 2d 794.

**APPLICATION** for relief for infringement of fundamental rights.

*Laxman Perera with J. C. Weliamuna and Anuradha Gunawardena* for petitioner.

*Bimba Jayasinghe Tillekeratne*, Deputy Solicitor General with *Rajiv Gunatilleke*, State Counsel for 2nd and 4th respondents.

*Cur. adv. vult*

October 19, 2004

**WIGNESWARAN J.**

The Petitioner was the News Editor of the Teleshan Television Network (Private) Ltd. (TNL).

After the General Election held on 5th December 2001 Mr. Ranil Wickremasinghe was appointed Prime Minister and was scheduled to be sworn in as Prime Minister at the President's House on the 9th of December 2001.

The Petitioner as on previous occasions faxed a letter to the Director of Information (3rd Respondent) giving the names and National Identity Card Numbers of the Petitioner and others who were to accompany him to "cover" the event.

Thereafter the Petitioner and his crew proceeded to the office of the 3rd Respondent. They were searched and identified by the officers of the Presidential Security Division. They then left for the President's House in the company of an officer of the Presidential Security Division.

At the entrance to the President's House, the Petitioner and his crew members were not allowed to enter the President's House by the officers of the President's Security Division who were in charge at the gate. The reason given for such refusal was that the 1st – 3rd Respondents had not given permission for them to enter the President's House.

Such refusal was reported on the same day in the Sinhala and English TNL news-cast. The Petitioner was compelled to borrow a video clipping

from Swarnavahini (another Television Company) and telecast same over the TNL news channel.

Such discrimination had affected the standing, business and income of the company of which the Petitioner was the News Editor. The Petitioner complained of unlawful animosity, hostility and discrimination towards the Petitioner and the Company.

He alleged violation of his fundamental rights. The Supreme Court granted leave to proceed on the alleged infringement of Articles 12(1), 12(2) and 14(1)(a) of the Constitution. Leave was not granted in respect of the alleged infringement relating to Articles 10 and 14(1)(g).

The Petitioner prayed for a declaration that the 1st to 3rd Respondents were not entitled to preclude the Petitioner and other authorized employees of the TNL and their agents from entering the President's House with necessary equipment for the purpose of their legitimate business mentioned above. He also asked for compensation and costs.

Apparently admitting refusal to the Petitioner and his crew, the learned State Counsel appearing for the 2nd and 4th Respondents has submitted as follows –

1. Swearing in of the Prime Minister is not a public function.
2. The President's House is not a public place.
3. The Petitioner was not treated unequally.

His arguments summarized are as follows –

### **1. A public function or not**

In terms of Article 30 of the Constitution the President is the Head of the Executive and the Government and the Commander - in - Chief of the Armed Forces.

In terms of Article 43(3) the Prime Minister is appointed by the President. Entering upon a public office, the Prime Minister must subscribe to the oath/affirmation set out in the Fourth Schedule to the Constitution. Taking or making such oath/affirmation prior to entering upon the duties of such office does not have to be at a public function. The Constitution does not specify unlike in the case of the President (Article 32(1)) or Judges of the

Higher Judiciary (Article 107(4)) as to how a Prime Minister should take or make oath or affirm. The President and the members of the Higher Judiciary are required to take or make oath/affirmation before a certain official. Not so the Prime Minister.

A public function is one which is open to the public to attend. Since the Prime Minister is not stipulated to take or make oath/affirmation before a particular official he could take or make such an oath/affirmation at a non-public function. If he takes or makes oath/affirmation in a place where the public shall have general access, then it would become a public function. But since he need not take or make oath/affirmation before any official publicly the occasion of his oath/affirmation does not become a public function.

The above said argument is connected to the next argument as to whether the President's House is a public place which would be set out presently. What the learned State Counsel says in effect regarding his first submission is that a Prime Minister is not mandated to take or make oath/affirmation before a specific official. But he could take or make oath/affirmation in a public place but such place should be open to the public. Since the Prime Minister in this instance took or made oath/affirmation in the President's House, it being not a public place the swearing in of the Prime Minister was not a public function. Hence the next argument needs to be considered.

## **2. Is the President's House a public place?**

Public have no access to all properties owned by the State. Military bases, official residences are some examples mentioned where public are not allowed free access. Learned State Counsel quotes Justice Mark Fernando in *Bernard Soysa & Others, Vs. AG<sup>(7)</sup>* and says "... what is permissible in a traditional public forum or a semi public forum, is not necessarily permissible in other public places." He submits that the President's House is public property which is not by tradition or designation a forum for public communication. It is the official Residence of the Head of State and the public have no right of access to it without invitation and permission of access. It is in effect not a public place.

If it is not a public place then the Petitioner should have had an invitation to enter the President's House. The learned State Counsel submitted that

the Petitioner had no invitation to enter. There was in fact no obligation on the part of the President to allow access to the Petitioner. Therefore the Petitioner has no right of access to the President's House. If the general public had not right of access to the President's House, the Petitioner nor his media institution could not have had any such right. (vide *Victor Ivan Vs. Silva*<sup>(2)</sup>)

Referring to the Indian Case of *Prabha Dutt Vs. Union of India*<sup>(3)</sup> the learned State Counsel pointed out that in that case the prisoner was willing to be interviewed whereas the President in this instance had not consented to the presence of the Petitioner nor consented to being televised by him.

#### **4. Was the Petitioner treated unequally ?**

As an extension of his argument that the occasion was not a public function and that the President's House was not a public place the learned State Counsel placed the argument that the Petitioner in any event was not treated unequally in terms of the Law, since allowing the Petitioner if at all would have been only a courtesy extended and not an obligation placed on anyone since he had no right of access. An unwanted person cannot force himself into a public property which is not a forum for public communication.

The abovesaid submissions would presently be examined.

The powers and functions of the President of the Democratic Socialist Republic of Sri Lanka are spelt out in Article 33 of the Constitution as follows :

"In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitution, the President shall have the power –

- (a) to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament ;
- (b) to preside at ceremonial sittings of Parliament ;
- (c) to receive and recognize, and to appoint and accredit, Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents ;

- (d) to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the Acts of Appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other Judges of the Supreme Court, such grants and dispositions of lands and immovable property vested in the Republic as he is by law required or empowered to do, and to use the Public Seal for sealing all things whatsoever that shall pass that Seal ;
- (e) to declare war and peace ; and
- (f) to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage he is required or authorized to do."

It is functionally obligatory on the President to "appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament" (Article 43(3)).

In terms of Article 43(2) the President shall be a member of the Cabinet of Ministers and shall be the Head of Cabinet of Ministers. It is because the President is deemed to be the Head of the Government and the Cabinet of Ministers that Article 32(1) refers to the Chief Justice or any other Judge of the Supreme Court as persons before whom the President is to take and subscribe the oath/affirmation set out in the Fourth Schedule to the Constitution. Article 107(4) reciprocates and reverses the roles wherein Judges of the Higher Judiciary take or subscribe to the Oath/Affirmation before the President.

Because the President is constitutionally the Head of the Cabinet of Ministers, the Prime Minister who is *primus inter pares* among the Ministers and such other Ministers have been referred together in Article 53. This does not in any manner detract the importance of the office of the Prime Minister. *Inter alia* Articles 37(1), 44(1), 45(1) and 46(1) confirm the importance of the Prime Minister. In fact where the President and the Prime Minister belong to different political parties the stature and importance of the Prime Minister who leads a party which has defeated the party led by the President, thus showing confidence of the people in a party other than the party of the President, must necessarily be higher than a lieutenant of the President from the same party. Whatever may be the contrary perceptions of a President and his party and his supporters may be, the leader of a different party who has received the majority of votes at a poll

and whom the President per force has to appoint as Prime Minister in terms of Article 43(3) must necessarily attract public adoration and attention. Thus the decision taken by the President in this instance to appoint Mr. Ranil Wickremasinghe to the post of Prime Minister was a constitutionally mandated decision. It is in order to give effect to her decision that the President decided to hold the swearing in ceremony in the President's House, her official residence. In terms of Article 33 she was again mandated to make and execute under the Public Seal the Act of Appointment of the Prime Minister. Therefore what was to take place in her official residence on the 9th of December 2001 was an official function, the venue for which had been decided by the President herself. Having decided that an official function is to take place in an official residence, except for considerations of security specifically raised such as an imminent threat to life, limb or property, was it available for the President to deny that the occasion was a public function? Whether it was a public function or not has to be ascertained from all the circumstances of the occasion rather than weighting it in a water tight compartment. There has been no complaint that the Petitioner or any one in his crew was a security threat. The swearing in of a new Prime Minister after an election was no doubt an occasion for rejoice to majority of the voters in the country. The occasion was no doubt looked forward to be enjoyed by people at large, because the Prime Minister was a people's choice. He was even in the President's opinion the person most likely to command the confidence of Parliament. If the occasion was a private occasion then none of the other televising institutions had any business at the President's House. So long as other televising institutions like Swarnawahini were granted permission to "cover" the event, it is to be concluded that the occasion was a public function but that discrimination had been shown probably due to some form of ill feeling. Even if private security considerations were the cause for such discrimination such decisions cannot be made in the air. They had to be factually verifiable. Otherwise such decisions could be considered capricious.

The 2nd Respondent stated as follows in paragraph 6(C) of his affidavit dated 09.04.2002.

"Like any other person gaining entry to President's House, media personnel must also be invited. The procedure adopted with regard to the media accessing President's House is as follows : A list of names of media personnel who are to cover any event at President's House is forwarded by the Director Information of the Government



Information Department. Thereafter, officers of the Presidential Security Division visit the office of the said Director of Information and check the identity of the said media personnel and also check their equipment and do a body-search. Thereafter, the said personnel are taken to President's House under the escort of the Presidential Security Division so that security is not breached"

The abovenamed procedure was gone through by the Petitioner and his crew according to the petition and affidavit filed by the Petitioner. The contents of paragraph 9 of the petition has been admitted by the 2nd Respondent confirming that the said procedure was followed on that day. Though the 2nd Respondent refers to various logistical shortcomings faced on 09.04.2001, the real reason for debarring the Petitioner and his crew is set out in paragraph 6(f) as follows -

"In the meanwhile, at about 2:15 p.m. that day, the Deputy Inspector General of Police of the Presidential Security Division, Mr. Illangakoon, spoke to me and informed me that Her Excellency the President has instructed that media personnel from "TNL", the "Ravaya" newspaper and "The Leader", newspaper should not be allowed into President's House that afternoon. I produce herewith marked, 2R1, a true copy of an affidavit made by the said Deputy Inspector General of Police, in confirmation of the facts averred above".

There is no reference to any security threat anticipated from the Petitioner's quarters. On the pleadings of the Respondents themselves the source of authority for the disallowance seems to have been the President.

Article 35 of the Constitution provides only for the personal immunity of the President from proceedings in any Court of Law and that too only during his or her tenure of office. The President cannot be summoned to Court to justify his or her action. But nothing prevents a Court of Law from examining the President's acts. Justice Sharvananda (as he then was) said as follows in the case of *Visuvalingam & Others Vs. Liyanage and Others No. (1)* (a) Full Bench consisting of nine Judges <sup>(4)</sup>.

"Actions of the executive are not above the law and can certainly be questioned in a Court of Law ..... Though the President is immune from proceedings in Court a party who invokes the acts of the President

in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law ; the seal of the President by itself will not be sufficient to discharge that burden”.

In this case the 2nd Respondent has relied on the purported directive of the President to justify his action.

Justice Thamotheram in *Wijesuriya Vs. The State* <sup>(5)</sup> stated as follows :

“The law is that a soldier is bound by law to obey the order of his superior so long as what is ordered is not manifestly and obviously illegal”.

A directive from the President cannot be a defence to the 2nd Respondent if it was manifestly and obviously illegal. A leader of a sovereign country is not expected to be parochial nor vindictive nor spiteful what ever the provocations of his subjects might be, real or imaginary. Leaders no doubt are human beings. But they are humans clothed with power and privileges granted by their compatriots out of their love and respect. This power is not to be used to harass such compatriots. The Chapter on Fundamental Rights as well as Article 35 of the Constitution have been enacted to curb such harassment by the Executive which is clothed with tremendous power and privileges. Leaders in authority should not transgress the fundamental rights of their compatriots by becoming subjective in their attitudes and decisions. Complementarily the compatriots themselves should not harass their leaders at least while they are in office. They should be allowed to do a job of work. Nor should minions take cover under the provisions of Article 35 transgressing the law while claiming orders from “above”.

The Articles under which leave to proceed was granted by the Bench of which His Lordship the Chief Justice was Chairman, related to Articles 12(1), 12(2) & 14(1) (a) which read as follows :

12(1) “All persons are equal before the law and are entitled to the equal protection of the law”.

12(2) “No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.

14(1)(a) “Every citizen is entitled to the freedom of speech and expression including publication ;”

Article 14(1) (a) includes "publication". The rights of the media are thus included in this Article. The restrictions placed by the Constitution to the enjoyment of such Fundamental Rights are set out in Article 15(2), (7) and (8) of the Constitution. They are as follows :

- 15:2 The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.
- 15:7 The exercise and operation of all the fundamental rights declared and recognized by Article 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "Law" includes regulations made under the law for the time being relating to public security.
- 15:8 The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interest of the proper discharge of their duties and the maintenance of discipline among them.

Justice Amerasinghe in *Sunila Abeysekera Vs. Ariya Rubasinghe, Competent Authority & Others*<sup>(6)</sup> stated as follows –

"In addition to being "prescribed by law", restrictions on the Constitutional right of freedom of speech, in order to be valid, must have a legitimate aim recognized by the Constitution. No doubt after balancing interests, albeit at a very general, wholesale level, the makers of our Constitution have in Article 15 made a threshold categorization, *inter alia*, of the varieties of speech that are not protected absolutely, but which may be limited by law".

Article 15(7) refers to 'restrictions as may be prescribed by law' and the Supreme Court has interpreted that in addition, restrictions must have a

legitimate aim recognized by the Constitution. Restrictions placed arbitrarily by those in authority for subjective reasons or on account of personal selectivity or idiosyncrasies as in this case, not appreciating the type of journalism or televising style of selected media organizations, cannot be considered as either restrictions "prescribed by law" or restrictions having a "legitimate aim recognized by the Constitution". Freedom of speech and expression entails recognition of diverse views and perceptions. The law in its wisdom does not condone the silencing of opposite views since positions can be reversed and the victim might one day become the vanquisher. It was Voltaire who said that though he would not agree with anything someone said he would yet fight with all at his command to establish that other's right to say so. Rights of the millions in this country should not be compromised at the altar of personal preferences and prejudices of the Executive.

The very reason trotted out by the learned State Counsel to prevent public from attending a function at the President's House is the reason which favours media coverage of such an event. The public and the media are entitled to know the events as they occur at the swearing-in ceremony of their Prime Minister. The journalists cover such events to impart such information through their respective media. Though the President's House is no doubt within the control and direction of the President and the public at large cannot all be accommodated for a public function of such a nature, yet all recognized media personnel after checking on their identities and also after body checks if necessary have been conducted could have been allowed in order to 'cover' the event for publication or telecasting to the people at large. After all the fundamental right of freedom of speech not only protects individuals but also the society at large. Societal functions to preserve free public discussion of Government affairs are also included under Article 14(1)(a). The press and the televising institutions under these circumstances act as agents of the public at large. They disseminate free flow of information and ideas. They function as surrogates for the public in the modern context. Perception of fairness towards the new Government formed by a party different from the party to which the President belonged, would have been possible for the public to gather only if there was openness in dealing with a media identified by the President as adversative. The concept of democracy demanded transparency, openness and fair play. Any reservations against the Petitioner or his employer on the grounds of political opinion should not have come between the President and the People.

As pointed out by the learned counsel for the Petitioner, the President's House is not exclusively a living quarters. It has an area for public meetings and an office complex. The living quarters no doubt should have been restricted for understandable reasons. The arguments of the learned State Counsel that the whole of the President's House should be considered as her living quarters and such restrictions be made to cover the entire building is unacceptable. No question of security nor privacy arose. In fact the Petitioner and his crew had been subjected to body checks and their identities ascertained. They were accompanied by a member of the Presidential Security Division. And in fact other media personnel had been allowed. If considerations of privacy prohibited outsiders, Swarnawahini (from whom the Petitioner obtained clippings later) and other televising institutions should not have been allowed entry. There was no question of the President choosing whom she wanted, to attend the swearing-in ceremony. Having chosen the Prime Minister herself, having chosen the venue for swearing-in herself, having decided on the time of swearing in with her approval, the question of who should attend the function and who should not have, would have been best left to the Presidential Security Division and her Director of Information (2nd Respondent was the Director of the PSD and the 3rd Respondent was the Director of Information). Decisions with regard to the personnel to be allowed to enter, the number to be accommodated, the area where they had to be seated and so on should have been professionally decided not on the pique and punctilio of the President.

Once the occasion has been identified as a public function, restriction to enter could only have been for acceptable reasons such as considerations of security, logistical constraints and similar reasons recognized in Article 15(7). If the President considered the President's House inconvenient for a public function of such a nature as the swearing-in of a newly elected and appointed Prime Minister, nothing prevented her to have had it in some other venue where her security as well as the right of the public to view the event, both, could have been professionally balanced.

The Petitioner and his crew have been singled out for discrimination for extraneous political or personal considerations and that from persons

however highly placed cannot be condoned. In any event the 2nd and 3rd Respondents cannot take cover under directions which are manifestly illegal. Such directions are illegal because the law does not condone vindictiveness and spitefulness in official acts, more so, on the ground of political opinion. If the entire media personnel were restricted for security considerations which were immediate, imminent and real the Petitioner may not have been able to show discrimination against him. But in this instance there was naked discrimination as reflected in the affidavits filed. There were no reasonable nor valid grounds for refusal. I am unable to accept that the swearing-in ceremony of the Prime Minister of this country was not a public function. I am unable to accept, under given circumstances, the President's House cannot be considered a public place. I am unable to accept that the Petitioner in this instance was not treated unequally.

I hold that inasmuch as the Petitioner and his crew were unreasonably and without any valid reasons refused permission to "cover" the swearing-in ceremony of the Prime Minister on 09.04.2001 there has been violation of the Petitioner's entitlement to the freedom of speech and expression including publication (by telecasting) and also a violation of the Petitioner's right to equality before the law and equal protection of the law. I hold and declare that 1st and 2nd and 3rd Respondents individually and/or collectively have violated the Fundamental Rights of the Petitioner enshrined in Articles 12(1), 12(2) and 14(1) (a) of the Constitution.

In my opinion the transgression of the Petitioner's rights would be sufficiently compensated and the ends of justice met if he is awarded Rs. 5000 and accordingly award same. He would also be entitled to costs in a sum of Rs. 2500. This is a liability to be incurred by the State and payable by the State.

### **TILAKAWARDENA, J.**

I agree with the pith and substance of the judgment of my brother judge Justice Wigneswaran. I also wish to add that in all public and official decisions, personal preference has to be subjugated, and must accord with the high standards of just decision making based on the fundamental principles of impartiality, equality and objectivity. To act otherwise would be to act unreasonably, to open the doors to arbitrary, capricious and subjective decision making which must necessarily eventually erode the

fundamentals of a free and democratic society, as well as pave the way for gross injustices, especially in an environment where political parties are polarized.

This just not only applies to the substantive decision itself but equally applies to the process, where the highest and best standards such as reasoned, transparent, clear and intelligible principles and values must apply. By this not only would the recipient of a decision know that justice has been rendered to him or her, but it would be manifest and apparent to him or her to see and understand that the decision is just. These standards would also prevent and bar other persons from even unconsciously perverting, misleading or even indirectly manipulating those in authoritative positions.

#### **N. E. DISSANAYAKE, J.**

I have had the advantage of reading the judgment, in draft of my brother Wigneswaran, J with which I find myself unable to agree.

The Petitioner by way of his petition and affidavit complained to Court that on 9th December 2001 he was refused entry to President's House to report on and cover the swearing in of the Prime Minister, Mr. Ranil Wickremasinghe consequent to the Parliamentary Election held on 5th December 2001. The Petitioner claimed that such refusal of entry to the President's House, constituted a violation of his fundamental rights in terms of Articles 10, 12(1), 12(2), 14(1)(a) and 14(1)(g) of the Constitution. Leave was granted only in respect of the alleged infringement of Articles 12(1) (2) and 14(1) (a).

The 2nd Respondent, the Director, Presidential Security Division, in his affidavit has set out the facts and circumstances with regard to how the Petitioner was not allowed access to President's House. The facts set out in the said affidavit have not been controverted by the Petitioner.

According to the contents of the affidavit of the 2nd Respondent access to President's House is by invitation only.

The Petitioner's petition and affidavit does not speak of any invitation received by him to be present at the swearing in of the Prime Minister on 9th December 2001, at President's House.

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The pith and substance of the position taken up by the Petitioner is that, the swearing in of the Prime Minister was a public function and that it was held in a public area of President's House and therefore as a media personnel he had a right of access to cover the aforesaid occasion.

I shall now examine the question whether the swearing in of the Prime Minister is a public function.

In terms of Article 30 of the Constitution the President of the Republic is the Head of State, Head of the Executive and the Government and Commander in Chief of the Armed Forces.

The President assumes office in terms of Article 32(1) by taking an oath before the Chief Justice. Except in one instance where President Jayawardene took his oaths at a public place i.e., when he took oaths before the then Chief Justice at Galle Face Green, at other times this oath has been taken within the precincts of the President's House.

In terms of Article 43(3) of the Constitution the Prime Minister is appointed by the President and in terms of Article 44(1)(b) of the Constitution, Ministers are appointed by the President. The mode of appointment is not specified save that Article 53 of the Constitution states that a person appointed to any office referred to in Chapter VIII of the Constitution shall not enter upon the duties of that office until he takes and subscribes to the oath/affirmation in the fourth schedule of the Constitution.

Article 107(4) of the Constitution with regard to appointment of the Judges of the Superior Courts is more specific in that it states that any person appointed to be or act as Chief Justice, President, Court of Appeal or a Judge of the Supreme Court or Court of Appeal shall not enter upon the duties of his office until he takes and subscribes to the oath/affirmation in the fourth schedule before the President.

In terms of Article 63 of the Constitution, no member shall sit and vote in Parliament (except to elect the Speaker) until he takes and subscribes to the oath stated therein.

This is so even for members of the public service. In terms of Article 61D (17th Amendment) of the Constitution, a person appointed to any



office in terms of Chapter IX of the Constitution is required to take and subscribe the oath in the fourth schedule.

All the aforesaid persons have to take and subscribe the oath in the fourth schedule. It does not necessarily follow however that taking of the oath in the fourth schedule to the Constitution, prior to entering upon the duties of that office, has to be at a public function.

It is only with regard to the President who is the Head of the Executive {Article 32(1)} and the members of higher Judiciary {Article 107(4)} that there is any mention of the manner in which this oath is taken:

A public function is one which is open to the members of the public to attend, and it is held at a place to which the public have access.

In the case of *Azam Khan Vs State of Andhra Pradesh*<sup>(7)</sup> it was stated that the word "public is ordinarily used with reference to a joint body of citizens. It means that it is shared in or participated in or enjoyed by the people at large. Otherwise it is common to all the people."

"In Stroud's Judicial Dictionary 3rd ed p 19, the meaning of the words public access to a place means a place open to all public in fact, whether by right or permission" {*State of Maharashtra Vs Namdeo Dhannu*<sup>(8)</sup>.)

The above passages are found at page 796 of K. J. Aiyar's *Judicial Dictionary* 13th edition.

In Dr. Sir Hari Singh Gour's work on "Penal Law of India", 11th edition Vol 2, in reference to the charge of affray a public place has been defined at page 1479 as follows :

"4. What is a Public Place ? A public place is a place where the public go no matter they have a right to go or not. If the public resort to a place without let or hindrance, it is a public place, though strictly speaking, they may be trespassing. Whether a place is public or not depends on the right of the public as such to go to the place, though of course a place to which the public can go as of right must be a public place. The place where the public are actually in the habit of going must be deemed to be public for the purpose of the offence of affray, for

instance, places like railway platforms, theatre halls, and open spaces resorted to by the public for purpose of recreation, amusement etc. ....”

It is to be observed that in the case of the President and members of the superior courts, the only requirement is that the persons assuming office must take oath/affirmation before the Chief Justice and the President respectively. There is no doubt that it is of public importance. However whether it takes place at a public function depends on where it is held. If it is held at Galle Face Green or Independence Square or any such other place to which the public have access, which is a public place then the swearing in becomes a public function.

In the case of the Prime Minister, Ministers of the Government and Public Officials there is no stipulation as with the President and members of the higher Judiciary as to before whom the oath shall be taken. Article 53 of the Constitution is silent on this point. It therefore connotes that such an oath could be taken at a non-public function. Once again the place at which the oath is taken, if it is a place to which the public have access as of right, would determine whether it is a public function.

However by the very fact of Article 53 of the Constitution being silent on the point to how the oath should be taken, implies that intrinsically, the swearing in does not take place at a public function.

Is the President's House or a part of it a public place ?

This question assumes importance as the position taken by the Petitioner by way of his written submissions that the aforesaid swearing in, is a public function held in a public area of the President's House which can be accessed by the public, and the counter submissions made on behalf of the 2nd and 4th Respondents to the effect that a ceremony, or event will be a public function only if it is held in a public place to which the members of public have access.

In the US case of *Perry Education Association vs Perry Local Educators Association et al*<sup>9)</sup> it was held in determining First Amendment rights (the right to free speech) that the existence of right of access to public property and the standard by which limitations on such right must be evaluated, differ depending on the character of the property in issue.

It was held in that case that "in places which by long tradition or government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public and .....

A second category consists of public property which the State has opened for use by the public of expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.

We have recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the Government. *United States Postal Services Vs Council of Greenburgh Civic Assns. (Supra)*

The said case of Perry was quoted by Fernando, J at page 58 in *Bernard Soysa and others Vs AG (Supra)* He identifies three categories of public places :

- (i) Traditional public fora.
- (ii) Limited purpose-semi public fora,
- (iii) Public property which is not by tradition or designation a forum for public communication.

At page 58, he stated "It is unnecessary to consider whether such a classification is applicable in Sri Lanka. However, it demonstrates that what is permissible in a traditional public forum, or a semi public forum, is not necessarily permissible in other public places".

Public property and public place do not have the same meaning. Property owned by the State is public property. However it does not mean that the public have access to all property owned by the State. Military bases, official residences, certain government buildings and offices are off limits to the general public or have restricted access. Similarly official residences of the Chief Justice and other judges are public property but not public places and therefore not accessible to the general public.

It has been contended on the written submissions tendered on behalf of the Petitioner that areas of President's House where she holds public

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meetings and the office complex are in the category of public places and no restrictions can be placed on members of public accessing the said areas.

It is to be observed that there is no material before this Court to indicate that the swearing in of the Prime Minister was held at an office complex of the President or in an auditorium. As a matter of fact by paragraphs 6(ii) and 7 of the petition, the petitioner reiterated that the swearing in function was held at the President's House, which was conceded by him to be the official residence of the President

It is to be observed that the President's House is dedicated as a building or property which is the official residence of the Head of State. It may have function rooms and office rooms of the Head of State. However, the character of the building remains unchanged. It admittedly is the official residence of the Head of State. Therefore it would appear that the members of the public would have no right of access to it, without invitation and permission of access, as it is not a public place.

Out of the 3 categories of public places enunciated by Fernando, J in *Bernard Soysa and others Vs AG (Supra)* the President's House falls into the 3rd category, i.e public property which is not by tradition or designation a forum for public communication. It is not in the same category as a street or a park which falls into the first category nor a public institution to which public have restricted access as to time and purpose which is the second category. The third category encompasses places to which the public have no right of access, Military bases, high security prisons, official residences and certain other government or public buildings come within this category.

It is of significance to note that the Petitioner has failed to provide any proof that he possessed an invitation to enter President's House. The 2nd Respondent had denied that the Petitioner had an invitation and this position is accepted by the fact that no counter affidavits or documents have been filed to show that the Petitioner was invited.

The Petitioner has a right to use a public place, such as roads and parks. However in places where access is restricted he does not have a right to extract an invitation.

The Petitioner has failed to establish an obligation on the part of the President who was performing an official function in her official residence, to allow access to the President's House to the Petitioner. The Petitioner's right of access would necessarily correspond to such an obligation on the part of the President.

Therefore it is clear that the Petitioner had no right to be at the President's House on the aforesaid date.

If the general public had no right of access to President's House then the petitioner can claim no more merely because he represents a media institution.

In the case of *Victor Ivan Vs Silva (Supra)* Fernando J said ;

"I don't think that a newspaper enjoys any greater privileges of speech, expression and publication, or immunity from prosecution, than the ordinary citizen. The freedom of the press is not a distinct fundamental right, but is part of the freedom of speech and expression, including publication which Article 14(1)(a) has entrenched for everyone alike."

Let me now consider the question whether the Petitioner was treated unequally by the 2nd and 4th Respondents and thereby violated Article 12(1) of the Constitution.

It is significant to observe that Article 12 has to be referable to a right as distinguished from a privilege or a courtesy which is extended. An invitation to attend a function in a non-public forum/place to which access is restricted or prohibited to the general public is a privilege or courtesy that is extended. Equality or unequal treatment can be claimed for a right but not a for a privilege or courtesy.

As access to the President's House is not available to the general public and access is only on invitation, the Petitioner can have no right to be present thereat. There can therefore be no unequal treatment when there is no corresponding right of the Petitioner. The Petitioner can have no right to a privilege or courtesy or invitation.

I reject the contention of the Petitioner that there was unequal treatment in violation of Article 12(1), discriminatory treatment in violation of Article

12(2) and his freedom of speech and publication guaranteed under Article 14(1)(a) have been violated by the Petitioner not being among the invitees and other persons to whom the courtesy of participation at the aforesaid has been extend.

I dismiss the application of the Petitioner with costs fixed at Rs. 5000/-.

*Relief granted.*

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