VICTOR IVAN AND OTHERS

v.

HON. SARATH N. SILVA AND OTHERS

SUPREME COURT
WADUGODAPITIYA, J.
P.R.P. PERERA, J.
BANDARANAYAKE, J.
GUNASEKERA, J. AND
ISMAIL, J.
SC APPLICATION NO. 898/99 (FR)
SC APPLICATION NO. 1000/99 (FR)
SC APPLICATION NO. 901/99 (FR)
SC APPLICATION NO. 902/99 (FR)
SC APPLICATION NO. 1052/99 (FR)
28TH, 29TH AND 30TH MAY 2001

Fundamental rights - Appointment of Chief Justice - Presidential immunity - Article 35 of the Constitution - Constitutional remedy for removing the Chief Justice - Article 107(2) of the Constitution - Jurisdiction of the Supreme Court - "Executive or administrative action" - Articles 17 and 126 of the Constitution.

The petitioners alleged that by reason of the appointment of the 1st respondent (the former Attorney-General) as the Chief Justice, by the President pending inquiry into a disciplinary inquiry against the 1st respondent *qua* attorney-at-law under section 42 of the Judicature Act their fundamental rights under Articles 12(1) and 17 were infringed. The 2nd petitioner further alleged that by reason of such appointment his rights under Articles 14(1)(a) and 14(1)(g) were also infringed. They prayed for a declaration accordingly and for a further declaration that the said appointment is null and void. The facts show that the said disciplinary proceedings were contemplated on the ground of alleged misconduct, to wit, interference with the proceedings in District Court Colombo Case No. 17082/Divorce and acts or omissions in respect of proceedings against Lenin Ratnayake, Magistrate, Baddegama.

It was urged on behalf of the 1st petitioner that the 1st respondent was the "beneficiary" of the impugned appointment. Hence the appointment could be questioned through the 1st respondent, who was "invoking" the President's act and the burden was on the 1st respondent to establish the lawfulness of the President's act notwithstanding the immunity under Article 35 which was personal to the President.

Held :

(1) The conduct of the 1st respondent in holding office as Chief Justice in consequence of his appointment by the President under Article 170 of the Constitution does not constitute "executive or administrative action" within the ambit of Articles 17 and 126 of the Constitution. The 1st respondent cannot be equated to a party or a person who has invoked the act of the President and who has the burden of establishing that the President's acts are warranted by law, in accordance with the principles set out in the previous decisions of the Court.

(2) Consequently, the petitioners have challenged an act of the President in respect of which they are precluded from instituting proceedings against the President in view of Article 35 of the Constitution which confers immunity on the President against proceedings in respect of such act.

(3) The claims of the petitioners are not in respect of any acts on the part of the President which may be pursued against the Attorney-General under the exception provided in Article 35(3) of the Constitution.

(4) Article 107(2) provides for the procedure of removing a Judge on the ground of "proved misbehaviour or incapacity" this is the only way in which a Judge who is in office could be removed.

Per Wadugodapitiya, J.

"It seems to me that upon a proper construction of paragraphs (2) and (3) of Article 107 and upon the authority of various dicta cited above, that it is quite clear that paragraphs (2) and (3) of Article 107 of the Constitution provide the only way in which the Chief Justice (1st respondent) could be removed from office"

(5) In the circumstances, the court has no jursdiction in proceedings under Article 126 of the Constitution to grant the declaration prayed for by the petitioners.

Cases referred to :

1. *Silva v. Bandaranayake* (1997) 1 SRI LR 92, 95, 99
2. *Mallikarachchi v. Shiva Pasupati, Attorney-General* (1985) 1 SRI LR 74
3. *Karunatilake v. Dayananda Dissanayake, Commissioner of Elections et al (1)* (1999) 1 SRI LR 157

4. *Joseph Perera v. Attorney-General et al* (1992) 1 SRI LR 199

5. *Visuvalingam v. Liyanage* (1983) 1 SRI LR 203

6. *I.M. Raj Bandula v. Lanka General Trading Co. Ltd. et al* (SC Special) 302/98 SCM 16. 10. 2000

7. *SADMP Gunasekera et al v. Inspector General of Police et al* (SC Application) 607/99 (FR) and 608/99 (FR) SCM 12. 01. 2000

8. *Somawathie v. Weerasinghe* (1990) 2 SRI LR 121

9. *Jones v. Wrotham Parks Estates Ltd.* (1980) AC 74

APPLICATION for relief for infringement of fundamental rights (Preliminary objections)

Ranjit Abeysuriya, P.C. with *Suranjith Hewamanne, G. Alagaratnam* and *J.C. Weliamuna* for the petitioner in SC Applications No. 898/99 FR and No. 1000/99 FR.

Rajpal Abeynayake the petitioner in person in SC Application No. 901/99/FR

Elmore Perera with *Mrs. P. Wanigaratne* for the petitioner in SC Application No. 902/99 FR and No. 1052/99 FR

K.C. Kamalasabayson, P.C., Attorney-General with *S. Marsoof, P.C.*, Additional-Solicitor General, *U. Egalahewa*, State Counsel and *N. Pulle*, State Counsel for the 1st and 2nd respondents in each application.

Cur. adv. vult.

June 20, 2001.

WADUGODAPITIYA, J.

All of the above-mentioned applications were listed for the granting of leave to proceed on 28. 5. 2001, 29. 5. 2001 and 30. 5. 2001, and were taken up together.

At the outset, Mr. Ranjit Abeysuriya, P.C., indicated to Court that he wished to withdraw S.C. Application No. 1000/99(F/R) as the subject-matter in that application had

already been decided by the Order of this Court in S.C. Application No. 898/99(F/R), dated 28. 02. 2001. This was allowed, and the application was dismissed *pro forma*. As regards S.C. Application 1052/99(F/R), I find that the subject-matter in that application has also been decided already in the Order of this Court in S.C. Application 902/99(F/R) of 28.2.2001. Also, learned Counsel did not make any submissions in that case. In the circumstances, S.C. Application 1052/99(F/R) is dismissed.

The Attorney-General brought to the notice of Court that S.C. Application 902/99(F/R) had undergone an extensive amendment without permission of Court first had and obtained. However, having considered the matter, we decided to accept the amendment in the interests of justice and fairness, and also, so as not to place the Petitioner, Mr. W.B.A. Jayasekera at a disadvantage. It appears that the original petition dated 15. 10. 99 had been prepared by Mr. Jayasekera in person within the time limit allowed therefor, and at a time he had not been able to obtain the services of Counsel. However, learned Counsel whom the Petitioner was able to retain subsequently, had decided to amend the petition, although as he said, he did so under a genuine belief, (albeit erroneous), that he had obtained permission of Court so to do. In any event, it was observed, and the Attorney-General conceded, that the "cause of action" of the amended petition was not substantially different to the Petitioner's original grievance. For the above reasons, we overruled the objection raised by the Attorney-General, and accepted the amended petition.

The Petitioners in all three applications cited the 1st Respondent, who is the Chief Justice, as the main Respondent, and alleged that their fundamental rights under Articles 12(1) and 17 of the Constitution have been infringed by reason of the appointment of the 1st Respondent as Chief Justice. In addition, the Petitioner in S.C. Application 901/99(F/R), being an Attorney-at-Law, claimed that his fundamental rights under

Articles 14(1)(a) and 14(1)(g) of the Constitution were also violated for the self-same reason. However, it is worthy of note that none of the Petitioners alleged that the 1st Respondent was guilty of any executive or administrative act which violated or was about to violate any of their fundamental rights.

A further declaration was sought in all three applications, that the said appointment was unconstitutional, invalid and null and void.

All three Petitioners mounted a direct challenge to the validity of the appointment of the 1st Respondent as Chief Justice in all three cases, but in view of the provisions of Article 35 of the Constitution, none of them sought to name as Respondent, the person who in fact made such appointment, viz, the President; nor, in view of the self-same Article, did any of them seek to institute proceedings against the Attorney-General for the purpose of representing and defending the President. And so, in all three cases, the Attorney-General appeared only for the 1st Respondent and on his own behalf.

When these applications (viz; S.C. Applications 898/99, 901/99 and 902/99F/R) were taken up for support, the Attorney-General raised three preliminary objections of law to the granting of leave to proceed in respect of all three applications, which objections, he said, were common to and applied to all three applications. As such, they were taken up for consideration together, and I propose making my order in respect of all of them in this order.

The preliminary objections raised by the Attorney-General are as follows:

1. that the appointment of the Chief Justice cannot be questioned in these proceedings;

2. that there are glaring deficiencies in the pleadings that would disentitle the Petitioners from presenting

their cases before this Court. (The Attorney-General said that he would be basing himself on and relying entirely on the material and documents produced by the Petitioners, which are now before Court); and,

3. that, in any event, there has been no violation of the fundamental rights of any of the petitioners.

I propose taking up for consideration, each preliminary objection separately. The first objection of the Attorney-General is as follows:

1. The appointment of the Chief Justice cannot be questioned in these proceedings

This objection must be viewed in the light of the relief sought by the Petitioners in the three cases, viz., a declaration that their fundamental rights under Articles 12(1), 17, 14(1)(a) and 14(1)(g) of the Constitution have been infringed by reason of the **appointment of the 1st Respondent as Chief Justice,** and a further declaration that **the said appointment** was unconstitutional, invalid and null and void. There was no allegation, however, by any of the Petitioners, that the 1st Respondent himself was guilty of any executive or administrative act which violated or was about to violate any of their fundamental rights.

It is clear then, that the central issue is the **appointment** of the 1st Respondent as Chief Justice. This issue must I feel, be considered in its three aspects, viz.,

(i) **the appointment** of the 1st Respondent as Chief Justice by the President under Article 107(1) of the Constitution,

(ii) **the immunity** of the President under Article 35(1) of the Constitution, and

(iii) **the irremovability** of the 1st Respondent from the post of Chief Justice **except** by impeachment under Articles 107(2) and 107(3) of the Constitution.

I shall now deal with these aspects one by one:

(i) The appointment of the 1st Respondent as Chief Justice by the President under Article 107(1) of the Constitution:

Article 107 of the Constitution occurs in Chapter XV thereof entitled, "The Judiciary", under the sub-heading, "Independence of the Judiciary". The marginal heading to Article 107 says, "**Appointment** and removal **of Judges of the Supreme Court** and Court of Appeal."

Article 107(1) states as follows:

> "The Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand."

As the Attorney-General pointed out, it is the Constitution that has created both the Supreme Court and the Court of Appeal, and being conscious of its own creation, the Constitution itself has also laid down in clear terms, the manner in which the Judges of such Courts could be appointed and removed.

The manner of appointment of the 1st Respondent as Chief Justice is thus laid down in clear and unambiguous terms in Article 107(1), a plain reading of which does not call for the observance of any guidelines, or the need for any type of co-operation between the President and anyone else. As my brother Fernando J, said in *Silva v. Bandaranayake*[1] (which case dealt with the appointment of a Judge of the Supreme Court, and not with the appointment of a Chief Justice),

"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," and added, that the President in exercising the power conferred by Article 107 had a "sole discretion" in making such appointments. This notwithstanding, he said, "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," for, "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." He added, "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."

This was the only qualification which Fernando J, felt may be desirable to qualify the power of the President when appointing a Judge of the Supreme Court, and it must be noted that the question of the desirability for co-operation between the President and the Chief Justice arose in that context.

I must point out here however, that Mr. Abeysuriya was mistaken when he strenuously urged that the **Bandaranayake case** held, and was authority for the proposition that, "the President, though he had the power to appoint, **must first consult the Chief Justice**." He appears to have made this the foundation for his argument that the President's power of appointment was a qualified one, and that it could be questioned in these proceedings. It however, had to be pointed out to Mr. Abeysuriya that the word "**must**" was never used by Justice Fernando anywhere in his judgment, and that, on the contrary, what was suggested in that judgment was that such co-operation was only desirable.

As was suggested, such co-operation would generally be in the form of a recommendation by the Chief Justice to the President. Inasmuch as the question was not in issue, no pronouncement was made, nor any suggestion preferred, as to what form such co-operation might assume in a case where the appointment was that of the Chief Justice himself.

It is worthy of note that unlike in the case of the Indian and Pakistani Constitutions, our Article 107(1) does not contain any guidelines qualifying or restricting or circumscribing the acts of appointment thereunder, and in this context, it is of no small significance to discover that, taking our Constitution as a whole, out of the numerous instances where the President is given the power of appointment, the majority of such instances are devoid of any guidelines or restrictions of any sort. Thus, whereas Articles 41(1), 44(1), 45(1), 46(1) and 113(1) contain specific provisions, expressly provided, requiring the President to make the appointment in consultation with or upon the recommendation of the stated bodies or persons, Articles 44(3), 45(2), 51, 52(1), 54, 56(1), 65(1), 103(1), 107(1), 109(1), 109(2), 111(2), 112(1), 153(1), 154B(2) and 156(2) do not impose any such qualification or restriction upon the power of appointment of the President. Thus one finds that, in the same enactment, (the Constitution), whereas just five Articles expressly impose some sort of restraint, as many as sixteen Articles (including Article 107(1) under discussion) specifically refrain from imposing any guidelines or from imposing any restraint or restriction (by way of co-operation or consultation or otherwise) on the power of appointment of the President. This surely must receive its natural, logical and only interpretation, viz., that plain words and plain language must be given their plain meaning and that these provisions of the Constitution must be construed accordingly. The fact that some appointments require consultation and co-operation and others do not, must surely indicate just such an intention, which intention must necessarily be attributed to the makers of the Constitution.

We certainly cannot read into Article 107(1) guidelines which the Petitioners think ought to be there, but are not.

It is in this context, that the opinion expressed by Fernando J. in *Silva v. Bandaranayake(supra)* must be viewed, for if one may extract the true import of that case, it clearly is that, in the particular context of an appointment to the office of Judge of the Supreme Court, it was desirable as Fernando J. said, that there be co-operation between the President and the Chief Justice before such appointment is made, since "considerations of comity" require such co-operation "in order to fulfil the object of Article 107."

What is of vital importance here is to note that Justice Fernando does not in any way seek to say or even suggest that such co-operation and consultation was either a legal or a constitutional requirement; neither does he say that such co-operation was in any way mandatory.

In this connection, the question that naturally arises in the cases before us is, what is the nature of the co-operation and/or consultation, if any, which is desirable when the appointment is that of the Chief Justice himself? No answer was suggested by anyone during the hearing into the instant applications.

It is thus seen that in appointing the 1st Respondent to the post of Chief Justice, the President has acted wholly *intra vires* and within the bounds of the power vested in her by Article 107(1) of the Constitution, and that such appointment is therefore both lawful and constitutionally valid.

For the above reasons, I would agree with the Attorney-General that the appointment of the 1st Respondent as Chief Justice by the President is both lawful and valid, and can in no way be held to be unconstitutional. At the same time, such appointment is in no way violative, either directly or indirectly, of any of the provisions of the Constitution.

Moving on to the next point in sequence, I would deal with the second aspect mentioned above, viz.,

(ii) The immunity of the President under Article 35(1) of the Constitution:

Article 35 occurs in Chapter VII of the Constitution, entitled,

"The Executive," and under the sub-heading, "The President of the Republic." The marginal heading to Article 35 says, **"Immunity of President from suit."**

Article 35(1):

"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."

(This Article is similar to Article 23(1) of the now repealed 1972 Constitution).

Article 35(2):

"Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law."

Article 35(3):

"The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any 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 paragraph (2) of Article 44 or to proceedings in the Supreme Court under

paragraph (2) of Article 129 or to proceedings in the Supreme Court under 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."

The Attorney-General's contention is that by virtue of Article 35 of the Constitution, the President enjoys absolute immunity from suit in any Court of Law, in respect of her act in appointing the 1st Respondent as Chief Justice under Article 107(1), which act she performed while she was holding the office of President. This immunity is clearly and unambiguously spelled out in Article 35(1), and both Articles 35(2) and 35(3) confirm the fact of absolute immunity granted under Article 35(1).

He added that the appointment itself by the President of the 1st Respondent as Chief Justice under Article 107(1) as discussed above, attracted to it the immunity provisions of Article 35(1) and therefore the appointment cannot be quashed in these proceedings.

In considering this aspect of the matter, I find the following cases revealing.

Of these, one of the most significant is the case of *Mallikarachchi v. Shiva Pasupathy. Attorney-General*[2] in which Sharvananda, C.J. went to great lengths to set out and explain the concept of Presidential immunity. I therefore think it useful to quote from his judgment *in extenso*.

In *Mallikarachchi's case*, the President's orders proscribing the Janatha Vimukthi Peramuna (JVP) under the provisions of the Emergency Regulations under the Public Security Ordinance were challenged.

Sharvananda C.J., having cited Articles 35(1), 35(2) and 35(3) of the Constitution, said at page 77,

"Article 35(1) confers on the President during his tenure of office, an absolute immunity in legal proceedings in regard to his official acts or omissions, and also in respect of his acts or omissions in his private capacity. The object of the Article is to protect from harassment the person holding the high office of the Executive Head of the State in regard to his acts or omissions either in his official or private capacity during his tenure of the office of President.

Such a provision as Article 35(1) is not something unique to the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978. There was a similar provision in Article 23(1) of the Constitution of Sri Lanka of 1972. The corresponding provision in the Indian Constitution is Article 361. The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office, and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law.

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

Article 38 of our Constitution has made provision for the removal of the President. . . It will thus be seen that the President is not above the law. He is a person elected by the People and holds office for a term of six years. The process of election ensures in the holder of the office, correct conduct and full sense of responsibility for

discharging properly the functions entrusted to him. It is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. If such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected, but the smooth and efficient working of the Government of which he is the head will be impeded. That is the rationale for the immunity cover afforded for the President's actions, both official and private.

The immunity afforded by Article 35(1) is personal to the President. . . Thus though the President is personally immune from legal proceedings in a court in respect of anything done or omitted to be done by him in his official or private capacity, his acts or omissions in relation to the category of matters referred to in Article 35(3) can be questioned in a court in proceedings instituted against the Attorney-General."

Wanasundera J, in the same case, agreed with Sharvananda C.J., that the President enjoyed immunity from being sued.

I might only add that the President, even though she holds high office, is, nevertheless by virtue of Article 42 of the Constitution, responsible to Parliament for the due exercise, performance and discharge of her constitutional powers, duties and functions.

In *Silva v. Bandaranayake*[1] at 99, my brother P.R.P. Perera J. (in a minority judgment of three Judges, which considered another aspect of that case, and which was not in conflict with the majority judgment of four Judges delivered by my brother Fernando J.) having cited *Mallikarachchi's case(supra)* stated,

"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. . . It is only the President who could furnish details relating to the said appointment. . . Such a 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*."

In *Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al*[3] the facts, which are of some importance, were as follows. After the period of office of five Provincial Councils came to an end in June 1998, the Commissioner of Elections (1st Respondent) took the necessary steps to fix 28. 8. 98 as the date of the poll. The issue of postal ballot papers was fixed for 4. 8. 98, but by telegram dated 3. 8. 98 the returning officers suspended the postal voting. No reason was given. The very next day, on 4. 8. 98, the President issued a Proclamation under Section 2 of the Public Security Ordinance and promulgated an Emergency Regulation which had the effect of cancelling the date of the poll, (viz., 28. 8. 98). Thereafter the 1st Respondent (Commissioner of Elections) took no steps to fix a fresh date for the poll and as a result, there was a failure to hold elections for the said Provincial Councils. The Petitioners alleged violation of Articles 12(1) and 14(1)(a) of the Constitution, by reason of the indefinite postponement of the said elections.

Fernando J. (with G.P.S. de Silva, C.J. and Gunasekera J. agreeing) said referring to Article 35 of the Constitution,

"What is prohibited is the institution (or continuation) of proceedings **against the President**. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any

other law. . . I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings **against** the President **while** in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. . . Immunity is a shield for the doer, not for the act. . . **It (Article 35) does not exclude judicial review** of the lawfulness or propriety of an impugned act or omission, **in appropriate proceedings against some other person who does not enjoy immunity from suit;** as, for instance, a defendant or **respondent who relies on an act done by the President, in order to justify his own conduct** . . . It is the Respondents who rely on the Proclamation and Regulation, **and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35** on the institution of proceedings against the President." (Emphasis mine).

Fernando J., while declining to rule on the validity or otherwise of the Proclamation issued by the President, did rule however, that the emergency regulation made thereunder was invalid. He held that, inasmuch as emergency regulations are delegated legislation which must be in the form of a **rule** and inasmuch as the impugned regulation had the character of an **order**, it was not an emergency regulation at all. There was no legal provision authorizing the making of an **order**.

This case confirms the proposition that the President's acts cannot be challenged in a Court of law in proceedings against the President. However, where some other official performs an executive or administrative act violative of any person's fundamental rights, and in order to justify his own conduct, relies on an act done by the President, then, such act of such officer, together with its parent act are reviewable in appropriate judicial proceedings.

In *Joseph Perera v. Attorney-General et al*[4] Sharvananda C.J. said as much with regard to Emergency Regulation

No. 28 promulgated by the President, which conferred an unguided, "naked and arbitrary power on the Police" to grant or refuse permission to distribute pamphlets or posters as it pleased. This Regulation was used arbitrarily by the police to the detriment of the Petitioner, and such acts of the police were violative of the Petitioner's fundamental right to equality. Court found that Regulation 28 was "constitutionally overbroad" and violative of Article 12 of the Constitution. As such, court held that, "that Regulation is invalid and cannot form the basis of an offence in law"; the "offence" being the act of the police who relied on it to justify their own arbitrary acts.

Thus it seems to be quite clear, that the two cases cited immediately above are agreed that, although the President's immunity remains inviolable, her acts under certain circumstances, may not.

Justice Fernando takes the matter beyond doubt when he clearly states that for such a challenge to succeed, there must be some other officer who has himself performed some executive or administrative act which is violative of someone's fundamental rights, and that, in order to justify his own conduct in the doing of such impugned act, the officer in question falls back and relies on the act of the President. It is only in such circumstances that the parent act of the President may be subjected to judicial review.

A comment I wish to make in this connection, is that these rulings regarding the subjection to judicial review of the acts of the President, in circumstances where the President cannot only, not be made a party, but cannot also be defended by the Attorney-General, raises a serious question regarding the applicability or otherwise of the principle, **audi alteram partem**, which principle of natural justice even a President is surely entitled to. After all, she is the only person who really knows why she appointed the 1st Respondent as Chief Justice.

Mr. Abeysuriya, P.C. strenuously argued, citing *Karunathilaka's case*, that what that case really meant was that any **"beneficiary"** of the President's act can be called upon to answer. He submitted that in the instant case, the 1st Respondent (Chief Justice) was the "beneficiary" of the President's act appointing him Chief Justice, for the reason that the 1st Respondent claimed the benefit of and was relying on the said act of appointment to stay in office. He submitted that therefore, inasmuch as the 1st Respondent being the "beneficiary" of the act of the President did not enjoy immunity, the President's act appointing the 1st Respondent as Chief Justice was reviewable and could be questioned in these proceedings through the person of the 1st Respondent. This was, of course, despite the fact that there was no allegation by any of the Petitioners that the 1st Respondent had performed any executive or administrative act violative of their fundamental rights. Needless to say, this interpretation is clearly not in accord with the decision in *Karunathilaka's case*, and I cannot agree with his view.

Mr. Abeysuriya also submitted, basing himself on what Sharvananda J. said in *Visuvalingam v. Liyanage*[5], that it was the 1st Respondent who was **"invoking"** the act of appointment of the President to stay in office, and as such, he (the 1st Respondent) will have to bear the burden of demonstrating that such act of the President is warranted in law.

I am unable to agree with Mr. Abeysuriya here either. The 1st Respondent has not "invoked" the President's act of appointment to rely on or justify anything. Unlike in the cases cited above, no allegation is made against the 1st Respondent that he has performed any executive or administrative act violative of anyone's fundamental rights. The only act challenged, is the President's own act in appointing the 1st Respondent as Chief Justice. Therefore, Mr. Abeysuriya's argument fails, inasmuch as his interpretation is not in accord with the decision he has cited.

Thus it is seen, that the three cases which Mr. Abeysuriya relied on to show that the act of the President in appointing the 1st Respondent to the post of Chief Justice can be questioned in Court, (viz. *Karunathilake's case, Joseph Perera's case* and *Visuvalingam's case*) have no application, (on the point in question), to the facts of the three applications before us.

I am constrained to say that, in fact, what the Petitioners are asking this court to do, is in effect to amend, by judicial action, Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This, of course, it is not within the power of this Court to do. In the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned.

I therefore agree with the contention of the Attorney-General, and am myself of the view that upon a consideration of the three applications before us, the President does in fact enjoy immunity under Article 35(1), in respect of her act of appointing the 1st Respondent as Chief Justice.

In any event, it seems that Article 35 will be rendered meaningless and indeed nugatory, if any individual were to be deemed to be able to question the act of appointment as has been prayed for by the Petitioners.

For the reasons given above, I am unable to agree with the submissions of any of the learned Counsel who appeared for the Petitioners, who were all of the view that the act of the President as aforesaid was reviewable in these proceedings, under Article 126 of the Constitution.

I would next like to consider the 3rd aspect mentioned above, viz.,

(iii) The irremovability of the 1st Respondent from the post of Chief Justice, except by impeachment under Articles 107(2) and 107(3) of the Constitution:

Article 107 of the Constitution occurs in Chapter XV thereof, entitled, "The Judiciary", under the sub-heading, "Independence of the Judiciary". The marginal heading to Article 107 says, "Appointment and **removal of Judges of the Supreme Court** and Court of Appeal."

Article 107(2) states as follows:

> "Every such Judge shall hold office during good behaviour, and **shall not be removed except by an** order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:
>
> Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity."

Article 107(3) states as follows:

> "Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative." (Emphasis mine)

The important case on the question of removal of Judges of the Supreme Court and Court of Appeal is that of *Visuvalingam v. Liyanage(supra)* in which the consequences of the failure of the Judges of the Superior Courts to take the oath of office before the President came up for consideration. This requirement was contained in the Sixth Amendment to the Constitution; the printed copy of which reached the Judges late. They were thus unable to take the oath before the President within the time prescribed therein, but had already taken the oath within time, before each other; all of them being *ex officio* Justices of the Peace. It transpired that the Bill which had been examined for its constitutionality on 3. 8. 83 by a Full Bench of the Supreme Court did not contain this requirement, which had been introduced by Parliament during the later Committee Stage, and was thus unknown to the Judges. Thus the failure to take the oath before the President was not deliberate, but due to the circumstance set out above. The Sixth Amendment stipulated that the oath had to be taken before the President within a calendar month of its coming into force, but since the Judges were unable to do so, they sought an appointment with the President for that purpose. This however did not take place as the Attorney-General had advised the President that the Judges were already late by two days, and had therefore ceased to hold office! The President thereupon re-appointed the Judges by fresh letters of appointment dated 15. 9. 83, as they were considered to have ceased to hold office by operation of law.

The main question which arose for decision was whether the failure of the Judges to take their oath of office before the President resulted in their ceasing to hold office as Judges on the expiry of the stipulated date. Seven Judges out of a Full Bench of nine held that they did not.

Dealing with this question, Sharvananda J. (as he then was) said (at page 236):

"So solicitous were **the framers of the Constitution** to make the position of the Judges independent and entrenched, that they invested them with **the status of irremovability save on the limited grounds and manner specifically set out in its provisions.** The Judges of the Supreme Court and Court of Appeal, unlike public officers of whatever rank, do not hold office at pleasure. . . The vital need of security of tenure can scarcely be over-emphasised. It is signicant that Article 107 appears under the caption, 'Independence of the Judiciary' . . . **He (a Judge) is not removable by the Executive; the only way he can be removed is by an order of the President in terms of Article 107(2).** . . The framers of the Constitution had considered it to be in the interest of the public and not merely of the individual Judges that their security of tenure should be sacrosanct and sanctioned by the Constitution. . . **A Judge of the Supreme Court or Court of Appeal can cease to hold office only in terms of the provisions of the Constitution,** and not by operation of any rule of estoppel. . . In view of the conclusion that the Judges had **not vacated** their office by reason of their omission to take the prescribed oath before the President. . . Article 107 ordains that their original letters of appointment continue to be valid and binding **and that the Judges may continue to hold office until they are removed under Article 107(2),** or reach the age of retirement."

Wanasundera J. (also agreeing with the majority) said at page 248,

"This (Article 107(2)) is the only provision in the Constitution dealing with the removal of a Judge who is already holding office. . . Article 107(2). . . is a special and specific provision." (Emphasis mine).

Justice Wanasundera agreed with learned Queen's Counsel's submission that **a Judge would not automatically**

vacate his office or be removed therefrom by a mere failure to take the oath of office, but that a wilful or contumacious refusal to take the oath could amount to misconduct or misbehaviour, and may, in appropriate circumstances, provide a ground for disciplinary action against such Judge.

Even Ranasinghe J. (as he then was) who was one of the two dissenting Judges, said (at page 290), agreeing in this respect with the majority of seven Judges,

> "Article 107 of the Constitution is a provision which guarantees the independence of the Judiciary by assuring security of tenure, and lays down that a Judge is removable only 'on the ground of proved misbehaviour or incapacity', and that too only by following the procedure so laid down. **This Article, therefore, provides for the 'removal' of a Judge. This is the only way in which a Judge, who is in office, could be removed.** Upon being so removed, the Judge would cease to hold office."

The Attorney-General submitted, in this connection that paragraphs (2) and (3) of Article 107 constituted the only path available for the removal of the Chief Justice, and that any process for his removal other than under paragraphs (2) and (3) of Article 107 would be invalid. He emphasized the words, "shall not be removed except by" occuring in Article 107(2).

On the important question of jurisdiction, he submitted that inasmuch as the jurisdiction of the Supreme Court was spelt out in Article 118 onwards, and inasmuch as the only method of removal of the Chief Justice was through the specific process under paragraphs (2) and (3) of Article 107, and the procedures thereunder, the jurisdiction of the Supreme Court to deal in any manner with the **removal of the Chief Justice** (as opposed to its jurisdiction to review the appointment in appropriate proceedings as adverted to by Fernando J, in *Silva v. Bandaranayake*[1] has been completely taken away by the Constitution itself. He was of the view therefore that it would

be unconstitutional to grant the declaration sought by the Petitioners. Indeed, no member of the public could, under the Constitution, move a Court to have a member of the Judiciary removed in the manner the Petitioners are praying for. This applied even to the minor Judiciary, where the power of removal was with the Judicial Service Commission.

These submissions are possessed of much substance, and I would agree with the learned Attorney-General.

It seems to me, upon a proper construction of paragraphs (2) and (3) of Article 107 and upon the authority of the various dicta cited above, that it is quite clear that paragraphs (2) and (3) of Article 107 of the Constitution provide the only way in which the Chief Justice (1st Respondent) could be removed from office. I would therefore say that the framers of the Constitution, in their endeavour to make the position of the Judges independent and assure their security of tenure, "invested them with the status of irremovability save on the limited grounds and manner specifically set out in its provisions," viz., paragraphs (2) and (3) of Article 107 of the Constitution.

I am also of the view that, that being the case, this Court in proceedings under Article 126 of the Constitution is powerless, and indeed has no jurisdiction to grant the declaration prayed for by the Petitioners.

For the reasons set out above, I would uphold the first preliminary objection raised by the Attorney-General that the appointment of the Chief Justice cannot be questioned in these proceedings.

I shall now deal with the second preliminary objection raised by the Attorney-General, viz.,

2. There are glaring deficiencies in the pleadings which would disentitle the Petitioners from presenting their cases before this Court:

The Attorney-General said that he would be basing himself entirely on the documents produced by the Petitioners.

A. **In regard to S.C. Application 902/99(F/R),** according to the Petitioner, he filed case No. 16799/D on 15. 12. 93 in the District Court of Colombo, praying for a divorce from his wife, and citing the 1st Respondent as co-respondent, which plaint was rejected by Mr. Upali Abeyratne, District Judge on 16. 2. 94. Thereafter, the Petitioner says he filed a second divorce case No. 17082/ D on 10. 6. 94 in which the name of the 1st Respondent as co-respondent was expunged also by Mr. Upali Abeyratne, District Judge on 7. 7. 94, after which, there had been an application for *alimony pendente lite*, in which order was made on 15. 9. 94 directing the Petitioner to pay Rs. 10,000/- per month. Thereafter, on 23. 9. 94 the Petitioner made a complaint against Mr. Upali Abeyratne, District Judge, to the Judicial Service Commission, which in turn referred the matter to the Attorney-General for action. The Petitioner states that on 28. 9. 94 the case was heard *ex parte*, and his wife was granted a divorce on the ground of constructive malicious desertion and he was ordered to pay a sum of Rs. 1 million as permanent alimony to her. The Petitioner says he tendered notice of appeal but this was rejected. He thereafter filed a revision application in the Court of Appeal and when his Court of Appeal application and his revision application to the Court of Appeal were pending, a writ was issued to seize and auction his property to recover the said Rs. 1 million. The Petitioner states that he had no option but to enter into a settlement by withdrawing his application in the Court of Appeal in return for the waiver of the Rs. 1 million. I shall refer to this settlement dated 29. 5. 96 presently, to show in what different circumstances this settlement was entered into by the Petitioner.

The contention of learned Counsel for the Petitioner was that, while the Petitioner's divorce case was pending, Mr. Upali Abeyratne, the then Additional District Judge of Colombo, was in contact with the 1st Respondent and that he acted on the instructions of, and was influenced by the 1st Respondent, at a time when the latter was a Judge of the Court of Appeal. In support of this contention, the Petitioner produced marked P15, an affidavit from Mrs. Hemalatha Tillekeratne, wife of High Court Judge, Mahanama Tillekeratne dated 11. 7. 99.

Before going further, I shall set down here, an English translation of the said affidavit marked P15, which runs as follows:

"1. I am the affirmant.

2. In or around April 1994, I along with my husband and two children came into occupation of Flat No. 278B, Sarana Road, Bauddhaloka Mawatha, Colombo.

3. Some houses situated around that house were used as official residences of Judges.

4. The house opposite to our residence was occupied by Upali Abeyratne and his family, who was a District Judge of Colombo.

5. Our residence did not have telephone facilities and was a privately owned premises.

6. For the purpose of receiving telephone messages from Chilaw given by my husband who was a High Court Judge of the North Western Province, as well as other messages, **we had given the telephone number 697053 which belonged to Upali Abeyratne.**

7. **Whenever there was a message for us, someone from our residence used to visit their house.**

8. **Either in June or July 1995 or close to that period, around 5.00 p.m. I received a message and visited that house.**

9. After the telephone conversation, Mrs. Abeyratne introduced to me, a person who was seated in the sitting room.

10. She introduced him as Mr. Sarath Silva, a Judge of the Court of Appeal. I was introduced as the wife of Judge Tillekeratne. At that moment, I noticed Judge Upali Abeyratne seated on an easy chair.

11. When I was introduced to him, he commended my husband, Mahanama Tillekeratne as an eminent Judge of this country.

12. At that time Mr. Abeyratne was reading some papers.

13. I did not speak with this stranger. Except for what is stated above, he too did not speak to me personally.

14. I returned to my residence. Even whilst returning home I noticed that the person who was introduced to me as Sarath Silva was remaining in their residence."

Signed by Affirmant

The Attorney-General attacked P15 as a false affidavit made specially for the purpose of this case and said that it is this false affidavit which forms the basis of the Petitioner's entire case before this Court.

Firstly, the Attorney-General produced the relevant extract of the telephone directory for the year 1995 which

showed quite clearly that the telephone Number 697053 referred to in the affidavit, belonged not to Mr. Upali Abeyratne at Sarana Road, Bauddhaloka Mawatha, as averred in the affidavit P15, but to a Mr. Romesh de Silva, who lived at No. 79/14, Dr. C.W.W. Kannangara Mawatha, Colombo 7 and who still has the same telephone. This then is clearly a completely false averment made by Mrs. Hemalatha Tillekeratne in paragraph 6 of her affidavit, P15.

Secondly, and more importantly, the Attorney-General showed conclusively, that contrary to what Mrs. Tillekeratne has averred in paragraph 8 onwards in her affidavit, P15, she could never have met the 1st Respondent at the residence of Upali Abeyratne at Sarana Road, Bauddhaloka Mawatha in or around June or July, 1995. The Attorney-General was able to prove by reference to letter dated 18. 10. 99 sent to the Registrar, Supreme Court by Upali Abeyratne, that in the middle of January, 1995 the said Upali Abeyratne had vacated the official bungalow at 380/66, Sarana Road, Bauddhaloka Mawatha, Colombo 7 and had since then, resided in Kurunegala, to which station he was transferred on 1. 1. 95. In mid-January 1995, Mrs. Rohini Walgama, the new District Judge, Colombo, came into residence, on being given vacant possession of the said bungalow.

The Attorney-General also produced another letter dated 14. 10. 99, sent by the Secretary, J.S.C to the Registrar, S.C. officially confirming the above position.

Both these letters have been extracted from the disciplinary inquiry file relating to the 1st Respondent and replies addressed to the Registrar, S.C. sent on the directions of this Court.

For the sake of fullness I reproduce both letters below:-

Your No. P76/99
18th October 1999

Mr. M.A. Cyril,
The Registrar of the Supreme Court,
Superior Courts Complex,
Hultsdorp,
Colombo 12.

Dear Sir,

COMPLAINT AGAINST MR. SARATH N SILVA
PRESIDENT'S COUNSEL

I refer to your letter bearing No. P 76/99 dated October 8, 1999.

This is to inform you that I was residing in the official bungalow No. 380/66, Sarana Road, Bauddhaloka Mawatha, Colombo 7, **only up to mid January 1995** as Additional District Judge of Colombo. Since then I was not in occupation of any bungalow or premises at Sarana Road, Bauddhaloka Mawatha, Colombo 7.

From the 1st of January 1995 I was transferred to Kurunegala as the District Judge and since then I was not entitled to occupy the said bungalow at Sarana Road as I was provided with an official bungalow at Kurunegala.

Upon my transfer to Kurunegala the official bungalow at Sarana Road, **was allocated to Mrs. Rohini Walgama the then Additional District Judge of Colombo to whom, vacant possession of the said bungalow was handed over by me in the month of January 1995.**

I was not in occupation of the said bungalow or of any other bungalow at Sarana Road, Bauddhaloka Mawatha,

Colombo 7, in the months of June and July 1995, and my residence from mid January 1995 upto date has been at No. 66/2B Thalawathugoda Road, Pitakotte.

Relevant documents and letters relating to my transfer from Colombo to Kurunegala as well as to the handing over possession of the said bungalow are available at the office of the Judicial Service Commission.

Yours faithfully,

Sgd.
A.H.M.U. Abeyratne,
District Judge,
Gampaha"

(Emphasis mine)

OFFICE OF THE JUDICIAL SERVICE COMMISSION

P.O.Box 573,
Colombo 12, October 14, 1999

My No. JB/10/16/94

Registrar,
Supreme Court,
Colombo 12.

COMPLAINT AGAINST MR. SARATH N SILVA, PRESIDENT'S COUNSEL

With reference to your letter dated 08. 10. 99 on the above subject.

Mr. A.H.M.U. Abeyratne, D.J. Gampaha has not been residing in a government bungalow situated at Sarana Road, Bauddhaloka Mawatha, Colombo 7, during the months of June and July, 1995.

The bungalow occupied by Mr. Abeyratne has been taken over by Mrs. P.R. Walgama as from 22. 01. 1995.

Sgd. Secretary
Judicial Service Commission."

The affidavit P15 affirmed to by Mrs. Hemalatha Tillekeratne is therefore false.

The importance to the Petitioner of the affidavit P15 is that it is the only item of evidence which links the 1st Respondent to the District Judge, Upali Abeyratne. Without P15, the Petitioner has no material whatsoever, to show any connection between the 1st Respondent and Upali Abeyratne. Without the affidavit, P15, the Petitioner can only make speculative allegations connecting the 1st Respondent with Upali Abeyratne, based entirely upon the respective positions they hold.

However, the real importance of P15 to the Petitioner is that it was vital for the purposes of the complaint marked P14 which the Petitioner made to the then Chief Justice on 14. 8. 99 under Section 42 of the Judicature Act, which was about a month before the 1st Respondent was appointed Chief Justice on 16. 9. 99 seeking the disenrolment of the 1st Respondent. The Petitioner seeks to support the averments in this complaint with the affidavit, P15, and it is this complaint which in turn forms the basis of the Petitioner's present fundamental rights application, which is now before us. Thus it is seen, that the false affidavit, P15, formed the foundation for Petitioner's complaint (P14) to the then Chief Justice, and the complaint, P14, in turn formed the basis for the Petitioner's present fundamental rights application before us.

Thus, I am in agreement with the Attorney-General that being a crucial document, once the affidavit P15 is proved to be false, the foundation of the Petitioner's case is necessarily

removed. No reliance whatsoever can thereafter be placed on whatever flows therefrom.

The next matter I wish to touch on is that the Attorney-General pointed out that the Petitioner, in his amended petition states that he had no other option but to agree to settle the matter by withdrawing his applications pending in the Court of Appeal. The Attorney-General quite correctly pointed out that this settlement was arrived at, not before Mr. Upali Abeyratne, who had gone on transfer to Kurunegala, but before Mr. M. Paranagama, the new District Judge, Colombo, against whom the Petitioner makes no complaint. Mr. Paranagama has made a careful record of the settlement proceedings in Court which shows the exemplary care and concern shown by him as a District Judge. This document is self-explanatory, and once again, for the sake of fullness, I wish to quote a translation thereof in full. The document runs as follows:

"(Before Mr. M. Paranagama, Additional District Judge)

Recorded by: M.K. Alwis
District Court, Colombo
Case No. 17082/Divorce

29. 05. 1996

Plaintiff present
Mr. Ranjith Karunaratne, Attorney-at-Law
appears for the Plaintiff

1st Defendant Petitioner absent.
Mr. Ikram Mohamed appears for her with
Mr. A.M. Faiz and instructed by
Mrs. Anoma Gunatillake

I inquired from both parties matters relating to the facts of this case.

Counsel on behalf of the 1st Defendant Petitioner states that he moves for writ of execution against the Plaintiff. Counsel for the Plaintiff moves that on the basis of the objections filed by the Plaintiff that the writ of execution prayed for by the 1st Defendant Petitioner be not ordered to be granted on the basis of the objections tendered by the Plaintiff. Counsel on behalf of the Plaintiff further moves that the present inquiry be adjourned as the inquiry into the revision application made in respect of the earlier orders in this case is scheduled to be taken up in the Court of Appeal on 03. 06. 1996. It is submitted on behalf of the 1st Defendant Petitioner that the present inquiry should be proceeded with and an order be made, as no stay order has been granted in the revision application.

Court explains matters to the Plaintiff by drawing the attention that even though a revision application has been filed in the Court of Appeal in respect of the earlier orders made by this Court as no stay order has been given the court is bound to take the matter up for inquiry today. The court further explains to the Plaintiff that after the conclusion of the inquiry, an order has to be made on the application of the 1st Defendant Petitioner.

Plaintiff states to court as follows:

He states that he would be content if he is given a hearing and justice is meted out to him. **At this stage I further explain the position to the Plaintiff as it is found in the case record. The court further draws the attention to the fact that subsequent to the decree nisi being made absolute against him the appeal has not been preferred in the proper manner. The court further points out to the Plaintiff that as he has not acted properly in prosecuting the appeal, he is bound to face certain difficulties in this case. The court also draws the attention of the Plaintiff to the fact that he has to face the present situation as a result of his not taking the appropriate steps at the given time though he has chosen to challenge the orders of this court.**

I informed the plaintiff that the order has to be made after holding an inquiry into the application of the first Defendant Petitioner as there is no stay order granted in the revision application. The court inquires from the Plaintiff as to the nature of the loss he has suffered in view of the circumstances he had to face in this case. Court also inquired from the Plaintiff the nature of the relief that he seeks at this stage. **Plaintiff in reply stated that all what he requires is an opportunity of being heard and justice meted out. At this stage the court allowed the Plaintiff to state all what he wished to submit to court.** He states that it was difficult for him to prosecute this case and the court did not give him a fair hearing.

The court further explained to the Plaintiff the nature of the order that could be made at the conclusion of the inquiry into the application of the first Defendant Petitioner. Further as there is no stay order granted in his revision application the court explained to the Plaintiff the difficulty of adjourning the present inquiry.

I further explained to the Plaintiff the relevant factual position that has arisen in this case, the present position of the case and the consequences of the failure on the part of the Plaintiff to take certain steps at the appropriate time.

Accordingly the court decided to take up this matter after case No. 15653/L fixed for trial for the day is heard to consider whether the Plaintiff is willing to come to a settlement with regard to the first Defendant Petitioner's application and the revision application of the Plaintiff and to put an end to all his problems. This case is kept down until such time all other trials are adjourned for the day in order to give an opportunity to the Plaintiff to consult his counsel and to arrive at a decision as to whether he is agreeable to come to terms and whether 1st Defendant Petitioner should withdraw her application.

At this stage the Plaintiff states that as the court has advised him to arrive at a settlement in order to put in all his problems to an end that he is willing to withdraw his revision application. However, as the Plaintiff has stated that he is willing to withdraw his revision application as the court has advised to do so I am of the opinion that the Plaintiff has not voluntarily agreed to withdraw the revision application. Court further explains to the Plaintiff that in the event of his agreeing to withdraw the revision application what is expected of him is an unconditional withdrawal. **It was further explained to him that merely because the court had advised him he should not withdraw all his cases, but he should do so voluntarily and in his own welfare.** I inform the first Defendant Petitioner and the Plaintiff to disclose their minds to the court once the trial in the other case is over.

After the conclusion of the trial in case No. 15653/L, **this case was again mentioned to consider a settlement. At this stage Plaintiff agrees to withdraw the revision application bearing number 902/94 and the application for leave to appeal bearing number 231/94, if the 1st Defendant Petitioner abandons her claim sought in her petition. The Plaintiff states that he voluntarily withdraws his application for his own benefit, as pointed out by court. Plaintiff undertakes to withdraw the two applications before the Court of Appeal on the date fixed for bearing such date being 03. 06. 1996.**

Replying on this undertaking the 1st Defendant Petitioner agrees to withdraw the prayers claiming permanent alimony and costs of action ordered and decreed against the Plaintiff as per decree entered in this case. The 1st Defendant Petitioner further undertakes to refrain from taking steps to claim damages or cost of action either in this case itself or some other action.

The terms of settlement having been duly explained to the Plaintiff, he places his signature on the case record

having understood the contents thereof. Accordingly the application of the 1st Defendant Petitioner claiming permanent alimony and cost of action as per decree entered against the Plaintiff, stands dismissed with no costs. Accordingly it is declared that the 1st Defendant Petitioner has no right to claim permanent alimony and cost of action against the Plaintiff on the decree nisi which is made absolute. In the circumstances the part of the decree nisi entered to the effect that the Plaintiff and the 1st Defendant be separated from bed and board forever on the ground of constructive malicious desertion is made absolute.

Sgd.
M.P. Paranagama
Add. DJ, Colombo, 29. 05. 1996"

(Emphasis mine)

It is seen that Mr. Paranagama, the District Judge, had taken great pains and great care to give the Petitioner a full hearing and to ensure that the settlement was a completely voluntary one resulting in a final end to the litigation between the parties. As agreed at the settlement, the Petitioner on his part withdrew both his cases which were before the Court of Appeal. This was done as agreed, on 3. 6. 96 when both cases came up for hearing before the Court of Appeal.

Thus, it appears that on 3. 6. 96 all litigation between the Petitioner and his former wife was at an end.

Thus it is seen that the Petitioner has based his complaint (P14) to the former Chief Justice against the 1st Respondent under Section 42 of the Judicature Act mainly on Mrs. Hemalatha Tillekeratne's affidavit, (P15) which has now been proved to be false. However, he forwarded the said complaint (P14) to the former Chief Justice on 14. 8. 99 about a month before the 1st Respondent was appointed Chief Justice on 16. 9. 99. Thereafter, on 15. 10. 99 he filed the present

fundamental rights application claiming that his fundamental rights have been violated by reason of the fact that the President has appointed the 1st Respondent as Chief Justice, when this complaint to the Supreme Court (P14) was pending. The juxtaposition of the dates is startling, when one considers that the Petitioner waited for over three years after his cases were finally settled, to complain to the former Chief Justice against the 1st Respondent; which complaint (P14) he lodged with the Supreme Court about a month before the 1st Respondent was appointed Chief Justice.

I do not wish to re-iterate the facts. Suffice it to say, that taking all the facts into consideration, I agree with the Attorney-General that the deficiencies in the pleadings are indeed glaring, and are such as to render this application baseless.

B. In regard to S.C. Application 898/99(F/R), the Attorney-General submitted, and Mr. Abeysuriya, P.C. agreed, that it was document P6 (dated 9. 9. 98), which formed the basis for the complaint P7 (dated 12. 8. 99) made by the Petitioner to the Supreme Court under Section 42 of the Judicature Act against the 1st Respondent (when he was Attorney-General), seeking the disenrolment of the 1st Respondent, and that, in turn, it is the complaint P7 which forms the basis of the present fundamental rights application before us. The central factor is the allegation revolving around, Lenin Ratnayake, Magistrate, Baddegama, as published in the "Ravaya" newspaper of which the Petitioner is the Chief Editor.

The Petitioner's grievance is that the Supreme Court has not yet completed investigations into his complaint P7, and says that until such investigation is completed, the 1st Respondent should not be appointed Chief Justice. He goes on to say that since, however, the 1st Respondent was in fact appointed Chief Justice before completion of the investigation, his fundamental rights under Article 12(1) of the Constitution have been violated.

A copy of P6 has been filed by the Petitioner who in reply to the Attorney-General's query as to how he came to be in possession of an official document marked "Confidential", made known to Court for the first time during the hearing before us, through his Counsel, Mr. Abeysuriya, P.C, that P6 had been personally handed over to him by its recepient, the former Minister of Justice and Constitutional Affairs, and that that was how he came to be in possession of P6.

The letter P6 which is marked "Confidential", is dated 9. 9. 98, and was addressed by the 1st Respondent (who was then Attorney-General) to the then Minister of Justice and Constitutional Affairs in reply to a communication from the latter, in regard to the Lenin Ratnayake case.

The Attorney-General's submission was that, inasmuch as P6 was a confidential communication between the Attorney-General who is the Legal Advisor to the Government and the Minister of Justice, which communication he said, would have been sent as a matter of courtesy, in reply to the Minister's query as to what the present position was in the Lenin Ratnayake incident, such document (P6), cannot be utilized by the Petitioner who is a third party, as the basis for a complaint (P7) under section 42 to the Supreme Court against the 1st Respondent. He stressed that the entire complaint (P7), was based on the confidential letter, P6, and strongly urged that since the Petitioner was a third party and also, since the letter P6 relates to a complaint against yet another person (viz., Lenin Ratnayake), the Petitioner had no right, and no *locus standi* either, to use P6 in the manner he did. On the contrary, it was the Minister of Justice, if at all, who, being the legitimate recepient of P6, could have taken action thereon if he so desired. It is worthy to note that the confidential document, P6, does not touch the Petitioner himself in any way. His only concern, if any, seems to be as a member of the public.

Going further, the Attorney-General submitted that, the complaint to the Supreme Court (P7) which is based on P6, cannot in turn, form the basis of the present fundamental rights application before us which alleges violations of the Petitioner's fundamental rights under Article 12(1) of the Constitution. In this connection Mr. Abeysuriya, P.C., agreed that the fundamental rights application was based directly on P6.

The Attorney-General strenuously contended that in the circumstances set out above, the Petitioner being a third party, cannot claim a violation of a fundamental right arising from the letter P6, and added that the Petitioner had no standing to do so either.

This apart, the Attorney-General pointed out that, in any event, in the letter P6 the 1st Respondent, as Attorney-General., did in fact set out the correct factual position with regard to the Lenin Ratnayake issue, and even learned Counsel for the Petitioners conceded that this position was correct, and had no complaint to make thereon. In any event, no consequences could flow from P6, and contrary to what the Petitioner alleges in paragraph 11 of P7, the letter P6 neither distorted the facts, nor did it have the effect of misleading the Minister of Justice to whom it was addressed. It was never alleged that P6 contained material that could be said to be false.

It was suggested that there was plenty of evidence against Lenin Ratnayake in respect of the alleged act of rape, but that the then Attorney-General (1st Respondent in the present application) failed to take action as he was said to be a relative of Lenin Ratnayake. However, it transpired that no complaint whatsoever had been made to the Police or to any other investigative authority by the victim of the alleged rape. In fact, the very first complaint was made to the Criminal Investigation Department (CID) about two years later when the CID was investigating into a completely different charge,

viz., a charge of criminal defamation against the Ravaya newspaper, on a complaint made by Lenin Ratnayake.

Further, Mr. Abeysuriya, P.C., alleged that no action was taken by the Judicial Service Commission (JSC) in regard to the Petitioner's complaint. This is factually incorrect. As it transpired, the J.S.C. appointed three Judges of the Court of Appeal to inquire into the complaint of the Petitioner and the report was sent to the Attorney-General to consider whether charges were to be framed against Lenin Ratnayake. Thereafter Lenin Ratnayake was interdicted from service and remains interdicted. Most importantly, there is an inquiry now proceeding against Lenin Ratnayake on certain disciplinary charges.

I must not fail to mention that the Petitioner himself relies on and incorporates as part and parcel of his own application, the complaint made to the former Chief Justice under section 42 of the Judicature Act, by the Petitioner in the other application before us, viz., S.C. Application 902/99(F/R) which latter, as already shown, was based upon a false affidavit. The Petitioner has attached a copy of such false affidavit to his own application, marked P8, thus irrevocably tainting his own application.

I have considered this matter with care, and I am inclined to agree with the Attorney-General's submissions.

Even though, as he claims, the Petitioner was given the confidential letter P6 by the former Minister of Justice and Constitutional Affairs, it is clear that it was given for the Petitioner's information and certainly not for the purpose for which the Petitioner later put it. There is no doubt that had the former Minister of Justice even suspected that the confidential letter P6 was going to be misused, I have no doubt that he would never have parted with it. I am therefore of the view that the confidential communication between the Legal

Adviser to the Government (the 1st Respondent), and the Government was entitled to the sanctity it deserved, and I feel that not only could the Petitioner not have used it to make a complaint to the Supreme Court against its maker (1st Respondent) but could not have used it to ultimately found a claim for a violation of a fundamental right under Article 12(1) of the Constitution, which the Petitioner says arose from it. Being a third, party he had no status to utilize, in the way he did, the confidential document P6 which related to yet another person, viz., Lenin Ratnayake.

In the result I agree with the Attorney-General, and find this application baseless.

C. **In regard to S.C. Application 901/99(F/R),** the Petitioner therein himself chose to rely on the two complaints aforesaid which had been made to the Supreme Court under Section 42 of the Judicature Act by the Petitioners in S.C. Applications 898/99 and 902/99(F/R), referred to above.

I have to observe that, inasmuch as the Petitioner in S.C. Application 901/99(F/R) himself relies on and bases his own application on the two complaints aforesaid, which as shown above are tainted with falsity, the same blemish would necessarily apply to S.C. Application 901/99(F/R), as well. In the circumstances, I would agree with the Attorney-General, and find that this application too is baseless.

For the reasons set out above, in respect of each of the three applications before us, I would uphold the second preliminary objection raised by the Attorney-General.

I now propose dealing with the third preliminary objection raised by the Attorney-General., viz.,

3. **In any event, there has been no violation of the fundamental rights of any of the Petitioners.**

The three petitioners in the three applications before us allege that their fundamental rights guaranteed by Articles 12(1) and 17 of the Constitution have been infringed.

In addition, the Petitioner in S.C. Application 901/99 (F/R) alleges that his fundamental rights under Articles 14(1)(a) and 14(1)(g) have been infringed. All of them allege that these fundamental rights have been infringed by executive or administrative action, viz., the appointment of the 1st Respondent as Chief Justice by the President on 16. 9. 99.

Although the Chief Justice has been named 1st Respondent in all three applications, not one of the Petitioners alleges the 1st Respondent himself has been guilty of any executive or administrative act which violated or was about to violate any of their fundamental rights.

Clearly, therefore, there is no complaint of any infringement of the fundamental rights of any of the Petitioners, by any executive or administrative act performed by the 1st Respondent. Thus, simply put, according to all three petitioners, **the only violation** is the act of appointment itself, and **the only violator** is the President.

That being the case, in terms of Rule 44(1) of the Supreme Court Rules of 1990, the Petitioners must set out what the nature of the violation is, and how and in what manner the violation they complain of, took place. The burden, clearly, is on the Petitioners to establish a *prima facie* case, for the purpose of obtaining leave to proceed. Have they discharged this burden? Upon a consideration of all the material presented by the Petitioners, I think they have not.

It is seen that the Petitioners in both S.C. Applications 898/99(F/R) and 902/99(F/R) lodged complaints under Section 42 of the Judicature Act with the former Chief Justice, against the 1st Respondent when he was Attorney-General praying that he be disenrolled. Their grievance is that while

such complaints were pending, the 1st Respondent was appointed Chief Justice by the President. The Petitioners allege that such act of the President was improper and arbitrary and that such arbitrary appointment violated their fundamental rights as aforesaid. I must add, that the Petitioner in S.C. Application 901/99(F/R) also bases himself on the self-same section 42 complaints aforementioned, and harbours the same grievance.

The first question that arises is whether it is open to the Petitioners to lodge complaints with the (then) Chief Justice against the 1st Respondent under Section 42 of the Judicature Act just about a month prior to the date he was appointed Chief Justice, and thereafter claim a violation of their fundamental rights after the President in fact made the appointment, on the ground that the said appointments were made when the complaints were pending.

In this connection it is necessary to mention that the Petitioner in S.C. Application 898/99(F/R) filed his complaint against the 1st Respondent with the (then) Chief Justice on 12. 8. 99 and that the Petitioner in S.C. Application 902/99(F/R) filed his complaint against the 1st Respondent on 14. 8. 99. The President appointed the 1st Respondent as Chief Justice on 16. 9. 99, on the retirement of the former Chief Justice.

It also transpires that the "grievance" of the Petitioner in S.C. Application 898/99(F/R) arose, when he claimed, during the hearing before us, that the former Minister of Justice and Constitutional Affairs personally handed over to him, the confidential letter he had received from the 1st Respondent (when he was Attorney-General), in reply to the inquiry made by him regarding the allegations of misconduct against Mr. Lenin Ratnayake, Magistrate, Baddegama. This letter, (produced marked P6) was dated 9. 9. 98, and was presumably handed over to the said Petitioner shortly thereafter. This vital letter (P6) was the one upon which both the complaint dated

12. 8. 99 against the 1st Respondent to the (then) Chief Justice, and the Fundamental Rights Application No. 898/99 dated 14. 10. 99 were based. What is noteworthy is the fact that although this Petitioner received the letter (P6) either on 9. 9. 98 or presumably, shortly thereafter, (no date of actual receipt was mentioned), he chose to wait for a period of eleven months till 12. 8. 99 to complain to the (then) Chief Justice against the 1st Respondent; this too, in the context where the appointment of the 1st Respondent as Chief Justice took place a month later, on 16. 9. 99.

It is also seen that the "grievance" of the Petitioner in S.C. Application 902/99(F/R) arose after he withdrew his Court of Appeal cases on 3. 6. 96 after entering into a settlement in the District Court on 29. 5. 96, and if he was in fact aggrieved, he could have complained against the 1st Respondent to the (then) Chief Justice anytime thereafter. He however chose to wait over three years till 14. 8. 99 to lodge his complaint with the (then) Chief Justice; this too, in the context where the appointment of the 1st Respondent took place a month later, on 16. 9. 99.

It is also noteworthy that the two Petitioners referred to above filed their complaints in the Supreme-Court under section 42 of the Judicature Act within just three days of each other; one on 12. 8. 99 and the other on 14. 8. 99, and both would allege that by virtue of the fact that these two complaints were filed against the 1st Respondent and were thus pending, the President was precluded from appointing the 1st Respondent as Chief Justice.

The juxtaposition of the dates would show among other things, that it was simply impossible to have these two complaints inquired into and concluded within the short space of time left before the date of appointment of the Chief Justice. Nevertheless, the Petitioners claim a violation of their fundamental rights alleging that the President acted arbitrarily

by appointing the 1st Respondent as Chief Justice while the two complaints above mentioned were pending before the Supreme Court.

Before going further, I might say that, as far as the law on the matter is concerned, the mere fact that there is a disciplinary proceeding pending against him, would not constitute a bar to the promotion of an officer or to his receiving a higher appointment, provided he is otherwise qualified. However, if such officer is subsequently found guilty, he can be dealt with appropriately, depending on the gravity of the charges against him. This of course is, based on the presumption of innocence and on the fact that such officer has not been found guilty as yet.

This view is set out in *I.M. Raj Bandula v. Lanka General Trading Co. Ltd. et al*[6] in which Fernando J. held, that the fact that there was a disciplinary inquiry pending against the officer in question for alleged misappropriation of Rs. 300,000/-, was no bar to his being promoted to the post of Assistant Accountant, as he had not been found guilty, but that, if found guilty he would be dealt with.

Even fundamental rights violators have been held not to be debarred from promotion.

Thus, in *SADMP Gunasekera et al v. Inspector-General of Police et al*[7] where promotions to posts of Assistant Superintendents of Police were in issue, it was found that, the 14th and 19th Respondents had been ordered to pay Rs. 2500/- each as compensation for infringements of Article 11 of the Constitution in two separate Fundamental Rights Applications filed against them earlier.

My brother, Gunasekera J., having said that the court orders against the 14th and 19th Respondents aforesaid could not be equated to convictions by Courts of Law, held that the

said 14th and 19th Respondents were not disqualified from being promoted to the posts of Assistant Superintendents of Police.

Thus, it seems clear and I hold accordingly, that, the two disciplinary proceedings pending against the 1st Respondent in the Supreme Court, certainly did not constitute a bar to his being appointed Chief Justice by the President on 16. 9. 99. To hold otherwise would, I think, open the door to great mischief, for it would be the easiest thing for an interested party to forward a petition complaining against some officer, and thus simply and effectively put a stop to his appointment, promotion or extension of service, or even to his scholarship or trip abroad!

In any event, I must say that once complaints under section 42 of the Judicature Act are made to the Chief Justice, they are in the sole charge of the Supreme Court and the inquiries relating to them, together with all incidental matters, are strictly confidential. Therefore, once the Supreme Court is seized of the matter, neither the complainant nor anyone else has access to information as regards its progress.

As I have stated above, in terms of Rule 44(1) of the Supreme Court Rules of 1990, the burden is on the Petitioners to set out what the violation is and how and in what manner the alleged violation of their fundamental rights took place. What indeed the Petitioners say is, that the President acted arbitrarily in appointing 1st Respondent as Chief Justice. But, merely making such an allegation is not sufficient. The petitioner must show upon what evidence and upon what material they make this serious allegation against the President. However, we see that the most the Petitioners are able to say is that the President was aware that there were two complaints pending in the Supreme Court against the 1st Respondent at a time when he was Attorney-General, and that despite being thus aware, the President went ahead and appointed him Chief Justice.

In the absence of anything else, this seems to be mere speculation, for there is neither evidence nor any other material to show that the President was in fact aware as is alleged by the Petitioners.

In any event, as I have set out above, inasmuch as, all proceedings in respect of such complaints are conducted in the strictest confidence, the Petitioners have not succeeded in showing how the President could have come by this information.

In any event, there is no material before us to show that the President was informed of the existence of the two complaints either, and so, in the absence of material to show that the President did in fact know of it, there is no alternative but to presume that she did not.

In the result, in the absence of any other material, the only circumstance we are left with is that the President appointed the 1st Respondent as Chief Justice, being unaware of the two complaints that were pending against him. In these circumstances it does not seem possible to conclude that the President had acted arbitrarily.

In Silva v. Bandaranayake(supra) the allegation was that the fundamental rights of the Petitioners were infringed by reason of the appointment of the 1st Respondent as a Judge of the Supreme Court by the President, and as Fernando J. said,

> "The question then is whether the Petitioners have established, *prima facie*, that there was no co-operation between the President and the Chief Justice. . . . While all four Petitioners make these allegations (that there was no such co-operation), 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." Fernando J. also said, "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." Fernando J. went on to say, that, "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."

Thus it appears, that in that case what Justice Fernando found was that there was no prospect whatsoever, that such evidence will be forthcoming, and therefore, leave to proceed was refused.

In the instant applications, the situation is no different, and the position is that the Petitioners have not only failed to establish, *prima facie*, that the President was aware of the two pending complaints against the 1st Respondent, under section 42 of the Judicature Act, "but have also failed to indicate how they propose to supply that deficiency."

They do not "claim personal knowledge of the facts", nor do they purport to suggest the "source or grounds for their belief." Thus, there is no way of ascertaining whether the President knew of the two complaints or not.

The resulting position is that there is no material before this Court to enable it to proceed any further with these applications.

The Petitioners have therefore failed to present any material to show that the President acted arbitrarily in appointing the 1st Respondent as Chief Justice. In these circumstances, it would indeed be futile to proceed any further.

The Attorney-General stated that the third objection raised by him flowed into **another ground, viz., that the Petitioner**

had no *locus standi*. The questions he posed were, what is the *locus standi* the Petitioners have, to have and maintain these applications? How are the Petitioners affected by the appointment of the 1st Respondent as Chief Justice?

The Attorney-General cited the case of *Somawathie v. Weerasinghe*[8] which was one where the Petitioner complained of the infringement of the fundamental rights under Articles 11 and 13 of the Constitution. However, the complaint was not based on the violation of the Petitioner's own rights, but those of her husband.

Amerasinghe J. held (Kulatunga J. dissenting) that, "Construed in this way, Article 126(2) (of the Constitution) confers a recognized position **only upon the person whose fundamental rights are alleged to have been violated,** and upon an Attorney-at-Law acting on behalf of such a person. No other person has a right to apply to the Supreme Court for relief or redress in respect of the alleged infringement of fundamental rights. The Petitioner is neither the person whose fundamental rights are alleged to have been infringed nor the Attorney-at-Law of such person. **Therefore the Petitioner has no *locus standi* to make this application."**

In the concluding paragraph of his judgment, Amerasinghe J. said,

> "Article 126(2) of the Constitution, construed according to the ordinary, grammatical, natural and plain meaning of its language, gives a right of complaint **to the person affected** or to his Attorney-at-Law, **and to no other person**. That was the intention of the makers of the Constitution as expressed in that Article. If it is believed to be inadequate and works injustice, the appeal must be to Parliament and not to this Court."

It must be pointed out that the significant words in Article 126(2) are -

"Where a person alleges that any such fundamental right or language right **relating to such person** has been infringed or is about to be infringed by executive or administrative action. . ." (Emphasis mine).

An assessment of the situation clearly suggests that only "the person affected" by the executive or administrative action is entitled to complain under Article 126(2) of the Constitution.

Thus the important questions that need to be asked in this context are, how are the three Petitioners affected by the appointment of the 1st Respondent as Chief Justice by the President, and what standing do the Petitioners have to bring these applications?

The Attorney-General submitted that in fundamental rights applications, only those directly affected are the ones in respect of whom an exclusive jurisdiction is exercised by the Supreme Court, and added that in such applications, the interest has been narrowed down by Article 126(2) of the Constitution, which in fact makes it personal.

It appears that none of the Petitioners has *locus standi* for the reason that none of them is affected by the act of the President as contemplated by Article 126(2) of the Constitution, and therefore none of them is entitled to complain in these proceedings.

Then again, none of the Petitioners had stated that he had any interest in the appointment of the 1st Respondent as Chief Justice, other than as a member of the public. A comparison was made with the Indian concept of public interest litigation, but it appeared that unlike our Article 126(2), the terms of Article 32 of the Indian Constitution, allows any public spirited individual or association to file fundamental rights applications. In *Somawathie v. Weerasinghe*[8] Kulatunga J, said that having regard to the express provisions of Article 126(2) of our Constitution, our courts cannot entertain complaints having the character of public interest petitions.

It seems, however that even in such litigation, the Petitioners had to show some direct interest in the relevant project or issue. In any event, this Court was not dealing with any such public interest litigation.

While the position of the Petitioners was that their interest lay in the general concept of an impartial judiciary, the Petitioner in S. C. Application 901/99(F/R) said that being an Attorney-at Law, in addition to an infirngement of his rights under Article 12(1), his fundamental right to freedom of speech and expression (Article 14(1)(a)) and to his freedom to practice his profession (Article 14(1)(g)) had also been infringed by the appointment of the 1st Respondent as Chief Justice, because of the allegations of moral turpitude against the Chief Justice. He however did not say how and in what manner this would infringe his right to freedom of speech; nor did he say how and in what manner this would infringe his right to practise his profession in any court anywhere in the island. He indeed forgot that he was in fact appearing before us in person, and making his submissions quite freely and untrammeled by any restrictions, real or fanciful. This Petitioner made no allegation whatsoever that anyone at all had prevented him from practising his profession, or hampered his practice in any way. He did not claim either, to have been a contender for the office to which the 1st Respondent was appointed. Thus it seems that he has neither been deprived of his right to free speech nor his right to practise his profession, and therefore he is not entitled to any relief either under Article 14(1)(a) or under Article 14(1)(g). It might be relevant to mention at this point that, in his petition, this Petitioner says that he is a senior journalist, and that he currently functions as the Deputy Editor of the Sunday Times newspaper.

All three Petitioners claim a violation of Article 12(1) of the Constitution, but have not shown how or in what manner such violation took place; neither do they disclose any material showing an infringement of Article12(1). They neither allege any discriminatory treatment in relation to the 1st Respondent,

nor do they claim that they have been denied the equal protection of the law. The Petitioners are therefore not entitled to any relief under Article 12(1) either.

For the reasons set out above, I uphold the third objection raised by the Attorney-General and hold that there has been no violation of any of the fundamental rights of any of the Petitioners. I also hold that in any event none of the Petitioners has *locus standi* to make these applications.

There is one other matter I wish to allude to, and that is that all three Petitioners in the three applications before us claimed a violation of Article 17 of the Constitution.

Article 17 of the Constitution states as follows:

> 17. "Every person **shall be entitled to apply to the Supreme Court,** as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled to **under the provisions this Chapter.**"

The marginal heading to Article 17 reads as follows:

"**Remedy for the infringement** of fundamental rights by executive action." (Emphasis mine).

Although the Petitioners claimed that this was a fundamental right, it appears that, as a plain reading of the plain words in Article 17 clearly show, Article 17 is only an enabling provision, albeit an extremely important one, under which a person whose fundamental rights "**under the provisions of this Chapter** (viz., Chapter III) have been violated, was "**entitled to apply** to the Supreme Court" for relief. This position is made doubly clear by the marginal heading which employs the words, "**Remedy for the infringement** of fundamental rights. . . ." (Emphasis mine).

The Attorney-General agreed with this position and Mr. Abeysuriya, P. C., himself submitted that Articles 17 and 126 vest the Supreme Court with the exclusive jurisdiction to hear and determine any question relating to infringements of fundamental rights.

As we have seen, the three Petitioners in the three applications before us have in no way been prevented from applying to this Court, or from appearing and prosecuting their fundamental rights applications. They have themselves been present in Court; have been adequately represented by Counsel (one of them being a President's Counsel), and have participated fully in the proceedings throughout.

In the circumstances, I cannot see how they can now complain that they have been prevented from either presenting their claims or from prosecuting them.

In any event, although the Petitioners claim a violation of their fundamental rights under Article 17 of the Constitution, no material was made available, as required by Rule 44 of the Supreme Court Rules of 1990, as to what exactly the alleged violation was, or who the alleged violator was, or what the nature of the executive or administrative action was, which caused it.

For the above reasons, I have no hesitation in holding that there is no substance or merit in this particular complaint of the three Petitioners.

CONCLUSION

It must be emphasized that in all three of the instant fundamental rights applications, the Petitioners do not allege that the 1st Respondent was guilty of any violation of any of their fundamental rights. On the contrary, the only allegation made by all the Petitioners is that it was the President who has violated their fundamental rights by her executive or

administrative act of appointing the 1st Respondent as Chief Justice.

However, as set out above, the Constitution itself gives the President immunity under Article 35(1) thereof, and therefore she cannot be brought before Court and called upon to answer for her actions. Neither, in the context of the facts in these applications, can her act of appointing the 1st Respondent as Chief Justice be questioned in these proceedings. Further, under Article 35(3), the Attorney-General cannot represent her in these cases either. Therefore, under the law as it stands, we shall never know the why and the wherefore of this appointment because it is only the President herself who knows the answer to that question. At the same time, until that is known, one cannot fault the President in any way, for the simple reason that she may well be possessed of good and ample reasons for having appointed the 1st Respondent to the post of Chief Justice.

In any event, assuming, but not conceding that we can do so, even if this Court holds that the President violated the fundamental rights of the Petitioners, even then it will not, by itself, have the effect of removing the Chief Justice from his post. He would still remain Chief Justice. The reason is that the removal of the Chief Justice can be done in one way only, and that too, only under and in terms of Articles 107(2) and (3) of the Constitution, because the Constitution itself says and the decided cases cited above confirm, that that is the only way in which the Chief Justice can be removed.

Therefore, however much the Petitioners may desire it, this Court, cannot go beyond its clear duty of proper and lawful construction of the provisions of the Constitution, to stretch the elasticity of its language beyond permissible limits under the guise of judicial interpretation, in order to accede to the request of the Petitioners to add yet another method of removal from office of a Judge of the Supreme Court or Court of Appeal, including the Chief Justice, lest it be held to be "a usurpation of the function which under the Constitution

of this country, is vested in the Legislature to the exclusion of the Courts." Per Lord Diplock in *Jones v. Wrotham Park Estates Ltd*[9] Therefore, the appeal by the Petitioners to add another method of removal of Superior Court Judges must be made not to this Court, but to Parliament.

To reiterate, what the Petitioners are asking this Court to do is, in effect, to amend the Constitution by judicial action. This request we must unhesitatingly decline.

This leads to a question of importance, and that is whether filing an application for alleged violation of fundamental rights would be the "appropriate proceedings" for achieving the objective of the Petitioners., viz., removal from office of the Chief Justice? My answer would be a laconic "No", for as set out above, the only "appropriate proceedings" for this purpose, would be those under Articles 107(2) and (3) of the Constitution. If any individual can challenge the President's appointment of the Chief Justice or any Judge of the Superior Courts by way of any application for alleged violations of fundamental rights, then Article 35 will have no meaning. One cannot invoke the limited fundamental rights jurisdiction to achieve a purpose not contemplated therein. The Petitioners are therefore seeking reliefs which are not available within the ambit of, and within the special jurisdiction of the limited fundamental rights jurisdiction as set out in the Constitution itself; and as the Attorney-General rightly said, this Court would itself be guilty of an unconstitutional act if it were to grant the reliefs and declarations prayed for by the Petitioners. I would hold that this Court, as set out above, is powerless to grant the reliefs and declarations prayed for by the three Petitioners in these proceedings.

The applications are misconceived, and relief is clearly not available in these proceedings.

I need hardly stress that our Constitution is the paramount law of the land, and that this Court has a sacred duty and a solemn obligation to uphold the Constitution. We

would therefore be failing in our duty of upholding the Constitution, and thus the Rule of Law, if we were to accede to the request of the Petitioners and grant the reliefs prayed for, without being clothed with the necessary jurisdiction therefor. To act thus without jurisdiction would be a clear violation of the Constitution itself. On the other hand, if this Court is to act strictly within the terms of, and *intra vires* the Constitution, us indeed learned Counsel for the Petitioners urged us to, then the way we have in fact acted is precisely the way we must, viz., in holding that this Court has no jurisdiction to remove the Chief Justice from office.

Whilst considering the matters before us objectively and impersonally, and strictly in accordance with the law, I have given my anxious and very careful consideration to the three preliminary objections raised by the Attorney-General, and also to the helpful submissions made by learned Counsel for all the Petitioners in that connection. I have also been at pains to analyse the relevant law and its applicability to the facts, and upon a consideration of the whole, for the reasons set out above, I would uphold the three preliminary objections raised by the Attorney-General, which objections apply to all three applications.

For the reasons set out above in detail in this order, taking into consideration all the facts and circumstances, inasmuch as it would clearly be futile to proceed any further in any of these three applications, I refuse leave to proceed in each of the S. C. Applications 898/99(F/R), 901/99(F/R) and 902/99(F/R) with costs.

P.R.P. PERERA, J. - I agree.

SHIRANI BANDARANAYAKE J. - I agree.

D.P.S. GUNASEKERA, J. - I agree.

AMEER ISMAIL, J. - I agree.

Leave to proceed refused.