HETTIARACHCHI
v.
SENEVIRATNE,
DEPUTY BRIBERY COMMISSIONER AND OTHERS (NO. 2)

SUPREME COURT
M. D. H. FERNANDO, J.
AMERASINGHE, J. AND
P. R. P. PERERA, J.
S.C. APPLICATION 127/94
JUNE 07, 1994.

Fundamental Rights – Application for leave to proceed – Article 12(1) of the Constitution – Application supported on further submissions – Article 132(3) of the Constitution – Finality of order of 28 April 1994 – Per incuriam rule –

Held:

It is a well established rule that in general a court cannot re-hear, review, alter or vary its own judgment once delivered. The rationale of that rule is that there must be finality to litigation. *Interest reipublicae ut sit finis litium.* A court whose judgments are subject to appeal, cannot set aside or vary its judgment, even if plainly wrong in fact or in law; that can be done only on appeal. It may, of course, have a limited power to clarify its judgment, and to correct accidental slips or omissions.

The matter of this application had been first supported on 28 April 1994 and the court made a final order.

A decision will be regarded as given *per incuriam* if it was in ignorance of some inconsistent statute or binding decision; but not simply because the court had not the best of argument.

Proceedings under Article 126 are essentially adversarial in nature. of course, the court has ample power to probe a matter for the purpose of ascertaining the truth; to expedite the work of the court by suggesting the consideration of issues of fact and law which seem to arise; and by indicating how a submission might be clarified or refined; and by guiding an argument in the direction of the matters of fact and law actually in issue. But it will nevertheless leave counsel entirely free to decide what he wishes to place before the court, and how he proposes to do so. The court recognizes and respects counsel's right to do so. It will not encroach on counsel's rights; especially when he repeatedly insists on following a plan of action he appears to have set himself and disregards suggestions from the bench as to an alternative course that might be followed. We must take the case as counsel deems it best presented on the interest of his client. Moreover, the court must take care to guard itself against any appearance of bias which might result

from intervention, for justice must not only be done, but must be seen to be done. As Judges, we are expected to be neutral. Therefore the court must refrain from entering into the arena by initiating and presenting legal and factual submissions on behalf of a party.

The jurisdiction and powers of this court are derived from the Constitution, and the Rule of Law binds the judiciary equally with the other organs of government. Judges must apply and observe the law, leaving the amendment of the law to those constitutionally empowered to do so; and Judges cannot under the thin guise of interpretation, violate the Constitution and the law in order to give effect to their personal preferences as to what the law ought to be.

The court has done what it could legitimately do to secure and advance fundamental rights in the matter of formulating rules for facilitating access to justice.

The duty of the judiciary as an organ of Government, to secure and advance fundamental rights, does not require a Judge to drop his mantle as a judge and become an advocate actively espousing the cause of some person who complains to him that his rights have been violated. The duty of the judge, whether in the exercise of his fundamental rights jurisdiction, or any other jurisdiction, is to maintain his neutrality and thereby secure rights guaranteed by the Constitution or conferred by any other law.

The submission now was that even though the Cabinet had the power to appoint the 1st respondent as Deputy Bribery Commissioner, yet that power was neither absolute nor unreviewable (Article 55(5)) and that failure to permit the petitioner to offer himself for consideration *prima facie* violated his right to equality under Article 12(1).

In the exceptional circumstances of this case, leave to proceed should be granted.

Cases referred to :

1. *Perera v. Jayawickrama* (1985) 1 Sri LR 285
2. *Bandara v. Premachandra* S. C. 213/95 – S. C. Minutes of 16.8.93.
3. *Pepper v. Hart* (1993) 1 All ER 42.
4. *Fernando v. Fernando* (1956) 58 NLR 262.
5. *Raju v. Jacob* (1968) 73 NLR 517.
6. *Katirmanthamby v. Hadjiar* (1971) 75 NLR 228.
7. *Kariapperuma v. Kotelawala* (1971) 77 NLR 195.
8. *In revision* (1921) 23 NLR 275 (per Shaw J)
9. *Manchinahamy v. Muniweera* (1950) 52 NLR 409.
10. *Sirinivasa Thero v. Sudassi Thero* (1960) 63 NLR 31.
11. *Ranmenikhamy v. Tissera* (1962) 65 NLR 214.
12. *Moosajees Ltd. v. Fernando* (1966) 68 NLR 414.
13. *Walker Sons and Co. Ltd. v. Fernando* (1964) 68 NLR 73.

14. *Liyanage v. The Queen* (1965) 68 NLR 265.
15. *Bryers v. Canadian Pacific Steamships Ltd.* (1957) 1 QB 134, HL (1958) AC 495.
16. *Jones v. National Coal Board* (1957) 2 QB 55, 64.
17. *Somawathie v. Weerasinghe* (1990) 2 Sri LR 121, 128-129.
18. *Faiz v. A. G.* SC 89/91 S.C. Minute of 19.11.1993.

APPLICATION for leave to proceed on question of equality under Article 12(1) of the Constitution.

R. K. W. Goonesekara, E. D. Wickramanayake and *D. W. Abeykoon* for petitioner.

Cur adv vult.

July 04, 1994.

FERNANDO, J. read The following order of the Court:

On 15.4.94 the petitioner filed a petition under Article 126 of the Constitution, alleging that his fundamental right guaranteed by Article 12(1) had been violated by reason of the appointment of the 1st Respondent as Deputy Bribery Commissioner. The Petitioner's application for leave to proceed was taken up for consideration on 28.4.94. Learned Counsel who then appeared supported that application on two grounds only. In the order made that day we held, for the reasons stated, that those grounds could not be sustained. Since Counsel failed to respond to several not-so-subtle indications from the bench that the factual allegations in the petition might perhaps be considered in relation to Article 55(5) of the Constitution, in our order of 28.4.94 we were constrained to observe :

> " Although invited to make any further submissions he wished to, learned Counsel did not address us on any of the other averments of fact contained in the petition, to support an allegation that the fundamental rights of the Petitioner had been violated. "

On 30.5.94 the petitioner moved the Court to permit further submissions in support of his application, claiming that it "raises matters of great national and public importance". He asked the Court, "as guardian of the fundamental rights of all citizens", to consider the Petitioner's complaint of the violation of his fundamental

right; and that the matter be listed before a bench of five judges so that "senior Counsel may make further and full submissions". The Chief Justice directed that the matter be considered by the same three judges who had dealt with it previously.

An application under Article 126 may be proceeded with only with leave to proceed first had and obtained from this Court, which leave may be granted or refused, as the case may be, by not less than two Judges. When the three of us refused leave to proceed, we were exercising the jurisdiction of the Supreme Court (see Article (132 (2)), and our decision was the decision of the Supreme Court; we were not sitting as some fragmented part of the Court. The petitioner's motion of 30.5.94 was filed under a misapprehension that other Judges of the Court, or more Judges, or even all the Judges, could constitute an appellate tribunal in respect of that decision of the Supreme Court which refused him leave to proceed under Article 126(2). While other Judges of the Supreme Court might regard that decision as erroneous, and refuse to follow it when deciding **other** matters, it was final as far as that case was concerned.

It is quite wrong to assume, as the petitioner does in his motion, that the power of the Chief Justice under Article 132(3) to direct that an appeal, proceeding or matter be heard by a bench of five or more Judges of, in his opinion, the question involved is one of general and public importance, makes any difference. That provision confers no right of appeal, revision or review. In any event, the Petitioner is mistaken in thinking that his application involved for decision some novel or uncertain question of general, public or national importance. That decisions of the Cabinet are subject to review in the exercise of the fundamental rights jurisdiction of this Court is a matter on which there is no uncertainty – not only are the express provisions of Article 55(5) quite clear, but this has been confirmed in decisions of this Court (as far back as 1984, by a Full Bench of nine Judges in *Perera v. Jayawickrama* [1], and less than an year ago in *Bandara v. Premachandra* [2]. The principles applicable to the review of such decisions, for inconsistency with the fundamental right to equality, are the same as those applicable to all other executive decisions made in the exercise of constitutional or statutory powers. Thus there is not in this case any question of law having far reaching consequences.

That the case may be of great interest to the public, or even sensational, is beside the point. As far as a court of law is concerned, there are no unimportant matters. The status and position of the persons before us, whether as petitioners or respondents, are of no consequence. In the words of Deuteronomy 1:16 – 17 :

> "And I charged your Judges at that time, saying hear the causes between your brethren and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man....."

And we might also say with Lord Denning (*Ex parte Blackburn* [1968] 2 QB 150, 155) :

> "Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right."

Our pulses do not beat any faster either because of the persons before us or because of public comments by any person.

It must not be supposed, or suggested, that the need to obtain leave to proceed under Article 126(2) is a mere formality. The onus is on a petitioner seeking relief to establish a *prima facie* case. Even if an important question of law, or jurisdiction, does appear to be involved, it must not be assumed, as some do, that this must necessarily be deferred for consideration at the final hearing. If it is relevant as a threshold consideration, that threshold must be crossed by obtaining leave to proceed, before seeking to proceed further.

It is a well-established rule that in general a court cannot rehear, review, alter or vary its own judgment once delivered. The rationale of that rule is that there must be finality to litigation. *Interest reipublicae ut sit finis litium.* A court whose judgments are subject to appeal, cannot set aside or vary its judgment, even if plainly wrong in fact or in law : that can only be done on appeal. It may, of course, have a limited power to clarify its judgment, and to correct accidental slips or omissions.

MANIFEST ERROR, OMISSION OR INADVERTENCE OF THE COURT

Since there is no opportunity for rectification by way of appeal in the case of the decisions of the highest court, may that court vary its own order ?

In support of his submission that this Court should vary its own order, Mr. R.K.W. Goonesekera, who now appears for the Petitioner, cited a recent decision of the House of Lords in *Pepper v. Hart* [3] and four local decisions : *Fernando v. Fernando* [4], *Raju v. Jacob* [5], *Katirmanthamby v. Hadjiar* [6], and *Kariapperuma v. Kotelawala* [7]. To that list can be added many others : e.g. *In revision* [8], *Menchinahamy v. Muniweera* [9], *Sirinivasa Thero v Sudassi Thero* [10], *Ranmenikhamy v. Tissera* [11]. But all these, with the exception of *Katirmanthamby v. Hadjiar,* are instances of manifest error, omission, or inadvertence by the Court itself.

In *Pepper v. Hart,* at the conclusion of the hearing of an appeal, the Appellate Committee of the House of Lords was inclined to dismiss the appeal, because it considered that the statutory provision in question should be interpreted in one way, but it did not make an order. The appeal was then re-argued before an expanded Appellate Committee, to consider whether Parliamentary history was relevant to the interpretation of that provision. Having decided that it was, the House of Lords then took the contrary view as to the meaning of that provision, and allowed the appeal. This decision does not help the Petitioner, as the question of the House of Lords setting aside its own order did not arise.

Moosajees Ltd v. Fernando [12], is perhaps more relevant. A bench of five Judges decided a preliminary question of law arising in a number of cases, in *Walker Sons and Co. Ltd. v. Fernando* [13]. Then, in view of the subsequent decision of the Privy Council upon a related question of law in *Liyanage v. The Queen* [14], a bench of five Judges (including four of the original five) considered that the original decision was incorrect, and reversed it in *Moosajees Ltd. v. Fernando*. However, despite the original decision upon the preliminary question, the case had not yet been finally disposed of on

the merits. The principle on which the Court acted was that "an order which has not attained finality according to the law or practice obtaining in a Court can be revoked or re-called by the Judge who made the order, acting with his discretion exercised judicially and not capriciously". Here, however, our order of 28.4.94 finally disposed of the matter.

The headnote of *Katirmanthamby v. Hadjiar* incorrectly states that the Court set aside its own order. That was a case which did not involve any lapse by the Court. Order absolute had first been entered granting probate of a Last will; upon the application of one party, the District Judge then vacated the order absolute. On appeal it was held that this (second) order was wrong, as the correction of error was a matter for the Supreme Court; that order was set aside. Thereupon an application was made to revise, not the order of the Supreme Court, but the order absolute itself. This was allowed on the ground that the District Judge had failed to comply with a mandatory provision of law. It is true that H.N.G. Fernando, C.J., did observe that the Supreme Court could have been invited, at the stage of appeal, to exercise its revisionary powers. But there the petitioner had an independent statutory right to move in revision, and what the Supreme Court set aside in revision was not its **own** order, but the first order of the District Judge, the second order having previously been set aside in appeal. That decision does not support Mr. Goonesekera's contention that we should vary our own order.

A decision will be regarded as given *per incuriam* if it was in ignorance of some inconsistent statute or binding decision; but not simply because the Court had not the benefit of the best argument: (see Halsbury, Laws of England 4th edition, Vol. 26, para 578 citing *Brvers v. Canadian Pacific Steamships Ltd.*[15].

Mr. Goonesekera unreservedly accepted the correctness of the Court's decision on the two matters that had originally been argued. This, he emphatically stated, was not an application for review or revision. Not being a case of error, omission or inadvertence, the decisions cited have no relevance. Mr. Goonesekera sought to overcome the resulting difficulty by submitting that "the Court must do what the Court **should** do". What should the Court have done

except what it ought to have done in the circumstances, and, indeed, had done?

INTERVENTION BY COURT ON BEHALF OF ONE PARTY

Mr. Goonesekera did not say so, but (at the hearing on 28.4.94) should the Court have intervened to do what learned Counsel who then appeared for the Petitioner had failed to do? This would have been quite improper: proceedings under Article 126 are essentially adversarial in nature. Of course, the Court has ample power to probe a matter for the purpose of ascertaining the truth; to expedite the work of the Court by suggesting the consideration of issues of fact and law which seem to arise; and by indicating how a submission might be clarified or refined; and by guiding an argument in the direction of the matters of fact and law actually in issue. But it will nevertheless leave Counsel entirely free to decide what he wishes to place before the Court, and how he proposes to do so. The Court recognizes and respects Counsel's right to do so. It will not encroach on Counsel's rights, especially when he repeatedly insists on following a plan of action he appears to have set himself and disregards suggestions from the bench as to an alternative course that might be followed. We must take the case as Counsel deems it best presented in the interest of his client. Moreover, the Court must take care to guard itself against any appearance of bias which might result from intervention, for justice must not only be done, but must be seen to be done. As Judges, we are expected to be neutral. Therefore the Court must refrain from entering into the arena by initiating and presenting legal and factual submissions on behalf of a party. In *Jones v. National Coal Board* [16], Lord Denning said :

> "[The judge] must keep his vision unclouded ...let the advocates one after the other put the weights into the scales – the nicely calculated less or more – but the judge at the end decides which way the balance tilts, be it ever so slightly. ... The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by

wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well ... Such are our standards."

Do the obligations created by Article 4(d) impose exceptional obligations on the Court to intervene on behalf of a Petitioner by initiating and presenting his case? There have been from time to time submissions and exhortations, both inside and outside the court-room, that Judges must adopt "investigative" or "inquisitorial" procedures; that they must be "activist"; and even that they must resort to techniques of interpretation of constitutional and statutory provisions whereby they would give effect to their own notions as to what the law should be, despite express provisions to the contrary. The jurisdiction and powers of his Court are derived from the Constitution, and the Rule of Law binds the Judiciary equally with the other organs of government; Judges must apply and observe the law, leaving the amendment of the law to those constitutionally empowered to do so; and Judges cannot under the thin guise of interpretation violate the Constitution and the law in order to give effect to their personal preferences as to what the law ought to be : *Somawathie v. Weerasinghe* [17], and *Faiz v. Attorney-General* [18].

In reaching the conclusion that there is no such duty to intervene, it is relevant to note that substantial efforts have been made by the Supreme Court, within the frame work of the Constitution and the law, to secure and advance fundamental rights, although ethical considerations have precluded Judges from making extra-judicial responses to comments suggesting that public expectations have not been adequately met. While discharging its adjudicatory functions relating to fundamental rights, the Court has provided relief in a variety of ways; it has taken steps to secure and advance fundamental rights by clarifying and explaining their meaning and by giving guidelines and directions in that regard in appropriate cases. Moreover, the Court has simplified and facilitated the invocation of the fundamental rights jurisdiction and the grant of effective relief in respect of violations, both administratively and by means of rules of court.

In January 1990, the Court began to entertain informal applications from persons held in detention who alleged the violation of their fundamental rights, particularly under Articles 11, 13(1) and 13(2). During the four-year period 1990-1993, about 5,500 such applications were entertained, and about 4,200 were disposed of ; any delay in disposal was due, almost invariably, to the default of parties or their representatives.

By the Supreme Court Rules, 1990, those procedures were not only formalised (Rule 44) but numerous other ambiguities and technicalities were eliminated (e.g. as to the grant of proxies, the proper persons to be named as petitioners, applications by third parties, curing deficiencies in pleadings, etc.). Subsequently, further provision was made permitting the exemption of indigent petitioners from the payment of court charges, as well as the assignment of Counsel and the payment of fees to assigned Counsel, where the interests of justice required it : Supreme Court (Exemption from Fees) Rules 1991, and Supreme Court (Assigned Counsel) Rules 1991. The relevant rules are annexed to this order as an Appendix, since it appears that the lack of awareness and appreciation of these rules has not only deterred victims of fundamental rights infringements from invoking this jurisdiction, but has also given rise to the misconception that there is undue expense, delay, technicality, and difficulty, in regard to this jurisdiction.

In accordance with the principle that Judges should preserve their detachment and impartiality, these rules were so framed as to exclude their involvement in giving advice, in the preparation of papers, or in the presentation of a party's case. However, the Court has done what it could legitimately do to secure and advance fundamental rights by facilitating access to justice.

If the Petitioner needed assistance in obtaining the services of Counsel, he could have availed himself of the benefits provided by those rules. However, he seems not to have been in any need to obtain such legal representation. Once he had legal representation whether made available under the rules or of his own choice, the obligation of Court was to allow Counsel to present his case in the way in which he wished to. The duty of the Judiciary as an organ of

Government, to secure and advance fundamental rights, does not require a Judge to drop his mantle as a Judge and become an advocate actively espousing the cause of some person who complains to him that his rights have been violated. The duty of the Judge, whether in the exercise of his fundamental rights jurisdiction, or any other jurisdiction, is to maintain his neutrality and thereby secure rights guaranteed by the Constitution or conferred by any other law.

THE IRRELEVANCIES THAT BURDENED THE PETITION

There were certain vague and unsubstantiated allegations in the petition upon which (for the reasons which are set out later in this order) we could not have granted leave to proceed from an alleged infringement of Article 12(1) read with Article 55(5).

Although learned Counsel at the hearing on 28.4.94 referred to these matters, it seemed to us that he was indirectly depending on them as establishing a foundation for his submission that they made the case to be one of public importance, in which the public were especially interested, and therefore, that leave to proceed should be granted. While public interest might be excited by many things, including vague and unsubstantiated allegations in a petition submitted to this Court, that does not confer on them the quality of being important either in a popular sense or in a legal sense.

In paragraphs 16 and 17 of his petition, the Petitioner had made several accusations to the effect that while a bribery allegation against an unnamed and unidentified person was under investigation by the Bribery Commissioner, influence was brought to bear on that officer again, by an unnamed and unidentified person - to stop that investigation; there was no affidavit from that officer, or any document, in support of the allegation of improper influence, which thus remained as pure hearsay. In the absence of particulars, such accusations can seldom, if ever suffice to establish the '*prima facie* case which entitles a Petitioner to the grant of leave to proceed. The Court had to presume that Counsel refrained from referring to unsubstantiated allegations of that sort because in his professional judgment he thought that they could not be established,

or because he was so instructed, or for some other good reason. Mr. Goonesekera very properly made no effort to rely on those averments, or upon yet another allegation that the 1st Respondent's appointment was bad because he was then a judicial officer. Without the slightest hesitation he jettisoned these irrelevancies that burdened his case.

VARIATION OF ORDER OF 28TH APRIL 1994

In the written statement which we directed Counsel to file before supporting this application, Mr. Goonesekera pointed out that our order of 28.4.94 did not expressly state that the Petitioner had failed to establish a *prima facie* case of the infringement of the Petitioner's fundamental rights; in his submissions he urged that, although the decision of the Court was final, the terms of that order clearly indicated that we were not satisfied that all the relevant material had been placed before it; and that, having regard to the sole and exclusive fundamental rights jurisdiction of this Court, the Petitioner should therefore be given an opportunity of making further submissions on the question whether the appointment of the 1st Respondent (as averred in paragraph 3 of the petition) involved a denial of an equal opportunity of being considered for the post. There was all the more reason for this, he said, because we ourselves had indicated that perhaps a case might be made out under Article 55(5). He submitted that the Petitioner had many years experience in the Bribery Commissioner's Department, while the 1st Respondent had none; the Petitioner had not only attended to the duties of the Deputy Bribery Commissioner for over an year (that post having fallen vacant in 1991), but had even been appointed, by the Cabinet, to act as Bribery Commissioner for a short period in 1992; that even though the Cabinet had the power to appoint the 1st Respondent as Deputy Bribery Commissioner, yet that power was neither absolute nor unreviewable (Article 55(5)); and that the failure to permit the Petitioner to offer himself for consideration *prima facie* violated his right to equality under Article 12(1).

Had the matter been presented in that way on 28.4.94, in response to our suggestion, we have no doubt whatever that we would have granted leave to proceed. When the present application was

supported on 7.6.94, for the reasons we have now set out, we were of the view that, in the exceptional circumstances of the case, leave to proceed should be granted on the sole question whether the Petitioner's right to equality under Article 12(1) had been violated by the failure to give him an opportunity to offer himself for consideration for appointment as Deputy Bribery Commissioner.

Leave to proceed granted.