In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of a reference under and in terms of Article 125 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C.Reference No. 3/2012
C.A.(Writ) Application No.358/2012

Chandra Jayarathne,
2, Greenlands Avenue, Colombo 5.

Petitioner

Vs.

1 Hon. Anura Priyadarshana Yapa,
M.P. Eeriyagolla, Yakwila

2 Hon. Nimal Siripala de Silva,
M. P. 93/20,Elvitigala Mawatha,
Colombo 8.

3 Hon.A.D.Susil Premajayantha, M.P.
123/1/Station Road, Gangodawila,
Nugegoda.

4 Hon. Dr. Rajitha Senaratne, M.P.
CD- 85, Gregory's Place,Colombo 7.

5 Hon.Wimal Weerawansa, M.P.
18,Rodney Place, Cotta Road,
Colombo 8.

6 Hon.Dilan Perera, M.P.
30, Bandaranayake Mawatha,
Badulla.

7 Hon. Neomal Perera, M.P.
3/3,Rockwood Place, Colombo 7.

8 Hon.Lakshman Kiriella, M.P.
121/1, Pahalawela Road, Palawatta,
Battramulla.

9 Hon.John Amaratunga, M.P.
88, NegomboRoad, Kandana.

10 Hon.Rajavarothiam Sampanthan,
M.P., 2D, Summits Flats,
Kkeppetipola Road, Colombo 5.

11 Hon.Wijitha Herath, M.P.
44/3, Medawaththa Road,
Mudungoda, Miriswaththa,
Gampaha.

Respondents-Respondents

Jayasooriya Alankarage Peter Nelson Perera, No.22/51, Chamikara Cannel Road, Chilaw.

Intervenient-Petitioner-Respondent

Before: Amaratunga J.

Sripavan J.

Dep, PC. J.

Counsel: K.Kanag Iswaran PC with B. Illlangathilake, T. Weragoda instructed by Lilanthi de Silva for the petitioner in SC Ref. 3 of 2012.

S.L.Gunasekera with Chanaka de Silva, Suren de Silva, Riad Ameen instructed by Paul Ratnayake Associates for the petitioner in SC Ref .4 of 2012.

Geoffrey Alagaratnam, PC with E.R.S.R.Coomaraswamy (Jr), Mohamed Adamaly and Lasantha Garusinghe instructed by Lilanthi de Silva for the petitioner in SC. Ref.5 of 2012.

Shibly Aziz, P.C. with Wijaya Wickramaratne, P.C. Uditha Egalahewa, PC., Raja Dep and Chrishmal Warnasuriya for the petitioner in SC. Ref. 6 of 2012.

Uditha Egalahewa PC. With Chrishmal Warnasuriya, Amaranath Fernando, Gihan Galabadage, Hemantha Gardihewa and Raja Dayananda for the petitioner in SC Ref.7 of 2012.

Chrishmal Warnasuriya with Dushantha Kularatne and Nalaka Jayasuriya instructed by Mohan Balendra for the petitioner in SC Ref. 8 of 2012.

Sanjeeva Jayawardene P.C. with Shantha Jayawardene, Pulasthi Hewamanne and Wardanee Karunaratne instructed by Mohan Bandara for the petitioner in SC Ref.9 of 2012.

Respondents absent and unrepresented.

Palitha Fernando, P.C. Attorney General with A.Gnanadasan P.C., Additional S.G., Shavindra Fernando, D.S.G., Sanjay Rajaratnam D.S.G, A.H.M.D. Nawaz, D.S.G. Janak de Silva, D.S.G., Nerin Pulle, S.S.C., Dr.Avanthi Perera, S.C. Suren Gnanaraj, S.C., and Manohara Jayasinghe, S.C. for A.G.

Chandana Liyanapatabendi, P.C.with Harshana Ranasinghe and Saman Silva instructed by Athula de Silva for the intervenient-petitioner-respondent in SC.Ref.3 of 2012.

Prof. H.M.Zafrullah instructed by K.W. Bandula for the intervenient-petitioner-respondent in SC. Ref. 4 of 2012

Razik Zarook, P.C. with Mahesh Katulanda instructed by Mary T.Dickman for the intervenient-petitioner-respondent in SC Ref. 5 of 2012

B. Manawadu with Asanka Dissanayake instructed by Sagala Abeywickrema for intervenient-petitioner-respondent in SC. Ref. 6 of 2012

Nigel Hatch PC, with Sagara Kariyawasam, Ms.S.Illangage and Sumudu Kantha Hewage for the intervenient-Petitioner-respondent in SC Ref.7 of 2012.

D.P. Mendis P.C. with Dilan de Abrew for the intervenient-petitioner-respondent in SC. Ref. 8 of 2012

Kushan de Alwis P.C. for intervenient in SC. Ref. 9 of 2012

Argued on: 13th and 14th December 2012 together with S.C.Reference Nos 4 – 9 of 2012

Decided on: 01.01.2013

ORDER OF COURT

The Court of Appeal on 20.11.2012, in the course of considering several writ applications that came up before it has referred to this Court, in terms of Article 125 of the Constitution, the following question relating to the interpretation of Article 107(3) of the Constitution.

> " *Is it mandatory under Article 107(3) of the Constitution for the Parliament to provide for matter (sic) relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof, standard of proof etc., of any alleged misbehavour (sic) or incapacity in addition to matters relating to the investigation of the alleged misbehavour (sic) or incapacity?*"

This question was referred in respect of all seven writ applications considered by the Court of Appeal on that day. In all seven writ applications the petitioners have mainly sought writs of prohibition prohibiting the eleven members of the Parliamentary Select Committee from investigating into the allegations of misbehaviour or incapacity alleged against the Chief Justice, Hon.(Dr) Shirani A. Bandaranayake in the Resolution presented to the Speaker in terms of Article 107(2) of the Constitution and published on the Order Paper of the Parliament for 6.11.2012.

When the seven references (S.C.Reference No. 3 to 9 of 2012) made by the Court of Appeal came up before this Court on 22.11.2012, it was observed that the Court of Appeal has not complied with Rule 64(1)(b) of the Supreme Court Rules of 1978. Accordingly, this Court directed the Court of Appeal to issue notice in terms of the aforesaid Rule and also directed notice to be issued on the Attorney General – who immediately appeared in Court when the Court resumed sittings at 1.30 p.m. on the same day. The Court of Appeal through its Registrar thereafter reported to this Court that notices have been issued to the parties in terms of Rule 64(1)(b) as per the direction given by this Court.

The respondents did not appear in this Court and also did not file their written submissions in terms of the said Rule 64(1)(b). After the petitioners filed their

written submissions the Attorney General has filed written submissions in terms of the said Rule 64(2).

When the seven references were taken up together for hearing on 13.12.2012, seven parties, having filed petitions and affidavits, sought to intervene in each of the seven references as intervenient-respondents. Article 125 of the Constitution or the Supreme Court Rules of 1978 do not provide for interventions in References made to this Court under Article125. However in terms of Article 134(3) of the Constitution read with Article 134(1), this Court has discretion to grant to any other person or his legal representative a hearing as may appear to the Court to be necessary in the exercise of its jurisdiction under Chapter XVI of the Constitution. Accordingly, the Court decided to give an opportunity to the parties who sought to intervene to make their submissions through their counsel. In view of certain averments contained in the petitions filed by the parties who sought to intervene in these proceedings, the Court specifically inquired from all parties including those who sought to intervene whether anyone has any objection to this Bench hearing these references but there was no objection by any party including those who sought intervention. Thereafter the Court heard the submissions of all learned President's Counsel and the other learned Counsel for the petitioners, the Attorney General and the learned President's Counsel and the other learned Counsel who appeared for the parties who sought to intervene. After the conclusion of oral submissions the Court in its discretion, granted to all those who have been heard an opportunity to tender written submissions on or before 18.12.2012.

At the outset we wish to deal with the submissions made by the Attorney General in support of his contention 'that there has been no proper reference by the Court of Appeal' as set out in his written submissions filed before the hearing. This was the first matter dealt with by the Attorney General in his oral submissions.

It is appropriate at this stage to set out the provisions of Article 125(1) which is as follows.

> " *The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and accordingly, whenever such question arises*

in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasai-judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question."

In support of his submission that there has been no proper reference by the Court of Appeal in terms of Article 125(1) of the Constitution, the Attorney General relied on a pronouncement made by Samarakone CJ in Billimoria vs The Minister of Lands, Land Development and Mahaveli Development and two others; (1978-79-80) 1 S.L.R. 10.

In his written submissions filed before the hearing, the Attorney General has quoted a part of Samarakone C.J.'s pronouncement in Billimoria's case which is relevant to his submission. However, I quote below the entire passage which contains Samarakone C.J.'s pronouncement including the part quoted in the written submissions of the Attorney General. That passage is as follows.

"*Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court. What is contemplated in Article 125 is "any question relating to the interpretation of the Constitution" arising in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise the need for an interpretation of the provisions of the Constitution. The mere reliance on a constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution. There must be a dispute on interpretation between contending parties. It would appear that*

Article 125 is so circumscribed that it must be construed as dealing only with cases where the interpretation of the Constitution is drawn into the actual dispute and such question is raised directly as an issue between the parties or impinges on an issue and forms part of the case of one party, opposed by the other, and which the Court must of necessity decide in resolving that issue."

Relying on the pronouncement contained in the passage quoted above the Attorney General contended that proceedings in the course of which a reference under Article 125 could be made are restricted to 'adversary proceedings between parties', and at the time the Court of Appeal made the reference there were no adversary proceeding in the sense of an issue which forms part of the case of one party and opposed by the other and which the Court must of necessity decide in resolving that issue. The Attorney General citing the decision in Walker and Sons Co.(UK) vs. Gunatilake and others (1978 – 79 - 80) 1 SLR, 231 at 245, where the Supreme Court in its decision has stated that "We have in this country over the years developed a cursus curaie of our own which may be summarized thus ..... . Three judges as a rule follow a unanimous decision of three judges," invited us to follow Samarakone C.J.'s pronouncement in Billimoria's case relating to the scope of Article 125 of the Constitution. The Attorney General invited our attention to the decision in S.C.Reference No.4 of 2011, [Prema Jayantha vs. Divisional Secretary; S.C.M of 16.01.2012] where the Supreme Court referred to the decision in Billimoria's case to point out the situations in which a reference under Article 125 could be made and invited us to follow the decisions in Billimoria and Prema Jayantha cases and to hold that there is no valid reference made by the Court of Appeal.

The Attorney General further submitted that this Court has the power to refuse to entertain the reference or to return it to the Court which referred the question to the Supreme Court and cited in support the cases of Prema Jayantha and Abeywickrema vs Pathirana (1984) 1 SLR 215.

All learned counsel who made submissions on behalf of the parties who sought to intervene in these proceedings associated themselves with the submissions

of the Attorney General on the question whether there is a valid reference by the Court of Appeal. In the written submissions filed (after the hearing) on behalf of the parties who sought intervention there is no fresh material or submissions not covered by the Attorney General's written and oral submissions.

The learned counsel who appeared for the petitioner in SC Reference No.4 of 2012 in his written submissions filed before the hearing has also taken up the position, for the reasons stated in his written submissions, that the reference made by the Court of Appeal is not a valid reference. However the learned counsel referring to a passage from the Order of Court in Premachandra vs Montague Jayawickrama and another SC Reference 2-5 of 1993 , (1994) 2 SLR 90, (which will be referred to later) has invited this Court to answer the question referred to this Court as a practical measure to avoid further delay. In the written submissions, the learned counsel has contended that ,

(i) Samarakone CJ's pronouncement in Billimoria's case was obiter; and that

(ii) Samarakone CJ made his pronouncement in relation to inter-parte proceedings and that he has not considered what the position would be in an ex-parte proceeding.

In addition, the learned counsel for petitioner in SC Reference 4 of 2012 has submitted that the exclusive jurisdiction vested in the Supreme Court by Article 118 (a) and the 1st limb of Article 125 (The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution.) is absolute and subject only to the Constitution and therefore the jurisdiction of the Supreme Court to interpret the Constitution or any provision thereof whenever it is necessary or relevant to do so in the opinion of Court is absolute and by no means limited to cases where a valid reference is made under Article 125(1).

In the written submissions filed on behalf of the petitioner in SC Reference 5 of 2012, the learned President's Counsel for that petitioner has subscribed to the view that the pronouncement in Billimoria's case is obiter.

The Court first deals with that submission. Billimoria's case was not a reference made under Article 125(1)of the Constitution. It was an appeal with leave to appeal granted by the Supreme Court. It was an appeal against an Order made by one

Bench of the Court of Appeal setting aside a stay order issued by a different Bench of the same Court on the basis that the Bench which issued the stay order had issued it per incuriam. In his judgment Samarakone C.J. has stated that "The only question we need to decide in this appeal is whether the stay order was made per incuriam....." (1978-79-80) 1SLR 10 at 12. The decision the Supreme Court, in the words of Samarakone C.J. was that "I am of opinion that the stay order in question was made after consideration and was not one made per incuriam." (at page 13). Thus, there was no occasion or necessity to consider the scope of Article 125(1) for the decision of the appeal the Supreme Court had to decide in that case.

Samarakone C.J.'s judgment in the case indicates the circumstances in which his pronouncement relating to Article 125(1) came to be made. The passage in which his pronouncement is contained begins as follows.

> *"Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court." (emphasis added)*

After those words Samarakone CJ made his pronouncement on the scope of Article 125(1). The word "dispute" used by Samarakone CJ in the above passage does not appear in Article 125 and the word used is any "question" relating to the interpretation of the Constitution. There can be a question relating to the interpretation of the Constitution without a dispute relating to the interpretation of the Constitution. For a dispute to arise, there has to be a contention by one party with regard to the correct interpretation of a constitutional provision, opposed by another party giving different interpretation to the same constitutional provision. However, a question relating to the interpretation of the Constitution can arise on the submissions of one party when the other party and the Court agree that a question relating to the interpretation of the Constitution has arisen from the submissions of the first party.

This has happened in the case of Premachandra vs Jayawickrama. (Supra) The relevant passage from the Order of Court is as follows.

> " *The four applications were taken up for hearing together in the Court of Appeal on 21.6.93. On the next day, in response to an inquiry from the Court Mr.L.C.Seneviratne P.C., appearing for the Chief Ministers, made his submissions in regard to certain preliminary objections of law. The Court and all counsel agreed that questions of constitutional interpretation arose, and counsel were invited to assist court, by framing those questions" (1994) 2SLR 90 at 96.(emphasis added)*

The five questions framed in that case were thereafter submitted to the Supreme Court in terms of Article 125. The Supreme Court having said that "It is unfortunate that these questions should have been framed with greater precision. It would have been far more satisfactory if, after hearing parties, the questions had been framed with specific reference to the grounds of challenge relevant to, and arising from the facts of, the pending applications". (at page 100) nevertheless proceeded to consider and answer the questions referred to it by the Court. It is pertinent to note that the case of Billimoria had not been considered by the Supreme Court in its Order.

This shows that even in the absence of a dispute between contending parties as to the correct interpretation of a constitutional provision, a question for the interpretation of the Constitution can be referred to the Supreme Court. The Supreme Court having regard to the facts giving rise to the dispute and the pleadings, if any, filed in the court, tribunal or other institution making the reference and the terms of the question referred to it, may decide whether such question shall be entertained and answered.

There may also be a situation where a court ex mero motu may decide to make a reference for the interpretation of the Constitution in a situation where both or all parties concede that a particular view is the correct interpretation of a constitutional provision. The interpretation of the constitution being a question of law, a court is not bound by the concessions of parties on a question of law. In such a situation

there is nothing in Article 125 to prevent a court from making a reference under Article 125 ex mero motu.

At the hearing a submission has been made that there were no proceedings in the Court of Appeal in the course of which a reference could be made under Article 125 as the Court of Appeal was merely considering ex parte, whether notice should be issued on the respondents. We are unable to accept this submission. The writ jurisdiction of the Court of Appeal is invoked by an application (petition supported by affidavit and documents, if any). Proceedings in an application commences when it is taken up in court for support. The application by which the jurisdiction of the Court is invoked then becomes a part of the proceedings. If the Court refuses to issue notice, the proceedings end there and if notice is issued the proceedings continue until the matter is finally decided. If a court, in ex parte proceedings, takes the view that there is a question relating to the interpretation of the Constitution, the better procedure would be, as rightly contended by the Attorney General, to notice the other party and the Attorney General and hear them for that limited purpose. However there is nothing in Article 125 to limit references to inter parte proceedings.

In his pronouncement Samarakone CJ has said that, "What is contemplated in Article 125 is 'any question relating to the interpretation of the Constitution' in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties in any adversary proceedings between them, there must arise a need for an interpretation of the provisions of the Constitution." (emphasis added)

Article 125 refers to legal proceedings and not to adversary proceedings, which term, if used has the effect of curtailing the scope of Article 125.

We have already set out that part of Samarakone C.J's judgment which indicate the circumstances in which the pronouncement relating to Article 125 has been made. He has stated that "It appears from the Order of the Court of Appeal that some dispute as to the interpretation of the constitution did arise in the course of the argument." The Order of the Court of Appeal, referred to by Samarakone C.J is not available to us and

also the submissions, if any, made by counsel when they invited the court to make order on constitutional disputes. It may well be that Samarakone C.J's pronouncement is worded in the way it appears in his judgment on the material and the submissions, if any, available to His Lordship at that time.

In any event Samarakone C.J's pronouncement Billimoria's case on Article 125 is to be treated with high respect. In subsequent decisions this Court has faithfully referred to it in considering the references made to this Court. No counsel disputed before us the position that when there are divergent views between parties as to the correct interpretation of a constitutional provision a reference under Article 125 could be validly made. What the petitioners contended, in particular the learned counsel for the petitioner in S.C.Reference 4 of 2012, is that the situations in which a valid reference could be made under Article 125 is not limited to the situation set out in Samarakone C.J.'s pronouncement and is not exhaustive and that there may be other situations in which such references could be validly made. For the reasons we have already given we agree with this contention and hold that there is a valid reference before us.

In his written submissions filed before the hearing, the Attorney General has stated that "Though Article 125(1) grants sole and exclusive jurisdiction to Your Ladyships Court to hear and determine any question relating to the interpretation of the Constitution, in view of the words "subject to the provisions of the Constitution" in Article 118 and the points made in paragraph 8.0 below it is respectfully submitted that when it comes to the removal of Judges of the Supreme Court or the Court of Appeal, the Supreme Court or the Court of Appeal does not have any jurisdiction, including the writ jurisdiction and the jurisdiction to interpret any provision of the Constitution". In paragraph 8.2 of the written submissions it is stated that the power to remove judges of the Supreme Court and the Court of Appeal vested in the Legislature and the Executive under our Constitution is a check on the judiciary. In such a context, judicial involvement in the removal proceedings, even if only for purposes of judicial review or interpretation of the Constitution, which forms part of such removal in counterintuitive because it would eviscreate the important constitutional check placed on the judiciary by the framers of our Constitution.

We are unable to accept this submission in the absence of any indication in Article 125 or in Article 107, that the jurisdiction of this Court in terms of the first limb of Article 125 is limited as contended by the Attorney General.

The question referred to this Court by the Court of Appeal, as set out at the commencement of this order, relates to the interpretation of Article 107(3) of the Constitution. Article 107 which provided for the appointment and removal of the Judges of the Supreme Court and Court of Appeal is reproduced below.

> "*107 (1) 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.*
>
> *(2) 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.*
>
> *(3) Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for 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."*

(4) ..... *[not quoted]* .....

(5) ..... *[not quoted]* .....

At this stage it is pertinent to refer to the provisions of the Ceylon (Constitution) Order-in-Council, (Cap 379, C.L.E.1956 Revision) referred to as the Soulbury Constitution, and the 1972 Republican Constitution with regard to the removal of Judges. Section 52 (2) of the Ceylon (Constitution) Order in Council is as follows.

"*Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor General on an address of the Senate and the House of Representatives.*"

The Republican Constitution 1972 provided as follows.

"122 (1) *The Judges of the Court of Appeal, of the Supreme Court or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding to or substantially similar to the powers and functions exercised or performed by the aforesaid Courts shall be appointed by the President.*

(2) *Every such Judge shall hold office during good behaviour and shall not be removed except by the President upon an address of the National State Assembly*"

In terms of the 1978 Constitution, the process for the removal of a Judge commences when a resolution for an address of Parliament to be presented to the President for the removal of a Judge on the ground of proved misbehaviour of incapacity is entertained by the Speaker or placed on the Order Paper of Parliament. Such resolution shall be signed by not less than one third of the total number of members of Parliament and shall contain full particulars of the alleged misbehaviour or incapacity. The address of Parliament to be presented to the President could be supported and adopted only when the allegations of misbehaviour or incapacity become proved misbehaviour or incapacity.

The requirement of a resolution setting out the full particulars of the alleged misbehaviour or incapacity, signed by not less than one third of the total number of Members of Parliament, the requirement of proved misbehaviour or incapacity as the ground of the address of Parliament for the removal of the Judge, the requirement of 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 are all new features (provisions) not found in the Soulbury Constitution and in the Republican Constitution of 1972.

The object and the significance of these new provisions are important matters this Court has to consider in interpreting Article 107(3) of the Constitution.

The Preamble to the 1978 Constitution assures to all people inter alia "FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and THE INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well being of succeeding generations of the People of SRI LANKA."

Thus the Supreme Law of Sri Lanka – the Constitution – ratified the immutable republican principle of the independence of the judiciary as one attribute of the intangible heritage that guarantees the dignity and well being of the people of Sri Lanka.

In Visuvalingam vs Liyanage (1983) 1 SLR 203, Sharvananda J, (as he then was) in his separate judgment in the Full Bench of nine Judges of the Supreme Court, (which examined interalia, the question whether the Judges of the Supreme Court and the Court of Appeal ceased to hold office as a result of the failure to observe the provisions of Article 157A read with Article 165 of the Constitution,) highlighted the importance of the independence of the judiciary in a democratic society as follows.

> " *The main aspirations of the Constitution are set out in its luminous preamble. Rule of law is the foundation of the Constitution and independence of the judiciary and fundamental human rights are basic and essential features of the Constitution. It is a lesson of history that the most valued constitutional rights pre-suppose an*

independent judiciary through which alone they can be vindicated. There can be no free society without law, administered through an independent judiciary. It is and should be the pride of a democratic government that it maintains and upholds independent courts of justice where even its own acts can be tested. The Supremacy of the Constitution is protected by the authority of an independent judiciary to act as the interpreter of the Constitution. 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. ..... a Judge of the Supreme Court or of the Court of Appeal ..... 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). Article 108 provides that their salaries are determined by Parliament and are charged on to the Consolidated Fund and that the salary payable to and pension entitlement of a Judge of the said Courts shall not be reduced after his appointment. It is manifest that these provisions are designed to safeguard the independence of the Judges by affording them security of tenure. These provisions have not been put into the Constitution merely for the individual benefit of the Judges; They have been put there as a matter of public policy. The security of tenure of Judges has been vouched to the Judges not only for their own protection but for the protection of the State itself. 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." (pages 236 -238, emphasis added).

The above quoted passage from Sharvananda J's judgment highlights the public policy underlying the Constitutional provisions which guarantee the tenure of the Judges of the Supreme Court and the Court of Appeal. Article 107 of the Constitution provides the mechanism for the removal of such Judges. It is a special constitutional process which has new features not found in the Soulbury Constitution and in the Republican Constitution of 1972.

Article 107 has not specified the body or the Authority which shall investigate or inquire into the allegations of misconduct or incapacity set out in the resolution presented in terms of the proviso to Article 107(2). The Constitution has provided in Article 107(3) that,

> " *Parliament shall by law or by Standing Orders shall 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*".

In terms of Article 107(3), Parliament shall by law or by Standing Orders provide for <u>all matters</u> relating to

(i) the presentation of such an address (the address under Article 107(2))

(ii) the procedure for passing of such resolution

(iii) the procedure for the investigation and proof of the alleged misbehaviour or incapacity

(iv) the right of such Judge to appear and to be heard in person or by representative.

Parliament has not enacted any law to provide for any or all matters set out in Article 107(3).

The Parliament on 4.4.1984 passed Standing Order 78A which now appears under the heading "Rules of Debate," in the Standing Orders of Parliament. The said Standing Order is set out below.

Rules of Debate

78. .....(not quoted).....

*78A [(1) Notwithstanding anything to the contrary in the Standing Orders, where notice of a resolution for the presentation of an address to the president for the removal of a Judge from office is given to the Speaker in accordance with Article 107 of the Constitution, the Speaker shall entertain such resolution and place it on the Order Paper of Parliament but such resolution shall not be proceeded with until after the expiration of a period of one month from the date on which the Select Committee appointed under paragraph (2) of this Order has reported to Parliament.

(2) Where a resolution referred to the paragraph (1) of this Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to

investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution.

(3) A Select Committee appointed under paragraph (2) of this Order shall transmit to the Judge whose alleged misbehaviour or incapacity is the subject of its investigation, a copy of the allegations of misbehaviour or incapacity made against such Judge and set out in the resolution in pursuance of which such Select Committee was appointed, and shall require such Judge to make a written statement of defence within such period as may be specified by it.

**(4) The Select Committee appointed under paragraph (2) of this Order shall have power to send for persons, papers and records and not less than half the number of members of the Select Committee shall form the quorum]

(5) The Judge whose alleged misbehaviour or incapacity is the subject of the investigation by a Select Committee appointed under paragraph (2) of this Order shall have the right to appear before it and to be heard by, such Committee, in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him.

(6) At the conclusion of the investigation made by it, a Select Committee appointed under paragraph (2) of this Order shall within one month from the commencement of the sittings of such Select Committee, report its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it may think fit to bring to the notice of Parliament;

(7) Provided however, if the Select Committee is unable to report its findings to Parliament within the time limit stipulated herein the Select Committee shall seek permission of Parliament for an extension of a further specified period of time giving reason therefor and Parliament may grant such extension of time as it may consider necessary.

(7) Where a resolution for the presentation of an address to the President for the removal of a Judge from office on the ground of proved misbehaviour or incapacity is passed by Parliament, the Speaker shall present such address to the President on behalf of Parliament.

(8) All proceedings connected with the investigation by the Select Committee appointed under paragraph (3) of this Order shall not be made public unless and until a finding of guilt on any of the charges against such Judge is reported to Parliament by such Select Committee.

(9) In this Standing Order "Judge" means the Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal appointed by the President of the Republic by Warrant under his hand.]

In terms of paragraph (2) of Standing Order 78A, where a resolution referred to in paragraph (1) of the Standing Order (a resolution for the presentation of an address to the President for the removal of a Judge from office is given to the Speaker in accordance with Article 107 of the Constitution,) is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution. The Select Committee appointed as aforesaid shall transmit to the Judge whose alleged misbahaviour or incapacity is the subject of its investigation, a copy of the allegations of misbahaviour or incapacity made

against such Judge and set out in the resolution in pursuance of which such Select Committee was appointed, and shall require such Judge to make a written statement of defence within such period as may be specified by it.

The select committee shall have the power to send for persons, papers and records. The Judge whose alleged misbehaviour or incapacity is the subject matter of the investigation by the Select Committee shall have the right to appear before it and be heard, by such Committee, in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him.

At the conclusion of the investigation made by it, the Select Committee shall within one month from the commencement of the sittings of such Select Committee report its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it may think fit to bring to the notice of Parliament. Sub-paragraph (8) of Standing Order 78A provides that all proceedings connected with the investigation by the Select Committee shall not be made public unless and until a finding of guilt on any of the charges against such Judge is reported to Parliament by the Select Committee.

If the Select Committee is unable to report its findings to Parliament within the time limit stipulated in sub-paragraph(6) of Standing Order 78A the Select Committee shall seek permission of Parliament for an extension of a further specified period of time giving reason therefor and Parliament may grant such extension of time as it may consider necessary.

The petitioners in their applications filed in the Court of Appeal (forwarded to this Court in terms of Rule 64 1(d) of the Supreme Court Rules of 1978) and in the written submissions filed in this Court have contended that Standing Order 78A confers judicial power on the Select Committee to investigate the allegations of misbehaviour or incapacity set out in the resolution presented to the Speaker in terms of Article 107(2) and give its findings which may include a finding of guilty of an allegation or allegations made against a Judge is ultra vires Article 4(c) of the Constitution. They have

further contended that judicial power cannot be conferred upon the Select Committee by Standing Order which is not Law.

The petitioners have relied on the Determination made by seven Judges of this Court (In Re the Nineteenth Amendment to the Constitution (2002) 3SLR 85). The Attorney General also relied on the same Determination to support his submissions on the balance of power between the three organs of the government and the checks provided by the Constitution in respect of the power attributed to one organ of the government. In view of this we propose to quote from that Determination the parts that are relevant to the balance of power.

> *This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution .....*
>
> *Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People. Similarly, legislative, power should not be identified with the Prime Minister or any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of the People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of government. These checks have not been included in the Constitution to resolve conflicts that may arise between the custodians of power or, for one to tame and vanquish the other. Such use of the power which constitutes a check, would be plainly an abuse of power totally antithetic to the fine balance that has been struck by the Constitution.*

The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the "trust" that is implicit in the conferment of power has been stated as follows:

> *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended." (Administrative Law 8th ed.2000 – H.W.R.Wade and C.F.Forsyth. p.356)*

It has been firmly stated in several judgments of this Court that the 'rule of law' is the basis of our Constitution (Visuvalingam v Liyanage, [1] *Premachandra v Jayawickrema.* [2]

A.V. Dicey in "Law of the Constitution" postulates that 'rule of law' which forms a fundamental principle of the Constitution has three meanings, one of which is described as follows.

> *"It means, in the first place, the absolute supremacy of predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone..."*

The Attorney General has appropriately cited the dictum of Bhagawati, J. (later Chief Justice of India) in the case of Gupta and Others v Union of India [3] *– Where he observed ;*

> *"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State*

within the limits of the law and thereby making the Rule of Law meaningful and effective."

To sum up the analysis of the balance of power and the checks contained in the Constitution to sustain such balance, we would state that the power of dissolution of parliament and the process of impeachment being some of the checks put in place, should be exercised, where necessary, in trust for the People only to preserve the sovereignty of the People, and to make it meaningful, effective and beneficial to the People. Any exercise of such power (constituting a check), that may stem from partisan objectives would be a violation of the rule of law and has to be kept within its limits in the manner stated by Bhagawati, J. There should be no bar to such a process to uphold the Constitution."(emphasis added)

The power of removal of the Judges of the Supreme Court and the Court of Appeal conferred on the President upon an address of Parliament is a check provided by the Constitution to sustain the balance of power between the three organs of the government. As pointed out in the Determination of the Divisional Bench of Seven Judges presided by S.N. Silva C.J this check has not been included in the Constitution 'to resolve conflicts that may arise between the custodians of power or for one to tame and vanquish the other', but only as a check to be exercised, where necessary, in trust for the People.

The exact nature of the investigation contemplated by Article 107(3) of the Constitution is a question which has not received judicial attention. In this reference it is necessary to consider this particular matter as it has a link to the question referred to this Court by the Court of Appeal. 'Is it mandatory under Article 107(3) of the Constitution for Parliament to provide for matters relating to the forum before which allegations are to be proved' is a part of the question referred to this Court.

Without a definite finding that the allegations have been proved no address of Parliament could be made for the removal of a Judge. Thus the "Investigation" referred to in Article 107(3) is an indispensable step in the process for the removal of a Judge of the Supreme Court and the Court of Appeal. The investigation leads to a finding whether the allegations made against the Judge have been proved or not. If the finding is that all or some allegations have been proved, it is a final decision on which an address of Parliament could be made. The finding that the charges have been proved is the indispensable legal basis for the address.

Thus, the finding that the allegations have been proved is a finding that adversely affects the constitutional right of a Judge to hold office during good behaviour. It is not a fact finding body like a Commission of Inquiry appointed under the Commissions of Inquiry Act. When a Commission of Inquiry makes a finding and recommendations such findings or recommendations do not determine or affect the rights of persons whose conduct is the subject of the inquiry by the Commission. The Authority which appointed the Commission of Inquiry may or may not take action on the recommendations of the Commission of Inquiry. In the case of a finding made by a Select Committee Parliament has to take cognizance of such finding that the allegations against the Judge have been proved and make an address of Parliament to be presented to the President for the removal of the Judge. Thus, the final decision of the Select Committee is what that eventually takes effect. The finding of the Select Committee is not subject to confirmation or approval by some other authority. It stands by itself. So the address of Parliament to be presented to the President is an inevitable consequence of a finding that the charges have been proved.

Thus a finding, after the investigation contemplated in Article 107(3), that the allegation against the Judge have been proved is a final decision which directly and adversely affects the constitutional right of the Judge to continue in office.

In a State ruled by a Constitution based on the rule of Law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision. Such legal power can be conferred

on such court, tribunal or body only by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law".

A Parliamentary Select Committee appointed in terms of Standing Order 78A derives its power and authority solely from the said Standing Order which is not law. Therefore a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a Judge against whom the allegations made in the resolution moved under proviso to Article 107(2), is the subject matter of its investigation. The power to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or a body, only by law and by law alone.

This is the reason why the framers of the Constitution have advisedly used the word 'law' when they enacted Article 107(3) which reads

> " *Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address including the procedure for 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 added)*

There is a presumption that Parliament will not use words in vain or unnecessarily. The reason for the use of the word 'law' in Article 107(3) is clear from what we have stated above. Therefore in our opinion it is mandatory for Parliament to provide by law the Body competent to conduct the investigation contemplated in Article 107(3) and give a legally valid and binding finding with regard to the allegations of misbehaviour or incapacity investigated by it.

The matters relating to proof being matters of law, also will have to be provided by law and the burden of proof, the mode of proof and the degree of proof also will have to be specified by law to avoid any uncertainty as to the proof of the alleged

misbehaviour or incapacity without leaving room for the body conducting the investigation to decide the questions relating to proof according to its subjective perception.

The right of the Judge under investigation to appear at the investigation and be heard being a fundamental principle of natural justice should also be provided by law with a clear indication of the scope of the "right to be heard" such as the right to cross examine witnesses, to call witness and adduce evidence, both oral and documentary.

Matters relating to the presentation of an address and the procedure for the passing of such resolution are matters which can be stipulated by Standing Orders but there is nothing to prevent Parliament from providing for such matters by law as well.

The selection of the body to investigate the allegations of misbehaviour or incapacity and its composition and the manner in which the investigation is to be conducted (procedure) are all matters to be decided by Parliament in its wisdom keeping in mind the necessity to ensure 'equal protection of the law' enshrined in the Constitution.

At the hearing submissions were made that the Select Committee of Parliament in investigating the allegations contained in the resolution exercises judicial power and as such it is contrary to Article 4 (c) of the Constitution and that Standing Order 78A is contrary to the Constitution, especially to Articles 12(1), 13(5) and 14(1)(g). However after careful consideration of the submissions and the question referred to this Court by the Court of Appeal, it is not necessary to decide those questions in order to answer the question referred to us. Accordingly, we express no opinion nor give any finding on those submissions.

The Attorney General and the learned President's Counsel and the other learned counsel for the parties who sought to intervene submitted that the power of removal of the Judges of the Supreme Court and the Court of Appeal is a power of Parliament. We are unable to accept this submission. There is a constitutional right given to the Members of Parliament to move a resolution containing the allegations of

misbehavior or incapacity against a Judge of the Supreme Court and the Court of Appeal and the right to make an address of Parliament to be presented to the President for the removal of such Judge for proved misbehaviour or incapacity. The power of removal of such Judge is a power of the President.

In view of the reasons we have set out above we answer the question referred to us, as setout at the beginning of this Order, as follows.

> " It is mandatory under Article 107(3) of the Constitution for the Parliament to provide by law the matters relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity."

This answer to the question referred to us and this Order is applicable to S.C Reference Nos. 4 , 5, 6, 7, 8,and 9 of 2012.

The reference made to this Court involves a matter which concerns the Judges of the Supreme Court and the Court of Appeal. In dealing with the question we therefore kept in mind that the objectivity of our approach itself may incidentally be in issue. It is therefore in a spirit of detached objective inquiry which is a distinguishing feature of judicial process, that we attempted to find an answer to the question referred to us. We have performed our duty faithfully bearing in mind the Oath of office we have taken when we assumed the judicial office which we hold.

Before we conclude it is pertinent to invite attention of all concerned to the words the late Hon. Anura Bandaranayake, M.P., the then Speaker of Parliament, contained in his ruling dated 20th June 2001, which is faithfully approved and followed by our Parliaments upto the present day. He said as follows.

> " *However Members of Parliament may give their mind to the need to introduce fresh legislation or amend the existing standing orders regarding Motions of Impeachment against Judges of the Superior Courts. I believe such provision has*

already been included in the Draft Constitution tabled in House in August 2000." (Hansard dated 20.6.2001 Column 1039)

The 2000 Draft constitution did not see the light of the day as a new Constitution.

We express our gratitude to the excellent assistance rendered by the learned Attorney General, the learned President's Counsel and the other learned counsel who appeared for the petitioners and the learned President's Counsel and the other learned counsel who appeared for the parties who sought to intervene.

Gamini Amaratunga J.

K.Sripavan J

Priyasath Dep, P.C, J.