

IN THE SUPREME COURT OF
THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application in Revision and for the
exercise of the inherent power and jurisdiction of the
Supreme Court

T. R. Ratnasiri,
23/4, Makola South,
Makola.

S.C.F.R.No. 536/2010

PETITIONER

Vs.

1. **P.B. Jayasundara,**
Secretary to the Ministry of Finance and Planning,
The Secretariat Building,
Colombo 01.

2. **Sarath Jayathilake**
117/30 Ananda Rajakaruna Mawatha
Colombo 10

3. **Thilak Perera,**
Director of Customs,
40, Main Street
Colombo 11

4. **Director General of Customs**
Sri Lanka Customs Department
40, Main Street
Colombo 12

Sudharma Karunarathna (May 2010 - Jan 2012)
Now the Secretary, Ministry of Plantation Industries
55/75, Vauxhall Lane
Colombo 2

Neville Gunawardena (Jan 2012 - December 2012)

Now Director General Trade & Investment Policy

Ministry of Finance, General Treasury

Colombo 1

Jagath Wijeweera (Dec 2012 to date)

5. **Board of Investment of Sri Lanka,**
West Tower,
World Trade Centre, Echelon Square,
Colombo 01.
6. **Colombo Dockyard Ltd,**
P.O. Box 906, Port of Colombo,
Colombo 15.
7. **Mohan Peiris**
Former Attorney General
3-14D, Kynsey Road
Colombo 8
8. **Attorney General**
Attorney General's Department
Colombo 12

RESPONDENTS

And Now Between

T R Ratnasiri
23/4, Makola South,
Makola.

PETITIONER - PETITIONER

Vs

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8. Attorney General

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Colombo 12

RESPONDENTS –RESPONDENTS

**TO: THE HON CHIEF JUSTICE AND THE OTHER HON JUDGES OF THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

On this 14th day of February 2013

1. The **Petition** of the Petitioner-Petitioner above-named (herein after referred to as the 'Petitioner') appearing by Nagananda Kodituwakku, Attorney-at-Law states as follows:

Introduction

2. The Petitioner states that, the 6th Respondent, Colombo Dockyard Ltd (CDL) had sold locally 21 marine craft, with raw material imported free of duty (only to be used for products meant for export market), an act which is prohibited, unless authorised by the 5th Respondent, the Board of Investments (BOI), and Customs, and all statutory levies fully paid. The CDL was fully aware of this legal requirement, and in all other cases where it had sold marine craft locally, (to Sri Lanka Transport Board and Road Development Authority), it had met this legal requirement and had fully paid the fiscal levies, prior to the disposal of the marine craft. However, in the case of 21 Marine craft sold to the Sri Lanka Ports Authority and the Sri Lanka Navy, the CDL had included the fiscal levy component in the sale price and recovered the total amount from the buyers, but had defrauded the entire fiscal levy component of Rs. 619,483,827.00, so collected without remitting same to Customs.

3. The Petitioner states that in response to a media publicity given by the Director General of Customs (DGC), calling for credible information about all forms of revenue frauds with 'handsome' cash rewards guaranteed by law to informants, the information about the CDL fraud was brought to his notice by a Customs informant on 11th October 2000.

(A copy of one such press advert published in the 'Daily News' dated 02nd April 1999 marked 'P1' and the formal receipt of the Information concerning the CDL fraud marked 'P2' are attached hereto).

4. The Petitioner states that whilst the Customs investigation headed by him was in progress, the CDL, the 6th Respondent, conceding their liability, voluntarily deposited a sum of Rs.94,015,050.00 with the Customs in two instalments on 25th July 2001 and 15th August 2001, as part of the total sum of Rs.619,483,827.00 defrauded.

(A copy of the Customs Investigation report compiled by the Petitioner marked 'P3' is attached hereto)

5. The Petitioner states that after the completion of the investigation, a formal Customs inquiry [Case No: P/Misc/93/2000] was commenced on 07th February 2002 to inquire into the alleged fraud, by the 3rd Respondent, but for no apparent reason, it dragged on for a period of two years, with no action whatsoever taken against the CDL as required by law.

6. The Petitioner states that he became aware of attempts by the 6th Respondent CDL to obtain a Tax Amnesty from the 2nd Respondent and he objected to the granting of such Tax Amnesty to the 2nd Respondent, the then DGC, by his letter dated 14th February 2004.

(A copy of the said letter dated 14th February 2004 addressed to the then DGC marked 'P5' is annexed hereto)

7. The Petitioner states that on 05th March 2004, the 2nd Respondent, disregarded the Petitioner's objections and purporting to act in terms of the Tax Amnesty Law [Act No 10 of 2003] granted a tax amnesty to the 6th Respondent, and terminated the Customs Inquiry [Case No: P/Misc/93/2000].

(A copy of the letter dated 05th March 2004 terminating the Customs inquiry marked 'P06' is annexed hereto)

8. The Petitioner states that on the 25th June 2004, he instituted action against the termination of the Customs Inquiry in the Court of Appeal (Case No: CA/1397/2004). On 09th February 2005, when the matter was taken up, the AG gave an undertaking to conduct the Customs inquiry 'as expeditiously as possible'. The Petitioner states that in view of the said undertaking, he

withdrew the Court action and states that the said undertaking has full force in law up to this moment.

(A copy of the said Court Order in CA/1397/2004 dated 09th February 2005 marked 'P7' is annexed hereto)

9. The Petitioner states that thereafter on 29th Aug 2005, the CDL, instituted legal action against the continuation of the Customs Inquiry, before the Court of Appeal [CA/1413/2005]. The CDL sought, *inter alia*, a Writ of Prohibition against the continuance of the Customs Inquiry, concerning the evasion of Goods and Services Tax (**GST**), Turnover Tax (**TT**), National Security Levy (**NSL**) and **Stamp duty**, on the basis that Customs was not empowered to invoke the provisions of the Customs Ordinance to 'recover' such levies.
10. The Petitioner states that after an inordinate delay of four years, on 27th April 2009 the Court of Appeal issued a Writ of Prohibition against the continuance of the Customs inquiry into non-payment of **GST**, **TT**, **NSL** and **Stamp Duty** as prayed by the CDL. Here, the Court has purported to follow the ruling given in the *Vallibel Lanka v DGC* (SC Appeal 26/2008 decided on 29th Aug 2008), wherein it has been held that 'recovery' of GST must be exercised by the Commissioner General Inland Revenue and not by the Director General of Customs. The Court of Appeal ruling contained an *obiter dictum* (referring to the *Toyota Lanka case*, SC Appeal No. 49/2008, decided on 20th March 2009) that "recovery" of the Customs duty '**could be made**' under Section 18A of the Customs Ordinance, a relief the 6th Respondent had not prayed for.

(A copy of the Judgement of the Court of Appeal in CA/ 1413/2005 marked 'P9' is annexed hereto)

11. The Petitioner states that the Supreme Court ruling in Toyota Lanka Case (SC Appeal No. 49/2008) clearly distinguishes the difference between the '**evasions of payment of fiscal levies**' with that of duties '**under-paid or unpaid on goods misdescribed**' and therefore the ruling given by the Court of Appeal in the CDL case [CA/1413/2005] has no application to the matter under review as in instances where the payment of Customs Duty is '**evaded**', Section 50A and 129 are required to be applied and only in instances where the Customs duties are '**underpaid**', section 18A may be invoked.
12. The Petitioner states further that owing to his persistent appeals, the 2nd Respondent, by letter dated 13th May 2009, instructed the 7th Respondent, the then AG, to appeal against the said Court of Appeal ruling [CA/1413/2005].

(A copy of the letter dated 13th May 2009 addressed to AG by the DGC marked 'P10' is annexed hereto)

13. The Petitioner states that the 7th Respondent unduly delayed complying with the DGC's instructions contained in the letter dated 13th May 2009, and therefore, the Petitioner along with the officers of the Customs Legal Affairs Unit, made representations to the then Solicitor General Priyasath Dep, who promptly agreed that there was a vital question of law to be decided and immediately took action to comply with the DGC's request, and on 05th June 2009 challenged the Court of Appeal ruling (CA/1413/2005) before the Supreme Court (SC/SLA/100/2009).
14. The Petitioner states that the 7th Respondent did not object to the Special Leave Application (SC/SLA/100/2009) filed by the Solicitor General, and on 04th November 2009, he convened a conference at his Chambers. It was attended by the Solicitor General Priyasath Dep, Deputy Solicitor General Sanjay Rajaratnam, the then DGC Sarath Jayathilake (2nd Respondent), Z A M Jazeel (Director of Customs, Legal Affairs Unit), Peter Goonawardena (OIC, Customs Legal Affairs) Upul Wasantha, Assistant Superintendent of Customs and the Petitioner. At the said meeting, the 7th Respondent, informed the 2nd Respondent that the references made in the Court of Appeal judgement (CA/1413/2005) in relation to the recovery of Customs duty under Section 18A, were mere ***obiter*** and in explicit terms advised the DGC to proceed with the Customs inquiry since the Court of Appeal judgement did not preclude the Customs from holding the inquiry. The Petitioner states that the minutes recorded in the Document marked '**P13**' by the Officer-in-Charge of the Legal Affairs Unit of the Customs, confirm the opinion expressed by the 7th Respondent at the said conference.
15. The Petitioner states that the Special Leave Application ((SC/SLA/100/2009) was called in Court on several occasions, but the AG repeatedly requested time to reconsider whether to proceed with the appeal. Thereafter, On 10th May 2010, almost one year after filing the application, the AG informed the 2nd Respondent, that the application for special leave would be withdrawn on the 'next date', which fell on 30th August 2010 and advised the Customs to initiate action to recover the Customs duties defrauded by the CDL under Section 18A of the Customs Ordinance.

*(A copy of the letter dated 10th May 2010 by AG addressed to DGC marked '**P13**' is annexed hereto).*

16. The Petitioner states that the 7th Respondent's advice to act in terms of Section 18A of the Customs Ordinance was a clear reversal of his opinion expressed to the panel of officers of the Customs Department on 04th November 2009 and it was tantamount to a negation of the punitive sanctions against the CDL, the 6th Respondent. Further the said advice also violated

the undertaking given to the Petitioner in the Court of Appeal in No CA/1397/2004, on 09th February 2005. The Petitioner states that this advice on the other hand exempted the CDL, from any penal sanctions being applied against them, as provided under Sections 50A and 129 of the Customs Ordinance. The Petitioner states further that 7th Respondent's act also deprived the Government of its rightful revenue, and effectively denied the informant and the Petitioner (the officer who received the information and headed the investigation) of their legitimate right to cash reward from the '**additional revenue**', that would have been recovered by way of penalties and forfeitures from the CDL, had the penal sanctions been invoked against the CDL, as mandated by Law.

17. The Petitioner states that on or about 24th May 2010 the 2nd Respondent, was removed from the office of the DGC before any action was taken on the 7th Respondent's advice. The 2nd Respondent's successor to the office of the DGC, Sudharma Karunaratna, the 4th Respondent, reviewed the entire matter relating to the CDL fraud. And then informed the 7th Respondent by the letter dated 03rd August 2010 that, considering the colossal revenue loss incurred by the government, the withdrawal of the Supreme Court action would be inappropriate. The said letter also drew the 7th Respondent's attention to the 'specific opinion' he had conveyed to the Customs on 04th Nov 2009, at the conference held at his chambers.

(A copy of the said letter dated 03rd August 2010 initiated by the 4th Respondent marked 'P14' is annexed hereto)

18. However, the Petitioner states that, on 16th Aug 2010 the 1st Respondent, the Secretary to the Treasury (ST), PB Jayasundara, summoned the 4th Respondent and several other officials, which included Peter Gunawardena (OIC), Customs Legal Affairs Unit (LAU), Upul Wasantha (AAL and the prosecutor of the CDL Customs Inquiry) to his office at the General Treasury and clearly instructed them to comply with the "directions" given by the AG on the matter, even though the 1st Respondent had no statutory power or authority to issue such instructions to the DGC, 'who has the General Superintendence of all matters relating to the Customs under the Customs Ordinance'. The Petitioner states that he is aware that when the Officers of the LAU had opposed the ST's directive, the ST had in turn warned them either to follow his directions or leave the Customs and join the private bar. However, the ST refrained from confirming his improper directive to the DGC, in writing.

19. The Petitioner states that the ST's verbal directive to DGC was preposterous from the 'protection of government revenue point of view, as the said provision of law [Sec. 18A (4) of the Customs Ordinance] allowed the CDL to pay the colossal amount of public funds it had

misappropriated, over an extended period in instalments as they pleased, without any interest being paid, frustrating punitive sanctions as provided by the Section 50A and 129 of the Customs Ordinance.

20. The Petitioner states further that the improper Executive Action taken by the 7th Respondent, which was endorsed by the 1st Respondent, was entirely against the public interests. The Petitioner reiterates that their actions have completely negated the legitimate rights and expectations guaranteed to the Informant, and also of the Customs investigator, that is the Petitioner. They have taken an enormous risk in bringing this highly influential fraudster, the CDL to book.
21. The Petitioner states that the improper conduct of the 1st, 2nd, 3rd, and 7th Respondents in this case warrant judicial scrutiny since they have evidently failed to honour their constitutional oath taken to perform the duties and functions of their respective offices honestly and faithfully. The Petitioner states that they are also liable for their fraudulent conduct, which has hitherto denied the State of its rightful revenue, by effectively preventing the operation of the Customs law against the CDL.
22. The Petitioner states that on 30th Aug 2010, when the matter (SC/SLA/100/2009) was taken up, the AG informed the Court that the 4th Respondent, the DGC, 'had been informed' and the DGC had consented to the withdrawal of the case. The Petitioner states that the said submission made to the Court was manifestly false and amounted to deceiving the Supreme Court and also the 4th Respondent, the DGC.
23. The Petitioner states that after the withdrawal of the Supreme Court action on 30th Aug 2010, contrary to the specific instructions of the 4th Respondent, the DGC, a letter dated 26th August 2010 by the 7th Respondent was 'hand-delivered' at the DGC's Office on 01st September 2010. This letter contained the following paragraph.

*'...please be advised that the Petition of Appeal was filed in the ordinary 'course as a matter of caution only'. I am of the considered view that there is **no merit in pursuing this appeal** and in the circumstances the said appeal would be withdrawn...'*

(A copy of the letter dated 26th August 2010 by the AG addressed to DGC marked 'P16' is attached hereto).

24. The Petitioner states that the date of the said letter entered as 26th August 2010 sent by the AG implies that the 4th Respondent, the DGC, had been duly informed prior to the withdrawal of the Special Leave Application on 30th Aug 2010. However, the Customs 'Received' stamp and the minutes made by the Legal Affairs Unit on the letter, confirm that the 'hand delivered' letter had in fact received by the Customs only on 01st September 2010, that was after the withdrawal of the case. The Petitioner restates that this letter was despatched to the DGC, after having deceived the Supreme Court and in clear disregard of the 4th Respondent's specific instructions to the 7th Respondent to proceed with the Special Leave Application. This improper action by the AG followed by his cover-up attempt made through the letter dated 26th August 2010, patently demonstrate the gross misconduct and dishonesty of the 7th Respondent, the then AG. The Petitioner states that DGC in the observations to the Petition of the Petitioner filed in Court, reaffirmed that the letter with date entered as 26th August 2010 was received in her office (01st September 2010) after the Supreme Court action was withdrawn by the 7th Respondent on 30th Aug 2010.

(A copy of the DGC's observation on the Petition of the Petitioner marked 'P20' is annexed hereto)

Professional misconduct of Counsel Upul Jayasooriya

25. The Petitioner states that in his Petition filed in Court on 24th September 2010, there was a reference to the misconduct and dishonesty of the 7th Respondent, supported by an affidavit affirmed by the then Director General of Customs WDL Perera, marked 'P12'. The Petitioner states that his then Counsel Upul Jayasooriya amended the said Petition on two occasions (07th and 17th October 2010), *inter alia*, removing the document marked 'P12', and also removing the references concerning Mohan Peiris.

(A copy of the Petition dated 24th Sep 2010 marked 'X' is annexed hereto)

26. The Petitioner states that thereafter the Counsel Upul Jayasooriya refused to represent the Petitioner giving no reasons the misconduct, of which was reported to the Chief Justice by the Petitioner vide an Affidavit dated 22nd November 2011. Thereafter Counsel Nagananda Kodituwakku was prevailed upon to appear for the Petitioner and further to an application, which was allowed by the Court on 05th December 2011, an amended Petition dated 23rd December 2011 was tendered. As permitted by the Court, in this amended Petition, 'specific references' concerning the conduct of the 7th Respondent, Mohan Peiris as evidenced by the Document marked 'P12' was reintroduced, and also citing him in his personal capacity.

(A copy of the Petition dated 23rd December 2011 marked 'Y', a copy of the Petitioner's affidavit dated 22nd Nov 2011 marked 'P17', the DGC WDL Perera's affidavit marked 'P12' and the Journal entry dated 05th December 2011, marked 'P25' are annexed hereto).

Abuse of legal process by the Respondents

27. The Petitioner states that since filing of his fundamental rights application in September 2010, it had been called before Court on 19 occasions and postponed 7 times as the Respondents deliberately prevented the supporting of the application. On numerous occasions applications made to support it before a 2-Judge Bench, (when names of Justice Dep and Ratnayake were included in the Bench, despite the fact that they had informed that they would not take part in the hearing) they were disallowed as the Respondents raised objections against supporting the application before a 2-Judge Bench, though clearly permitted under Article 126(2) of the Constitution.

Abuse of Office by Hettige J

28. The Petitioner states that when the matter was fixed for support on 27th March 2012 the Bench included Dep J, (who on 30th Sep 2011 had clearly indicated his unwillingness to hear the case), and accordingly the matter was postponed to 02nd July 2012. Thereafter further to a Motion filed in Court on 13th June 2012 by the 8th Respondent the matter had been called in Court on 21st June 2012, with no notice to the Petitioner, and re-fixed ex-parte for support on 06th September 2012.

29. The Petitioner states that on 02nd July 2012, unaware of what had transpired on 21st June 2012, he and his Counsel attended the Court and found that the matter had been called on 21st June 2012 and postponed for support on 06th September 2012. The Petitioner states that thereafter on 04th July 2012 a Motion was filed specifying reasons and seeking permission to support the Petition on 11th, 12th or 13th July 2012. However, on 09th July 2012, Hettige J completely disregarded the said Motion and removed the case from the support list of cases due for 06th September 2012 and made order, that the case only be mentioned on 06th September 2012 to fix a date for support.

(A copy of the Motion dated 04th July 2012 filed in Court marked 'P23' is annexed hereto)

30. The Petitioner states that his Counsel then reported the abuse of office by Justice Hettige to the Chief Justice Dr Bandaranayaka on 12th July 2012 with an affidavit dated 05th July 2012,

furnished by the Petitioner. Thereafter, further to the directions of the Chief Justice, conveyed to his Counsel by the Secretary to the Chief Justice, another Motion was filed by his Counsel on 20th July 2012, seeking an earlier date (02nd, 06th or 08th August 2012) to support the application. This was referred to the very same Hettige J, who was compelled to reverse his earlier order made on 09th July 2012 and to re-fix the matter for support on 08th August 2012, as requested by the Petitioner.

(Copies of the Motion dated 20th July 2012 marked 'P24', the Affidavit dated 05th July 2012 marked 'P18' and the complaint made against Hettige J to the Hon Chief Justice by the Counsel for the Petitioner dated 11th July 2012 marked 'P22' are annexed hereto)

Continuous abuse of legal process by Respondents

31. The Petitioner states that thereafter when the matter was taken up for support on 08th August 2012 the Counsel for the 6th Respondent, Colombo Dockyard, was absent and the matter was once again postponed for support on 10th September 2012 on which day the 8th Respondent, the AG was absent and then again matter was re-fixed for support on 22nd January 2013.
32. The Petitioner states that thereafter further to a Motion filed by his Counsel on 12th December 2012, and the date fixed for support was brought forward to 20th December 2012. And on 20th December 2012 when the matter was taken up before the Bench presided over by Bandaranayake CJ, the Respondents who were all present, once again objected to the supporting of the application claiming that the Motion filed in Court had not been served through the Registry, and it was once again postponed.

Interference with the hearing by the 7th Respondent Mohan Peiris

33. Petitioner states that the matter was then listed for support on 31st January before a Bench presided over by Tilakawardena J but at the last minute, this case was transferred to a different Bench presided over by the 7th Respondent, with Sripawan J and Wanasundara J. The Petitioner states that his case was all about the gross misconduct and dishonesty of the 7th Respondent and therefore 7th Respondent's taking part in the hearing was objected his counsel and then it was re-fixed for support on the following day (01st February 2013).

(Supreme Court Cases listed for 31st January 2013 marked 'P26' is annexed hereto)

34. The Petitioner states that on 01st February 2013 his matter was listed to be taken up before a Bench presided over by Marsoof J in Court 502, but just before the Court sessions were commenced, it was announced that it would be taken up for support before a different Bench

presided over by Ratnayake J (who had already indicated that he did not wish to hear this case) and two other Justices namely Hettige J and Wanasundara J in Court 403. When the case was taken up, Ratnayake J withdrew stating that he had already declined to hear this case but the 8th Respondent, the AG insisted that the matter should be supported before the remaining two Justices. The Petitioner's Counsel strenuously objected, to support the matter before Hettige J, on the basis that he was prejudiced, as Hettige J's abuse of office as aforementioned had been reported to the Chief Justice by his Counsel. However, Hettige J overruled the objections and directed that the matter be supported.

(Schedule of Supreme Court Cases listed for 01st February 2013 marked 'P27' is annexed hereto)

35. The Petitioner states that then the 8th Respondent raised a preliminary objection that Petitioner's Fundamental Rights Application is based solely on a Judicial Decision pronounced by the Supreme Court, dismissing the 'special leave to appeal application' (SC/SLA/100/2009) filed by the 4th Respondent, and that therefore there is 'no valid fundamental right violation Petition' before the Court for the Petitioner to support.
36. The Petitioner states that his Counsel argued that improper acts committed by the 7th Respondent, the then AG viz the withdrawal the special leave to appeal application (SC/SLA/100/2009) filed by the 4th Respondent, the DGC, disregarding the clear instruction given by the 4th Respondent, and that 7th Respondent's directions given to the 4th Respondent by his letter dated 26th August 2010, that recoveries due from the 6th Respondent, CDL should be pursued in terms of Section 18A, effectively negating the invocation of penal sanctions under the Sections 50A and 129 of the Customs Ordinance against the CDL, had violated the Petitioner's fundamental right guaranteed under Article 12(1).
37. The Petitioner states that his Counsel further submitted that the 7th Respondent's gross misconduct and dishonesty concerning the withdrawal of the special leave to appeal application (SC/SLA/100/2009) was manifestly established by his letter dated 26th August 2010 sent 'by hand' to the 4th Respondent, which had in fact been received by the DGC's office only after the withdrawal of the case by the AG, the fact which was proved by the Director General's observations sent to the AG filed in Court.
38. The Petitioner states further that his Counsel submitted to the Court that AG's Executive act of withdrawing the said special leave application (SC/SLA/100/2009) was a clear abuse of office of the AG, by the 7th Respondent Mohan Peiris, as he had deceived, Supreme Court and the DGC, the 4th Respondent.

39. The Petitioner states that his Counsel further argued that the said improper and dishonest act committed by the then AG clearly violated Petitioner's and his informant's fundamental right to equal treatment guaranteed under Article 12(1) of the Constitution, as the said dishonest act effectively denied them their legitimate right to a pecuniary reward guaranteed under the Customs Ordinance (Section 153).

Ruling by the 2-Judge Bench

40. The Petitioner states that on 01st February 2013, the 2-Judge Bench paid no attention to his Counsel's submissions or to examine the documents referred to by the Counsel, and finally order was made that there was no right violation by an Executive action established and leave to proceed was denied with a further punishment meted to the Petitioner to pay the Respondent's Costs, which the Petitioner states itself demonstrates the level of prejudice shown by the Bench against the Petitioner.

Refusal to accept the request for the Order of 2-Judge Bench by the Registry

41. The Petitioner states that an application was made by his Counsel for a certified copy of the Order made on 01st February 2013, to the Registrar of the Supreme Court on 05th February 2013, yet the said application was not acknowledged. Therefore, in order to have a proof of delivery of the same, the Counsel made the same request by Recorded Delivery on 06th February 2013. Yet, a certified copy of the Order has not been made available to the Counsel up until this Revision Application is tendered to the Court and in the event a certified copy of the Order is issued by the Registry, the Petitioner states that the same would be produced to the Court through the Counsel.

(The copies of the application dated 05th February 2013 for the certified copy of the Order marked 'P28' and the letter dated 06th February 2013 marked 'P29', accompanying the application, and the proof of the recorded delivery marked 'P30' are annexed hereto)

Judgment made *per incuriam*

42. The Petitioner states that 'the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent provided by the Constitution itself [Article 4 (d) of the Constitution]] and 'Judges must beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws.' - Francis Bacon (Of Judicature).

43. The Petitioner states that there are precedents, where it has been held that the Court should exercise its power of inherent jurisdiction to rectify errors, in similar circumstances as in the Petitioner's case.

- a) As per the judgement in **Jayaraj Fernandopulle vs. Premachandra de Silva and others** [1996 (ISLR).70, " the Court has no statutory jurisdiction conferred by the Constitution or by any other law to rehear, review, alter or vary its decisions and as a general rule, no Court has power to rehear, review, alter or vary any judgment or order made by it after it has been entered. However, the Court has inherent power to correct decisions made *per incuriam*."

When a person invokes the exercise of inherent powers of the Court, that are adjunct to existing jurisdiction to remedy injustice, two questions must be asked by the Court:

- i. Is it a case which comes within the scope of the inherent powers of the Court?
- ii. Is it one in which those powers should be exercised?

The attainment of justice is a guiding factor, and an order made on wrong facts, given to the prejudice of a party, will be set aside by remedying the injustice caused.

- b) In the **Revision Application [SC 209/2007 (FR)] made by the 1st Respondent, P.B Jayasundara**, who had been found guilty by the Supreme Court for abuse of office held in trust, and paid a sum of Rs 500,000.00, being compensation to the state, it was held *inter alia* as follows.

Per Hon. Justice **Ms Thilakawardene**, (dissenting)

'... It is important to recognise, then, that the Supreme Court's broad powers over matters of Fundamental Rights stem, not from an overzealous interpretation of judicial power, but from an understanding of the unique nature of these matters for which the Court has been empowered to protect. Put simply, Fundamental Rights applications are qualitatively different from other types of appeals heard before this Court and warrant greater latitude with respect to their review and redress in order to encompass the equitable jurisdiction exercised in these applications...'

Per **Hon. Justice Marsoof**,

*“While our hierarchy of courts is built on an assumption of fallibility, with one, two or sometimes even three rights of appeal, as well as the often used remedy of revision, being available to correct errors that may occur in the process of judicial decision making, in the absence of such a review mechanism, the remedy provided by Article 126 is fraught with the danger of becoming an “unruly horse”, and for this reason has to be exercised with great caution”. This Court has generally displayed objectivity, independence and utmost diligence in making its decisions and determinations, conscious that it is fallible though final. The decision of this Court in the **Fernandopulle** case stressed the need for finality, and very clearly laid down that this Court is not competent to reconsider, revise, vary or set aside its own judgement or order (in the context of a fundamental rights application) except under its inherent power to remedy a serious miscarriage of justice, as for instance, where the previous judgement or order was made through manifest error (per incuriam).*

Per **Hon. Justice Sripavan**,

*The decision of the Supreme Court is to be considered as final. The judgement once delivered cannot be reviewed by the same Bench or by any other division of the Court except in the limited circumstances as set out in the case of **Jayaraj Fernandopulle and others vs De Silva** and others (1996) 1 SLR page 70, also vide **Bandula Ravindranata Jayantha & eight others vs Ms Chandrika Bandaranaike Kumaratunge & others S C Minutes of 03rd Aug 2009***

44. The Petitioner respectfully states that the order by the 2-Judge Bench has been made without jurisdiction in as much as;
- a) The Petitioner was not granted a full and complete hearing before making the said Order;
 - b) The 2-Judge Bench was not competent to make the said Order;
 - c) Hettige J was not qualified to attend the hearing, and hence the order was made through manifest error (per incuriam)
 - d) The said order has been made breaching the Petitioner’s right to a fair trial guaranteed by Article 13(3);

- e) The said Order has been made *per incuriam* and in violation of the Petitioner's Fundamental Rights guaranteed under Article 12(1) of the Constitution;
 - f) Objections raised by the Counsel for the Petitioner against the hearing before the 2-Judge Bench were overruled, whereas on a number of previous occasions, similar applications made by the Counsel for the Petitioner had been refused accepting the objections raised by the Respondents;
 - g) Petitioner's Fundamental Rights Application is patently based on violation of fundamental rights by an Executive Action;
45. The Petitioner states that in view of the foregoing it is clear that there has been a grave miscarriage of justice and there exists a just and reasonable cause for the Court to exercise its inherent power to intervene and to revise the Order made by the Court on 01st February 2013.
46. The Petitioner has not previously invoked the jurisdiction of the Court in respect of the matter hereinbefore set out, and pleads that documents attached hereto marked 'X', 'Y', 'P1' to 'P30' be deemed to be part and parcel hereof.
47. The Petitioner has given notice of this Application to the Attorney General and all other Respondents in the Original Application.

Wherefore the Petitioner prays that Yours Lordships' Court be pleased to;

- a) Vacate the Order dated 01st February 2013 terminating the Petition of the Petitioner
- b) Grant leave to proceed with the FR Application No 536/2010 as amended
- c) Grant such other and further relief as to Your Lordship's Court shall seem fit and meet

Attorney-at-Law for the Petitioner