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

In the matter of an application under and in terms of Article 140 of the Constitution for Mandates in the nature of Writs of Certiorari and Prohibition.

CA Writ Application No: 285/2017

B. Deniswaran

2nd Cross Street,

Pettah, Mannar.

Petitioner

Vs.

01. Hon.Justice C.V.Wingneswaran.

Chief Minister, Northern Province,

26, Somasundaram Avenue,Jaffna.

02. Hon.K.Sarveswaran

Kaddaipirai Road,

Kopay South Kopay.

03. Hon.Ananthi Sasitharan

Valakamparai,

Chulipuam,Jaffna.

04. Hon. G.Gunaseelan

Field Street,Sinnakadai,

Mannar.

05. Hon.K.Sivanesan

Kanukerny East,

Mulliyawalai,Mullaitivu.

06. Hon. P.Sathiyalingam

Vairavapiliyankulam,Vavuniya.

07. Hon.Reginald Cooray,

Governor,Northern Province,

Governor's Secretariat, Old Park, Kandy,

Road,Chundukuli,Jaffna.

Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel: Suren Fernando with K. Wickremanayake and Shiloma David for the Petitioner

K. Kanag-Iswaran P.C. with L. Jayakumar and A. Weeraratne for the 1st Respondent

M.A. Sumanthiran P.C. with N.J. Anketell and J. Arulananthan for the 6th Respondent

Argued on: 08.05.2018, 10.05.2018 and 15.05.2018

Written Submissions filed on:

Petitioner on 22.05.2018 and 30.05.2018

1st Respondent on 22.05.2018 and 30.05.2018

6th Respondent on 22.05.2018

Decided on: 29th June 2018

Janak De Silva J.

The Petitioner was elected as a member of the Northern Provincial Council (NPC) on 25.09.2013 from the Mannar District on the Illankai Tamil Arasu Kadchi (ITAK) list (P1). He was appointed as Minister of Fisheries, Transport, Trade and Commerce and Rural Development of the NPC with effect from 11.10.2013(P2). Four other Ministers, namely, the 1st Respondent who is also the Chief Minister of the NPC, 6th Respondent, Hon. P. Ayngaranesan and Hon. T. Kurukularasa were sworn in as Ministers alongside the Petitioner. Later, the Petitioner was assigned a further portfolio of Road Development and Motor Traffic (P3).

Sometime in 2016, the 1st Respondent appointed an inquiry panel to inquire into allegations already made and allegations that would be made in the future in respect of Hon. P. Ayngaranesan, Hon. T. Kurukularasa, the 6th Respondent and the Petitioner. The inquiry panel exonerated the Petitioner and the 6th Respondent but held that Hon. P. Ayngaranesan and Hon. T. Kurukularasa were guilty of certain allegations and recommended that they be removed as Ministers.

On 06.06.2017 the 1st Respondent presented the inquiry panel report before the NPC and informed that explanations will be called from the Ministers found guilty. On 14.06.2017 the 1st Respondent requested the two Ministers found guilty to resign and at the same time indicated that the two Ministers found not guilty, i.e. Petitioner and 6th Respondent, must go on one month's compulsory leave pending fresh inquiry into them. The Petitioner claims that several members of the ITAK protested at the unfair treatment of the Petitioner and 6th Respondent which culminated in the handing over of a motion of no-confidence against the 1st Respondent signed by about 20 members of the NPC.

The Petitioner claims that later after several discussions between the 1st Respondent and the leader of the ITAK Hon. R. Sampanthan, it was agreed that the motion of no-confidence against the 1st Respondent would be withdrawn if inter alia the Petitioner and 6th Respondent would not be compelled to go on compulsory leave pending another inquiry which the 1st Respondent may wish to conduct.

The Petitioner submits he became aware in the meantime that Ministers Hon. P. Ayngaranesan and Hon. T. Kurukularasa had resigned and were replaced by the 2nd and 3rd Respondents (P6).

The Petitioner claims that despite the understanding between Hon. R. Sampanthan and the 1st Respondent, attempts were made by the 1st Respondent to remove the Petitioner and the 6th Respondent from the Board of Ministers of the NPC. He states that several attempts were made by the 1st Respondent through intermediaries to get the Petitioner to resign voluntarily which he resisted. The Petitioner states that there were some media reports that the 6th Respondent has indicated his desire to resign voluntarily but he is unaware whether the 6th Respondent has in fact resigned.

On 22.08.2017 the Petitioner attended the meeting of the Board of Minister's held at the residence of the 1st Respondent. On 23.08.2017 the 7th Respondent, Governor of the NPC, informed the Petitioner during a telephone conversation that the 1st Respondent had removed the Petitioner from office and that the 7th Respondent had received a letter to that effect and that the 1st Respondent wanted the 7th Respondent to swear in new Ministers to replace the Petitioner and the 6th Respondent. The Petitioner informed the 7th Respondent that the 1st Respondent had no authority to remove the Petitioner.

By letter dated 23.08.2017 (P8) sent to the 7th Respondent which was copied to the 1st Respondent, the Petitioner states that he is made to understand from the news paper that the 1st Respondent has requested the 7th Respondent to swear in new Ministers including one to replace him. In that letter the Petitioner states that he continues to be a Minister of the NPC and that a Governor of a Province has no authority to cause a "Minister to lose his position acting on the advice of the Chief Minister" and called upon the 7th Respondent to "halt your hands" in the swearing in of a new Minister replacing the Petitioner.

The Petitioner however later learnt from media reports that the 7th Respondent had purported to swear in the 3rd and 4th Respondents as Ministers as requested by the 1st Respondent. Thereafter the Petitioner sent the 7th Respondent letter dated 24.08.2017 (P11) by which he asserted that there was no vacancy in the Board of Ministers of the NPC to which a person could

have been appointed to replace the Petitioner and that he continues to remain as a member of the Board of Ministers of the NPC.

The Petitioner further states that on 24.08.2017(P12) he collected a letter dated 20.08.2017 addressed to him by the 1st Respondent which read:

> "this is to inform you that **I have decided to remove you from the post of Minister** of Fisheries, Transport, Trade and Commerce, Rural Development, Road Development and Motor Traffic forthwith. Please hand over all official documents in this regard to your Secretary. The official letter in this regard will follow. Thank you." (emphasis added)

Subsequently, the Petitioner states that he became aware that the portfolios held by him have been purportedly distributed amongst the 1st, 3rd and 5th Respondents (P13).

The Petitioner received a letter dated 25.08.2017 (P14) from the 1st Respondent in response to P8 which reads as follows:

> "Your letter of 24.08.2017 under above handing to hand.
>
> I refer you to Article 154(F)(5) of the Constitution and section 14(f) of the Interpretation Ordinance. In any event there is no Ministry as you refer."

The Petitioner states that his purported removal by the 1st Respondent as evidenced by P12 is ultra vires the powers of the 1st Respondent and is illegal, void ab initio and of no force or effect in law. He further states that in terms of Article 154F (5) of the Constitution the power of appointment of Ministers is provided to the Governor who shall appoint such Minister on the advice of the Chief Minister but is silent on the question of removal of Ministers.

It is further submitted that in terms of Article 154F (1) of the Constitution, the Board of Ministers is restricted to the Chief Minister and not more than four other Ministers. The Petitioner claims that the purported appointment of the 4th and 5th Respondents as Ministers was made despite the absence of any vacancies in the Board of Ministers of the NPC.

Previous Proceedings

On 19.09.2017 this application was supported for notice before another division of this Court and the learned Counsel for the Petitioner and 6th Respondent and the Learned President's Counsel for the 1st Respondent were heard. The Court on 16.10.2017 refused notice on the basis that the affidavit filed by the Petitioner is not valid, P12 is not amendable to writ jurisdiction as it is only a communication of the intention of the 1st Respondent to remove the Petitioner and that the impugned appointments are political in nature and the rules of administrative law does not apply to them.

The Petitioner filed S.C. (Special) Leave to Appeal Application No. 246/2017 assailing the judgement of the Court of Appeal. On 21.11.2017 the Supreme Court made order that the parties are agreeable to have the matter sent back to the Court of Appeal and to have the matter supported afresh after notice to the Respondents.

When this matter was sought to be supported for notice after all parties were noticed, the learned President's Counsel for the 1st Respondent raised what he termed to be three preliminary objections in law for consideration by Court which are:

(1) This Court is without jurisdiction to hear and determine this application by reason of the provisions of Article 125 of the Constitution, in that, the Application calls for an interpretation of the provisions of Article 154F (5) of the Constitution.

(2) This application is violative of Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990, in that, the Petitioner has failed to exhibit either the original or duly certified copies of its exhibits together with the Petition.

(3) As a matter of law, the 6th Respondent could not have been impleaded as a party Respondent to this Application and his name should therefore be struck off for the reason that it is settled law that in proceedings for prerogative writs the only persons who can be made party Respondents are (i) the person or authority whose exercise of power is sought to be prohibited and/or quashed, and (ii) persons who benefitted from the impugned order.

Delay in raising preliminary objections

The learned Counsel for the Petitioner objected to these preliminary objections been considered by Court as the 1st Respondent did not raise it when this matter was first supported on 19.09.2017 or before the Supreme Court when the special leave to appeal matter was taken up. He relied on the decision in *Ediriwickrama and another v. Ratnasiri* [S.C. Appeal No. 85/2004, S.C.M. of 22.02.2013]. There the Supreme Court overruled certain preliminary objections inter alia as they were taken up nearly nine years after special leave to appeal was granted. However, in this application the Court of Appeal after hearing parties refused notice on 19.09.2017 against which a special leave to appeal application was filed. When that matter was supported parties agreed to have the matter sent back to the Court of Appeal and to have the matter supported afresh after notice to the Respondents. Hence the facts in this application are different to the facts in *Ediriwickrama's* case (supra).

In any event, the first preliminary objection is based on Article 125 of the Constitution which vests the Supreme Court with sole and exclusive jurisdiction to interpret the Constitution. Hence there is a patent lack of jurisdiction for this Court to interpret the Constitution which cannot be remedied by the acquiescence of the parties [*Thambipillai and two others v. Thambumuttu* (77 N.L.R. 97)].

I therefore overrule the objection raised by the learned Counsel for the Petitioner to the preliminary objections raised on behalf of the 1st Respondent.

Preliminary Objection No. 1 – Petitioner's application calls for an interpretation of the provisions of Article 154F (5) of the Constitution

Ambit and Scope of Article 125 of the Constitution

Article 125 of the Constitution states that the Supreme Court has sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and whenever any such question arises in the course of any proceedings in, inter alia this Court, such question must be referred to the Supreme Court for determination.

The ambit and scope of Article 125 of the Constitution was explained by Samarakoon C.J. in *Billimoria v. Minister of Lands and Land Development & Mahaweli Development and others* [(1978-79-80) 1 Sri. L. R. 10 at 15] as follows:

> "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."

This exposition of the law was long considered to be the correct legal position and followed by our Courts. In *Shanthi Chandrasekeram* v *D.B Wijetunge and others* [(1992) 2 Sri LR 293 at 297] Fernando J. appears to have adopted part of the said observations in stating that "just as Article 125(1) would apply to a question relating to the interpretation of the Constitution, **properly** arising in the course of the proceedings of any court or tribunal, and not one which is irrelevant or of purely academic interest."

However, the learned President's Counsel for the 1st Respondent submitted that the *ratio decidendi* in *Billimoria's* case is:

> "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."

He submitted that the rest of the judicial pronouncement in *Billimoria's* case is *obiter dicta* and relied on the determination of the Supreme Court in *Chandra Jayaratne v. Hon. Anura Priyadarshana Yapa and others* [S.C. Reference No. 3/2012, C.A. (Writ) Application No. 358/2012].

The learned Counsel for the Petitioner in response submitted that in *Hon. Attorney General v. Dr. Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake and others* [S.C. Appeal 67/2013, S.C.M. 21.02.2014] a five-judge bench of the Supreme Court overruled the determination of the Supreme Court in *Chandra Jayaratne's* case (supra) and as such *Billimoria's* case should be considered as the authoritative guide in understanding the ambit and scope of Article 125 of the Constitution.

Marsoof J. in the relevant part of the *Dr. Bandaranayake's* case (supra) held as follows:

> "It is my considered opinion that the determination of this Court in SC Reference No. 3/2012 manifestly exceeded the mandate conferred on this Court by Article 125(1) of the Constitution to interpret the Constitution, and was made in disregard of the clear language of Article 107(3) and other basic provisions of the Constitution. The determination is a blatant distortion of the law, and is altogether erroneous, and must not be allowed to stand. This Court hereby overrules the said determination of this Court in SC Reference No. 3/2012." [page 24 of the judgement]

The learned President's Counsel for the 1st Respondent countered by submitting that the five-judge bench in *Dr. Bandaranayake's* case (supra) could not as a matter of law have overruled the determination of the three-judge bench in *Chandra Jayaratne's* case (supra) vis-a-vis its pronouncements about the ambit and scope of Article 125 of the Constitution.

In addressing this submission, it is important to bear in mind the distinction between the *ratio decidendi* and the *obiter dicta* of a judgement.

Rupert Cross in *Precedents in the English Law* (3rd Ed., 1977) offers the following formulations for the two terms:

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury" (page 76)
>
> "*Obiter dictum* is a proposition of law which does not form part of the ratio decidendi" (page 79)

Thamotheram J. in *Walker Sons and Co. (UK) Ltd. v. Gunatilake* [(1978-79-80) 1 Sri. L. R. 231 at 232] explicitly held that the ratio decidendi of a Superior Court is binding for all inferior Courts:

> "The ratio decidendi of cases decided by the Court becomes a rule for the future binding all courts which the courts of last resort are not whether it be under the same system or under a different system."

Rupert Cross in *Precedents in the English Law* (Oxford University Press, 1961 at p. 75) states that in order to discover what the *ratio decidendi* of a particular case is one must have regard to the facts of that case, the issues raised by the pleadings and arguments and subsequent cases that have considered the case under review.

As correctly submitted by the learned President's Counsel for the 1st Respondent, the two questions upon which leave had been granted in *Dr. Bandaranayake's* case (supra) were:

1) Did the Court of Appeal err in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament?
2) Did the Court of Appeal err in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament?

Rupert Cross in *Precedents in the English Law* (Oxford University Press, 1961 at p. 122) observes that express overruling in general is where a later decision overrules the *ratio decidendi* of a previous case. This results in the *ratio decidendi* of the earlier case having no authority so far as the doctrine of binding precedent is concerned. He goes onto say that **dicta in an overruled judgment could still be cited in the course of argument in subsequent cases since the case only ceases to be authority for the *ratio decidendi*.**

Hence, I agree with the submission made by the learned President's Counsel for the 1st Respondent that the five-judge bench in *Dr. Bandaranayake's* case (supra) could not, as a matter of law, have overruled the determination of the three-judge bench in *Chandra Jayaratne's* case (supra) vis-à-vis its pronouncement on the ambit and scope of Article 125 of the Constitution and that the part of the judgement in *Chandra Jayaratne's* case (supra) dealing with the ambit and scope of Article 125 of the Constitution could still be cited in the course of argument in subsequent cases since the case only ceases to be authority for the *ratio decidendi.* In *Chandra Jayaratne's* case (supra) after analysing Article 125 of the Constitution the Supreme Court appears to take the view that the observations made in *Billimoria's* case (supra) on the scope of Article 125 of the Constitution is *obiter dicta* although later it is stated that "in any event Samarakone C.J.'s pronouncement (sic) Billimoria's case on Article 125 is to be treated with high respect" (page 12).

The Supreme Court went on to state:

> "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." (page 10 of the determination)

However, the question referred to the Supreme Court in *Chandra Jayaratne's* case (supra) was:

"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 maters relating to the investigation of the alleged misbehavour (sic) or incapacity?"

The reference did not deal with the ambit and scope of Article 125 of the Constitution. Accordingly, applying the same test proposed by the learned President's Counsel to ascertain the *ratio decidendi* in *Dr. Bandaranayake's* case (supra), I am of the view that the dicta in *Chandra Jayaratne's* case (supra) on the ambit and scope of Article 125 of the Constitution is not part of the *ratio decidendi* of the case.

Rupert Cross in *Precedents in the English Law* (3rd Ed., 1977) observes that a distinction can be drawn between different kinds of dicta. This would be:

(a) dicta which are irrelevant to the case in which they occur (which he identifies as obiter dicta) and

(b) dicta **which relate to some collateral issue in the case** although not forming part of the *ratio decidendi* (which he identifies as judicial dicta). (page 85) (emphasis added)

This classification seems to suggest that judicial dicta have a higher level of authority than mere obiter dicta. In my view the observations made in *Chandra Jayaratne's* case (supra) about the scope of Article 125 falls into the latter category as the Supreme Court had to deal with the ambit and scope of Article 125 of the Constitution in response to a preliminary objection raised by the Attorney General in both his oral arguments and written submissions.

Nonetheless I note that, which the Supreme Court did not consider in *Chandra Jayaratne's* case (supra), the dicta in *Billimoria's* case (supra) on the ambit and scope of Article 125 of the Constitution received a high approval of seven (7) judges of the Supreme Court in *Wijewickrema v. Attorney General* [(1982) 2 Sri. L. R. 775 at 777] when the Supreme Court stated that "Before parting with this matter, we wish to draw the attention of the District Judge to the requirements of Rule 64 of the Supreme Court Rules 1978 and to the observations of this Court in *Billimoria's* case whenever a reference is made under Article 125(1)" (emphasis added). That matter arose from a reference made by the District Court in terms of Article 125 of the Constitution Thus, a seven-judge division of the present Supreme Court had no hesitation in acknowledging what they referred to as "the observations of this Court in *Billimoria's* case" as the correct statement of the law on the ambit and scope of Article 125 of the Constitution.

In the circumstances, I am inclined to apply the judicial dicta in *Billimoria's* case (supra) vis-à-vis Article 125 of the Constitution in determining whether this application raises a question of interpretation of the Constitution as presently constituted.

Interpretation v. Application

In examining this question, it is important to bear in mind the distinction between interpretation and application as Article 125 of the Constitution requires only a question relating to the interpretation of the Constitution to be referred to the Supreme Court.

In *Kumaranatunge* v. *Jayakody and another* [(1984) 2 Sri LR 45 at 58] Tambiah J. explains the distinction between the two concepts as follows:

> *"There is a clear distinction between "application" and "interpretation" of a provision of a Statute.* ***"Interpretation may be defined as the process of reducing the Statute applicable to a single sensible meaning*** *- the making of a choice from several possible meanings.* ***Application, on the other hand, is the process of determining whether the facts of the case come within the meaning so chosen*** *. . . . . The meaning of a statute is not doubtful merely because its application in a particular case is doubtful. Even though the statute is so plain and explicit as to be susceptible of only one sensible meaning, and even though the meaning is ascertained as a matter of interpretation, it often remains in doubt whether the facts are within or without the penumbra of a single meaning. To determine this question, then, is what is meant by application."* (emphasis added)

Analogous approach is discernible when a similar question arises in the context of treaty interpretation.

The simplest exposition of the distinction between treaty interpretation and treaty application can be seen in the Dissenting Opinion of Judge Ehrlich in the *Case concerning the Factory at Chorzow (Claim for indemnity—Jurisdiction)* [PCIJ Rep Series A No 9 (1927)]. The learned judge observed as follows:

> "The words "interpretation and application" do not, by themselves, imply such an affirmative answer. They refer to processes, of which one, interpretation, is that of determining the meaning of a rule, while the other, application, is, in one sense, that of determining the consequences which the rule attaches to the occurrence of a given fact; in another sense, application is the action of bringing about the consequences which, according to a rule, should follow a fact. Disputes concerning interpretation or application are, therefore, disputes as to the meaning of a rule or as to whether the consequences which the rule attaches to a fact, should follow in a given case."

A similar viewpoint is taken in the *Harvard Law School Draft Convention on the Law of Treaties Commentary* [Harvard Law School, 'Draft Convention on the Law of Treaties: Article 19. Interpretation' reprinted in (1935) 29 AJIL (Supplement: Research in International Law) 937, 938–39] according to which 'interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation'.

I invited the learned President's Counsel for the 1st Respondent to propose the question relating to the interpretation of the Constitution which according to him arises for determination in these proceedings. He has proposed the following question:

> "Whether, a Chief Minister of a Provincial Council has the power to remove a Minister appointed under and in terms of the provisions of Article 154F (5) of the Constitution or whether such power is reposed in the Governor to be exercised in his own discretion?"

However, the learned Counsel for the Petitioner submitted that no question of interpretation of the Constitution arises in this application. He submits that it is only a question of application that requires the attention of Court. He bases his argument on a plain reading of Article 154F (5) of the Constitution and submits that it is clearly stated that it is the Governor who has the power to appoint Ministers of a Provincial Council. He further submits that while the Article does provide for the Governor to act on the advice of the Chief Minister, even if the role played by the Governor was held to be that of a mere rubber stamp, the fact remains that it is the Governor who is the appointing (and thus removing) authority for Ministers of a Provincial Council. Hence it was submitted that even if one applies section 14 of the Interpretation Ordinance as asserted by the 1st Respondent, a removal of a Minister cannot be effectuated unless and until there is an act of the Governor doing so.

The Sinhala text of Article 154F (5) reads as follows:

> "154ඊ (5) **ආණ්ඩුකාරවරයා විසින්** ප්‍රධාන අමාත්‍යවරයාගේ උපදේශය අනුව, සෙසු අමාත්‍යවරයන් එම පළාත සඳහා සංස්ථාපනය කර ඇති පළාත් සභාවේ මන්ත්‍රීවරයන් අතුරින් **පත් කළ යුත්තේය**." (emphasis added)

I am inclined to agree with the learned Counsel for the Petitioner that it is clear on a plain reading of Article 154F (5) that the final act of appointment as well as removal (if one accepts the argument of the learned President's Counsel for the 1st Respondent based on section 14 of the Interpretation Ordinance) of a Minister of a Provincial Council must be under the hand of the Governor. The position is the same even if it is held that the Governor has no discretion in that act and must act on the advice of the Chief Minister. Therefore, the question proposed by the learned President's Counsel for the 1st Respondent does not arise for determination on the pleadings presently constituted in this application.

The real question is whether the facts of this case discloses that the removal of the Petitioner has been carried out under the hand of the Governor. This is a question of application and not interpretation.

The facts of this application as presently pleaded are as follows:

(a) The Petitioner was appointed as a Minister of the NPC along with four others.

(b) The 1st Respondent wrote to the Petitioner informing him that the 1st Respondent has decided to remove the Petitioner from the post of Minister of Fisheries, Transport, Trade and Commerce, Rural Development, Road Development and Motor Traffic forthwith and that the official letter in this regard will follow.

(c) On 23.08.2017 the 7th Respondent, Governor of the NPC, informed the Petitioner during a telephone conversation that the 1st Respondent had removed the Petitioner from office and that the 7th Respondent had received a letter to that effect and that the 1st Respondent wanted the 7th Respondent to swear in new Ministers to replace the Petitioner and the 6th Respondent.

(d) On been challenged as to the authority of the 1st Respondent to remove the Petitioner, the 1st Respondent claimed he had the power to remove the Petitioner in terms of Article 154F (5) of the Constitution and section 14(f) of the Interpretation Ordinance

(e) The Governor appointed two new Ministers.

The facts presently before us does not indicate of any act by which the Governor removed the Petitioner from the post of Minister. In fact, the 7th Respondent Governor has failed to appear before Court and state his case though noticed by Court. The only document before Court which speaks of the Petitioners removal is P12 by which the 1st Respondent states that he has decided to remove the Petitioner from the post of Minister. There is also the telephone conversation between the Petitioner and 7th Respondent as pleaded by the Petitioner.

The 1st Respondent could have countered this evidence by seeking permission and filing limited statement of objections to the interim relief. However, he did not do so.

In *Billimoria's* case Samarakone C. J. held that "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."

In the circumstances, I am inclined to take the view that as presently constituted this application does not raise a question of interpretation but merely an application of the Constitution. This may well change once parties, including the 7th Respondent if he so wishes to, files objections and places factual matters for our consideration at which point we may have to revisit the question of a reference to the Supreme Court in terms of Article 125 of the Constitution.

In this regard I wish to refer to the judgement in *Premachandra v. Major Montague Jayawickrema and another* (Provincial Governor's case) [(1994) 2 Sri.L.R. 90 at 100] where the Supreme Court stated as follows:

> "The function of this Court under Article 125 is not to attempt to provide comprehensive answers (to abstract or academic questions) setting out all the available grounds of judicial review, but rather to provide answers for the questions which actually arose in the course of the proceedings in the Court of Appeal. **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." (emphasis added)

I therefore overrule the 1st preliminary objection raised by the learned President's Counsel for the 1st Respondent.

Preliminary Objection No. 2 – Non-compliance with Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990

The Learned President's Counsel for the 1st Respondent submitted that the Petitioner has failed to comply with the above rule and as such the application must be dismissed in limine. He relies on the decisions in *Thajudeen v. Sri Lanka Tea Board and another* [(1981) 2 Sri.L.R. 471], *Brown & Co. Ltd. and Another v. Ratnayake, Arbitrator and Others* [(1994) 3 Sri.L.R. 91] and *Perera v. Perera* [(2001) 3 Sri.L.R. 30].

Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules 1990 (1990 Rules) reads:

> "Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of Petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a Petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of Court to furnish such document later. Where a Petitioner fails to comply with the provisions of this rule the Court may, *ex mero motu* or at the instance of any party, dismiss such application.

The Petitioner has annexed fourteen annexures to the petition. P12 and P14 are two letters sent by the 1st Respondent to the Petitioner and the originals of these have been annexed and there is compliance with the Rule 3(1) of the 1990 Rules with regard to these two documents.

P7, P8, P10 and P11 are letters sent by the Petitioner to either the 1st Respondent or the 7th Respondent with copy to the 1st Respondent. Clearly the originals of these documents are not available with him. The Petitioner has, at paragraph 62 of the petition, stated that originals of

several documents relevant to this matter are in the custody of the 1st and 7th Respondents and has reserved the right to make an appropriate application to Court to call for the record and/or permit him to obtain and produce the required documents. In my view, this complies with the requirements in Rule 3(1) of the 1990 Rules.

P1, P2, P3, P6 and P13 are Gazettes of the Democratic Socialist Republic of Sri Lanka. The Petitioner states that these were obtained from the website of the Government of Sri Lanka documents.gov.lk. The learned President's Counsel for the 1st Respondent submits that this does not comply with Rule 3(1) of the 1990 Rules. I am unable to accept this submission.

Section 57(7) of the Evidence Ordinance states that Courts shall take judicial notice of the accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of Sri Lanka, if the fact of their appointment to such office is notified in the Gazette. The gazettes marked P1, P2, P3, P6 and P13 refers to the appointment of members and ministers of the NPC. In *Arumugam alias Podithambi v. Range Forest Officer* [(1986) 2 Sri. L. R. 398] the Court of Appeal held that when a charge is laid under a statutory rule, regulation or by-law which is required by law to be published in the Government Gazette the prosecution need not produce the gazette in which the rule or regulation or by-law appears in proof thereof and that reference to the particular gazette is sufficient. It was further held that Court can take judicial notice of the rule, regulation or by-law. Therefore, I agree with the submissions made by the learned Counsel for the Petitioner that Court will take judicial notice thereof and it would have been sufficient for the Petitioner to only name the gazettes without annexing same.

In any event, section 3 of the Electronic Transactions Act No. 19 of 2006 (Act) states inter alia that no electronic document shall be denied legal recognition, effect, validity or enforceability on the ground that it is in electronic form. Section 26 of the Act states that "electronic document" includes documents, records, information, communications or transactions in electronic form. Section 9 of the Act states that where any Act or enactment provides that any Proclamation, rule, regulation, order, by-law, notification, or other matter shall be published in the Gazette, then

such requirement shall be deemed to have been satisfied if such rule, regulation, order, by-law, notification or other matter is published in an electronic form of the Gazette.

Therefore, even though a Court will take judicial notice thereof and it would have been sufficient for the Petitioner to only name the gazette without annexing same, I am of the view that there is also compliance with Rule 3(1) of the 1990 Rules even where a copy of the Government Gazette is produced from the website of the Government of Sri Lanka documents.gov.lk.

I am of the view that in any event the Petitioner has complied with Rule 3(1) (a) of the 1990 Rules. The requirement is that originals or duly certified copies of the documents material to this application must be tendered. [*Urban Development Authority v. Ceylon Entertainments Ltd.* (2004) 1 Sri. L. R. 95, 97 and 98]. Whether a document is material or not is a matter for the appellate court and it is not for the parties to decide. [*Rodrigo v. The Finance Co. Ltd.* (2005) 2 Sri. L. R. 285 at 289]. I am persuaded to accept that the material documents to this application are P2, P3, P12, P13 and P14 and that the Petitioner has complied with Rule 3(1) (a) of the 1990 Rules with regard to these documents.

I therefore overrule the 2nd preliminary objection raised by the learned President's Counsel for the 1st Respondent.

Preliminary Objection No. 3 – 6th Respondent not a necessary party and must be struck off

The third and final preliminary objection raised by the learned President's Counsel on behalf of the 1st Respondent is that the 6th Respondent should be struck off as he is not a necessary party.

I am minded to state that this objection is not a preliminary objection as the term is generally used. Tilakawardena J. in *Jathika Sevaka Sangamaya v. Sri Lanka Ports Authority and another* [(2003) 3 Sri. L. R. 146 at 148] stated that "the advantage of a preliminary is the possibility to dispose of a matter expeditiously which can lead to a resolution of the dispute between parties with a minimum amount of expense or delay, for the convenience of all parties including the Court".

A pronouncement on the third preliminary objection raised by the learned President's Counsel for the 1st Respondent does not lead to a resolution of the dispute between parties. An answer in favour of the 1st Respondent will only mean that the name of the 6th Respondent will be struck off leaving the application of the Petitioner still to be determined on the merits.

I therefore overrule the 3rd preliminary objection raised by the learned President's Counsel for the 1st Respondent.

For the reasons set out above, I am of the view that the Petitioner has made out a prima facie case for notice to be issued on the Respondents.

The next question for consideration of Court is the interim relief sought by the Petitioner.

In *Duwearatchi and another v. Vincent Perera and others* [(1984) 2 Sri. L. R. 94] the Court of Appeal held that the Court should be guided by the following principles in issuing an interim stay order in a writ application:

(a) Will the final order be rendered nugatory if the Petitioner is successful?
(b) Where does the balance of convenience lie?
(c) Will irreparable mischief or injury be cause to either party?

The Petitioner was duly appointed as a Minister of the NPC. His case is that the 1st Respondent has removed him from that post illegally when he did not have the power to do so. He is seeking writs of certiorari which will restore the status quo ante. According to his pleadings the term of the NPC ends in September 2018. At this point of time, the Respondents have not filed any objections and it is not clear whether this matter can be concluded before the term of the NPC ends. Therefore, I am of the view that the final order in this application will be rendered nugatory if the Petitioner is successful unless interim relief is granted to the Petitioner. The balance of convenience favours the Petitioner and irreparable mischief and injury will be caused to him unless interim relief is granted. On the other hand, the interim relief will not prevent the Petitioner from been duly removed from his post according to law. Hence there will be no irreparable mischief or injury to the Respondents.

For the foregoing reasons, I issue notice on the Respondents and grant the Petitioner the interim reliefs prayed for in prayers b, c and d to the petition which reads as follows:

b. Issue an interim order restraining the Respondents from interfering with and/or prohibiting and/or preventing and/or the Petitioner functioning as Minister of Fisheries, Transport, Trade and Commerce, Rural Development, Trade & Commerce, Road Development and Motor Traffic of the Northern Province;

c. Issue an Interim order suspending operation of "P12";

d. Issue an interim order suspending "P13"to the extent that the portfolios of Fisheries, Transport, Trade and Commerce, Rural Development, Road Development and Motor Traffic have been allocated to persons other than the Petitioner.

The Petitioner has stated that presently there are seven (7) Ministers with the Chief Minister in the Board of Ministers of the NPC when the Constitution provides for only five (5) Ministers with the Chief Minister. According to the Petitioner, the seven (7) are made up of the 1st to 6th Respondents and the Petitioner. I have concluded that on the material before Court the Petitioner has not been removed from the post of Minister according to law. The interim relief is granted on that basis.

In view of the findings of this Court and the interim relief granted, it is for the appointing authority to consider the constitutional restriction on the number of Ministers and take suitable action.

Registrar is directed to issue notice on the Respondents returnable on 9th July 2018. Interim relief effective until 10th July 2018.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal