

GHANY
v
DAYANANDA DISSANAYAKE,
COMMISSIONER OF ELECTIONS AND OTHERS

SUPREME COURT
FERNANDO, J.
ISMAIL, J.
EDUSSURIYA, J.
YAPA, J. AND
WIGNESWARAN, J.
S.C. APPEAL NO 37/2003
COURT OF APPEAL APPLICATION
NO. 1115/20002
17 SEPTEMBER 2003

Writs of certiorari and mandamus – Alleged irregularities in counting preference votes at Local Authorities Election – Constitution, Articles 104A and 104H – 17 Amendment, section 27 – whether Article 104H of the Constitution

removed jurisdiction of Court of Appeal to inquire into alleged election irregularities committed by the Elections Commissioner and his subordinates.

At the local government election held on 20.05.2002 for election of members to the Colombo Municipal Council, the Sri Lanka Muslim Congress ("SLMC") became entitled to six seats. The appellant was the 7th candidate of that party according to preference votes and was therefore not elected. He applied to the Court of Appeal for a *writ of certiorari* to quash the declaration of results. The 1st respondent was the Commissioner of Elections, the 2nd respondent was the Returning Officer and the 3rd respondent was the Assistant Commissioner of Elections, Colombo city. The appellant prayed for certiorari on the ground of irregularities at the counting of preferences and a *writ of mandamus* to compel a recount.

On a preliminary objection, the Court of Appeal held that in view of Article 194H of the Constitution (introduced by the 17th Amendment) the jurisdiction of the court in relation to matters arising out of the exercise of powers by the Elections Commissioner/Election Commission had been removed to the Supreme Court. Hence the Court of Appeal lacked jurisdiction to hear and determine the matter.

The Election Commission introduced by the 17th Amendment in October 2001 has not yet been established. In terms of section 27 of the 17th Amendment the Election Commissioner shall continue to exercise the powers of the Election Commission until the Commission is constituted.

Held:

- (1) A difficult and important question of constitutional interpretation arose which should have been referred to the Supreme Court in terms of Article 125 of the Constitution.
- (2) Article 104A confers, in respect of the Election Commission finality of decisions and immunity from suit subject, however, to the jurisdiction of the Supreme Court under Article 126(1), Article 104H and Article 130 and of the Court of Appeal under Article 144.
- (3) Article 104H provides *inter alia*, that the jurisdiction of the Court of Appeal under Article 140 of the Constitution shall in relation to any matter that may arise *in the exercise by the Commission* of the powers conferred on it by the Constitution or by any other law be exercised by the Supreme Court.
- (4) The interpretation of the relevant provisions must commence on the basis that "Election Commission" means the yet to be established Election Commission and not its officers, and not the Commissioner of Elections and the "Commissioner of Elections" means the Commissioner and not his officers.

- (5) Article 104H must be read with Article 104 A(a). Read together, those two provisions manifest a clear intention to transfer to the Supreme Court a part of the writ jurisdiction of the Court of Appeal namely, in relation to any matter arising by reason of the exercise by *the Election Commission of its powers*, and also to make decisions, directions and acts *of the Election Commission final and immune from judicial review except under Articles 104H, 126(1) and 130. Ex facie* neither Article applies to the acts and omissions of the Commissioner of Elections or of his officers.
- (6) The subject matter of the appellant's writ application to the Court of Appeal was mainly, if not entirely, in respect of the alleged acts (and omissions) of officers of the Commissioner of Elections. He did not allege any exercise of the powers of the Election Commission. Those acts could not have been regarded *ex facie* as an exercise of the powers of the Commissioner of Elections and/or the Election Commission. Accordingly, upon the material available as set out in the application Articles 104 A and 104 H read with Article 27 of the 17th Amendment did oust the writ jurisdiction of the Court of Appeal, and the preliminary objection should have been rejected.

Case referred to:

S.C. Special Determination No 1/92

APPEAL from the judgment of the Court of Appeal.

A.S.M. Perera, P.C. with *Prasanna de Zoysa, Neville Ananda and Anuruddhika Bulegoda* for appellant.

A. *Gnanathanan*, Deputy Solicitor-General with *N. de Silva*. State Counsel and A. *Jayaweera*, State Counsel for 1st, 2nd and 3rd respondents.

Cur.adv.vult

October 31st 2003

FERNANDO, J.

The petitioner-appellant ("the appellant") contested the local government election held on 20.5.2002 (under the Local Authorities Elections Ordinance, No 53 of 1946 as amended from time to time) for the election of members to the Colombo Municipal Council. as a candidate of the Sri Lanka Muslim Congress ("SLMC"). That party secured six seats. The sixth successful SLMC candidate obtained 2723 preference votes while the appellant, the seventh SLMC candidate, obtained only 2686

preference votes, and was unsuccessful. Alleging that there had been serious irregularities in regard to the counting of the SLMC preference votes, that a request for a recount had been refused, and that consequently there had not been a lawful count and declaration of results, the appellant applied to the Court of Appeal for *certiorari* to quash "the decision of the 1st and/or 2nd and/or 3rd respondent announcing the final preferential results", and for *mandamus* to direct those three respondents "to recount the preferential votes of all candidates of the SLMC", and "to publish the results.... specifying the names of the SLMC candidates who are elected on the basis of such recount". The 1st respondent is the Commissioner of Elections, the 2nd respondent is the Returning Officer, and the 3rd respondent is an Assistant Commissioner of Elections who is said to have read out the results of the preferential voting.

In his petition the appellant complained that the 2nd respondent had refused a recount, and that the announcement of the final results by the 3rd respondent was not lawful; and all his other allegations were in respect of acts and omissions of other officers at the counting centres. Although he prayed for *certiorari* and *mandamus* against the 1st respondent, he did not allege any wrongful act or omission by the 1st respondent in the exercise of his powers conferred by the Constitution or by any other law.

At the outset, the learned Deputy Solicitor-General, on behalf of the 1st, 2nd and 3rd respondents, took three preliminary objections. The Court of Appeal by its judgment dated 17.10.2002 (which dealt with several similar writ applications) overruled two objections, and upheld the third objection, which was quoted in its judgment as follows:

"The Court of Appeal lacked jurisdiction to hear and determine this matter as in terms of Article 104H of the Constitution (introduced by the 17th Amendment to the Constitution) the jurisdiction had been transferred or removed to the Supreme Court in relation to matters arising out of the exercise of powers by the Election Commissioner/Election Commission."

The Court of Appeal observed that a decision on that objection “does not require an interpretation of the Constitution, which sole jurisdiction admittedly lies with the Supreme Court, but merely an application of the Constitution”, and went on to consider and uphold that objection.

I must refer to the relevant Constitutional provisions. The existing Articles 103 and 104 were repealed by the 17th Amendment. The new Article 103 introduced by the 17th Amendment provides for the establishment of the “Election Commission”. That Commission has not yet been established despite the lapse of two years after the enactment of the 17th Amendment. 50

Article 104A confers, in respect of the Election Commission, “finality of decisions and immunity from suit”, in the following terms:

“Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, Article 104H and Article 130, and on the Court of Appeal by Article 144, and the jurisdiction conferred on any court by any law to hear and determine election petitions or Referendum petitions. 60

(a) no court shall have the power or jurisdiction to entertain or hear or decide or call in question on any ground and in any manner whatsoever, any decision, direction or act *of the Commission*, made or done or purported to have been made or done under the Constitution or under any law relating to the holding of an election or the conduct of a Referendum as the case may be, which decisions, directions or acts shall be final and conclusive; and 70

(b) no suit or other proceeding shall lie against any member or *officer of the Commission* for any act or thing which in good faith is done or purported to be done by him in the performance of his duties or the discharge of his functions under the Constitution or under any law relating to the holding of an election or the conduct of a Referendum as the case may be.” [emphasis added throughout]

This provision draws a sharp distinction between the acts of 80

the Commission and the acts of its officers. In particular, the latter receive protection only in respect of acts done in good faith. That distinction militates against any general assumption that the acts of officers can be equated to, or deemed to be, acts of the Commission.

Article 104B(3) makes *the Commission* “responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament”.

Article 104H of the Constitution provides:

“(1) The jurisdiction conferred on the Court of Appeal under Article 140 of the Constitution shall, in relation to any matter that may arise *in the exercise by the Commission* of the powers conferred *on it* by the Constitution or by any other law, be exercised by the Supreme Court. 90

(2) every application invoking the jurisdiction referred to in paragraph (1), shall be made within one month of the date of the commission of the act to which the application relates. The Supreme Court shall hear and finally dispose of the application within two months of the filing of the same.” 100

One significant disadvantage of that ouster of jurisdiction, from the point of view of a petitioner, is that the short time limits make it difficult for a petitioner to obtain all the necessary affidavits and documents which are generally required to support a petition based on electoral misconduct.

It is Article 140 which confers the writ jurisdiction on the Court of Appeal, subject to the proviso (introduced by the 1st Amendment) that Parliament may by law provide that in such category of cases as may be specified in such law the writ jurisdiction shall be exercised by the Supreme Court. 110

Section 27 of the 17th Amendment provides:

“(1) Unless the context otherwise provides, there shall be substituted for the expressions “Commissioner of Elections” and “Department of the Commissioner of Elections” wherever such expressions occur in the Constitution and in any

written law or in any contract, agreement or other document, of [*sic*] the expression "Election Commission".

(2) The person holding office as the Commissioner of Elections on the day immediately preceding the date of commencement of this Act, shall continue to exercise and perform the powers and functions of the office of Commissioner of Elections as were vested in him immediately prior to the commencement of this Act, and of the Election Commission, until an Election Commission is constituted in terms of Article 103, and shall, from and after the date on which the Election Commission is so constituted, cease to hold office as the Commissioner of Elections. 120

(3) All suits, actions and other legal proceedings instituted by or against the Commissioner of Elections appointed under Article 103 of Constitution prior to the amendment of such Article by this Act, and pending on the day immediately prior to the date of commencement of this Act, shall be deemed to be suits, actions and other legal proceedings instituted by or against the Election Commission, and shall be continued and completed in the name of the Election Commission. 130

(4) Any decision or order made, or ruling given by the Commissioner of Elections appointed under Article 103 of the Constitution prior to the amendment of that Article by this Act, and [*sic*] under any written law on or before the date of the commencement of this Act, shall be deemed to be a decision or order made or ruling given, by the Election Commission." 140

The Court of Appeal held (in relation to all the writ applications) that "the writ jurisdiction conferred on the Court of Appeal under Article 140 of the Constitution in relation to matters that arise in the exercise [by] the Commission/Election Commissioner of the powers conferred... either by the Constitution or any other law, including the Local Authorities Elections Act as amended, was removed by the 17th Amendment to be exercisable only by the Supreme Court." The reasons given may be summarized as follows. Since section 27(1) substitutes for "Commissioner of 150

Elections” the expression “ Election Commission”, the acts of the Commissioner of Elections in relation to the Local Authorities Elections of 2002 are considered to have been done by the Election Commission. In terms of section 27(2), the Commissioner of Elections functions in a dual capacity – first, he functions under the powers legally vested in him, as Commissioner of Elections, up to 2.10.2001, and second, from 3.10.2001, he also functions as the Election Commissioner, until an Election Commission is constituted. Under section 27(3), all suits, actions and legal proceedings pending on 2.10.2001, are deemed to be suits, etc, against the Election Commission, and shall be continued and completed *only* in the name of the Election Commission. Finally, all decisions and orders made and rulings given by the Commissioner of Elections prior to 3.10.2001, are deemed by section 27(4) to be decisions, etc, of the Election Commission. Thus, despite the failure to constitute the Election Commission a legal fiction was created to the effect that all such decisions, orders, and rulings of the Commissioner of Elections would be deemed to be those of the Election Commission, and suits, actions, and proceedings against the Commissioner of Elections would be completed in the name of the Election Commission.

The Court of Appeal failed to consider whether the allegations made by the appellant related to matters arising from the exercise of the powers of the Commissioner of Elections: or to the exercise and performance of his powers and functions: or to his decisions, orders and rulings. Furthermore, although the respondents had not been called upon to file their objections, and the hearing was only in respect of preliminary objections, the Court of Appeal went on to make the following observations in regard to the merits, including the duty of the 1st respondent to hold a recount:

“Procedures which ensure just and fair conduct of elections (are) set out and regulated by law and such law should be adhered to. This must be buttressed by the transparent actions of the public officers/officers appointed by the Election Commissioner who have [a] sacred duty to carry out the procedure and processes established by law, which makes it quite

essential that the results reflect the true and correct decision of the preference votes cast by the franchised people and only then will the elected candidates be ensured of their rights and justice will prevail. Unfortunately, as far as these applications are concerned, clearly in terms of [the] 17th Amendment the writ jurisdiction is no longer vested in this Court, but lies in the Supreme Court, and this Court cannot in law arrogate such powers to itself in conflict with law that takes away the jurisdiction of this Court to hear and determine such matters.

But this must not deter the Commissioner of Elections to merely have a recount [of] the votes of these areas of the candidates who have preferred these applications challenging their appointments [sic], based on allegations against his own officers which must indirectly affect the legitimacy of his own office. 200

In the name of justice, it is but due and right that he should recount the votes, which are in any event in his custody, and take appropriate action to rectify the declarations and determinations that have been made by officers appointed by the Election Commissioner where either due to error or deliberate manipulation and/or undue influence... 210

Since the Court of Appeal held that it had no jurisdiction and did not call for objections on the merits from the respondents, it ought not to have cast an obligation on the Commissioner of Elections to recount the votes and take remedial action. Besides, without hearing them it could not be said that a *prima facie* case had been established of "electoral misconduct" by his officers. The Court of Appeal also failed to consider the implications of its findings that the appellant's allegations were not against the Commissioner of Elections but only against his officers.

Undoubtedly, a difficult and important question of Constitutional interpretation (and not merely application) arose, affecting several writ applications, and that should have been referred to this Court under and in terms of Article 125 of the Constitution. 220

Special leave to appeal was granted on the question whether the Court of Appeal had erred in holding that it had no jurisdiction.

The interpretation of the relevant provisions must commence on the basis that "Election Commission" means the yet-to-be-established Election Commission, and not its officers, and not the Commissioner of Elections, and that the "Commissioner of Elections" means the Commissioner and not his officers – unless, of course, the language or the context expressly or by necessary implication requires a contrary interpretation. 230

Learned President's Counsel for the petitioner contended that Article 104H would apply only in relation to any matter that may arise in the exercise *by the Commission* of the powers conferred *on it*, and that it did not apply to any exercise of power *by the Commissioner of Elections*. Any attempt to treat Article 104H as applicable to this case required that the words "by the Commissioner" be replaced by the phrase "by the Commissioner of Elections". He pointed out that any such substitution was not authorised by any provision of the 17th Amendment, and that what section 27(1) required and permitted was the exact opposite, namely, the substitution of "Election Commission" for "Commissioner of Elections." 240

Article 104H must be read with Article 104A(a). Read together, those two provisions manifest a clear intention to transfer to this Court a part of the writ jurisdiction of the Court of Appeal, namely, in relation to any matter arising in the exercise *by the Election Commission of its powers*, and also to make decisions, directions and acts *of the Election Commission* final and immune from judicial review except under Articles 104H, 126(1) and 130. *Ex facie*, neither Article applies to acts and omissions of the Commissioner of Elections, or of his officers. 250

To put it another way, Article 104H effects an ouster of the jurisdiction of the Court of Appeal only upon *an exercise* of the powers of the Election Commission, *by the Commission itself*. Article 104H does not apply to an exercise of the powers of the Election Commission *by any other person*. The words "by the Commissioner" are words of limitation. If Parliament had intended that Article 104H should also apply to an exercise of those powers by the Commissioner of Elections, it would have removed those words of limitation, so that Article 104H would have read: ... "in relation to any matter that may arise in the exercise of the 260

powers conferred on the Commission by the Constitution or by any other law", omitting the words "by the Commission" and "on it."

Likewise, Article 104A(a) refers to "any decision, direction or act of the Commission", and not to "any decision, direction or act in the exercise of the powers of the Commission". The plain meaning of those provisions is that there is an ouster of the jurisdiction of the Court of Appeal *only* in respect of an exercise of power by the Election Commission itself. 270

It is necessary, however, to ascertain whether there is any other contrary provision, express or implied, to the effect that the acts, decisions, etc, of the Commissioner of Elections shall be deemed to be those of the Election Commission. As learned President's Counsel for the appellant submitted, section 27(1) of the 17th Amendment only authorises the substitution, in legislation, of "Election Commission" for "Commissioner of Elections", and not *vice versa*. From that it cannot be inferred that Parliament intended the opposite, namely, the substitution of "Commissioner of Elections" for "Election Commission" in Article 104H, because *expressio unius exclusio alteris*. Indeed, section 27(1) was not intended to be a transitional provision: it was a substantive provision, applicable to the period *after* the constitution of the Election Commission, transferring to the Election Commission the powers vested in the Commissioner of Elections under various existing laws. It does not follow that when the Commissioner of Elections exercises those powers during the transitional period his acts become the acts of the Election Commission. *Ex hypothesi*, acts of officers of the Commissioner of Elections are not acts of the Election Commission. 280 290

There are many functions performed under the Local Authorities Elections Ordinance (and other election laws) by various officers of the Commissioner of Elections or appointed by him. Thus the annual distribution and collection of enumeration forms, and the preparation, publication, correction and certification of electoral lists, are basic functions. To accept the respondents' submission would mean that the *mala fide* failure of such an officer to issue or collect an enumeration form, or to publish, correct or certify an electoral list, would be deemed to be an act 300

or omission of the Commissioner of Elections, and therefore of the Election Commission; and that the writ jurisdiction in respect of such matters would be exercisable only by the Supreme Court within the short time limits prescribed by Article 104H(2). In such instances, during the transitional period, the Court of Appeal has jurisdiction.

Section 27(2) is a transitional provision which enables the Commissioner of Elections during that period to exercise and perform the powers and functions (a) of the office of Commissioner of Elections (under pre-existing laws), and (b) of the Election Commission. While section 27 (2) empowers the Commissioner of Elections to exercise the powers of the Election Commission, it does not make such exercise, or deem such exercise to be, an exercise of power by the Election Commission. Article 104H(1) itself is a good example: it empowers the Supreme Court to exercise the writ jurisdiction of the Court of Appeal; but when it does so, it is nevertheless an exercise of that jurisdiction by the Supreme Court, *qua* Supreme Court, and it can hardly be argued that when the Supreme Court does exercise that jurisdiction, that would be, or would be deemed to be, an exercise by the Court of Appeal. Likewise in this case even if the Commissioner of Elections did exercise the powers of the Election Commission, it was nevertheless an exercise by the Commissioner of Elections. 310 320

What is more, in this case the appellant did not impugn any exercise of power by the Commissioner of Elections. As the Court of Appeal itself recognised, the impugned acts were the acts of officers of the Commissioner of Elections. Section 27(2) clearly has no application to such acts. But even if I were to assume that the acts of those officers may be regarded as an exercise of the powers of the Commissioner of Elections, nevertheless they were powers under pre-existing law – the Local Authorities Elections Ordinance – and hence there was no exercise of the powers of the Election Commission. 330 340

Section 27(3) is a transitional provision applicable to pending actions. The fact that pending actions by or against *the Commissioner of Elections* were to continue in *the name* of the Election Commission has no bearing on the distinct question as to *the court* in which new actions should be instituted. Perhaps it 340

might be legitimate to infer that in a new action the proper party should be the Election Commission, but nevertheless that does not mean that the proper court is the Supreme Court. Indeed, section 27(3) requires that pending actions should continue in the same court, so that the ouster clauses are inapplicable to pending actions, and should be equally inapplicable to new actions instituted before the Election Commission is constituted, as section 27(3) is quite consistent with the ouster clauses being applicable only to the acts of the Election Commission itself.

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Section 27(4) applies to "decisions, orders and rulings" made or given by the Commissioner of Elections. The appellant's petition did not involve any decision, order or ruling of the Commissioner of Elections, but only acts and omissions of various officers. That provision has no relevance to this appeal.

To sum up, the subject-matter of the appellant's writ application to the Court of Appeal was mainly, if not entirely, in respect of the alleged acts (and omissions) of officers of the Commissioner of Elections, and not in relation to decisions, directions, acts, orders or rulings of the Commissioner of Elections. He did not allege any exercise (by those officers or by the Commissioner of Elections) of the powers of the Election Commission. Those acts could not have been regarded *ex facie* as an exercise of the powers of the Commissioner of Elections, and/or of the Election Commission. Accordingly, upon the material available, namely as set out in that application, Articles 104A and 104H read with section 27 of the 17th Amendment did not oust the writ jurisdiction of the Court of Appeal, and the preliminary objection should have been rejected. I therefore allow the appeal and set aside the order of the Court of Appeal, and direct the Court of Appeal to entertain, hear and determine the appellant's application after giving all the respondents the opportunity of filing their objections. The appellant will be entitled to costs in both Courts in a sum of Rs 30,000/- payable by the State.

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Before concluding this judgment, I must refer to the provisions of Article 154G(2), in Chapter XVIIIA of the Constitution:

"No Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule shall become law unless such

Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference... 380

The 17th Amendment amends one provision (Article 154R) of Chapter XVII A as well as one provision (see section 23) of the Ninth Schedule, but no reference appears to have been made for the purpose of enabling every Provincial Council, as part of the legislative process for the amendment of that Chapter, to express its views thereon - *An Act to amend the Greater Colombo Economic Commission Law, No. 4 of 1978*,⁽¹⁾. In holding that there has been no ouster of the writ jurisdiction of the Court of Appeal, I express no opinion as to whether or not Articles 104A and 104H have "become law" in terms of Article 154G(2). 390

ISMAIL, J.	-	I agree
EDUSSURIYA, J.	-	I agree
YAPA, J.	-	I agree
WIGNESWARAN, J.	-	I agree

Appeal allowed.