MAHINDASOMA
V.
MAITHRIPALA SENANAYAKE AND ANOTHER

COURT OF APPEAL.
DR. GUNAWARDENA, J. AND
J.A.N. DE SILVA, J.
C.A. APPLICATIONS NOS. 17/96 AND 18/96
29 FEBRUARY , 1,5,6,7,11 and 12 March, 1996.

Provincial Councils - Dissolution - Writs of Certiorari and Prohibition - Whether the Governor has a discretion, when he exercises the power of dissolution of a Provincial Council, vested in him under Article 154 B (8) (c) of the Constitution or whether he is bound by the advice of the Chief Minister in terms of Article 154B(8) (d).

The two Provincial Councils of North Central Province (N.C.P.) and Sabaragamuwa Province (S.P.) were dissolved by the respective Governors of the said Provinces by Orders published in the Gazette dated 3.1.1996. In consequence, the Commissioner of Elections published Notices dated 4.1.1996 indicating his intention to hold elections to the said Provincial Councils, and called for nominations. On representations made by the general public and on information gathered by them about the alleged maladministration of the said Councils, the said Governors have

sought the advice of their respective Chief Ministers whether the said Councils should be dissolved. The said Chief Ministers who command the support of the majority of members of the said Provincial Councils, advised the said Governors against dissolution. Thereafter the said Governors sought the advice of Her Excellency the President, in the alleged exercise of their discretion. Her Excellency the President by her direction dated 2.1.1996, directed the said Governors to dissolve the said Provincial Councils.

Held :

(1) It is a cardinal principle of Constitutional construction that intention of the framers of the Constitution must be given effect to .. The only provision in the Constitution which enables the Governor to dissolve a Provincial Council is Article 154 B (8) (c). The provisions in sub-paragraph (d) which immediately follow, are unambiguously applicable to all the powers exercisable by the Governor under paragraph (8) of Article 154B. This would mean that, when the Governor is exercising the power of dissolution vested in him under sub-paragraph (c), he is required to act in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands a majority in the Provincial Council.

(2) The said sub-paragraph (d) is a constitutional provision in itself, which lays down the procedure to be followed by the Governor when exercising his power of dissolution under sub paragraph (c). As the Governor is bound to uphold the provisions of the Constitution, he is required to follow the procedure laid down in said sub-paragraph (d), when exercising the power vested in him under sub-paragraph (c). Thus it cannot be said that it is, "a matter as respects which the Governor is by or under this Constitution required to act in his discretion", as stated in Article 154F (2).

(3) There is no provision in the Constitution, which empowers the President to dissolve a Provincial Council.

(4) The word "shall" in sub-paragraph (d) of Article 154B(8) cannot be read as meaning "may", as it will give the discretion to the Governor to dissolve a Provincial Council at his will.

***Per* Gunawardana, J.:**

"This certainly does not seem to be the situation, the Constitution envisages".

(5) According to Article 4(b) the executive power of the people is vested in the President. But what is meant by "executive power" is not defined in the Constitution. The said term "executive power" is used in a general sense. The well known rule of construction *Generalis Specialibus Non Derogant* would apply, in this instance. Hence, the provision, will take precedence over the general provision in Article 4(b) of the Constitution.

(6) In the judgment of the Thirteenth Amendment case (1987) 2 SLR 322, the provisions of the Constitution have been considered, with a view of ascertaining whether the provisions of chapter XVIIA (The Thirteenth Amendment) were inconsistent with the provisions of Article 2 and 3 of the Constitution, and not with a view of examining what legal effect should be given to the provision of Article 4(b), in relation to the other provisions of the Constitution. The provisions of Article 154B(8) (c) and (d) have not been considered in relation to Article 4(b).

(7) The proviso to sub-paragraph (9) in Article 154B is not intended to apply to the provisions of Article 154B(8) (d).

(8) The Governor when dissolving a Provincial Council, acting under the provisions of Article 154B(8) (c) has no discretion and is bound by the provisions of Article 154B(8) (d), to act on the advice of the Chief Minister, provided the Board of Ministers commands a majority in the Provincial Council.

(9) The Governors have acted contrary to the provisions of Article 154B(8) (c) and (d) of the Constitution, by seeking the advice of the President, in a matter they had no discretion and dissolved the Provincial Councils in accordance with the directions given by the President. Hence the said dissolution of the Provincial Councils are illegal and are declared null and void.

Cases referred to :

1. *Sussex Peerage Case* (Bindra: Interpretation of Statutes 7 Ed. page 940.)
2. *Chief Justice of Andhra Pradesh v. L.V.A. Dixitulu* (Bindra : Interpretation of Statutes 7 Ed. page 940)
3. *Thirteenth Amendment Case* - [1987],2 Sri L.R. p. 312.

APPLICATIONS for Writs of Certiorari to quash respectively the orders of dissolution of the Provincial Council of the North Central Province issued by the Governor of the North Central Province and of the Provincial Council of the Sabaragamuwa Province issued by the Governor of the Sabaragamuwa Province.

K.N.Choksy P.C. with *L.C. Seneviratne, P.C., E.P. Paul Perera PC, Daya Pelpola, S.J. Mohideen, Henry Jayamaha, Lakshman Perera, Ronald Perera, Nigel Hatch* and *Anil Rajakaruna* for Petitioners in both applications. *E.D. Wickramanayake with Dr. Jayampathy Wickramaratne, M.A.Q.M. Gazzali, P. Mathew, Amitha Nikapitiya, Gaston Jayakody, Malathie Ratnayake, Anandi Cooray, Shanika Seneviratne, U.A. Najeem* and *Prasanna Obeysekera* for the 1st Respondent in Application No. 17/96.

Sarath N. Silva A.G. with *K.C. Kamalasabayson DSG, Parakrama Karunaratne SSC, Kamal Arulanathan SSC* for the 2nd Respondent.

D.S.Wijesinghe P.C. with *Dr. Jayampathy Wickremaratne, M.A.O.M. Gazzali, P. Mathew, Gaston Jayakody, U.A. Welimuna, Amitha Nikapitiya, Malathie Ratnayake, Shanika Seneviratne* and *Prasanna Obeysekera* for the 1st Respondent in C.A. Application No. 18/96.

Cur. adv. vult.

27 February, 1996.

DR. A. DE Z. GUNAWARDANA, J.

The two applications were argued together, as agreed by the learned Counsel appearing for the parties, in view of the fact that same issues arise for consideration of the Court, in both Applications. The Application C.A. No. 17/96 relates to the dissolution of the Provincial Council of North Central Province (hereinafter referred to as N.C.P.) The Governor of the N.C.P. the respondent, by order dated 3.1.1996 (marked P4) published in Gazette Extraordinary No. 904/7 purported to dissolve the said Provincial Council of N.C.P. with effect from 3.1.1996. The Application No. 18/96 relates to the dissolution of the Provincial Council of Sabaragamuwa Province (hereinafter referred to as S.P.). The Governor of S.P. the first Respondent, by his order dated 3.1.1996 (marked P7), published in Gazette Extraordinary No. 904/7, purported to dissolve the said Provincial Council of S.P. with effect from 3.1.1996. In consequence of the said purported dissolution of the Provincial Council of N.C.P. the Commissioner of Elections, the second Respondent, published a notice (marked P5) in Gazette Extraordinary No. 904/13 dated 4.1.96, indicating his intention to hold an election to the said Provincial Council and called for nominations commencing January 18, 1996. A similar notice (marked P8) was published by the second Respondent in respect of the Provincial Council of S.P. in the same

Gazette Extraordinary calling for nominations of the same date. The main reliefs claimed in the said Applications are for grant of Writs of Certiorari quashing the said Orders of dissolution by the said Governors and the said Notices issued by the Commissioner of Elections. A Writ of Prohibition is also sought against the Commissioner of Elections, the second Respondent, restraining him from taking any steps to hold elections to the said Provincial Councils.

The 33 members of the Provincial Council of N.C.P. were elected by an election held on May 17, 1993. At the said election 18 members were elected from the United National Party, 11 members from the Peoples Alliance. 3 members from the Democratic United National Front and 1 member from Sri Lanka Muslim Congress. Subsequent to the said election, the then Governor appointed the Petitioner in Application C.A. No. 17/96 as the Chief Minister and a Board of Ministers. The said petitioner has averred that he commands the support of the majority of the said Council and has produced marked P1 (a) to P1 (s) affidavits of the members of the said Council who support him. A Resolution passed by the said Council on December 21, 1995, opposing the dissolution of the said Council is produced marked P1 (t). By letter dated December 15, 1995, (marked P2) the Governor, the first Respondent, sought the observations of the said Petitioner regarding the contents of the matters stated therein and also the Petitioner's advice as to whether the said Provincial Council should be dissolved under the provisions of Article 154B (8) of the Constitution. The first Respondent, sought the said Petitioner's reply to the said letter, within seven days. The Petitioner replied the said letter (marked P2) by his letter dated December 20, 1995 (marked P3) stating *inter alia*,

(i) that sufficient particulars had not been given to enable the Petitioner to reply to the said letter (marked P2) and requested for more particulars in respect of the matters set out therein, as also more time as the period of seven days was insufficient.

(ii) that Petitioner and the Board of Ministers continue to command the support of the majority of the members of the said Council.

(iii) that a Provincial Council can be dissolved only on the advice of the Chief Minister in terms of Article 154B (8) (c) & (d) of the

Constitution and the petitioner found no reason to advice a dissolution of the said Council, and was not advising a dissolution.

The Petitioner received no reply to the said letter (marked P3). The first Respondent, the Governor dissolved the said Council by the said Order dated 3.1.1996. (marked P4).

On May 17, 1993 elections were held for the purpose of electing members to the Provincial Council of Sabaragamuwa. The 44 members who were elected at the said election, consisted of 24 members of the United National Party, 14 members of the Peoples' Alliance, 5 members of the Democratic United National Front and 1 member of the Nava Sama Samaja Paksaya. The then Governor appointed the Petitioner in Application C.A. No. 18/96 the Chief Minister and the Board of Ministers. The said Petitioner has averred that he continues to command the support of the majority of the said Council and has produced marked P1 (a) to P1 (z), the affidavits of the members who support the said Petitioner. By letter dated December 14, 1995 (marked P2) the first Respondent, the Governor, sought the observations of the said Petitioner as to the contents of the matters stated therein, and also sought the Petitioner's advice as to whether the said Provincial Council should be dissolved under the provisions of Article 154B (8) of the Constitution. The said Petitioner replied to the said letter (marked P2) by his letter dated December 19, 1995 (marked P3). The contents of the said reply (marked P3) are similar to letter (marked P3) in Application C.A.No. 17/96, referred to earlier. As the said Petitioner did not receive a reply from the first Respondent, the Petitioner had sent a further letter to the first Respondent dated 2/1/96 (marked P4). The said petitioner had also sent a letter dated December 14, 1995 (marked P5) to the first Respondent requesting the first Respondent, the Governor to make a change in the Board of Ministers. The first Respondent has by his letter dated December 18, 1995 (marked P6) inquired from the said Petitioner as to the reason for the said request. The first Respondent, the Governor dissolved the said Council by the said Order dated 3.1.1996 (marked P7).

The first Respondents to the said Applications, who are the Governors of the respective provinces, have in their objections stated *inter alia*,

(i) that they sought the advice of the Petitioners on the question of dissolution of the said Provincial Councils. It is further stated that letter marked P2 was addressed to the Petitioner on the basis of the representations made to the said Respondents by the general public of the respective provinces and on credible information received and facts gathered by the said Respondents upon investigation into said representations.

(ii) that it was considered necessary by the said Respondents both in the exercise of their discretion and in the public interest, to refer the matter to Her Excellency the President. The said Respondents further state that, in view of the provisions of the Constitution particularly Article 154B (2) they thought it necessary to bring the facts and circumstances relating the state of affairs of the said Councils, together with documents marked P2 and P3, to the notice of Her Excellency the President and sought her directions in respect of the exercise of their discretion.

(iii) that Her Excellency the President by her direction dated 2.1.1996 (marked X) directed the said Respondents to dissolve the said Provincial Councils.

(iv) that the said Provincial Councils were dissolved by the said Respondents acting under Article 154B and 154F of the Constitution upon the direction of Her Excellency the President.

The learned Counsel for the Petitioners submitted that, the only provision in the Constitution which enables the Governor to dissolve a Provincial Council, before the expiry of the term of 5 years is under Article 154B (8) (c). He added that however when the Governor is acting under the provision of Article 154B (8) (c) it is mandatory in terms of the provisions of Article 154 (8) (d), that the Governor must act in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands the support of the majority of the Provincial Council. The Governor has no discretion in the matter. The said Article enjoins him to act on the advice of the Chief Minister.

The learned Counsel for the Petitioners pointed out that in both Applications under consideration, there is no dispute that the said Pe-

titioners had at all times the support of the majority of the Council. He referred to the fact that the said Governor had sought the advice of said Petitioners by letter marked P2, with express reference to Article 154B (8) (d). He submitted that the dissolution of the said Provincial Councils was contrary to the advice of the said Petitioners and was a clear violation of the Constitutional provisions.

The learned Counsel for the second Respondent, who made the submissions first, with the permission of Court, stated that the dissolution of the Provincial Council is a matter within the discretion of the Governor. He referred to Article 154B (c) which states that, "The Governor may dissolve the Provincial Council". He argued that the said provision gives a discretion to the Governor to dissolve the Provincial Council and therefore when exercising the said discretion, the Governor is bound by the directions of the President in terms of Article 154F (2). He added that the decision of the Governor to act in his discretion cannot be questioned in any Court.

The learned Counsel for the first Respondent in Application C.A.No. 17/96 associated himself with the said submission made by the learned Counsel for the second Respondent and added that the Governor being appointed by the President, acting under the provisions of Article 4 (b) of the Constitution, the Governor is bound by the directions given by the President.

The learned Counsel for the first Respondent in Application C.A. No. 18/96 associated himself with the said submissions of the learned Counsel for the second Respondent and stated that the word "shall" occurring in Article 154 (8) (d) is not mandatory, but only an enabling provision, empowering the Chief Minister to tender advice to the Governor with regard to the summoning, proroguing and dissolving of a Provincial Council.

He cited Bindra- Interpretation of Statutes, 7th Edition page 1113, which states as follows :-

> "Shall - The word "shall" in its ordinary signification is mandatory though there may be considerations which influence the Court in holding that the intention of the Legislature was to give a discre-

tion. But this word is not necessarily mandatory, nor always mandatory. Whether the matter is mandatory or directory only depends upon the real intention of the Legislature which is ascertained by carefully attending to the whole scope of the Statute to be construed".

The central issue that arises for consideration from the above submissions is whether the Governor has a discretion, when he exercises the power of dissolution of a Provincial Council, vested in him under Article 154B (8) (c) or whether he is bound by the advice of the Chief Minister, so long as the Board of Ministers commands a majority in the Council. To arrive at a satisfactory conclusion we have to consider this issue from different perspectives.

It is a cardinal principle of constitutional construction that the intention of the framers of the Constitution must be given effect to. In this regard it is appropriate to refer to the rule, stated by Lord Chief Justice Tyndal in the *Sussex Peerage* case.[1] as quoted in Bindra - Interpretation of Statutes (7th Edition - 1987) page 941, which states as follows :-

"My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such cases, but declare the intention of the law giver."

As referred to earlier the only provision in the Constitution which enables the Governor to dissolve a Provincial Council is Article 154B (8) (c), which states that the Governor may dissolve a Provincial Council. However, it is important to note that the sub-paragraph (d), which immediately follows states that,

"(d) The Governor shall exercise his power under this paragraph (my emphasis) in accordance with the advice of the Chief Minister so long as the Board of Ministers commands in the opinion of the Governor, the support of the majority of the Provincial Council."

On a plain reading of the above quoted sub-paragraph (d) it appears that its provisions are unambiguously, applicable to all the powers exercisable by the Governor under paragraph 8 of Article 154B. This would mean that, when the Governor is exercising the power of dissolution vested in him under sub- paragraph (c), he is required to act in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands a majority in the Provincial Council.

It is significant to note that, it is a constitutional provision itself, viz. the said sub-paragraph (d), which has laid down the procedure to be followed by the Governor, when exercising his power of dissolution, under sub-paragraph (c).

As the Governor is bound to uphold the provisions of the Constitution, he is required to follow the procedure laid down in said sub-paragraph (d) when exercising the power vested in him under sub-paragraph (c). Thus it cannot be said that it is "a matter as respects which the Governor is by or under the Constitution required to act in his discretion." as stated in Article 154F (2). Since the procedure has been laid down by the Constitution itself, it is not a matter within the discretion of the Governor. Therefore the Governor cannot act on the directions of the President under Article 154F (2). Further, it is to be observed that, it is abhorrent to common principles of construction to disregard the immediate provision in sub-paragraph (d) in the said Article 154B (8) and go on to apply the provisions of Article 154F (2) to the provisions of Article 154B (8) (c). In the circumstances the provisions of Article 154F (2) would not apply to the provisions of Article 154B (8) (c).

It appears from the scheme of the Constitution, that the Governor's powers relating to summoning, proroguing and dissolving of the Provincial Council are dealt with in Article 154B (8). Therefore the actions of the Governor relating to summoning, proroguing and dissolving a Provincial Council must be ascertained according to the said provisions. In the case of *Chief Justice of Andhra Pradesh v. L.V.A. Dixitulu,* [2] cited in Bindra - Interpretation of Statutes (7th Edition - 1987) at page 940, it is stated that,

> "Where two alternative constructions are possible, the Court must choose the one which will be in accord with the other parts of the

statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion or friction, contradiction and conflict between its various provisions or undermines or tends to defeat or destroy the basic scheme (my emphasis) and purpose of the enactment. These canons of construction apply to our Constitution with greater force .....".

It is to be observed that the whole of the provisions of Chapter XVIIA were brought in by the Thirteenth Amendment to the Constitution. It was submitted by the learned Counsel for the Petitioners that, the said Amendment was an exercise in the devolution of power under the aegis of Article 27 (4) of the Constitution. This Article requires the State, to broaden the democratic structure of government and democratic rights of the people, by decentralizing the administration, and affording all possible opportunities to the people to participate at every level in national life and in government. It is in that background that the provision had been made requiring the Governor, to consult the Chief Minister, the elected representative of the people, who commands a majority of the elected members.

It is pertinent to note here that, the learned Counsel for the Respondents, conceded that there is no express provision in the Constitution, which empowers the President, to dissolve a Provincial Council.

In this context, if the interpretation sought to be given by the learned Counsel for the first Respondent, in Application C.A.No. 18/96, that the word "shall" in the said sub-paragraph (d) of Article 154B (8) should be read as discretionary, becomes untenable. If the word "shall" is read as meaning "may", the whole of the provision in sub-paragraph (d) of Article 154 (b) (8) becomes meaningless and superfluous. It will give the discretion to the Governor to dissolve the Provincial Council, at his will, whether or not the Chief Minister commands the support of the majority of the Council. This certainly does not seem to be the situation, the Constitution envisages.

The learned Counsel for the second Respondent submitted that executive power of the people including the defence of Sri Lanka is exercised by the President. He argued, that therefore the Governor

who is appointed by the President, exercises the executive power on behalf of the President in view of Article 4 (b) read with Article 154B of the Constitution. He added that the provisions of Article 154B (8) (d) would only apply to the exercise of Governor's powers solely as a delegate.

The learned Counsel for the first Respondent in Application C.A.No. 17/96, associated himself with the said submissions made by the learned Counsel for the second Respondent, and added that in view of the provisions of the Constitution, particularly Article 154B (2), (the provision which enables the President to appoint a Governor) the said first Respondent brought the facts and circumstances relating to the state of affairs of the Council to the notice of the President, and sought her directions in regard to the exercise of his discretion. The President directed the first Respondent to dissolve the said Council. He submitted that the first Respondent being a delegate of the President, is bound by the said direction and acted accordingly.

The learned Counsel for the Petitioners pointed out that, ours is a written Constitution, and when express provision is made for a particular situation, such provision must prevail over the general provision. He submitted that provision in Article 154B (8) (d) is a special provision, and that Article 4(b) of the Constitution dealt generally with the executive power of the President. Therefore the said special provision must prevail over the said general provision.

The Article 4 of the Constitution dealing with the Sovereignty of the people, in sub-paragraph (b) states as follows :-

"(b) the executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the people :-

What is meant by "executive power" is not defined in the Constitution. It was submitted by the learned Counsel for the second Respondent that executive power, "connotes the residue of governmental functions that remain after the legislative and judicial functions are taken away". Thus it appears that the said term executive power is used in a general sense.

The learned Counsel for the Petitioners submitted that, the said "executive power" referred to in Article 4 (b) is not unlimited power. He referred to several provisions in the Constitution itself, which he submitted expressly limits the exercise of such "executive power". He cited the following provisions of the Constitution.:

(i) Article 34 (1) Proviso.
(ii) Article 70 (1) Proviso (a).
(iii) Article 70 (1) Proviso (b).
(iv) Article 70 (1) Proviso (c).
(v) Article 154B (8) (d).
(vi) Article 154 F (4) .
(vii) Article 154 F (4) Proviso.
(viii) Article 154 F (5).

The learned Counsel for the second Respondent submitted that, in the context of the Thirteenth Amendment, one cannot read a limitation into the powers of the President, which the President derives under Article 4(b). The various provisions referred to by the learned Counsel for the Petitioners are inbuilt provisions, which set out the manner in which the various powers therein are to be exercised. For instance, Article 34 proviso cannot be regarded as a restriction on the power of the President. It sets out the manner in which that power is to be exercised in the situation referred to in the proviso. Similarly, Article 70 is a self contained provision which provides for the procedure and powers in respect of the matters set out therein. These also contain inbuilt provisions which cannot be regarded as a limitation on the powers of the President.

It is to be observed that under the proviso to Article 34, the President is required to call for a report from the Judge who heard the case, and follow a certain procedure before a pardon is granted. Under Article 70 (1) although the President is given the power to summon, prorogue and dissolve Parliament, the President cannot dissolve Parliament before the expiration of one year from the date of General Elections (Proviso (a) or on the rejection of the Statement of Government Policy (Proviso (b)) or after the Speaker has entertained a resolution under Article 38 (2) of the Constitution (Proviso (c)). Although they are inbuilt provisions relating to the power of dissolution, they are nev-

ertheless Constitutional restrictions, to the exercise of the power of dissolution. Under Article 154 (8) (d) the Governor is required to act on the advice of the Chief Minister when exercising any of the powers under paragraph (8) of Article 154B, so long as the Board of Ministers commands the support of the majority in the Provincial Council. Article 154F (4) of the Constitution provides that the Governor shall appoint as Chief Minister, the member of the Provincial Council, who in his opinion can command the support of the majority of the members of the Provincial Council. The Proviso to Article 154F (4) states that, where more than one-half of the members elected to a Provincial Council are members of one political party, the Governor shall appoint the leader of the political party, as the Chief Minister. Article 154F (5) requires that the Governor shall, on the advice of the Chief Minister appoint among the members of the Provincial Council, the other Ministers. These are all powers that fall within the aforesaid definition of "the residue of governmental functions that remain after the legislative and judicial functions are taken away" and are therefore executive powers.

In this context it is appropriate to refer to para. 875 of Halsbury (4th Edition, vol. 44) where it is stated as follows :-

"875. General and Particular enactments.

Whenever there is a general enactment in a Statute which, if taken in its most comprehensive sense, would override a particular enactment in the same Statute, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the Statute to which it may properly apply. This is merely one application of the measure that general things do not derogate from special things."

In the aforesaid provisions, the Constitution itself has sought to deal with those executive powers specifically. Therefore those special provisions being Constitutional provisions in themselves, must be given effect to. Hence the well known rule of construction *Generalia Specialibus Non Derogant* would apply. Thus the special provision in Article 154B (8) (d) will take precedence over the general provision in Article 4 (b) of the Constitution.

The learned Counsel for the second Respondent has in his written submissions stated that, the main question to be decided is whether Article 154B (8) (c) contemplates a discretionary power by the Governor, and if so whether such power is required to be exercised on the directions of the President. He has raised a further issue whether Article 154B (8) (d) contemplates the exercise of the Governor's powers solely as a delegate only. He has gone on to state that, the broader question to be decided is whether, in matters of this nature the said provisions in the Constitution have to be interpreted, in the light of the majority judgment in the 13th Amendment Case. He has gone on to point out that, the most important feature of the said judgment is that the Republic of Sri Lanka is a Unitary State and does not have federal characters. He has added that emphasis was placed on the fact that the Provincial Council was a subordinate body and laid down the basis on which the three functions including the executive functions are to be exercised. He has also cited the following passage from the said judgment. The said passage appears at pages 322-323, in (1987) 2 S.L. R. (3) and states as follows :-

The Governor is appointed by the President and holds office in accordance with Article 4 (b) which provides that the executive power of the People shall be exercised by the President of the Republic, during the pleasure of the President (Article 154B (2)). The Governor derived his authority from the President and exercises the executive power vested in him as a delegate of the President. It is open to the President therefore by virtue of Article 4 (b) of the Constitution to give directions and monitor the Governor's exercise of this executive power vested in him. Although he is required by Article 154F (1) to exercise his functions in accordance with the advice of the Board of Ministers, this is subject to the qualification "except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion." Under the Constitution the Governor as a representative of the President is required to act in his discretion in accordance with the instructions and directions of the President. Article 154F (2) mandates that the Governor's discretion shall be on the President's directions and that the decision of the Governor as to what is in his discretion shall be final and not be called in question in any Court on the ground that he ought or ought not to have acted on his discretion. So long as the President retains the power to give directions to the

Governor regarding the exercise of his executive functions, and the Governor is bound by such directions superseding the advice of the Board of Ministers and where the failure of the Governor of Provincial Council to comply with or give effect to any directions given to the Governor or such Council by the President under Chapter XVII of the Constitution will entitle the President to hold that a situation has arisen in which the administration of the Province cannot be carried on in accordance with the provisions of the Constitution and take over the functions and powers of the Provincial Council (Article 154K and 154L). There can be no gainsaying the fact that the President remains supreme or sovereign in the executive field and the Provincial Council is only a body subordinate to him.

The learned Counsel for the first respondent in Application No. C.A. 17/96 in his written submissions referred to the said judgment and has stated that the Court emphasised that so long as the President retains the power to give directions to the Governor regarding the exercise of his executive functions the Governor is bound by such directions superseding the advice of the Board of Ministers. He has added that, the President can take over the functions and powers of the Provincial Council by virtue of Article 154K and 154L. He goes on to quote the last sentence of the above cited passage, of the said judgment.

The Counsel for the Petitioner, in his written submissions has stated that, the said judgment is not directed to the meaning of Article 154B. It was concerned with the question of whether or not the 13th Amendment altered the unitary character of the Constitution enshrined in Article 2 and 76, and therefore required approval at a referendum. It was only in this context that Article 4 (b) was referred to and considered. The passages of the judgment which refer to Article 4 (b) make this clear.

It has been pointed out in the said judgment, at page 318, that,

"The main contentions of the Petitioners were that the new chapter XVIIA consists of several provisions which are inconsistent with the provisions of entrenched Article 2 and 3 of the Constitution and therefore that Chapter cannot become law unless the number of votes cast

in favour thereof amounts to not less than 2/3 of the whole number of members (including those not present) and is approved by the People at a Referendum as mandated by Article 83 of the Constitution."

The said Article 2 refers to the unitary status of Sri Lanka and Article 3 relates to the Sovereignty of the People.

Thus the provisions of the Constitution were considered in the said judgment with a view of ascertaining whether the provisions of Chapter XVIIA (The Thirteenth Amendment) were inconsistent with the provisions of Article 2 and 3 of the Constitution and not with a view of examining what legal effect should be given to the provision in Article 4 (b), in relation to the other provisions of the Constitution. More specifically, the provisions of Article 154B (8) (c) and (d) have not been considered in relation to the provision in Article 4 (b).

It is important to note that in the above cited passage of the said judgment, it is stated that,

"It is open to the President therefore by virtue of Article 4 (b) of the Constitution to give directions and monitor the Governor's exercise of this executive power vested in him. Although he is required by Article 154F (1) to exercise his functions in accordance with the advice of the Board of Ministers, this is subject to the qualification, "except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion." (my emphasis)

Thus it is seen that the said judgment recognises the fact that the Governor is required to exercise his executive functions, discretionary or otherwise, in accordance with the provisions of the Constitution.

It is pertinent to note that the said judgment has taken into consideration the fact that not only executive power but also legislative power is vested with the President and the Parliament, in holding that the unitary status of the Country was not affected by the provisions of the Thirteenth Amendment. The said judgment at page 320 states,

"The question that arises is whether the 13th Amendment Bill under consideration creates institutions of government which are supreme,

independent and not subordinate within their defined spheres. Application of this test demonstrates that both in respect of the exercise of its legislative powers and in respect of the exercise of executive powers no exclusive or independent power is vested in the Provincial Council. The Parliament and the President have ultimate control over them and remain supreme."

All the learned Counsel appearing for the Respondents submitted that, the proviso to Article 154B sub-paragraph (9) is not applicable to the said sub-paragraph (9). It was submitted that, the said sub-paragraph (9) deals with granting of a pardon by the Governor in the exercise of a prerogative power and therefore the question of "Advice of the Board of Ministers" does not arise. Therefore they argued that the reference in the said proviso is to the advice of the Chief Minister stipulated in Article 154B (8) (d), which is given on behalf of the Board of Ministers. It was further pointed out that pardons are granted in the interest of justice and not in the "public interest".

The Counsel for the petitioners submitted that, upon a proper construction, the said Proviso should apply only to said sub-paragraph (9). If It was intended to apply to the entirety of Article 154B it would have been placed at the end of the said Article. The Court cannot lightly impute a mistake to the Legislature. He cited Halsbury (4th Edition) Vol.44, para. 862. In any event, the Proviso only refers to "advice of the Board of Ministers". It does not refer to the "Advice of the Chief Minister". It cannot, therefore apply to Article 154B (8) (d), which speaks of "the advice of the Chief Minister". The Court cannot add words into the Proviso and thereby extend its operation to include the advice of the Chief Minister.

On a consideration of the above submissions it is clear that Proviso to sub-paragraph (9) in Article 154B is not intended to apply to the provisions of the Article 154B (8) (d).

The learned Counsel for the first Respondent in Application C.A. No. 18/96 has, for the first time, in his written submissions, which were filed after the conclusion of oral hearing of this case, has taken up the position that two questions should be referred to the Supreme Court for determination under Article 125 of the Constitution. The two questions are,

(1) whether under Article 154B (8) (d) the Governor has a discretion in the exercise of the powers conferred on him by Article 154B (8) (c) to act contrary to the advice of a Chief Minister, who in the opinion of the Governor, commands the support of the majority of the Provincial Council;

(2) whether the Proviso appearing immediately after sub-Article (9) of Article 154B applies to Article 154B (8) (c).

It must be pointed out at the outset that, the learned Counsel for the first Respondent in Application C.A.No.18/96 did not raise the matter at the argument stage, nor was any submission made that these are fit questions to be determined by the Supreme Court under Article 125. In fact none of the learned Counsel appearing for the Petitioners or for the Respondents made any suggestion to refer any question to the Supreme Court for determination. In any event, it is seen from the reasoning given above, that the aforesaid questions can be decided by application of the relevant provisions of the Constitution and the interpretation of the Constitution does not arise.

In view of the reasons stated above we are of the view that the Governor when dissolving a Provincial Council, acting under the provisions of Article 154B (8) (c) has no discretion and is bound by the provisions of Article 154B (8) (d), to act on the advice of the Chief Minister provided the Board of Ministers commands a majority in the Provincial Council. Therefore we hold that the Governors, who are the first Respondents in each of the Applications C.A.No. 17/96 and C.A.No. 18/96, have acted contrary to the provisions of Article 154B (8) (c) and (d), of the Constitution, by seeking the advice of the President, in a matter they had no discretion, and dissolving the said Provincial Councils in accordance with the directions given by the President. Hence the said dissolutions of the said Provincial Councils are illegal and should be declared null and void.

Accordingly, this Court hereby declare that, the said dissolution of the Provincial Council of North Central Province, by the said Order, marked P4, made by the first Respondent, is null and void. Therefore this Court hereby issue and grant to the petitioner in Application C.A.No. 17/96, an Order in the nature of Writ of Certiorari quashing the said Order of dissolution, marked P4.

Since the said Order of dissolution, marked P4, is illegal, the consequential Notice marked P5, issued by the second Respondent to the Application C.A.No.17/96, is also illegal. Therefore this Court hereby issue and grant to the Petitioner in Application C.A.No. 17/96 an Order in the nature of Writ of Certiorari quashing the said Notice, marked P5.

This Court also hereby declare that the said dissolution of the Provincial Council of Sabaragamuwa Province by the said Order, marked P7 made by the first Respondent, is null and void. Therefore this Court hereby issue and grant to the Petitioner in Application C.A.No. 18/96, an Order in the nature of Writ of Certiorari, quashing the said Order of dissolution, marked P7.

Since the said Order of dissolution marked P7, is illegal, the consequential Notice marked P8, issued by the second Respondent to the Application C.A.No.18/96, is also illegal. Therefore this Court hereby issue and grant to the Petitioner in Application C.A.No.18/96, an Order in the nature of Writ of Certiorari, quashing the said notice marked P8.

Although the Petitioners in both the said Applications have prayed for Writs of Prohibition, against the second Respondent, restraining him from taking steps to hold elections to the said Provincial Councils, the question of holding elections does not arise, as the terms of office of the said Provincial Councils would be revived, by virtue of this Order. Therefore this Court hereby refuse the said Applications for the issue of Writs of Prohibition against the second Respondent.

The Petitioner in Application C.A.No.17/96 is allowed costs in a sum of Rs. 5000/- against the first Respondent. We do not award costs against the second Respondent, as he had only taken a consequential step, in his official capacity.

The Petitioner in Application C.A.No.18/96 is allowed costs in a sum of Rs. 5000/-, against the first Respondent; we do not award costs against the second Respondent, as he had only taken a consequential step, in his official capacity.

J.A.N. DE SILVA, J. - I agree.

Certiorari granted quashing order of dissolution of Provincial Councils and notices declared illegal.