

OMALPE SOBHITA THERO
v
DAYANANDA DISSANAYAKE AND ANOTHER

SUPREME COURT
SARATH N. SILVA, C.J.
JAYASINGHE, J.
UDALAGAMA, J.
DISSANAYAKE, J.
AMARATUNGA, J.
SC (FR) 278/2005
AUGUST 22, 2005

Constitution Article 4 (b), Article 30(2) – Article 31(3A)(d) i – Article 62(2) 83 – Article 92, Articles 93, 94 – Article 125(1), Article 126(2) – Article 160, Articles 161(a), 163 – 1982 Amendment to the Constitution – 1972 Constitution – Amendments – Presidential Elections Act – Commencement of the second term of office of the incumbent – President if elected – Constitutional interpretation?

The petitioner filed an application under Article 126(2) alleging an infringement or an imminent infringement of Article 12(1) – the impugned conduct being the failure on the part of the 1st respondent to make a pronouncement that the next Presidential election will be held on the basis that the term of office of the President will expire on 22.12.2005 and not in November 2006.

Held:

- (1) The Dominion Constitution 1948 and the first Republican Constitution 1972 were based on the Westminster model of Parliament and Cabinet governed with the Prime Minister elected to Parliament from one of the 168 Electorals being the Head of the Cabinet of Ministers. The Governor-General – later the President whose functions were more ceremonial was nominated by the Prime Minister and acted on the advice of the Prime Minister. The Parliament elected under the first Republican Constitution on 21.7.1977 made the second amendment of altering the term of Government to that of an executive Presidency.
- (2) Section 5 was amended to provide that the executive power of the people shall be exercised by the people and Section 20 was amended to provide that the President shall be the Head of Executive, Head of the Government and the Commander in Chief of the armed forces.

- (3) A new Section – Section 26 was introduced to provide that the President shall be elected by the people and shall hold office for a term of six years from the date of assumption of office. Section 28B provides that the person holding the office of Prime Minister is deemed to be the Executive President, and shall hold office for a period of six years from the date of assumption of office – 4.2.1978.
- (4) The same Parliament adopted and enacted the presently operative second Republican Constitution certified on 31.8.1978 and in Article 160 it is seen that it takes over *mutatis mutandis* the threefold fiction contained in Section 28B.
- (5) Continuity in office under the new Constitution without recourse to the exercise of the franchise was assured to the Executive President upto 4.2.1984.
- (6) On 27.8.1982, the Third Amendment was made to the Constitution to enable the incumbent President to seek a further mandate after completing four years in office. This was immediately amended and on 17.9.1982 nominations were received for the Presidential Election and at the election held on 20.10.1982, the incumbent President was declared elected.

- (7) (i) Under Article 30 (4) – election held in the ordinary course upon a full term of office of 6 years, then the term of office of the person elected will commence on the expiration of the term of office of the President in office.

In terms of proviso (b), if the incumbent President is not a candidate or fails to win, his term of office is deemed to expire on the date of the election and consequently the successful candidate's term will commence on the date of election.

- (ii) Under Article 31 3 (A) d (1) – election is held as in (ii) above and the President in office is declared elected, the date of commencement of the second term of office of the person declared elected as President at an election if such person is the President in office hold office for a term of six years commencing on such date – in the year in which that election is held (being a date of such election) or in the succeeding year, as corresponds to the date on which his first term of office commenced, whichever date is earlier.
- (8) The authority for the exercise of executive power stems from the elections by the people. The franchise which terms part of the sovereignty of the people – Article 3 – is exercised *inter alia* at the election of the President as provided in Article 4(e). Article 30(2) directly links the terms of office of six years to the election by the people, these are entrenched provisions of the Constitution. Commencement of the term of office of the President signifies the commencement of the executive power of the people on the authority of the mandate received at the election. The mandate is based on

the exercise of the franchise at the election of the President in terms of Article 3 read with Article 4(e). Viewed from this presumption it is in accord with the basic premise of the Constitution that the term of office of the President should commence on the date of election.

- (9) Provisions of Article 31 3 (A) (d) i – should be interpreted on the basis that the President will hold office for a period of six years commencing on the date on which the result of the election is declared – being in the present case 22nd December 1999 – as the first term of office of the President Commenced upon election on 10.11.1994 and as early elections were called in terms of Article 31(3A)(a) 1 and declared elected on 22.12.1999.
- (10) Courts have taken the view that the judicial act of interpretation and appraisal is imbued with creativity and realism and since interpretation always implied a degree of discretion and choice, the Court would adopt particularly in areas such as constitutional adjudication dealing with social rights – Courts are held as finishers, refiners and polishers of legislatures which gives them a state requiring varying degrees of further processing.

APPLICATION under Article 126(2).

Cases referred to:

- 1) *Bandaranayake v Weeraratne and others* 1981 –1 Sri LR 10 at 14.
- 2) *Johnson v Moreton* 1978 – 3 All ER 37.
- 3) *Vacher and Sons Ltd. v London Society of Compositors* – 1913 All 107 at 121.
- 4) *Gladstone v Bower*.
- 5) *Brandleng v Barrington* 1827 – 6B & C 467 at 575.
- 6) *River Wear Comr. v Adamson* 1877 2 App. Cas 742 at 763.
- 7) *Attorney-General v H.R.H. Prince Ernest Augustus of Hanover* 1975 – 1 All ER 49 at 54.
- 8) *Stock v Frank Jones (Tipton Ltd.)* 1978 1 All ER 948 at 953.
- 9) *R. v Committee of Loyds ex.p. Moran* 1983 The Times 24 Journal
- 10) *ICI Ltd. v Shatwell* 1961 All 656 at 675.
- 11) *Bhatia International v Bulk Trading SA* – AIR 2000 Sc 11 at 1437 and 1438.

Manohara de Silva with *David Weeraratne, Udaya Prabath Gammanpila, Govinda Jayasinghe, K.H.C. Kahandawela* and *N. Perusinghe* for petitioner.

Elmore Perera with *Shariff A. Nawaz* for 1st respondent.

K.C. Kamalabasbeysan PC Attorney-General with *Jayantha Jayasuriya, DSG, Nerin Pullie* SC for 2nd respondent.

H.L.de Silva, PC with *Nigel Hatch* PC, *Chanaka de Silva* and *Gaston Jayakody, M.A. Sumanthiran, Viran Corea, Aravinda Athurupana* with *Kamal Nissanka* for parties seeking intervention – as *amicus curiae*.

August 26, 2005

SARATH N. SILVA. C.J.

The Venerable Thera being a Member of Parliament and the General-Secretary of a recognized political party founded on Buddhist principles having 9 members in Parliament, filed this application in terms of Article 126(2) of the Constitution alleging an infringement or an imminent infringement of his fundamental right guaranteed by Article 12(1) of the Constitution. The impugned conduct is the failure on the part of the 1st respondent, being the Commissioner of Elections to make a pronouncement that the next Presidential Election will be held on the basis that the term of office of the President will expire on 22.12.2005 as contended by the Petitioner and not in November 2006 as contended by the incumbent President (vide publications P8 and P9). The petitioner submits that different statements have been made by spokesmen of the two main political parties as exemplified by the publication P10 resulting in a pervasive uncertainty in relation to this important matter. Hence the petitioner wrote letter P11 to the 1st respondent, adverting to the controversy as to the operative date and the consequential environment of uncertainty and doubt, that seriously impede the petitioner and his party in taking important policy decisions and organizational measures as to the next Presidential Election. The petitioner requested the 1st respondent being the appropriate statutory authority to make a clear pronouncement as to the operative date without delay. The alleged infringement is the failure to make such pronouncement.

After the application was filed and prior to it being supported for leave to proceed, letter dated 2.8.2005 was received by the petitioner which was tendered to Court. Counsel submitted that the letter merely refers to several provisions of the Constitution and states that an order would be made in terms of the Presidential Elections Act at the appropriate stage. It was submitted that the reply does not clear the controversy and uncertainty referred to by the petitioner and as such it is necessary to proceed with the application. The Attorney-General had no objection for leave to proceed being granted since there is an ambiguity in the relevant provision of the Constitution viz:

Article 31(3A) (d) (i), that involve questions of interpretation, being within the sole and exclusive jurisdiction of this Court, in terms of Article 125(1) of the Constitution. Since the question is of general and public importance, the hearing was referred to a Divisional Bench at the earliest possible date taking into account the urgency of the matter. For the same reason applications for intervention were not allowed but Counsel representing every such party was permitted to make submissions on the question of interpretation, as *amicus curiae*.

The ambiguity is in relation to a provision included in the Third Amendment to the Constitution. Suffice it for the present to start that the objective of the Third Amendment was to enable an incumbent President, in the first term of office, after the expiration of four years, to seek a mandate by election to hold office for a further term. To get straight to the point, the issue is in regard to the commencement of the second term of office, if the incumbent President is declared elected at such an election.

Although seemingly narrow in its ambit considering the serious implications on other basic provisions of the Constitution, that would be adverted to, it is necessary to examine the issue in the light of the pre-existing legal framework and the factual matrix that gave rise to the Amendment, as may be gathered from official records.

The post-independence Dominion Constitution of 1948 and the first Republican Constitution of 1972 were based on the Westminster model of Parliamentary and Cabinet Government with the Prime Minister elected to Parliament from one of the 168 Electorates (according to the last delimitation of electorates) in the country being the head of the Cabinet of Ministers. The Governor-General and later the President whose functions were more ceremonial in nature was nominated by the Prime Minister (vide Section 25 of the 1972 Constitution) and acted on the advice of the Prime Minister (Section 27(1)). The Parliament elected under the first Republican Constitution on 21.7.1977 made the second Amendment to the 1972 Constitution on 20.10.1977 that had the far reaching effect of altering the form of Government to that of an Executive Presidency. Section 5 of the Constitution was amended to provide that the executive power of the People including the defence of Sri Lanka shall be exercised by the President and

Section 20 was amended to provide that the President shall be the "Head of the Executive, Head of the Government and the Commander-in-Chief of the armed forces."

A new Section 26 was introduced to provide that the "President shall be elected by the People and shall hold office for a term of six years from the date of assumption of office". However, a Presidential Election was not held as required by this provision and Section 28B brought in by this Amendment stated as follows:

"Notwithstanding anything to the contrary in the other provisions of the Constitution, the person holding the office of Prime Minister on the day immediately preceding the date of coming into operation of this section, shall be deemed for all purposes to have been elected the President of the Republic and the provisions of Section 25 shall apply to him. Such President shall hold office for a period of six years from the date of assumption of office."

It is seen that Section 28B encompasses a threefold fiction, viz:

1. The person holding the office of Prime Minister is deemed to be the Executive President;
2. The person who was elected to Parliament from one of the 168 Electorates to wit: Colombo West, is deemed "for all purposes" to have been elected by the People of Sri Lanka.
3. That person will hold the office of Executive President for a period of six years from the date of assumption of office.

The same Parliament adopted and enacted the presently operative second Republican Constitution certified on 31.8.1978. Although the basic provisions of the new Constitution; Article 4(b) as to the exercise of the sovereignty of the People; Article 4(e) as to the franchise of the People; Article 30(2) as to the term of office of the President and other provisions such as Articles 92, 93 and 94, provide for the President to be elected by the People, in fact there was no election. Instead, Article 160 stated as follows:

"Notwithstanding anything to the contrary in any other provision of the Constitution, the person holding the office of President immediately before the commencement of the

Constitution shall be the first President under the Constitution and shall be deemed for all purposes to have been elected as the President of the Republic, and shall hold office for a period of six years from February 4, 1978."

It is seen that this Article takes over *mutatis mutandis* the three-fold fiction as contained in Section 28B cited above. One significant alteration is that the term of office of the President who is deemed to have been elected by the People is for a period of six years from 4.2.1978.

Although that the Constitution provides for a Parliament elected according to proportional representation, Article 161(a) states that the members of the National State Assembly elected under the previous Constitution on the basis of a "first past the post" (FPP) election shall be deemed to have been elected as Members of Parliament under the new Constitution. Article 161(e) provided that unless sooner dissolved Parliament shall continue for six years from 4.8.1977.

The only organ of Government not assured continuity of office under the new constitution was the higher judiciary. Article 163 ominously provided that all Judges of the Supreme Court and the High Court (there being no Court of Appeal constituted as at present at that time) holding office on the day immediately before the commencement of the Constitution, shall on the commencement of the Constitution cease to hold office. Some were re-appointed and some were not. The members of the higher judiciary were thereby denied continuity in office assured to all others in the judicial service (minor judiciary) public service, local government service and employees of public corporations, by Article 164 of the Constitution. The resulting position is that all Judges of the Supreme Court, the newly created Court of Appeal and the High Court had to receive their appointments from the person who was deemed to be the President. Thereby the genesis of the 1978 Constitution was effectively put beyond the pale of judicial review.

Continuity in office under the new Constitution without recourse to the exercise of the franchise was thus assured to the Executive President upto 4.2.1984, and the Parliament upto 4.8.1983.

Amendments to the Constitution effected in 1982, that deal with these two matters, as to the term of office of the President and of Parliament, are devoid of any general legislative purpose and are explicable only on the factual matrix that gave rise to them, which must necessarily be stated for a proper understanding of its content.

The Judgment of this Court in the case of *Bandaranaike v Weeraratne and others*¹⁾ at 14 records that a Resolution was passed by Parliament under Article 81(1) of the Constitution imposing civil disability on the leader of the main political party in opposition and expelling her from Parliament, whilst an application was pending in this Court challenging the findings of the Special Presidential Commission of Inquiry on the basis of which the resolution was presented in Parliament. The Court dismissed the application in limine on the basis of the preclusive clause in Article 81(3) of the Constitution. The judgment states as follows:

"There is, therefore, a peculiar duty resting on this Court to uphold and give effect to a provision of the Constitution and we have no alternative but to give proper effect to the preclusive clause in Article 81(3) ..."

To continue with the sequence of events on 27.8.1982, the Third Amendment, now in issue, was made to the Constitution to enable the incumbent President to seek a further mandate after completing four years in office. The Amendment was immediately availed of and on 17.9.1982, nominations were received for the Presidential Election and at the election held on 20.10.1982, the incumbent President was declared elected. Within a fortnight of the Presidential election an urgent Bill was referred to this Court by the President for a special determination in terms of Article 122(1)(b) of the Constitution. The Bill titled the Fourth Amendment to the Constitution had a single clause to repeal Article 161(e) as to the term of the Parliament and extend it for a further six years upto 4.8.1989. An objection was raised that the term of the Parliament, not elected under the Constitution, cannot be validly extended in terms of Articles 62(2) and 83(a) of the Constitution even with a Referendum. A bench of seven Judges of this Court was constituted to consider the matter. The determination of the Court (Decisions of the Supreme Court on Parliamentary Bills

1978-1983 – Vol. 1 page 151) which runs into a few lines records that the majority of the Court was of the view that in view of the provisions to proviso (a) of Article 120 the Court cannot exercise jurisdiction in respect of the Bill. In a single sentence it is recorded that : *“Three members of this Court are not in agreement with the above view.”*

The same Parliament passed the Bill with 2/3 majority and the referendum was held on 22.12.1982, the results of which reveal that the Amendment although approved on the total poll, was overwhelmingly rejected in all the Districts of the Northern and Eastern Provinces except the District of Digamadulla. The District Jaffna exemplifies the rejection with only 25,315 voting in favour of the Amendment and 265,534 voting against it. The conflict in the North and East exacerbated to an armed conflict with a spiral of violence leading to the ethnic violence of July 1983. The final Amendment to the Constitution, in this group of Amendments to viz: the Sixth Amendment made shortly after the July violence, on 8.8.1983, contains a prohibition against the violation of the territorial integrity of Sri Lanka and the requirement to take an oath in the seventh schedule not to promote and advocate the establishment of a Separate State. The Members of Parliament, including the Leader of the Opposition, who represented the Tamil United Liberation Front did not take this oath and vacated their seats in Parliament and the conflict was irretrievably removed from a Democratic platform to the hands of an armed group resulting in a horrendous loss of life and property. The loss of irreplaceable valuable lives continue unabated.

I recounted the foregoing events, that require sober and deep reflection, albeit briefly, as the factual matrix from which the three Amendments, commencing with the one at issue emerged. **The Amendments are inexplicable in logic and common-sense. They do not even remotely advance a general legislative purpose based on good governance and transparency. They are explicable only on the basis of personal and partisan interests, advanced regrettably through the medium of the law.**

In the background stated above, I would now refer to the general provisions in the Second Amendment to the 1972 Constitution and

the present Constitution as regards the term of office of the President and its commencement without adverting to the fictions introduced for the benefit of the incumbent in office dealt with above.

Section 26(1) of the Second Amendment to the 1972 Constitution provided as follows:

"The President of the Republic shall be elected by the People, and shall hold office for a term of six years from the date of assumption of office. No person shall hold the office of President for more than two consecutive terms:...."

It is seen that the term is fixed at six years commencing from "the date of assumption of office".

Section 28 provided that if the President vacated office during this period the National State Assembly will elect a President for the remainder of the period.

In the present Constitution Article 30(2) the contents of which would be examined morefully hereafter, provides a fixed six year term, any mid-term vacancy will be filled by a MP elected for the balance period from Parliament. According to Article 30(3) the poll for the election of the next President has to be taken not less than one month and not more than two months from the expiration of the term of office of the incumbent President. Under Article 30(4) the next term of office of the President commences on the fourth day February next succeeding the date of election. Thus the Constitutional scheme upto the Third Amendment was explicit, with a fixed six year term made more specific in the present Constitution with a fixed date of commencement being the fourth of February. The fixed term, fixed date, arrangement is obviously drawn from the system in the United States. Since the incumbent President's term was fictitiously stated to commence on 4.2.1978 by Article 160 referred to above, no term of office would exceed the six year period laid down in the entrenched provision in Article 30(2). This scheme makes sense because the President has a discretion of dissolving Parliament after one year, the President is therefore denied the added power of manoeuvring the date of his second election to his advantage.

The carefully laid out scheme was cast asunder by the Third Amendment and the President was invested the power to manoeuvre the date of election for the second term at any time after the completion of four years of the first term. This necessarily upset the provision in Article 30(4) fixing the date of commencement of the new term as the fourth of February, which was accordingly repealed by the Third Amendment. In its place the Amendment introduced three provisions that fix the date of commencement of the term of office of the President.

Two provisions contained in Article 31(3A) (d) relate to an early election before completing the full period of six years. The other, in the replaced provision 30(4) relates to an election upon a full term of office. I would deal with these provisions in the order of simplicity of its content—

- i) Article 30(4); election held in the ordinary course upon a full term of office of six years. Then the term of office of the person elected will commence on the expiration of the term of office of the President in office.

In terms of proviso (b) to this Article, if the incumbent President is not a candidate or fails to win, his term of office is deemed to expire on the date of the election and consequently the successful candidate's term will commence on the date of his election.

- ii) Article 31(3A)(d)(ii); election is held before the expiry of the first term of office, after four years or more and the incumbent President does not win that election, the term of office of the successful candidate will commence on the date he is declared elected.
- iii) Article 31(3A)(d)(i); election is held as stated in (ii) above and the President in office is declared elected, the date of commencement of the second term of office is to be reckoned according to this provision. Since the issue involves primarily, an interpretation of this provision I would re-produce the entirety of sub-paragraph (d)(i) which reads as follows:
(d) *The person declared elected as President at an election held under this paragraph shall, if such person -*

- i) is the President in office, hold office for a term of six years commencing on such date in the year in which that election is held (being a date after such election) or in the succeeding years, as corresponds to the date on which his first term of office commenced whichever date is earlier;*

The provisions referred to in (i) and (ii) are easily comprehended and the date of commencement of the term of office is clearly ascertainable, as it necessarily should be. Situation in (iii) above has none of these characteristics of simplicity and clarity. I have to observe on the chronology of events and the facts relevant to that time, set out in the preceding section of the Judgment that the formula in (iii) was intended to cover the case of the then incumbent President who obviously initiated the Third Amendment as the Head of Government. He availed of the Amendment and issued a Proclamation in terms of Article 31(3A)(a)(1) to commence the electoral process on 27th August 1982 (vide Government Gazette No. 207/12 of 27.8.1982) being the same day on which the Speaker certified the Third Amendment.

The words used in sub-paragraph (d)(i) are manifestly contorted. The contortion is not the result of slovenly drafting as submitted by Mr. Sumanthiran, since the other provisions are drafted with clarity and the same formula of the term commencing on the date the result of the election is declared, could easily have been adopted.

The contortion was intended to seemingly arrive at a date that was in mind, being the fourth of February, as borne out by subsequent events that will be referred to. This result could only be arrived at with reference to the date of commencement of the first term. As noted above, the first Presidency was based on a threefold fiction. As regards the term of office, Article 160 referred to, stated that the incumbent President "shall be deemed for all purposes to have been elected as the President of the Republic and shall hold office for a period of six years from February 4, 1978." Although the period of six years is from February 4, 1978, Article 160 did not specifically state that the term of office commenced on that date. It appears that for this reason an amendment was moved at Committee Stage in Parliament to the Third Amendment Bill to add

another to the threefold fiction referred to above by providing that the first term of office of the first President is deemed to have commenced on February 4, 1978. This fourth fiction added significantly at Committee Stage in Parliament, after the Supreme Court had examined the constitutionality of the Bill now appears as Article 31(3A)(f) of the Third Amendment and reads as follows:

"(f) For the purposes of this paragraph, the first term of office of the first President referred to in Article 160 shall be deemed to have commenced on February 4, 1978."

This provision fits in with the formula in sub-paragraph (d)(i) and seemingly pushes the date of commencement of the second term of office to February 4th of the next year. The then incumbent President who benefited from the process set out above, won the election and assumed office on February 4, 1983, in the grandeur of the independence day parade at Galle Face Green, held to commemorate the 35th Anniversary of our country gaining independence, by subscribing to the affirmation (oath) before the then Chief Justice, whereas he was declared elected on 21.10.1982. The then Commissioner of Elections, it is seen computed the President's term of office as commencing on 4.2.1983 and not 20.10.1982, since the next Presidential Election was held on 19.12.1988.

As regards the incumbent President, her first term of office commenced upon election on 10.11.1994. She called for an early election in terms of Article 31(3A)(a)(1) and was declared elected on 22.12.1999. Since the commencement of the first term was on 10th November (1994) which is before the date of election 22nd December (1999), it is the contention of Mr. H.L.de Silva, Mr. Sumanthiran and the Attorney-General (who made the final submission) that in applying the formula in sub-paragraph (d)(i), the date of commencement of the second term should be taken as 10th November 2000. They found it difficult to ascribe a meaning to the last phrase of the sub-paragraph appearing after the comma, "whichever date is earlier." These words in the last phrase contemplate the comparison of two dates. It was contended that "date" means only the month and the day in the next succeeding year viz: the year 2000. On that basis the comparison will be between 22nd December being the date of election and 10th

November being the date of commencement of the first term of office. The earlier date being 10th November, the term of office should be taken as having commenced on 10th November 2000. When observed by Court that the word "date" appearing in the last phrase reproduced above should have its normal connotation of a day, month and an year and that date of election being 22nd December 1999, can never be taken as 22nd December 2000 solely to carry out a senseless comparison, Mr. de Silva contended that words in the last phrase would apply only in a situation in which, the day and month of the commencement of the first term would fall after the day and month of the election. It was submitted that in which event the date of election being the earlier date should be taken as the date of commencement of the term of office. The illogical and unreasonable result that would follow such an interpretation was pointed out on the basis of two hypothetical dates as the date of commencement of the first term considered in relation to the actual date of election for the second term viz: 22nd December 1999. If the 21st of December (1994) is taken as the commencement of the first term, since the corresponding date should be a date after the date of election, the second term would commence on 21st December 2000. On the other hand, if the first term is taken to have commenced on 23rd December (1994) there is no necessity in terms of the formula in the sub-paragraph to shift to the succeeding year and the corresponding date could be fixed in the year of election itself. Then the comparison would be between two dates in the year of election viz: the 23rd December and 22nd December and earlier date would be 22nd on which date the term of office would commence. Thus a difference of 2 days in the date of commencement of the first term will result in a difference of almost 1 year in the second term of office. When this was pointed out, Mr. de Silva contended that the task of the Court is merely to interpret the sub-paragraph giving its words their ordinary meaning even if such meaning could in comparable situations produce vastly different results as to the commencement of the second term. On such an interpretation the actual duration of the second term computed from the election to the expiration of the term of office would vary from six years to nearly seven years.

On the other hand Mr. Manohara de Silva for the petitioner and Mr. Elmore Perera for the Commissioner cut the 'Gordian knot' by

submitting that sub-paragraph (d)(i) would not apply since the corresponding date viz: the commencement of the first term 10th November, is earlier to the date of the second election, 22nd December. It was submitted that the sub-paragraph would apply only if the corresponding date is later in the year in which the election was held and there is no basis whatever to shift the year of commencement of office to 2000 when the Election was in the year 1999. It was therefore submitted that the "knotted up" formula in sub-paragraph (d)(i) be cut off and the term of office be ascertained in terms of a basic provision of the Constitution viz: Article 30(2) which reads as follows:

"The President of the Republic shall be elected by the people, and shall hold office for a term of six years."

It was submitted that the term of office of six years is directly linked to the election by the people and the commencement of the term should be taken as the date of such election. Mr. Perera cited passages from Bindra's Interpretation of Statutes, in the chapter titled "Interpretation of Constitution" and submitted that the interpretation that is given should ensure a smooth and harmonious working of the Constitution and avoid an absurdity giving rise to practical inconvenience.

It is appropriate at this stage to cite some relevant rules of interpretation of statutes from judgments and well recognized texts on the subject before moving to an analysis of the vastly different submissions.

In the case of *Johnson v Moreton*⁽²⁾, the House of Lords considered the protection granted to tenant farmers under Section 24(1) of the Agricultural Holdings Act 1948, vis-a-vis the freedom and sanctity of contract considered as having pre-eminent legal values at Common Law. The observations made by every one of the Law Lords in the opinions that were delivered in appreciation of the great service rendered by tenant farmers to England, their immense effort put into agriculture, animal husbandry and the preservation of the fertility of the soil and that the protection of the tenant farmers should not only be a matter of public importance but of national importance, are useful to an agricultural country such as Sri Lanka, sadly affected by a metamorphosis of cherished values

steeped in a rich heritage. Significantly, Lord Simon decried the driving force of man's pursuit of his own interest couched in the cliché, "man's selfishness is Gods providence". The overpowering reasoning that emerge from all the opinions is that the national interest should prevail over personal gain. On that basis it was held that the protection granted to a tenant farmer cannot be renounced by contract and the contract was to that extent held to be null and void although there was no express provision in the law nullifying such a contract. Lord Salmon (at 41 and 42) streamed up by stating three important principles of interpretation of statutes, gleaned from precedents as follows:

(i) *"If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results: Vacher & Sons Ltd. v London Society of Compositors⁽³⁾ at 121 – Per Lord Atkinson.*

(ii) *The courts have no power to fill in a gap in a statute, even if satisfied that it had been overlooked by the legislature and that if the legislature had been aware of the gap, the legislature would have filled it in Gladstone v Bower⁽⁴⁾; Brandling v Barrington⁽⁵⁾ at 575.*

(iii) *If the words of a statute are capable, without being distorted, of more than one meaning, the courts should prefer the meaning which leads to a sensible and just result complying with the statutory objective and reject the meaning which leads to absurdity or injustice and is repugnant to the statutory objective; River Wear Comr. v Adams⁽⁶⁾ per Lord Blackburn at 763. Attorney-General v HRH Prince Ernest Augustus of Hanover⁽⁷⁾ per Viscount Simonds at 54; Stock v Frank Jones (Tipton) Ltd.⁽⁸⁾ per Lord Simon of Glaisdale at 953."*

The submissions of Mr. H.L.de Silva, Mr. Sumanthiran and the Attorney-General tend to draw on the first principle cited above whereas the submissions of Mr. Manohara de Silva and Mr. Perera are based on the third principle.

It is seen that for the first principle to apply the language of the statute has to be "plain admitting of only one meaning". It is only in such situations that the "clear terms enacted must be enforced though it should lead to absurd or mischievous results." Words of sub-paragraph (d)(i), in issue in this case are anything but plain and a "meaning" could be drawn from these words only in relation to the facts stated above being far removed from statutory interpretation. Hence we have to move from the first principle which could be described as the rule of literal construction (interpretation) to the third principle which involves elements of "consequential construction." Of, testing the literal meaning against the practical outcome, Francis Bennion in his work titled "Statutory Interpretation (3rd Edition-1997) at page 660 has stated the process of consequential construction citing dicta of Mustill, J. and of Lord Radcliffe as follows:

"The modern attitude is indicated by a dictum of Mustill J, that 'a statute or contract cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it R. v Committee of Lloyd's, ex p Moran.⁽⁹⁾

Some modern judges have gone so far as to suggest that the correct course is to start by considering which result would be desirable, and then see if the law permits it. Thus Lord Radcliffe said "it sometimes helps to assess the merits of a decision, if one starts by noticing its results and only after doing that allots to it the legal principles upon which it is said to depend" - ICI Ltd. v Shatwell⁽¹⁰⁾ at 675.

Lord Radcliffe went on to say that in the instant case he had begun by considering the consequences of the apparent meaning of the enactment, and found these disquieting. He went on "I start then with the assumption that something must have gone wrong in the application of legal principles that produce such a result (page 676).

More in line with the same principle of interpretation, the Supreme Court of India, in the case of *Bhatia International v Bulk Trading S.A⁽¹¹⁾* at 1437 and 1438, stated as follows:

"The courts have taken the view that the judicial art of interpretation and appraisal is imbued with creativity and realism and since interpretation always implied a degree of discretion and choice, the court would adopt particularly in areas such as constitutional adjudication dealing with social and (sic) rights. Courts are therefore, held as "finishers, refiners, and polishers of legislatures which gives them in a state requiring varying degrees of further processing. If language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. In selecting out of different interpretations the court will adopt that which is just reasonable and sensible rather than that which is none of those things, as it may be presumed that the legislature should have used the word in that interpretation which least offends our sense of justice."

In the background of the preceding statements of the relevant rules of interpretation of statutes, I have to now revert to the inescapable provision in sub-paragraph (d)(i). There is no principle of interpretation of statutes on which the submission of Mr. Manohara de Silva to cut off sub-paragraph (d)(i) as being inapplicable could be upheld. As stated before, the Third Amendment contains three provisions, covering distinct situations and lay down the manner in which the date of commencement of the term of office of the President is to be determined. Sub-paragraph (d)(i) covers specifically the situation at issue where a President in the first term of office calls for an election after 4 years and is re-elected for a further term. The phrase "cut the Gordian knot" is attributed to an act of Alexander the Great King Gordius was the ruler of the area now forming Turkey was known as a tier knot. He proclaimed that any person who removed the knot that he tied would rule the whole of Asia. Alexander the Great when presented with this knot simply cut it off with one swipe of his sword. Judges are not Emperors. They are only upholders of the

Rule of Law. Hence sub-paragraph (d)(i) being the provision which applies cannot be cut off. It has to be interpreted according to the principles stated above.

It is plain that sub-paragraph (d)(i) beings into the formula the date of the commencement of the first term of office. If the words are taken by themselves all counsel conceded that it makes no sense whatsoever to incorporate a reference to the date of the commencement of the first term. The incorporation of the date makes "sense" only in the light of the particular circumstances given above. Whatever be the peculiarity of the source of these words, we are now stuck with them and words have to be interpreted. Applying the formula to the dates relevant to this case we arrive at the date 10th November 2000. But that it is not the end of the provision. The vital words in my view, are found after the comma in the final phrase that read as 'whichever date is earlier'. The preceding words of the sub-paragraph provide for a mere artificial fixation of a date. The words that require interpretation is the phrase at the end. The earlier date could be determined only on a comparison of two dates. The submission of Mr. de Silva, that these words have meaning only in some situations and have no meaning in other situations is not based on any principle of interpretation. Similarly the submission that the words "whichever date" means month and day only, cannot be accepted. This phrase is separated from rest sub-paragraph with a comma and each of the dates contemplated therein should be identifiable with reference to a day, month and the year. Hence we have to necessarily compare two dates, with reference to day month and year from which the earlier one is taken as the date of commencement of office of the second term.

The first date referred to in the sub-paragraph is the date of the election. It is only with reference to the date of election that the other date as corresponds to the date of the commencement of the first term of office is fixed. If the corresponding date is before the date of election, it is shifted to the succeeding year. If the corresponding date is after the date of election it would remain in the year of election itself. Thus the date of election in effect is the pivotal date in the sub-paragraph and should be reckoned as one of the dates in the comparison that is required. When considered in the light of the third

principle stated by Lord Salmon (cited above) the inclusion of the date of election as one of the dates to be reckoned, does not lead to absurdity or injustice or repugnancy with the statutory objective. On the contrary, the reckoning of a date that corresponds to the date of the commencement of the first term fixed according to the formula that is given either in the year of the election or the succeeding year, attracts all the negative considerations of absurdity, injustice and repugnancy with the statutory objective. Therefore in my view, in the absence of an express provision to that effect either way the correct interpretation consistent with the principles stated above is to interpret the provisions of sub-paragraphs (d)(i) on the basis that the date of election being the pivotal date is one of the dates to be reckoned in applying the provisions. The other date has to be fixed corresponding to the commencement of the first term of office either in the year of the election or the succeeding year, according to the formula given in the sub-paragraph. When applied to the present case, the date of the election was the 22nd December 1999. The first term of office commenced on 10th November 1994. The corresponding date fixed according to the formula in the sub-paragraph would be 10th November 2000. Hence, as between these two dates, the earlier date is 22nd December 1999. The strength and credibility of this interpretation lies in the fact that on whatever combination of dates adopted in applying the formula in the sub-paragraph, the invariable result would be that the date of commencement of office will be the date of election for the second term. This would avoid the widely varying dates that will result from adopting the interpretation contended for by counsel referred above.

The foregoing interpretation will result in the provisions of sub-paragraph (d)(i) being consistent with the other provisions that deal with the commencement of the term of office of the President and also being consistent with other basic provisions of the Constitution.

Article 4 which lays down the manner in which the sovereignty of the People is exercised states in paragraph (b) as to the exercise of executive power 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:

Thus the authority for the exercise of executive power stems from the election by the People. The franchise which forms part of the sovereignty of the People as stated in Article 3 of the Constitution is exercised *inter alia* at the election of the President as provided in Article 4(e). Similarly Article 30(2) reproduced above directly links the term of office of six years to the election by the People. Accordingly the provisions for the exercise of sovereignty of the People, the franchise and the term of office of the President have a vital common factor that connects the exercise of executive power by the President, to the election by the People. These are entrenched provisions of the Constitution, the repeal or amendment of or, any inconsistency with, would require not only 2./3rd majority in Parliament but also approval by the People at a Referendum in terms of Article 83. Commencement of the term of office of the President, signifies the commencement of the exercise of the executive power of the People on the authority of the mandate received at the election. The mandate is based on the exercise of the franchise at the election of the President in terms of Article 3 read with Article 4(e) of the Constitution. Viewed from this perspective it is in accord with the basic premise of the Constitution that the term of office of the President should commence on the date of election. The interpretation given above to the provisions of Article 31(3A)(d)(i) which produce the same result draws its highest strength from this basic premise of the Constitution.

It is in my view unnecessary to go through the contorted formula in the sub-paragraph to arrive at this result which would be the same when due meaning is given to the phrase "whichever date is earlier." The contorted formula could at first blush lead to a date in the succeeding year. Perhaps the draftsman succeeded to the extent and the then incumbent President availed of it by ceremonially commencing his term of office on the 4th of February 1983 in the celebrations to commemorate the 35th year of the country gaining independence, an event hailed at that time as the dawn of a 'golden era.' But, the hand that guided the draftsman also included the words "whatever date is earlier" at the end of the sub-paragraph, on a proper interpretation of which, the provision could be brought in accord with the firm moorings of the Constitution.

Accordingly, I hold that the provisions of Article 31 (3A)(d)(i) should be interpreted on the basis that President will hold office for a period of six years commencing on the date on which the result of the election is declared being in the present case 22nd December 1999. The 1st respondent is directed to take steps on that basis to conduct the Poll for the election of the President in terms of Article 31(3) and the applicable law.

These proceedings commenced on the application filed by the Venerable Thera in terms of Article 126. The Court has exercised jurisdiction in terms of Article 126(2) and Article 125 of the Constitution as stated in the order granting leave to proceed. The Petitioner is granted the declaration prayed for in paragraph (b) of the prayer to the petition without any finding against the 1st respondent. Since this application has been filed in the public interest and the determination sought by the petitioner has been made, it would not be necessary to grant any further relief. The application is allowed. No costs.

JAYASINGHE, J. - I agree.
UDALAGAMA, J. - I agree.
DISSANAYAKE, J. - I agree.
AMARATUNGA, J. - I agree.

Application allowed.

President will hold office for a period of six years commencing on the date on which the result of the election is declared being in the present case 22.12.1999.

The 1st respondent is directed to take steps on that basis to conduct the poll for the election of the President in terms of Article 31(3) and the applicable law.