

1972 *Present* : H. N. G. Fernando, C.J., G. P. A. Silva, S.P.J., and
Alles, J.

C. SUNTHARALINGAM, Petitioner, and THE ATTORNEY-GENERAL
and 2 others, Respondents

S. C. 1 of 1972—Application for Injunction

*Injunction—Proceedings of Constituent Assembly—Supreme Court cannot order
discontinuance of such proceedings.*

In an application to obtain an injunction to prevent and prohibit the Minister for Constitutional Affairs "from taking any steps to repeal the Ceylon (Constitution and Independence Orders-in-Council, 1946 and 1947) and to substitute therefor a Constitution entitled a 'Constitution of Sri Lanka'"—

Held, that a Court cannot consider the validity or otherwise of a new Constitution, unless and until a new Constitution is established or purported to be established.

APPPLICATION for an Injunction against the Attorney-General and the Minister for Constitutional Affairs.

C. Suntharalingam, the relator-petitioner, in person.

Cur. adv. vult.

February 7, 1972. H. N. G. FERNANDO, C.J.—

The purpose of this Application is to obtain an injunction from this Court to prevent and prohibit the Minister for Constitutional Affairs "from taking any steps to Repeal the Ceylon (Constitution and Independence Orders-in-Council, 1946 and 1947) and to substitute therefor a Constitution entitled a ' Constitution of Sri Lanka ' ."

The same petitioner made a previous application naming as respondents the Honourable Sirimavo R. D. Bandaranaike and the other members of the Cabinet. In that application the petitioner sought orders restraining the respondents from conducting the proposed proceedings of the Constituent Assembly as convoked and created by a Resolution of the members of the House of Representatives passed on 19th July, 1970. That application was refused by my judgment dated 13th February, 1971, my brother Wijayatilake agreeing. The Privy Council thereafter refused leave to appeal from that judgment without reasons stated. In these circumstances it has to be assumed that the Privy Council confirmed or adopted the reasons stated in the former judgment for the refusal of the petitioner's previous application, and we therefore considered ourselves bound by that judgment.

The operative passage in the former judgment, which indeed has been relied on by the petitioner on the present occasion, is the following :—

" If and when such a new Constitution is established or is purported to be established, one of two possible situations will in my opinion exist :—

- (1) That the new Constitution is a legal and valid instrument which will in law supersede the Constitution and Independence Orders-in-Council which are presently law ; in which event a challenge of the validity of the new Constitution will be fruitless.
- (2) *Alternatively*, if the true position be, that the new Constitution established by the Constituent Assembly does lack legal force and validity, and if a competent Court will have jurisdiction so to pronounce, the occasion for the making of such a pronouncement can arise only after the Constitution is established or purports to be established, and only in a proceeding in which the validity of some provision of the Constitution properly and actively arises for determination."

It is clear from this passage that the ground for the refusal of the previous application was that a Court cannot consider the validity or otherwise of a new Constitution, unless and until a new Constitution is established or purported to be established. That contemplated event has not yet occurred.

The petitioner has relied on the provision contained in s. 48 (2) of the draft of a new Constitution which has been published in the Gazette of 29th December, 1971, and he has submitted that the position has materially altered in view of that provision. This submission has apparently

found favour with one of the two Judges who made a preliminary order on this application on 21st January, 1972. The draft Section 48 (2) provides as follows :—

“ No institution administering justice nor any other institution, person or authority shall have the power to inquire into or pronounce upon the validity of any law of the National Assembly. ”

If this draft provision does eventually become operative, its effect will be that no Court will have power to declare *any law of the National Assembly to be invalid*. The petitioner is apparently of the view that this draft provision will preclude also a challenge of the validity of the proposed new Constitution ; and it is in anticipation of this possible event that the petitioner claims that the position has “ materially altered ”, and that the alternative mentioned in paragraph (2) of the passage in my former judgment will not be available.

The alternative there stated is the possibility of the new Constitution being declared invalid *if a competent Court will have jurisdiction so to pronounce*. This statement clearly contemplated the possible position that a court may not have such a jurisdiction. It is therefore not correct to say that there is or will be any altered position which the former judgment did not take into consideration.

Hence the grounds on which the petitioner’s previous application was dismissed apply equally in the case of his present application. In both cases his purpose is the same, namely to prevent the new Constitution from being established or being purported to be established.

For these reasons we dismissed the application.

SILVA, S.P.J.—I agree.

ALLES, J.—I agree.

Application dismissed.
