

**KARUNATHILAKA AND ANOTHER**  
**v.**  
**DAYANANDA DISSANAYAKE,**  
**COMMISSIONER OF ELECTIONS AND OTHERS**  
**(Enforcement Judgment)**  
**(Case No. 2)**

SUPREME COURT

G. P. S. DE SILVA, C.J.,

FERNANDO, J. AND

GUNASEKERA, J.

S.C. APPLICATION NO. 509/98 (ENFORCEMENT OF JUDGMENT)

MARCH 09, 1999

*Fundamental Rights – Enforcement of judgment – Directions by court to fix a new date of poll for Provincial Council elections – Failure by the Commissioner of Elections to duly exercise his direction in complying with the judgment – Power of court to enforce its judgment.*

By the judgment of the court delivered on 27.01.99, the court declared that the failure of the Commissioner of Elections to hold the poll on 4.8.88 for five Provincial Council Elections because of a purported Emergency Regulation was unlawful and directed him to fix a new date or dates within three months from 27.1.99. The Commissioner fixed 1.4.99 as the new date of poll. Representations were made complaining that 1.4.99 was unsuitable for Buddhists, Christians and Muslims as it would interfere with religious observances by them having regard to the fact that 31.3.99 was a Full Moon Poya day, 2.4.99 was Good Friday and that the said date fell within the period during which Muslims participate in the Haj Pilgrimage to Mecca. Many of these representations were received by the Commissioner of Elections. Consequently, the Commissioner by a motion and affidavit applied to the court for permission to vary the said date.

**Held:**

1. Although the Commissioner of Elections had complied with the time limit fixed in the judgment, his decision to fix 1.4.99 was, *ab initio*, not reasonable, and thus not in due compliance with the judgment. The Commissioner's decision was not a proper exercise of his discretion – for the reason that he completely failed to consider relevant matters.

2. Had the Commissioner of Elections properly complied with the directions given in the judgment, then the court would be *functus officio*; but as he had not, the court has the power, and perhaps also a duty to enforce compliance by giving further directions. Since the issue relates to the court's power to enforce its judgment, the submission that the proper remedy is by legislation is unfounded.

*Per* Fernando, J.

"The fact that the court was *functus officio* in regard to the substance of the judgment does not make it *functus officio* in regard to its enforcement."

**Case referred to:**

1. *Jeevakaran v. Wicremanayake* (1997) 1 SRI LR 351.

**APPLICATION** for further directions to comply with the judgment of the court.

*K. C. Kamalabayson*, PC SG with *U. Egalahewa*, SC and *M. Gopallawa*, SC for the 1st respondent.

*R. K. W. Goonesekera* with *J. C. Weliamuna* for the petitioners.

For the parties noticed :

*K. N. Choksy*, PC with *Daya Pelpola* for the General Secretary, United National Party.

*Anil Obeysekera*, PC with *Champani Padmasekera* for the General Secretary, People's Alliance.

*H. Wijetunga* with *O. R. Samaranayake*, *Herbert Kumarasinghe* and *R. S. Sirisena* for the General Secretary, Sinhala Mahasammata Bumiputra Party.

*Piyasena Dissanayake* with *Kanishka Vitharana* for the General Secretary, Mahajana Eksath Peramuna.

*Sunil Watugala* for the General Secretary, Janatha Vimukthi Peramuna.

*Kamal Nissanka* for the General Secretary, Liberal Party.

*Raja Samarakoon*, Leader, Independent Group, Kandy District.

March 16, 1999.

**FERNANDO, J.**

The date of the poll for five Provincial Council elections was duly fixed (in terms of the Provincial Council Elections Act, No. 2 of 1988) for 28.8.98. The Commissioner of Elections did not hold the poll on that day only because of a purported Emergency Regulation issued on 4.8.98, which was held to be unlawful for the reasons stated in the judgment delivered in this case on 27.1.99.

As noted in that judgment, the Commissioner of Elections wrongfully failed to exercise his undoubted power (under section 22 (6) of the Act) to fix a new date. Even thereafter, despite the determination of this Court dated 30.11.98 (in SC SD 9-14/98), and despite the observations of this Court on 7.12.98 (when reserving judgment in the principal application No. 509/98), he again failed and neglected to fix a new date.

Consequently, this Court was obliged to ensure that a reasonably early date would in fact be fixed. It was not appropriate for the Court itself to fix a date, because the date involved administrative arrangements properly within the purview of the Commissioner of Elections. But as section 22 (6) stipulates no time limits, a simple direction to the Commissioner of Elections to act under that provision might not have ensured the fixing of a reasonably early date. Further, the date previously fixed (under Rule 10 (1) for the issue of postal ballot papers had been cancelled. There was no express provision to fix a new date for that purpose, and accordingly a simple direction to fix a new date *of poll* under section 22 (6) may not have enabled the Commissioner of Elections to fix a new date for issue of postal ballot papers. Accordingly, it was essential for the Court to give directions to ensure that the Commissioner of Elections *would* fix a reasonably early date of poll, and to enable him to fix a new date for the issue of postal ballot papers.

It was in those circumstances that this Court directed the Commissioner of Elections to fix a new date or dates within three

months from 27.1.99 (ie on or before 27.4.99); and, so that all concerned would have adequate notice thereof, directed him to notify that date within two weeks of 27.1.99 (ie on or before 10.2.99).

On or about 8.2.99 (within the stipulated period) the Commissioner of Elections fixed 1.4.99 as the new date of poll (also within the stipulated period). There was no reason for anyone to think that the order of this Court in any way circumscribed his discretion as to the fixing of that date, or compelled him to fix 1.4.99 – because the *only* restriction was that the date could not be after 27.4.99.

Late in the afternoon of 3.3.99 the Commissioner of Elections filed a motion supported by his affidavit, requesting this Court "to permit him to vary the said date acceptable to all sections of the public". In his extremely brief affidavit he offered no explanation as to how and why he happened to fix 1.4.99 as the new date of poll; nor did he mention any of the matters which he had taken into consideration. He produced copies of several letters, from religious personalities and others, complaining that 1.4.99 was unsuitable: for Buddhists, because the previous day (31.3.99) was Bak Full Moon Poya day, and preparations for the poll would interfere with religious observances on that day, particularly because many polling booths would be in the vicinity of temples; for Christians, because the next day (2.4.99) was Good Friday, and past experience of the imposition of curfews on account of post-election violence made it likely that religious observances on that day would be impeded by such a curfew; and for Muslims, because that day fell within the period when many Muslims participate in the Haj pilgrimage to Mecca. Many of those representations had been made to the Commissioner of Elections within a few days of 8.2.99. He has not told us what replies, if any, he gave to those who had written to him, nor why he delayed for nearly three weeks to move this Court.

The Commissioner's application was taken up the very next morning. We asked Mr. Kamalabayson, PC, SG, whether this Court had jurisdiction to vary – as requested by the Commissioner of Elections the directions given in its judgment; and if this Court did have such jurisdiction, what the circumstances were which justified the exercise

of that jurisdiction. We also expressed the view that after the Commissioner of Elections had fixed the new date of poll, candidates contesting the elections had probably acquired a right to express their views in regard to any proposed change in that date. Mr. Kamalabayson agreed that they should have notice of the application made by the Commissioner of Elections, and we accordingly directed that the Commissioner of Elections should give notice of his application, by 6.3.99 at the latest, to all Secretaries of recognised political parties and leaders of independent groups contesting the five elections, indicating that it had been re-fixed for support on 9.3.99.

On the question of jurisdiction, Mr. Kamalabayson stated that there was no error, omission, inconsistency or ambiguity in the judgment dated 27.1.99, and that the application was not made on the basis of any need for correction, amendment or clarification. It follows that if in fixing 1.4.99 as the new date the Commissioner of Elections had duly exercised his discretion, complying with the directions given in the judgment, then we were *functus officio*; but if he had not, then this Court would have a power, and perhaps also a duty, to enforce compliance by giving further directions to enforce due compliance, even if that meant amending the directions contained in our original order to the extent necessary to ensure such compliance (as, for instance, where the lapse of time rendered such amendment necessary).

There can be no doubt that the Commissioner of Elections complied with the time limits fixed in our judgment. The only question then is whether there was a proper exercise of his discretion.

Mr. Kamalabayson submitted that it was only after receiving a large number of representations that the Commissioner of Elections had realised that he ought not to have selected 1.4.99, because of the indirect impact on religious observances. He conceded that the Commissioner of Elections had failed to take into account some relevant matters, and that therefore his decision to fix 1.4.99 was, *ab initio*, not reasonable, and thus not in due compliance with the judgment.

In fixing the date of poll, under the relevant enactments or in compliance with the directions of this Court, the Commissioner of Elections must not act arbitrarily; he must act with a degree of openness, taking into account all relevant matters. These would include the convenience of voters, because the purpose of an election is to enable voters – and as many voters as possible – to exercise their franchise. Article 104 refers to the powers, duties and functions of the Commissioner of Elections. But that is not exhaustive of his powers and duties. Article 93 of the Constitution requires that voting be free, equal and secret, and it follows that the Commissioner of Elections has such implied powers and duties as are necessary to ensure that voting is free, equal and secret. There are other Constitutional provisions as to religious freedom, which too he must consider. Thus in *Jeevakaran v. Wickremanayake*,<sup>(1)</sup> it was held that while the freedom of religious worship and observance (Article 14 (1) (e)) imposed on the State no obligation to grant public holidays and other special facilities for religious worship and observance, nevertheless it must not prevent or impede religious worship and observance. A glance at the calendar would have shown that week commenced on Monday 29th March, which was Haj Festival Day; which was followed on Wednesday the 31st by Bak Full Moon Poya Day; and ended with Good Friday, on 2nd April. The past experience of the Department of Elections would have revealed the position both as to the take over of premises in proximity to temples in order to set up polling stations, as well as to the likelihood of a curfew following election violence. The time limits fixed by this Court were flexible enough to permit him to have avoided that period.

It would seem that the Commissioner of Elections did not pay attention to these aspects until the representations became voluminous.

Mr. Kamalabayson's submissions indicate very clearly that the Commissioner himself now realises that fixing 1.4.99 was not a reasonable and proper exercise of his discretion, and that his decision was flawed. He stated that if the Commissioner of Elections was granted the relief prayed for, he intended to fix as early a date after 1.4.99 as was reasonably possible, during the following week.

Mr. Goonasekera on behalf of the original petitioners submitted that the Commissioner of Elections had acted *bona fide* and had the discretion under section 22 (6) to fix a new date; and that his discretion could not be fettered by anyone. He was not required to consider representations made, whether before or after fixing a date.

Several submissions were made by counsel appearing on behalf of some of the parties and groups noticed.

It was pointed out – correctly – that on 8.2.99 the Commissioner of Elections had fixed a new date by issuing a "Notice under section 22 (6)". It was contended that the only power of postponement which the Commissioner of Elections had was under section 22 (6); that enabled him to change the date fixed under section 22 (1) (c), but not a date fixed under section 22 (6); and that accordingly the Commissioner of Elections could not now again fix a new date under section 22 (6).

It was also submitted that section 22 (6) enabled a new date to be fixed if the poll could not be taken on the original date because of "emergency or unforeseen circumstances", and that there were no such circumstances here.

It was urged that to permit the Commissioner of Elections to alter the date already fixed would amount to this Court not only giving him a power of postponement which the Legislature had not given, but even violating the law.

Another submission was that the judgment delivered on 27.1.99 was a final order, and that this Court was now *functus officio*.

Flowing from that submission, it was further contended that if the Commissioner of Elections had made a mistake, the proper, and indeed the only, remedy was by legislation by Parliament.

There were also two technical objections, that the Commissioner was only a respondent to the original application, and that he had applied only by way of a motion (and not by petition).

Finally, there was one complaint that the election campaign was already well under way, and that a postponement would cause prejudice – details of which were not disclosed.

The relief which this Court is asked to grant involves not any variation of the substance of the judgment dated 27.1.99, but rather its due implementation. If the Commissioner of Elections failed, within two weeks, to fix a new date, or if within that period he fixed as the new date a Full Moon Poya day or a public holiday (which section 22 (1) (c) by necessary implication prohibits), the question of enforcement of the judgment would have arisen. The Court could not in such a situation have refrained from giving relief on the ground that the period of two weeks had lapsed; it would be obliged to do whatever was reasonably possible to ensure that there would be a proper election; and accordingly, the Court would again have directed the Commissioner of Elections to fix a date, notwithstanding the lapse of that period of two weeks. The fact that the Court was *functus officio* in regard to the *substance* of the judgment, did not make it *functus officio* in regard to its *enforcement*.

The situation that this Court now faces is somewhat different. Although the Commissioner of Elections has purported to comply with the judgment, yet on his own admission that compliance was by means of a decision that was not a proper exercise of his discretion – for the reason that he completely failed to consider relevant matters which he could and should have taken into account at that time. That decision was therefore flawed on *procedural* grounds. It is now said on his behalf that if he had taken those matters into consideration he would have fixed some date other than 1.4.99. Whether such a decision is right or wrong is a question which involves the *merits*. Our duty is to decide, not whether that would be a correct exercise of the Commissioner's discretion, but only whether that would be an unlawful, arbitrary, capricious, or unreasonable exercise of discretion. We are of the view that it would not. That being the case, the effect of allowing the flawed decision fixing 1.4.99 to stand would be to affirm an improper implementation of the judgment of this Court.



The fact that the question of due compliance comes up on a motion, and that by a respondent, does not affect our jurisdiction.

No question therefore arises of a past or future exercise by the Commissioner of Elections of his power under section 22 (6). The fact that the *Gazette* notification issued by him purported to be under section 22 (6) makes no difference; the issue now is whether he should be allowed to comply properly with the judgment of this Court. The fact that there are no "emergency or unforeseen circumstances" is irrelevant to that issue. Compelling the Commissioner of Elections to comply with that judgment does not in any way amount to giving him a power of postponement which the Legislature had not given. Since the issue relates to the Court's power to enforce its judgment, the submission that the proper remedy is by legislation is unfounded.

As for the complaint that a postponement would cause prejudice, Mr. Kamalabayson has already told us that the Commissioner of Elections would fix a date during the following week. While it is true that prejudice would have been minimized if the Commissioner of Elections had acted sooner, nevertheless there is no reason to think that any prejudice would be significant.

It is for these reasons that at the conclusion of the hearing on 9.3.99, we made order *permitting* the Commissioner of Elections (notwithstanding the directions given in our judgment dated 27.1.99) to fix a new date of poll, not later than 27.4.99, after such consultation as he thought appropriate, and requiring him to notify that date within two days.

**G. P. S. DE SILVA, CJ.** – I agree.

**GUNASEKERA, J.** – I agree.

*Commissioner of Elections permitted to vary the date of poll.*