
**DAEWOO ENGINEERING AND CONSTRUCTION CO. LTD
VS
AMARASEKERA**

COURT OF APPEAL.
SRIPAVAN, J.
SISIRA DE ABREW, J.
CA 251/06.
FEBRUARY 14, 15, 28, 2006.

Writ of Certiorari - Jurisdiction of court to quash a decision taken by the Cabinet of Ministers-Guidelines on Government tender procedure - Do they apply to the Cabinet?-Procedure for consideration of report by Cabinet not spelt out - Constitution Article 4 (c)- Article 140 - Interpretation Ordinance, section 2 - Did the Cabinet have statutory authority or power?

The petitioner seeks to challenge the decision of the Cabinet of Ministers to award the contract to the 8th respondent contrary to the decision taken by the Procurement Appeals Board. The tender for the said contract is governed by the Guidelines on Government Tender procedure of 1997 and the Revised Guidelines which are formulated by the Government and have the force of law under the Constitution.

It was contended by the 8th respondent that the court has no jurisdiction to quash a decision taken by the Cabinet of Ministers.

HELD:

(1) Court has jurisdiction to issue writs on a body of persons according to law. Certiorari lies only against persons or tribunals, the source of whose authority to make decisions or orders affecting the rights of subjects is legal.

Per Sripavan, J. :

“Court has to consider that when the Cabinet took the impugned decision did it do so in the exercise of any statutory authority or power?”

- (2) Although the guidelines are to be followed by all the Government institutions, they do not apply to the Cabinet.
- (3) The Procurement Appeals Board is expected to submit a report to the Cabinet ; however the guidelines do not specify when and how the report is to be decided by the Cabinet. The procedure for the consideration of the report by the Cabinet is not spelt out.

In the absence of any procedure Court cannot declare that the Cabinet has failed to act in conformity with any procedure prescribed. There has not been an excess or abuse of executive power.

Per Sripavan, J. :

"Equally Court is ill equipped to pronounce that the decision of the Cabinet is arbitrary, illegal or unreasonable unless there is concrete evidence to establish that the Cabinet in taking such a decision has violated and acted contrary to the laws of the land"

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Rex vs Electricity Commissioner* 1924 KB 171 at 204
2. *Rex vs National Joint Council for Dental Technicians (1953)* 1 QB 704 at 707
3. *Smithkline Beecham Biological SA and Another vs. State Pharmaceutical Corporation of Sri Lanka* 1997 3 Sri LR 20 at 38.

Faiz Musthapa, PC with Sanjeewa Jayawardena and T. Machado for petitioner.

D. S. Wijesinghe, PC with Kaushalya Molligoda for 6th and 7th respondents.

K. Kanag - Iswaran, PC with A. M. Illiyas and A. M. Aslam for 8th respondent.

Cur.adv.vult.

March 13, 2006.

SRIPAVAN, J.

The petitioner in this application seeks to challenge the decision of the Cabinet of Ministers to award the contract for Package II of the Southern Transport Development Project to the eighth respondent contrary to the decision taken by the Procurement Appeals Board.

Learned President's Counsel for the petitioner contended that the tender for the said Package II is governed by the "Guidelines on Government Tender Procedure" of 1997 and the "Revised Guidelines on Government Tender Procedure for Projects Assisted by Foreign Financing Agencies" which guidelines were formulated by the Government of Sri Lanka and have the force of law under the Constitution.

An objection was taken by the President's Counsel for the eighth respondent that the court has no jurisdiction to quash a decision taken by the Cabinet of Ministers. In terms of Article 4(c) of the Constitution, the judicial power of the People is exercised through courts, tribunals and institutions created, established, or recognized by the Constitution or created and established by law. The power to issue writs against a judge of any Court of First Instance, tribunal or other institution or any other person is conferred on the Court of Appeal in terms of Article 140 of the Constitution. Section 2 of the Interpretation Ordinance provides that "person" includes "any body of persons corporate or unincorporate". Thus, this court has jurisdiction to issue writs on a body of persons according to law. In *Rex vs Electricity Commissioners* at 204, the writ of certiorari was declared to be available against "any body of persons having legal authority to determine the questions affecting the rights of the subjects and having the duty to act judicially". In other words, certiorari lies only against persons or tribunals, the source of whose authority to make decisions or orders affecting the rights of subjects, is legal. Commenting on the phrase "Legal authority" Lord Goddard C. J. in *Rex vs. National Joint Council for Dental Technicians*⁽²⁾ at 707 said "Legal authority generally means statutory authority". Therefore the court has to consider that when the Cabinet took the impugned decision, did it do so in the exercise of any statutory authority or power? The preface to the "Guidelines on Government Tender Procedure" states that Government institutions are expected to follow the tender procedure to obtain goods and services in order to achieve the following objectives :-

1. To keep the process fully transparent and honest.
2. To speed up the process.
3. To obtain financially the most advantageous and qualitatively the best services and supplies for the country.

Accordingly, the guidelines are to be followed by all the Government Institutions inclusive of Ministries, Departments, Public Corporations and Statutory Bodies, Fully Owned Government Companies, Provincial Councils and Local Authorities for the procurement of works, services and supplies and disposal of Government Assets as stated in the Public Finance Circular No. 352 dated 25th September 1997 and incorporated in the said guidelines. It is therefore noted that the provisions contained in the guidelines do not apply to the Cabinet. In terms of clause 138 :1 of the said guidelines, the

Procurement Appeals Board is expected to submit a report to the Cabinet, through the Secretary to the Cabinet with a copy to the Secretary of the relevant Ministry within two weeks of an appeal being lodged. The guidelines do not specify when and how the report of the Appeals Board is to be decided by the Cabinet. In other words, the procedure for the consideration of the report by the Cabinet is not spelt out. In the absence of any procedure, this court cannot declare that the Cabinet has failed to act in conformity with any procedures prescribed. Equally, the Court is ill - equipped to pronounce that the decision of the Cabinet is arbitrary, illegal or unreasonable unless there is concrete evidence to establish that the Cabinet in taking such a decision has violated and acted contrary to the laws of the land.

Amerasinghe, J. In *Smithkline Beecham Biologicals S. A. and Another vs State Pharmaceutical Corporation of Sri Lanka and Others*⁽⁹⁾ at 38 states thus :

“I understand this to mean that the procedure relating to Government procurements should ensure the most favourable conditions for the advancement of the People by obtaining “Financially the most advantageous and qualitatively the best supplies for the country is preeminently a matter of policy that the Government which is accountable to the People, must decide...” (Emphasis added)

The proceedings of the Cabinet of Ministers are secret and confidential. A former judge of the Constitutional Court Joseph A. L. Cooray at page 191 of his work on “Constitutional and Administrative Law of Sri Lanka” - 1995 remarked thus :-

“The secrecy of Cabinet decisions is necessary for arriving at a compromise and agreement through frank discussions among the Ministers under the direction of the President, as the Head of the Executive and of the Cabinet. This practice gives effect to the principles of public unanimity and collective responsibility and also tends to promote strong and stable Government... It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the most essential principles of parliamentary responsibility established”.

Whilst holding that his court has the power to review executive decisions in appropriate cases, I do not find that in the instant application there has been an excess or abuse of executive Power. The Cabinet concerns itself with the provision of numerous monetary benefits, welfare services and the regulation of many activities for the benefit of the people of the country. Therefore, the court would be hesitant to look into or examine the merits of executive policy. As such, the court is not inclined to issue notice on the respondents. Notice is thus refused.

SISIRA DE ABREW, J. - *I agree.*

Notice refused.
