

MAHINDASOMA
V.
HON. MAITHRIPALA SENANAYAKE AND OTHERS

COURT OF APPEAL.
DR. GUNAWARDENA, J.
ASOKA DE SILVA, J.
C.A. APPLICATION NO. 17/96.
11, 12, and 16 JANUARY 1996.

Provincial Council - Dissolution of the Provincial Council by the Governor-Writ of Certiorari and Prohibition- When would the Court would grant interim relief? - Principles governing issue of stay order.

The Petitioner made an application for interim relief by way of restraining the second Respondent, the Commissioner of Elections, from holding the elections to the Provincial Council, in particular, from receiving nominations till the final determination of this application.

Held :

(1) that the Court will be guided *inter alia*, by the following principles, in granting interim relief:

(a) Will the final order be rendered nugatory if the petitioner is successful?

(b) Where does the balance of convenience lie?

(2) That on a consideration of the facts and circumstances of this case, if a stay order is not granted the final order would be rendered nugatory.

(3) That on a balance of convenience and in the public interest, it is appropriate to grant a stay order.

APPLICATION for interim relief by way of a stay order.

K.N. Choksy P.C. with L.C Seneviratne P.C., E.P. Paul Perera, M.D.K Kulatunge, Daya Pelpola, D.H.N Jayamaha, S.G. Mohideen, Raja Dep, Ronald Perera, R.L.Perera, Nigel Hatch and Anil Rajakaruna for Petitioner.

E.D. Wickramanayake with Dr. Jayampathy Wickremaratne. M.A.G.M. Gazzali, Palitha Mathew, Gaston Jayakody and P. Obeysekera for 1st Respondent.

Shibly Aziz P.C. with K.C. Kamalabayson, D.S.G., Parakrama Karunaratne SSC and K. Arulanathan S.C. for 2nd Respondent.

Cur.adv.vult.

January 16, 1996.

DR. GUNAWARDANA, J.

We have heard the submissions of the learned Counsel for the Petitioner. The learned Counsel for both the Respondents consented to accept notice. We issued notice as a *prima facie* case was made out and in view of the consent expressed by the learned Counsel for the Respondents to accept notice.

The learned Counsel for the Petitioner made an application for interim relief, by way of restraining the second Respondent from holding the elections to the Provincial Council till the final determination of this application.

The learned counsel for the Petitioner submitted that in terms of Article 154B (8)(c) of the Constitution the Governor has the power to dissolve the Provincial Council. However, Article 154(8)(d) states that the Governor can exercise this power, only in accordance with the advice of the Chief Minister, so long as the Chief Minister commands the support of the majority of the Provincial Council.

He submitted that, therefore the Governor has no discretion in the matter and should follow the advice of the Chief Minister. He pointed out that paragraph 8 of Article 154(b) of the Constitution deals with the Governor's powers in relation to the Provincial Council. He submitted further that when dissolving the Provincial Council the Governor is bound by the procedure laid down in Article 154(8)(d) and should act according to the advice of the Chief Minister, as he is the people's representative.

The learned Counsel for the 1st Respondent submitted that under Article 4(b) of the Constitution, the exercise of the executive power is vested with the President. Therefore, the President has the power to give directions to the Governor. He pointed out that the Governor is bound by the directions given by the President as the Governor is appointed by the President. The Governor has no discretion, and has to carry out the directions given by the President.

The learned Counsel for the 2nd Respondent, the Hon. Attorney General submitted that, Article 154 F(2) provides that " If any question arises whether any matter is or is not a matter as respects which the Government is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final,....." He argued that in view of the said provision, the decision of the Governor that he has a discretion in the matter is final and cannot be questioned in any Court. However, he conceded that the reasonableness of the use of the discretion can be questioned in Court. He further submitted that when the Governor acts under Article 154B(8) (c) the Governor has a discretion to decide whether to follow the advice of the Chief Minister or not. The learned Counsel added that there is no express provision in the Constitution for the President to dissolve a Provincial Council.

Thus a substantial question of law has arisen as to whether the Governor has a discretion when he acts under Article 154B(8)(c) of the Constitution, which can only be decided, after hearing full argument, having given the opportunity to the Respondents to file their objections. Therefore, the question of granting interim relief has to be considered.

This Court has set out on a number of occasions the matters which should be taken into consideration when granting interim relief.

The learned Counsel for the Petitioner cited a case of this court C.A. No 112/ 85, Court of Appeal minutes dated 30.01.85, where it has been stated that when the Court is considering the issue of a stay order the Court will be guided *inter alia* by the following principles :-

- (a) Will the final order be rendered nugatory if the Petitioner is successful?
- (b) Where does the balance of convenience lie?

On a consideration of the facts and circumstances of this case, we are of the view that if a stay order is not granted the final order will be rendered nugatory. We are also of the opinion that on a balance of convenience and in the public interest it is appropriate to grant a stay order.

Accordingly we hereby issue a stay order, restraining the 2nd Respondent from proceeding to act in the terms of the notice, published in Gazette No: 904/13 dated 04.01.96, marked 'P-5' pending the hearing and the final determination of this application, and in particular from receiving nominations.

The Registrar, Court of Appeal is directed to inform the 2nd Respondent of this interim order made by this Court, restraining the 2nd Respondent from proceeding to act in terms of notice published in Gazette No: 904/13 dated 04.01.96, marked 'P-5' pending the hearing and the final determination of this application, and in particular from receiving nominations.

The Registrar is further directed to inform the 2nd Respondent of this order, by telegram or fax, at the expense of the Petitioner.

J.A.N. DE SILVA, J. – I agree.

Stay order dismissed.