

BANDARANAIKE**Attorney-General v.
ATTORNEY-GENERAL****SUPREME COURT**

SHARVANANDA, J., WANASUNDERA, J., AND VICTOR PERERA, J.

S.C. APPLICATION NO. 104/82

NOVEMBER 25, 1982

*Constitution - Articles 83(5), 83, 84, 85, 120, 122, 123, 132 - Bill to amend
Constitution - Certificate of Cabinet - Jurisdiction of Supreme Court*

A Bill to amend the Constitution to provide that the term of the first Parliament be extended was referred to the Supreme Court for special determination in terms of Article 122(1) of the Constitution. The Secretary to the Cabinet had endorsed the Bill that in the view of the Cabinet it was urgent in the National interest.

The Supreme Court made and communicated the following determination: "The majority of this Court is of the view that the period of the first Parliament may be extended as proposed by the Draft Bill which is described in its long title as being for the amendment of the Constitution and is intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum. In view of this decision this Court in terms of Article 120 Proviso (b) states that it does not have and exercise any further jurisdiction in respect of the said Bill. Three members of the Court are not in agreement with the above views."

Following this determination the Bill was passed with the special majority required by Article 83 and was submitted to the People at a Referendum.

The Petitioner alleged that the Supreme Court had made certain errors and therefore the determination was invalid.

Held -

- 1) The determination was valid as the reasons were given in the determination.
- 2) Once the Cabinet of Ministers certifies that the Bill is to be passed by a special majority and submitted to the People at a Referendum the Supreme Court exercises no further jurisdiction.

3) The majority view is the view of the whole Supreme Court assembled.

Cases referred to:

(1) *Grindley v. Basser* (1978) 1 BOS P 229

(2) *Picea Holdings v. London Rent Tribunal* (1971) 1 A.F.R. 805.

PETITION for correction of alleged errors in determination of Supreme Court on urgent Bill referred to it.

Felix R. Dias Banda Ratne - petitioner in person.

Civ. Adv. Vult.

December 6, 1982.

SHARVANANDA, J. read the following unanimous order of the Court:

A Bill titled "An Act amend the Constitution of the Democratic Socialist Republic of Sri Lanka" was referred to the Supreme Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of the Court as to whether the Bill or any provision thereof was inconsistent with the Constitution. The Bill bore the endorsement under the hand of the Secretary to the Cabinet, that in the view of the Cabinet of Ministers, it was urgent in the national interest. The Bill was certified in terms of Article 120(b) of the Constitution by the Cabinet of Ministers that the said Bill was intended to be passed with the special majority required by Article 83 of the Constitution and submitted to the People by Referendum.

The Reference was considered on 3rd November 1982 by a Bench of seven Judges. At the hearing of the Reference, the petitioner and 2nd petitioner-respondent were heard. Thereafter the Court made and communicated the following determination in terms of Article 123(1) of the Constitution, to the President and to the Speaker of Parliament:

"The majority of this Court is of the view that the period of the first Parliament may be extended as proposed by the draft Bill which is described in its long title as being for the amendment of the Constitution and is intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum. In view of this decision this Court in terms of Article 120 Proviso (b) states that it does not have and exercise any further jurisdiction in respect of the said Bill.

Three members of this Court are not in agreement with the above views.”

Following on the above determination, the Bill has been passed with the special majority required by Article 83 of the Constitution and been submitted to the People by Referendum in terms of Article 85(1) of the Constitution.

In his petition dated 10th November, 1982, the petitioner has alleged that this Court has committed certain errors by reason of which no valid determination has been made by the Supreme Court upon the Reference made respecting the Fourth Amendment. He has moved this Court to exercise its inherent jurisdiction to take action, on the basis of that there has been no valid determination.

We gave the petitioner a full and patient hearing on his submission.

He urged three grounds in support of his contention that the determination of the Supreme Court was invalid, namely

1. that the determination of the Supreme Court has not been accompanied by the reason therefor, as required by the mandatory provision of Article 123(1) of the Constitution.
2. that in view of the fact that the Court had divided four; three in its determination, it should be presumed that the Court entertained a doubt, as referred to in Article 123(3) of the Constitution.
3. that a valid determination requires unanimity among the judges, the decision of the majority does not operate to constitute a determination of this Court.

We have considered the contentions of the petitioner and we regret to state that the contentions are not well founded and have no merit.

Articles 120, 121, 122, 123, 124 and 125 of the Constitution spell out the nature and ambit of the constitutional jurisdiction vested in the Supreme Court. They have to be read together and not in isolation.

Article 120 provides that the Supreme Court shall have sole and exclusive jurisdiction to determine any question whether any Bill or

any provision thereof is inconsistent with the Constitution. The Article must be read subject to the provisos (a) to (d) which control it. The primary purpose of function of a proviso is to limit the general application of the enactment. The proviso exempts the cases which fall within its terms from the operation of the enacting clause.

Proviso (a) and (d) to Article 120 reads as follows:

- (a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of article 83;
- (b) Where the Cabinet of Ministers certifies that a Bill, which is described in its long title as being for the amendment of any provisions of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill."

The questions that can arise as the nature words of a proposed Bill are:-

- 1) Is it inconsistent with any provision of the Constitution?
- 2) Is the Bill for the amendment of any provision of the Constitution? (amendment includes, repeal, alteration and addition: Article 82(7)).
- 3) Is the Bill for the repeal and replacement of the Constitution?

When a Bill or any provision therein is found to be inconsistent with the Constitution, then the next question is how is it to be enacted into law: Is it sufficient to be passed by the special majority required by Article 84(2), namely two third majority? or Does such a Bill or any provision thereof require to be passed by the special majority required by Article 84(2) and approved by the People at a Referendum in terms of the provisions of Article 83?

Article 82(5) provides for the amendment of any provision of the Constitution. It has to be read subject to the provisions of Article 83.

Article 82(5) states:

"A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79."

Article 83 states:

Notwithstanding anything to the contrary in the provisions of Article 82-

- (a) a Bill for the amendment or for the repeal and replacement of which is inconsistent with any of the provisions of Article 1,2,3,6,7,8,9,10 and 11, or of this Article; and
- (b) a Bill for the amendment or for the repeal and replacement of which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of President, as the case may be, to over six years,

shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

Articles 82(5), 83(a) and 84 prescribe the ways in which a Bill which is inconsistent with any provision of the Constitution or which seeks to amend any provision of the Constitution may be validly enacted into Law. Subject to the limitations contained in these Articles it is competent for Parliament to pass any law, whether it is inconsistent with any provision of the Constitution or seeks to amend any provision of the Constitution. The legislative power of

the People exercised by Parliament consisting of elected representatives of the People and by the People at a Referendum. (Vide Articles 3 and 4(a) knows no legal limitation. There is no foundation whatever for the contention of the petitioner that there is an area which is outside the legislative power of the People, exercised by Parliament and by the People at a Referendum.

Article 120 postulates that an amendment of any provision of the Constitution involves inconsistency with some provision of the Constitution. The provisos (a) and (b) to Article 120, are based on that assumption. Proviso (b) to Article 120 provides for the case of the amendment being intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum. The effect of that proviso is that when the Cabinet of Ministers so certifies with respect to the Bill, the Supreme Court, is relieved of the task of determining whether the Bill requires the approval of the People at a Referendum. In view of the said certificate the Court has only to be satisfied that the Bill can be enacted as proposed in the certificate. On being so satisfied, the Supreme Court exercises no further jurisdiction in respect of the said Bill. According to the proviso (b) to Article 120 the Constitutional jurisdiction of the Supreme Court with respect to the proposed Bill is confined to the question whether the Bill falls within Article 83 and whether the course of action proposed by the Cabinet of Ministers with respect to the Bill conforms to the requirements of the Constitution.

As stated earlier Article 122 has to be read with Article 120 and when so read the reference by the President under Article 122(b) attracts provisions of Article 122(b) attracts provisions of Article 120 and the determination on such reference is governed by Article 120 read with the relevant proviso. Article 121 and Article 122 prescribe the conditions for the invocation of the constitutional jurisdiction vested in the Supreme Court by Article 120 read with its provisos. On this view of the matter the provisions of Article 123(2) will apply only in cases where the provisos to Article 120 do not apply.

Article 123(1) states that the determination of the Supreme Court shall be accompanied by the reasons therefore. An intelligent reading of the determination of the majority, will show that the majority of the Court were of the view that the period of the first Parliament could be extended by the process specified in the certificate of the

Cabinet and that, in the circumstances, Article 120 Proviso (b) applied to the determination in question. The reason for that conclusion is manifest.

With respect to the alleged second error it must be stated that neither the majority nor the minority had any doubt that the Bill was inconsistent with the Constitution. The difference of opinion was grounded on the question whether the period of the first Parliament could be extended as proposed by the draft Bill. Hence arguments based on the supposition of the existence of such doubt are irrelevant.

The last ground has even less merit than the above. Articles 118 to 136 in Chap. XVI of the Constitution deal with the various kinds of jurisdiction of the Supreme Court and the manner of their exercise by the Supreme Court. Article 132(1) provides that the jurisdiction of the Supreme Court shall ordinarily be exercised at all time by not less than three Judges of the Supreme Court sitting together on the Supreme Court. No distinction is made in this respect between, constitutional jurisdiction and appellate jurisdiction. Article 132(4) provides that "the Judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority." In the scheme of the chapter, it is quite clear that the provisions of Article 132(4) applies equally to the "*determination*" referred to in Article 121, 122, 123, 125 and 126 and the "*Judgment*" referred to in Article 127, "*opinion*" referred to in Article 129(1) and "*determination*" under 129(2) and again to the "*determination*" under Article 130, all made by the Supreme Court in the exercise of its several jurisdiction. The petitioner tried to draw a distinction between "*determination*" and "*judgment*" and submitted that article 132(4) does not apply to the "*determination*" when it exercises original jurisdiction and pronounces "*judgment*" when it exercises appellate jurisdiction. That this distinction is untenable is demonstrated by Article 130 which provides that the Supreme Court shall have the power to hear and determine and make such orders as provided by law on any appeal from an order or *judgment* of the Court of Appeal in the case of an election petition. The descriptions '*determination*', '*judgment*', '*opinion*', '*decision*', '*conclusion*' are different labels for the same concept.

It is to be noted that the Court of Appeal when it gives judgment in an election petition, it does so, in the exercise of original jurisdiction.

The petitioner's submission further overlooks the well-established rule of law that "where a number of persons are entrusted with powers not of a private confidence, but in some respect of a general nature, and all of them are regularly assembled, the majority will conclude the minority and their act will be the act of the whole". *Grindley Vs. Barker* (1), *Picea Holdings Vs. London Rent Tribunal* (2). Article 132(4) is based on this important rule of law.

There is no substance in the petitioner's allegation that this Court had committed errors in making its determination.

The application is unwarranted.

We accordingly refuse notice of the application on the respondent and dismiss the application.

Notice refused.