REV. SERUWILA SARANKITHI AND OTHERS
v
THE ATTORNEY-GENERAL AND OTHERS

COURT OF APPEAL
WIJAYARATNE, J.,
C.A. 852/2002 (Writ)
NOVEMBER 4, 2003

Provincial Councils Act, No. 42 of 1987, section 37(2)(a) – Writ of mandamus to hold a Poll Referendum in the Eastern Province – Constitution, Articles 31, 35, 31(3), 44(2) and 87(1) – Immunity of the President – Attorney-General made a party – Maintainability – Referendum Act, No. 7 of 1981, section 2 – Necessary party – Laches – Evidential value of documents.

The petitioner sought a writ of *mandamus* directing the respondents to take necessary action to hold a Poll Referendum in the Eastern Province under section 37(2)(a) of Act, No. 42 of 1987 and a direction on the respondents to refrain from altering the administrative structure of the Eastern Province without holding such a Poll.

The respondents objected to the application (1) on the ground that the Attorney-General has been wrongly named as the 1st respondent in terms of Article, 35 (2) necessary parties have not been named, (3) laches, (4) writ does not lie where there is a discretionary power and (5) documents attached cannot be relied upon.

Held:

1. The only instances in which acts or omissions of the President could be the subject of judicial proceedings through representation of the Attorney-General are in relation to the exercise of any power pertaining to any subject or function assigned to the President under Article 44(4).

2. Determining the date of the Poll is one vested with the President in terms of section 37(2) of Act, No. 42 of 1987. This is not a function covered by Article 44(2). The petitioners cannot institute proceedings making the Attorney-General a party representing the President under and in terms of Article 35.

3. In terms of Article 87(1) and section 2 of Act, No. 7 of 1981, conducting a Referendum is the function of the Commissioner of Elections. The Commissioner of Elections has not been made a party. It is fatal to this application.

4. The application for *mandamus* is made after six months of the gazette notification. *Mandamus* will be refused to an applicant guilty of undue delay.

5. In terms of section 37 of Act, No.42 of 1987 the power to determine the date of the Poll and to postpone same is vested in the President and that too is left to the discretion of the President.

Per Wijayaratne, J.

"Copies of documents which are publications through printed and electronic media are not authentic documents as required by the law of evidence and cannot be acted upon by a court of law."

APPLICATION for a writ of *mandamus*

Cases referred to:

1. *Mallikarachchi* v *Shiva Pasupathy* – Attorney-General (1985) 1 Sri LR 74
2. *Abdul Rahuman* v *Mayor of Colombo* – 69 NLR 211

Elmore Perera for petitioner

M.N.B. Fernando, Senior State Counsel for respondent

Cur.adv.vult

January 01, 2004

WIJAYARATNE, J.

The several petitioners of whom 1st to 6th named are described as electors of Eastern Province, make this application invoking the writ jurisdiction of this Court, against the 1st to 3rd respondents who are the Attorney-General, the Minister and the Secretary of the Ministry of Home Affairs, Provincial Councils and Local Government.

The substantial relief sought by the petitioners is the grant and issue of a mandate in the nature of writ of *mandamus* directing the respondents to take necessary action to hold a poll in the Eastern Province under the present administrative structure as required by section 37(2)(a) of the Act, No. 42 of 1987. They also sought a direction to the respondents to refrain from altering administrative structure of Eastern Province without holding such a poll. The

above reliefs are sought on the premise that the establishment of an Interim Administration linking the Eastern Province with the Northern Province without holding a poll, is imminent and establishment of such interim administrations will result in an irreversible and irrevocable *de facto* merger of the Eastern Province with the Northern Province in blatant disregard of the clear wishes of the majority of electors of the Eastern Province.

The first respondent, responding to the notice of such application whilst resisting the application raised preliminary objection to the maintainability of the same. The matter of the preliminary objections was argued before the Bench Comprising the two judges named above, with the appointment of H/L Tilakawardena J, (P/CA) to the Supreme Court, before the judgment and order on the matter of such objections, the parties agreed that judgment be given by me alone as one of the judges before whom the matter was argued. Accordingly I shall deal with each of the objections raised as follows:

(a) The Attorney-General has been wrongly named as the 1st respondent to this application in terms of Article 35 of the Constitution.

The paragraph 2 of the petition and the corresponding paragraph of the affidavit of the petitioners state that

> *"The 1st respondent is the Hon. Attorney-General who has been made as party in terms of the Rules of the Supreme Court and the provisions of Article 35 of the Constitution in as much as the date for the poll....has to be determined by H.E. the President"*

Thus it is the declared position of the petitioners that the 1st respondent is made a party to this application both in terms of Rules of Supreme Court and more so in terms of the provisions of Article 35 of the Constitution. This means that the petitioner concedes that President who has to determine the date of the poll, cannot be sued or proceedings cannot be instituted against, in terms of the provisions of Article 35 of the Constitution. However the petitioners elected to have these proceedings instituted against the Attorney-General purportedly in terms of Article 35(3) of the Constitution which reads:

"*The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) relating to the election of the President:*

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General"

According to the above provisions of Sub Article 3 the only instances in which acts or omissions of the President could be subject of judicial proceedings through the representation of the Attorney-General are in relation to the exercise of any power pertaining to any subject or function assigned to the President under Article 44(2) of the Constitution. Defining the nature and the scope of proceedings which may be instituted against the Attorney-General, the Supreme Court in the case of *Mallikarachchi* v *Shiva Pasupathi, Attorney-General* (1)

"*The petitioner's complaint of illegality of the proscription order made by the President does not qualify to be a proceedings in relation to the exercise of any power pertaining to any subject or function in the charge of the President under Article 44(2) and hence these proceedings could not have been instituted against the Attorney-General. The Attorney-General is not competent to represent President in proceedings not covered by the proviso to Article 35(3). Rule 65 of the Supreme Court Rules requiring the Attorney-General to be cited as a respondent in proceedings for the violation of Fundamental Rights under Article 126 of the Constitution does not visualise the Attorney-General being made a sole party respondent to answer the allegations in the petition*".

In deed, the petitioners have conceded that the powers of determining the date of the poll is one vested with the President in terms of the provisions of sec. 37(2)(a) of Provincial Council Act, No.42 of 1987. There is not even a suggestion that such is a function that is covered by Article 44(2) of the Constitution. Then the petitioner could not have instituted these proceedings making Attorney-General a party representing the President under and in terms of Article 35 of the Constitution, and the objection is validly raised.

b) Failure to name the relevant parties.

The petitioners seeking the issues of a mandate in the nature of *mandamus* to hold the poll have not made the authority whose duty and responsibility it is to hold the poll referendum to enable the elector to decide whether provinces should be linked or constitute separate administrative units. In terms of the provisions of Article 87(1) of the Constitution and section 2 of the Referendum Act, No. 7 of 1981 conducting a referendum is the function of the Commissioner of Elections. Any of the respondents named in this application has no power or authority to conduct a poll for the purpose mentioned in this application. Accordingly *mandamus* will not be issued as the respondents have no power to perform the act sought to be mandated in this application.

c) Laches on the part of petitioners

In the application dated 03rd May 2002 the petitioners (in para 18 of the petition) concedes that the President by order published in the Gazette dated 7.11.2001 the Poll in the Eastern Province was postponed to 16.11.2002. The petitioners complain that the proposal to be put to the electors at the referendum have not been specified in the proclamation. The application for *mandamus* is made at least six months after the Gazette notification and the petitioners do not appear to explain the delay in making this application. Not even in their submissions, do the petitioners explain such delay. The accepted norm in the field of administrative law is that "*mandamus* is refused to an applicant guilty of undue delay. In the case of *Abdul Rahuman* v *The Mayor of Colombo* (2) with the unexplained delay, it was held that:

> *"it is sufficient for us to say that in view of this delay and the consequences of such delay, an application for a writ of mandamus must fail."*

d) *Writ of mandamus* does not lie where there is a discretionary power.

The petitioners in their prayer to the petition seek issuance of a "*Writ of mandamus* directing the respondents to take necessary action to hold a poll in the Eastern Province..... as required by sec. 37(2) (a) of the Provincial Councils Act, No. 42 of 1987 as early as possible."

However the petitioners concede in their application in terms of the provision of sec. 37 of the Provincial Councils Act the power to determine the date of the Poll and to postpone the same is vested in the President and that too is left to the discretion of the President. In their submissions too the petitioners concede that "the President may in her discretion decide to postpone the said polls....." It is beyond argument that in the event of the President exercising her discretionary power and decides to postpone the poll, there is nothing that any of the respondents could do to hold the poll; for that matter not even the Election Commissioner could perform toward the conduct of the poll. Accordingly the petitioners', application to compel the respondents to take necessary action to hold a poll, the date of holding the same is solely determined by the President in the exercise of her discretionary powers, is a misconception of law and is not tenable.

e) Evedential value of the documents relied on by the petitioner.

The petitioners have attached copies of many a document which are publications through printed and electronic media, and rely on them as providing the basis of their contentions as grounds for the issuance of a writ of *mandamus.* The matter referred to there may perhaps be the subject of common knowledge of many a member of public in this country and even the rest of the world. However the documents attached to the petition are not authentic documents as required by the law of evidence and cannot be acted upon by a Court of Law.

Accordingly I hold that the several preliminary objections as discussed above, are taken validly and uphold the same. The matters of such objections go to the root of the matter of the application and hence the application of the petitioners for the issuance of mandate in the nature of writ of *mandamus* cannot be maintained. Notice refused.

In the result the application is rejected. No order of costs is made as the application is one made in the exercise of a citizens franchise.

Application dismissed.