

**GAMAGE  
VS.  
PERERA**

SUPREME COURT,  
BANDARANAYAKE J.,  
DISSANAYAKE J.,  
FERNANDO J.,  
SC 16/2002.  
OCTOBER 14, 2004,  
NOVEMBER 1, 2004,  
AUGUST 18, 2005.

*Section 12 (8) Provincial Councils Act- Section 12 (2) - Rules of Procedure of Provincial Council.- Judicial Review of proceedings of Council- Constitutional validity of any Act of Parliament- Can it be called in question? - Amenable to writ jurisdiction? - Constitution Article 80 (23) - Article 140-*

*Ouster clause- Writ jurisdiction of the Superior Courts- Announcing of results of an election- No review of proceedings?*

The Court of Appeal issued a mandate in the nature of a writ of certiorari directing the 2nd respondent-appellant to announce the result of the election of the petitioner-respondent to the post of Chairman of the Council. The Court also granted a mandate in the nature of a writ of prohibition against the appellant from conducting or taking any action to hold an election in respect of the post of Chairman of the Council.

It was contended in appeal that the Court of Appeal erred in not considering that a Provincial Council is a legislative body and as such the writs prayed for would not lie to review the action of the appellant which forms a part of the proceedings of the Provincial Council.

**HELD per Dr. Shirani Bandaranayake J.**

"In terms of Article 80 (3), the constitutional validity of any provision of an Act of Parliament cannot be called in question after the certificate of the President or the Speaker is given. Such a law cannot be challenged on any grounds whatsoever even if it conflicts under the provisions of the Constitution even if it is not competent for Parliament to enact it by a single majority or two thirds majority."

- (1) In the instant case what the Court of Appeal had considered is not to question the validity of Section 12 (2) of the Provincial Councils Act, but to decide whether in view of the provisions of Section 12 (2), the Court of Appeal is precluded from examining the performance of the duties of the 2<sup>nd</sup> respondent in accordance with Rule 5 (6) of the Rules of Procedure of the Provincial Council.

**Per Dr. Shirani Bandaranayake J.**

"The question before the Court of Appeal was not with regard to reviewing of any proceedings of the respondent Provincial Council in its legislative process but the conduct of the appellant at the proceedings, held on 19.12.2002 of the Council where the election was held to select its Chairman" .

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Per Dr. Shirani Bandaranayake J.

"In terms of Rule 5 (6) it was the duty of the appellant to announce the result of the said election. When he failed to announce the said results of the election declaring the 1st respondent as the Chairman of the 2nd respondent Council and proceeded to record and announce that the election of the Chairman was not concluded and scheduled another election for 8.1.2001 the appellant had acted arbitrarily and maliciously".

**HELD FURTHER:**

( 2) The Court of Appeal was correct when it held that its jurisdiction under Article 140 remains intact and unfettered on the face of the preclusive clause contained in Section 12 (2) of the Provincial Councils Act.

**APPEAL** from a judgment of the Court of Appeal.

**Cases referred to :**

1. *Atapattu vs. People's Bank* 1997 1 Sri LR 221
2. *Sirisena Cooray vs. Tissa Dias Bandaranayake* 1999 1 Sri LR 1
3. *Wijayapala Mendis vs. P.R.P. Perera* 1999 2 Sri LR 110
4. *In re the Thirteenth Amendment to the Constitution*
5. *R vs. Secretary of State for the Environment ex parte Nottinghamshire County Council* 1986 AC 240
6. *Anisminic Ltd. vs. Foreign Corporative Commission* 1962 2 AI 147
7. *Pearlman vs. Keepers and Governors of Harrow School* 1979 QB 56
8. *Re Racai Commodities Ltd.* 1980 23 WLR 181

Dr. Jayampathy Wickremaratne PC with Cyrene Siriwardhene for appellant.  
Manohara de Silva for respondents.

November 30, 2005

**DR. SHIRANI BANDARANAYAKE, J.**

This is an appeal from the judgment of the Court of Appeal dated 22.02.2002. By that judgment the Court of Appeal issued a mandate in the nature of a writ of mandamus directing the 2<sup>nd</sup> respondent-appellant

(hereinafter referred to as the appellant) to announce the result of the election of the petitioner-respondent (hereinafter referred to as the 1st respondent) to the post of Chairman of the 1st respondent -respondent Council (hereinafter referred to as the respondent Provincial Council). The Court of Appeal also granted and issued a mandate in the nature of a writ of prohibition against the appellant or his successor in office from conducting and/or taking any action to hold an election in respect of the post of Chairman of the respondent Council. The Court of Appeal also cast the appellant in costs in a sum of Rs. 10,000/- considering the manner in which he had acted and directed the said sum to be paid personally by the appellant to the 1st respondent. The appellant appealed against the said judgment of the Court of Appeal on which this Court granted Special Leave to Appeal.

The facts of this appeal, *albeit* brief are as follows :

The 1st respondent, who was a member of the respondent Provincial Council, filed an application in the Court of Appeal seeking writs of mandamus and prohibition against the appellant. The 1st respondent in his application had stated that, on 19.12.2000 an election was held to fill the vacancy in the post of Chairman in the respondent Provincial Council. The names of the 1<sup>st</sup> respondent and 3rd respondent-respondent (hereinafter referred to as the 3rd respondent) were proposed and seconded. At the election held on the same date the 1st respondent and the 3rd respondent received 42 votes each. There being an equality of votes, the appellant, who was the Secretary of the respondent Provincial Council, proceeded to conduct an election once again in terms of Rule 5(a) of the Rules of Procedure and at the conclusion of the counting recorded the votes cast in the following manner:

1 <sup>st</sup> respondent	43 votes
3rd respondent	40 votes
Abstained	<u>14 votes</u>
Total	<u>97 votes</u>

The 1st respondent further stated that the appellant having recorded the votes obtained by the candidates failed to announce the results of the election declaring the 1st respondent as the Chairman of the respondent Provincial Council as required by Rule 5(6). The 1st

respondent sought a writ of mandamus directing the appellant to announce the results of the election of the 1st respondent to the post of Chairman of the respondent Provincial Council in accordance with the aforesaid Rule 5(6). He also prayed for a writ of prohibition against the appellant from conducting and/or taking any action to hold another election in respect of the post of Chairman.

As stated earlier the Court of Appeal issued the writ of mandamus and prohibition as prayed by the 1st respondent.

Both Counsel agreed that the only question that has to be examined would be as follows:

“Did the Court of Appeal err in not considering that a Provincial Council is a legislative body and as such the writs prayed would not lie to review the action of the appellant which forms a part of the proceedings of the Provincial Council”.

Learned President's Counsel for the appellant submitted that the Court of Appeal had relied on the decisions in *Atapattu v Peoples Bank* <sup>(1)</sup> *Sirisena Cooray v Tissa Dias Bandaranayake* <sup>(2)</sup> and *Wijeyapala Mendis v P. R. P Perera* <sup>(3)</sup> and had made a grave error in following the said decisions. The contention of the learned President's Counsel was that the dictum in the aforementioned decisions that the jurisdiction which the Supreme Court exercises under Article 140 is unfettered, cannot be accepted. It was further contended that Section 12(2) of the Provincial Councils Act contains a preclusive clause, which prevents the Court of Appeal from issuing a writ against the appellant.

Section 12(2) of the Provincial Councils Act deals with the preclusive clause and reads as follows:

“No officer or member of a Provincial Council in whom powers are vested, by or under this Act, for regulating the procedure, or the conduct of business, or for maintaining order, in such Council shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers”

The question at issue therefore is that in terms of the aforementioned Section 12(2) of the Provincial Councils Act, whether the Court of Appeal was prevented from issuing the writs of mandamus and prohibition. If the answer to the aforesaid question is in the affirmative, the next question that would arise would be whether a grave error was made in the decisions referred to in the judgment of the Court of Appeal, viz., *Atapattu v People s Bank (Supra)*, *Sirisena Cooray v Tissa Dias Bandaranayake (Supra)* and *Wijayapala Mendis v P.R.P Perera (Supra)* as well as by the Court of Appeal in its own decision. The contention of the learned President's Counsel for the appellant is that the validity of Section 12 of the Provincial Councils Act, as the validity of the proceedings of the 1st respondent Council held on 19.12.2000, cannot be questioned in terms of Article 80(3) of the Constitution and on the basis of the preclusive clause embodied in Section 12(2) of the Provincial Councils Act.

Article 80(3) of the Constitution refers to a Bill becoming law and reads as follows:

“Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no Court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever”

The aforesaid Article thus had clearly stated that in terms of that Article, the constitutional validity of any provision of an Act of Parliament cannot be called in question after the certificate of the President or the Speaker is given. Reference was made to the provisions in Article 80(3) of the Constitution and its applicability by Sharvananda, J. in re the *Thirteenth Amendment to the Constitution* <sup>(4)</sup> and had expressed his Lordship's views in the following terms:

“Such a law cannot be challenged on any ground whatsoever even if it conflicts with the provisions of the Constitution, even if it is not competent for Parliament to enact it by a simple majority or two third majority.”

Whilst agreeing with the views expressed by Sharvananda, CJ, in re *The Thirteenth Amendment to the Constitution*, regarding the scope of Article 80(3) of the Constitution, it is to be borne in mind that the

question which arises in this appeal is not connected to the applicability of the said Article. The appellant's contention is that, the Court of Appeal had questioned the validity of Section 12 of the Provincial Councils Act and in terms of Article 80(3) of the Constitution that the Court of Appeal could not have questioned such validity of the said provision. However, what the Court of Appeal had considered is not to question the validity of Section 12(2) of the Provincial Councils Act, but to decide whether in view of the provisions of Section 12(2), the Court of Appeal is precluded from examining the performance of the duties of the 2<sup>nd</sup> respondent, in accordance with Rule 5(6) of the Rules of Procedure of the respondent Provincial Council.

Section 12(2) of the Provincial Councils Act states that no officer or member of a Provincial Council shall be subject to the jurisdiction of any Court in respect of his exercise of the powers which were vested under the Act, for regulating the procedure, or the conduct of business or for maintaining order in such Council. This Section, *prima facie*, thus precludes the intervention by any Court to examine the exercise of powers of the officers or members of a Provincial Council.

The applicability of a preclusive clause was discussed in detail by Dheeraratne, J, in *Sirisena Cooray v Tissa Dias Bandaranayake* (*Supra*). In that case Court examined several preclusive clauses contained in Special Presidential Commissions of Inquiry law, No. 7 of 1978, as amended, either ousting or partially ousting writ jurisdiction. After considering those clauses as well as the decisions which had examined the applicability of the preclusive clauses, it was held that the jurisdiction conferred on this Court by Article 140 is unfettered. In a later decision (*Wijeyapala Mendis v PR.P Perera and others* [*supra*]), Fernando, J, endorsed the views expressed by Dheeraratne, J., in *Sirisena Cooray* case (*supra*). Considering the provisions in the Special Presidential Commission of Inquiry Law, Fernando, J, stated that, -

"I respectfully agree with Dheeraratne, J., that the jurisdiction which this Court exercises under Article 140 is unfettered (*Cooray v Bandaranayake*)."

Learned President's Counsel for the appellant contended that in *Cooray v Bandaranayake (supra)* when the Court held that the preclusive clause inserted by Section 18(A)1 must be read subject to Article 140, it did what was prohibited by the Constitution, namely judicial review of legislation.

However, it is to be borne in mind that in *Cooray v Bandaranayake (supra)*, the 1st and 2nd respondents *inter alia* had raised objections that the writ jurisdiction of the Superior Court had been ousted by preclusive clauses contained in the Special Presidential Commissions of Inquiry law and the Interpretation Ordinance. Considering those objections, this Court had held that the writ jurisdiction of the Superior Courts is conferred by Article 140 of the Constitution and it cannot be restricted by the provisions of ordinary legislation contained in the ouster clauses enacted in Sections 9(2) and 18A of the Special Presidential Commission of Inquiry Law or Section 22 of the Interpretation Ordinance. The Court therefore held that its jurisdiction is unfettered.

Learned President's Counsel for the appellant further contended that granting power to Courts with unlimited judicial review is although a welcome move, the Courts must necessarily function within the limits set down by the Constitution and the Law. Learned President's Counsel relied on the dictum of Lord Scarman in *R v Secretary of State for the Environment ex parte Nottinghamshire County Council* <sup>(5)</sup> where it was stated that,

"Judicial review is a great weapon in the hands of the judges, but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power."

However, it is to be noted that referring to the aforementioned, Professor Wade has commented that it is only the criterion of reasonableness that is restricted by this doctrine and also only in special situations dominated by questions of political judgment. He further clarifies the position and states that, (Administrative Law, 9<sup>th</sup> Edition, pg. 380)

'The normal rule is that parliamentary approval does not affect the operation of judicial review, whether for unreasonableness or otherwise.

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For this the decisions on delegated legislation, which is frequently approved by Parliament, afford ample illustration.”

Judicial review is for the purpose of challenging the legality of the action or inaction of a public authority. Such review is the gateway to a remedy for the grievance complained of by the aggrieved party and Acts of Parliament makes provision from time to time to restrict or at certain times to eliminate such judicial review such as Section 12(2) of the Provincial Councils Act, which is presently in question.

The approach of the Courts, with regard to the applicability of ouster clauses could be clearly seen in the leading case of *Anisminic Ltd. v Foreign Compensation Commission*<sup>(6)</sup> where the words of ‘shall not be called in question in any Court of law’ contained in the Foreign Compensation Act of 1950 came under scrutiny and the House of Lords held that the ouster clause did not protect a determination which was outside jurisdiction. This fresh approach was expanded by the decisions in *Pearlman v Keepers and Governors of Harrow School*<sup>(7)</sup> and *Re Racal Communications Ltd.*<sup>(8)</sup>

Considering the aftermath of the decision in *Anisminic (Supra)*, Prof. Wade has succinctly expressed wider consideration given to the applicability of ouster clauses in the following words:

‘The *Anisminic* case and its sequels were the culmination of the judicial insistence, so often emphasized in this work, that administrative agencies and tribunals must at all costs be prevented from being sole judges of the validity of their own acts. If this were allowed, to quote Denning L. J. again, ‘the rule of law would be at an end’ (emphasis added)’

In fact in *Anisminic (supra)* Lord Wilberforce expressed a similar view in different words. According to Lord Wilberforce,

“What would be the purpose of defining by statute the limit of a tribunal’s powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?”

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It is thus clear that the Court of Appeal was correct when it held that, its jurisdiction under Article 140 remains intact and unfettered on the face of the preclusive clause contained in Section 12(2) of the Provincial Councils Act.

The next question that has to be examined would be whether a writ would lie against the Provincial Council which is a legislative body. Learned President's Counsel for the appellant contended that the Provincial Councils are legislative bodies and that therefore the question in issue, being an internal matter of the Provincial Council, it cannot be subject to Administrative Law. It is to be borne in mind that the Court of Appeal had taken the view that the Provincial Councils are legislative bodies. However, the question before the Court of Appeal was not with regard to reviewing the validity of any proceeding of the respondent Provincial Council in its legislative process, but the conduct of the appellant at the proceedings held on 19.12.2002 of the respondent Provincial Council where an election was held to select their Chairman.

The 1st respondent's complaint was that after the election, was conducted in which he had obtained 43 votes, the appellant failed to announce the result of the election declaring the 1st respondent as the Chairman of the Council as required by Rule 5(6). The said Rule reads as follows :

"At the conclusion of counting, the name of the member who has obtained the highest number of votes shall be written and the number of votes shall be indicated against the name. The name of the member or names of members who have obtained the next highest number of votes shall be indicated with the respective amount of votes polled against their names and the result shall be marked in descending order and the result shall be announced."

Therefore in terms of Rule 5(6) it was the duty of the appellant to announce the result of the said election. When he failed to announce the said results of the election declaring the 1st respondent as the Chairman of the 2<sup>nd</sup> Respondent Council and proceeded to record and

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announce that the election of the Chairman of the 1st respondent Council was not concluded and scheduled another election to be held on 08.01.2001, the appellant had acted arbitrarily and maliciously. Therefore the 1st respondent had come before the Court of Appeal challenging the conduct of the appellant in proceedings held on 19.12.2000 of the respondent Provincial Council for the election of a Chairman and not the validity of any of the proceedings of the respondent Provincial Council. In such circumstances the submissions of learned President's Counsel for the appellant that the proceedings of the Provincial Council cannot be subjected to Administrative Law does not arise in this appeal.

For the reasons aforesaid, I answer the question in this appeal in the negative.

This appeal is accordingly dismissed and the judgment of the Court of Appeal dated 22.02.2002 is affirmed.

I make no order as to costs in these proceedings in this Court.

**DISSANAYAKE, J.** — *I agree.*

**RAJA FERNANDO, J.** — *I agree.*

*Appeal dismissed.*