

MALLIKARACHCHI
v.
SHIVA PASUPATI, ATTORNEY-GENERAL

SUPREME COURT.

**SHARVANANDA, C. J., WANASUNDERA, J., COLIN-THOME, J., RANASINGHE, J.
AND ABDUL CADER, J.**

S.C. APPLICATION No. 107/84.

NOVEMBER 19 AND 20, 1984.

Immunity of President – Proscription orders made under Emergency Regulations – Infringement of fundamental rights under Article 14 (1), (a), (b), (c) and (d) and Article 12 (2) of the Constitution—Is Attorney-General the proper party to be sued in view of legal immunity of the President? – Articles 35 (1) and (3), 44 (2) and 126 of the Constitution—Rule 65 of the Supreme Court Rules, 1978.

The petitioner, a member of the Politbureau of the Jathika Vimukthi Peramuna which was a recognised political party, was elected a member of the District Development Council of Colombo having come forward as a candidate of his Party. He functioned as such until the Jathika Vimukthi Peramuna was proscribed by the President on 30th July, 1983, under the provisions of the Emergency Regulations made under the Public Security Ordinance. The orders of proscription were continued by periodical publication in the Gazette. The petitioner alleged that the President was inspired by mala fides and aimed at eliminating opposition and that the petitioner and his fellow members were prevented from contesting and putting forward candidates for election to Parliament for Kundasale and Trincomalee electorates. The petitioner claimed that by the proscription orders there had been an infringement of his fundamental rights under Article 14 (1) (a), (b), (c) and (d) and Article 12 (2) of the Constitution. He sought a declaration that the proscription order published in the Gazette Extraordinary dated 18.8.1984 is inoperative and that the Jathika Vimukthi Peramuna (J.V.P.) is entitled to function as a political party. He cited Shiva Pasupati, Attorney-General, as respondent.

Held –

By Article 35 (1) of the Constitution the President during his tenure of office is absolutely immune from legal proceedings in his official or private capacity. The immunity afforded by Article 35 (1) is personal to the President. But in respect of actions or omissions of the President in relation to the category of matters referred to in Article 35 (3), that is, those which are referable 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 proceedings have to be instituted against the Attorney-General.

The petitioner's complaint of illegality of the proscription order made by the President does not qualify to be a proceeding 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 the 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.

The application is not properly constituted and fails in limine.

Case referred to :

- (1) *Satyapala v. The Attorney-General – S.C. Application No. 40/84 – S. C. Minutes of 30.4.1984 and 11.5.1984.*

APPLICATION for leave to proceed under Article 126 of the Constitution.

Nimal Senanayake, P.C. with Sanath Jayatileke, Mrs. A. B. Dissanayake, R. Jagindran instructed by Saliya Mathew for petitioner.

K. M. M. B. Kulatunga, P.C. with Sarath Silva, D.S.G., A. Kasturiaratchi, S.C. and T. G. Gunaratne, State Attorney, for the Attorney-General.

Cur. adv. vult.

February 11, 1985.

SHARVANANDA, C.J.

The petitioner is a member of the Jathika Vimukthi Peramuna, popularly referred to as the J.V.P. The petitioner was elected to the Party's Politbureau and was also elected to be a member of the District Development Council of Colombo, as a candidate of that party and functioned as such till the party was declared to be a proscribed organisation. The J.V.P. was proscribed by order made by His Excellency the President on 30th July, 1983, under the provisions of the Emergency Regulations under the Public Security Ordinance. The order of proscription of the Party has been continued to date by orders of proscription periodically published in the Government Gazette.

The Petitioner in his petition submits that the J.V.P. is a leftist party and that it has a fair popular support in the country and that on its electoral performances, the party qualified as a recognised political party under the laws relating to Parliamentary Elections, and is a political party recognised by the Commissioner of Elections. The petitioner further states that His Excellency the President is the leader of the United National Party, which is the Government political party and that the President had not in making the order proscribing the

J.V.P. exercised his power bona fide, but had exercised the power vested in him by the relevant Emergency Regulations, mala fide and without any grounds. He complains that the proscription orders are being continued to disrupt the J.V.P. organisation and to ensure that the party would not gain further public support and that they are merely colourable and made for the purpose of eliminating political opposition.

The petitioner further states that the petitioner and his fellow members have been prevented by the order proscribing the J.V.P. from selecting candidates for election to Parliament for Kundasale and Trincomalee electorates and they are deprived of the popular base and political goodwill and of the opportunity of utilising the advantages accruing to recognised political parties.

The gravamen of the allegations of the petitioner is that all orders of proscription of the J.V.P. made by His Excellency the President, in the exercise of the powers vested in him under the provisions of the Public Security Ordinance are vitiated by colourable motives. The petitioner pleads that there has been an infringement of his fundamental rights under Article 14 (1) (a), (b), (c) and (d) and Article 12 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka by the orders proscribing the J.V.P. and that the resulting restrictions on the exercise of the petitioner's fundamental rights are not valid. In his petition he prays inter alia for a declaration that the order published in the Gazette Extraordinary dated 18th August, 1984, is inoperative and for a declaration that the organisation called the J.V.P. is entitled to function as a legal political party.

The petitioner has cited "Shiva Pasupati", Attorney-General, as the respondent to his application.

As the allegations in the petition involved Constitutional questions regarding the legal immunity of His Excellency the President, the court invited the Attorney-General to assist us in satisfying ourselves of the prima facie validity of the argument of counsel for the petitioner and the tenability of the petition. The Solicitor-General appeared in response to the request of this court and submitted in limine, that the petition fails on the ground that the Attorney-General was not the proper person to be cited as respondent to the petitioner's petition and that there was no legal justification for the proceedings to be instituted against the Attorney-General.

Article 35 of the Constitution which confers personal immunity on the President provides as follows :-

- 35 (1) "While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity."
- (2) "Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law."
- (3) "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."

It is to be noted that the petitioner has not in his petition averred any reason for making the Attorney-General the respondent to his application.

Article 35 (1) confers on the President during his tenure of office an absolute immunity in legal proceedings in regard to his official acts or omissions and also in respect of his acts or omissions in his private capacity. The object of the article is to protect from harassment the person holding the High Office of the Executive Head of the State in regard to his acts or omissions either in his official or private capacity during his tenure of the office of President.

Such a provision as Article 35 (1) is not something unique to the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978. There was a similar provision in the Article 23 (1) of the Constitution of Sri Lanka of 1972. The corresponding provision in the Indian Constitution is Article 361. The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary court of law.

It is very necessary that when the Executive Head of the State is vested with paramount power and duties, he should be given immunity in the discharge of his functions.

Article 38 of our Constitution has made provision for the removal of the President for –

- (i) intentional violation of the Constitution ;
- (ii) treason ;
- (iii) bribery ;
- (iv) misconduct or corruption, involving the abuse of the power of the office ; and
- (v) any offence under any law, involving moral turpitude.

It will thus be seen that the President is not above the law. He is a person elected by the People and holds office for a term of six years. The process of election ensures in the holder of the office correct conduct and full sense of responsibility for discharging properly the functions entrusted to him. It is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. If such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected but the smooth and efficient working of the Government of which he is the head will be impeded. That is the rationale for the immunity cover afforded for the President's actions, both official and private.

The immunity afforded by Article 35 (1) is personal to the President. Article 35 (3) however provides that the said immunity shall not apply to any proceedings in 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 and that in relation to the exercise of any power pertaining to any such subject or function, it is competent to institute any such proceeding against the Attorney-General. Article 44 (1) empowers the President to appoint Ministers of Cabinet and assign subjects and functions to such Ministers. Article 44 (2) gives a discretion to the President to assign to himself any subjects or functions and vests him with the residual power to remain in charge of any subject or function, not assigned to any Minister under the provisions of Article 44 (1). It follows that in respect of actions or omissions of the President which are not referable 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, proceedings cannot be instituted against the Attorney-General.

Thus though the President is personally immune from legal proceedings in a court in respect of anything done or omitted to be done by him in his official or private capacity, his acts or omissions in relation to the category of matters referred to in Article 35 (3) can be questioned in a court in proceedings instituted against the Attorney-General. Thus in proceedings in respect of such acts or omissions of the President the Attorney-General can properly be made the defendant or respondent.

Article 35 (3) exhausts the instances in which proceedings may be instituted against the Attorney-General in respect of the actions or omissions of the President in the exercise of any powers pertaining to subject or functions assigned to the President or remaining in his charge under that paragraph 2 of Article 44. It is only in respect of those acts or omissions of the President, that it is competent to proceed against the Attorney-General. The Attorney-General is thus made constitutionally liable to defend such acts or omissions but his liability does not however extend to acts or omissions of the President committed in the exercise of powers not covered by Article 44 (2) of the Constitution, but in the purported exercise of powers vested in him otherwise.

The order of proscription complained of by the President is, as stated by Ranasinghe, J. in *Satyapala v. The Attorney-General* (1) –

“not an order made by the President on the footing of any assignment of subjects and functions in terms of the provisions of Article 44 of the Constitution. It is not one done as a result of or because of any such assignment of subjects and functions. It is, on

the other hand an order made by the President under and by virtue of a power vested in him by an express provision of law, viz : Regulation 68 of the Emergency Regulations, made under the provisions of section 5 of the Public Security Ordinance (Cap. 40)."

The Public Security Ordinance which is deemed to be a law enacted by Parliament (see Article 155 (1) of the Constitution of 1978) authorises the President to make emergency regulations and the relevant regulation 68 has been made in pursuance of the delegated legislative power. In the circumstances the present proceedings stemming from the petitioner's complaint of illegality of the proscription order made by the President do not qualify to be proceedings referred to in the proviso to Article 35 viz., proceedings in relation to the exercise of any power pertaining to any such subject or function in the charge of the President under paragraph (2) of Article 44 and hence these proceedings could not have been instituted against the Attorney-General. The petitioner has erred in citing the Attorney-General as Respondent to his petition. The Attorney-General cannot be called upon to answer the allegations in the petitioner's application. He does not represent the President in proceedings which are not covered by the proviso to Article 35 (3), and is not competent or liable to answer the allegations in the petition. Counsel for the petitioner sought to justify the citation of the Attorney-General as respondent by reference to Rule 65 of the Supreme Court Rules which provides that in proceedings under Article 126 of the Constitution, the Attorney-General shall be cited as Respondent. This Rule 65 was designed to meet the mandate of Article 134 which states that the Attorney-General shall be noticed and have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction. That Rule does not visualise the Attorney-General being made a sole party respondent to answer the allegations in the petition. Since infringement of fundamental right by executive or administrative action is alleged, the Attorney-General is noticed only to watch the interests of the State. He is not cited as the person who has committed the alleged infringement.

The application of the petitioner is not properly constituted and therefore fails in limine. Leave to proceed is therefore refused and the application is dismissed on the ground that there is no justification for the Attorney-General to be cited to respond to the allegations in the petition and that the petitioner has erred in instituting these

proceedings against the Attorney-General. Since the objection raised by the Solicitor-General is fatal to the maintainability of the present application, it is not necessary to decide the wider question as to the maintainability of actions questioning the validity of the exercise of powers by the President in matters not covered by Article 35 (3) of the Constitution.

COLIN-THOMÉ, J. – I agree.

RANASINGHE, J. – I agree.

WANASUNDERA, J.

While I agree that the President enjoys immunity from being sued in this matter, I am however of the view that having regard to the provisions of Article 35 (3) of the Constitution, the Attorney-General is the proper respondent to this petition.

ABDUL CADER, J.

The petitioner has instituted proceedings complaining that his fundamental rights have been violated as a result of the proscription of the Janatha Vimukthi Peramuna by His Excellency the President.

“As the President enjoys immunity in terms of Article 35(1) of the Constitution he has made the Attorney-General the respondent in compliance with Article 35 (3), which permits such a procedure in ‘proceedings’ 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”

Article 44 (1) empowers the President to assign subjects and functions to Ministers.

Article 44 (2) empowers the President to assign to himself any subject or function and remain in charge of any subject or function not assigned.

This Article therefore deals with subjects and functions that are assignable to Ministers.

The President derived his power to proscribe from Emergency Regulations and this power is expressly conferred on the President, who alone can make an order of proscription.

Counsel for the petitioner did not submit that this power is an assignable power. In fact this question was not discussed at all.

Under these circumstances it appears to me that Article 35 (3) does not apply.

I agree with the order made by the Chief Justice.

Leave to proceed refused.
