

PUBLIC INTEREST LAW FOUNDATION AND ANOTHER
v
ATTORNEY-GENERAL AND ANOTHER

COURT OF APPEAL
UDALAGAMA, J. (P/CA) AND
SRIPAVAN, J.
C.A. 1396/03
OCTOBER 28, AND
NOVEMBER 18, 2003

Writ of mandamus to compel the President to appoint members to the Election Commission – Constitution – 17th Amendment, Articles 35 and 41 B – Recommendations of the Constitutional Council – Has the President discretion not to appoint the recommended person? Is an act or omission of the President justiciable? – Blanket immunity under Article 35.

Held:

- (i) Article 35 gives a blanket immunity to the President from having proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity except in the circumstances specified in Article 35(3).
- (ii) The present application does not fall within the ambit of Article 35(3).
- (iii) The power to appoint a Chairperson and the Members of the Election Commission is expressly conferred on the President who alone can make such appointments in terms of Article 41B of the 17th Amendment.
- (iv) The petitioners have erred in citing the Attorney-General as the 1st respondent.

APPLICATION for a writ of mandamus.

Cases referred to :

1. *Mallikarachchi v Shiva Pasupathi* – (1985) 1 Sri LR 74 at 78.
2. *Edward Francis William de Silva, President's Counsel v Shirani Bandaranayake* – (1997) 1 Sri LR 92 at 99.
3. *Kumaranatunga v Jayakody* – (1985) 2 Sri LR 124 at 135.

- 4 *Karunatilake and another v Dayananda Dissanayake, Commissioner of Elections and others* – (1999) 1 Sri LR 157 at 177.
- 5 *Victor Ivan and others v Hon. Sarath N Silva and others* (2001) – Sri LR 309 at 327

J.C. Weliamuna with S. Jayawardena and S. Senanayake for petitioners.

P. A. Ratnayake, P.C., Additional Solicitor General with A. Gnanathasan, Deputy Solicitor-General and M.R. Ameen, State Counsel, for 1st and 3rd to 13th respondents.

Cur.adv.vult

December 17, 2003

SRIPAVAN, J.

The petitioners invoked the jurisdiction of this court seeking a writ of *mandamus* compelling the second respondent (President of the Democratic Socialist Republic of Sri Lanka) to appoint the fourteenth respondent as the Chairman and the fifteenth to the eighteenth respondents as the members of the Election Commission. 01

In view of the constitutional importance of the questions involved, without permitting the application to be supported *ex parte*, this court on 4th September 2003 directed that notice be issued on the first and the third to the thirteenth respondents so that they be heard in opposition before notice is issued as prayed for in paragraph (a) of the prayer to the petition. The learned Additional Solicitor-General appeared and assisted court in the consideration of the matter. 10

The basis of the petitioners' challenge is that consequent to the seventeenth amendment to the Constitution, the President is left with no discretion to appoint the Chairperson and the members of the Election Commission once the recommendations of the Constitutional Council is received. In this context, Counsel for the petitioners contended that the seventeenth amendment in Art. 41B removed the discretion of the President and as such the said amendment did not intend to give the President unfettered and unrestrained powers to appoint the Election Commission or not to appoint same. Accordingly, Counsel argued that the basic features contained in Art. 41B of the seventeenth amendment to the Constitution would be nullified if Art. 35 is invoked. 20

Art. 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. 30

(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 or the validity of the referendum or to proceedings in the Court of Appeal under Article 144 or in Supreme Court, relating to the election of a Member of Parliament.] 40

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.

The reason for granting immunity to the President is succinctly stated by Sharvananda, C.J. in *Mallikarachchi v Shiva Pasupati* ⁽¹⁾ at 78 as follows:- 50

“..... 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 con- 60

ferred, 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."

In *Edward Francis William Silva, President's Counsel v Shirani Bandaranayake* ⁽²⁾ at 99 the court held "We are of the view, therefore, that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of law, more-so where the said act or omission is being questioned in proceedings where the President is not a party **and in law could not have been made a party.**"

No doubt, in certain situations the acts or omissions of the President can be questioned in a court instituted against the Attorney-General in relation to matters referred to in Art. 35(3). Art.35 has been interpreted authoritatively by the Supreme Court in various cases. Art. 41 (B) contained in the seventeenth amendment to the Constitution will have to be read subject to Art. 35 in order to ensure a smooth and harmonious working of the Constitution. The cardinal rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning in construing words in a constitutional enactment. Thus, the words used in the Constitution must be understood in the sense most obvious to the common understanding. "Where the language of the Constitution is plain and unambiguous, effect has to be given to it and a court cannot cut down the scope or amplitude of such provision for the reason that notionally it cannot harmonise with the ideal of the Constitution." - *per* Sharvananda, C.J. in *Kumaranatunga v Jayakody* ⁽³⁾ at 135.

In *Karunathilaka and another v Dayananda Dissanayake, Commissioner of Elections and others* ⁽⁴⁾ at 177 Fernando, J. observed thus :-

"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings *against* the President *while* in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity; immunity is a shield for the doer, not for the act."

Thus, it would appear having regard to Art. 35 of the Constitution, an act or omission of the President is not justiciable in a court of law during the tenure of her office. Wadugodapitiya, J. in the case of *Victor Ivan and others v Hon. Sarath N. Silva and others* ⁽⁵⁾ at 327 interpreting Art. 35 laid down the objective and the intention of the framers of the Constitution in the following words :-

“ I am constrained to say that, in fact, what the petitioners are asking this court to do, is in effect to amend by judicial action, Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This, of course, is not within the power of this Court to do. In the guise of judicial decisions and rulings, judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned.”

Following the judicial decisions quoted above, I hold that Art. 35 gives a blanket immunity to the President from having proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity, except in circumstances specified in Art. 35(3). The present application does not fall within the ambit of Art. 35(3). As observed by Sharvananda, C.J. in *Mallikarachchi's case* “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 Act. 35 (3), and is not competent or liable to answer the allegations in the petition.” The power to appoint a Chairperson and the members of the Election Commission is expressly conferred on the President who alone can make such appointments in terms of Art. 41B of the Constitution as introduced by the seventeenth amendment. Thus, I hold that the petitioners have erred in citing the Attorney-General as the first respondent to this application. The application is therefore not properly constituted and fails on that ground as well.

For the reasons stated above, notice on the respondents is refused.

UDALAGAMA, J. (P/CA) – I agree

Notice refused.