

DHARMADASA GOMES

v.

COMMISSIONER OF ELECTIONS AND ANOTHER

COURT OF APPEAL
DE SILVA, J. (P/CA)
AMARATUNGA, J.
C.A. 1045/2001
JULY 31TH, 2000

Writ of Prohibition - Commissioner of Elections - Referendum Act 7 of 1982 - S. 2 - Constitution - Articles 82, 83, 85, 86, and 140 - Interpretation Ordinance S. 24, S. 24(1), S. 24(2) - Holding of a Referendum - Can the Commissioner of Elections consider its validity? Applicability of S. 24 on State Officers.

The petitioner sought a Writ of prohibition preventing the Commissioner of Elections from holding a Referendum directed to be held by a Proclamation issued by the President in terms of Section 2.

It was contended that the President has no power to issue a Proclamation and the Commissioner of Elections has a discretion not to carry out the directions given by the President, as such directions are illegal.

Held :

- (i) The Commissioner has no judicial power to consider the validity of the acts of the Hon. President in calling for Referendum or Election.
- (ii) Where public officers are acting in their official capacity, Section 24 of the Interpretation Ordinance, would apply and no injunction would lie in the circumstances.

Per J. A. N. de Silva, P/CA.

"If the relief prayed for is granted it would amount to an injunction against the State, as the President under whose direction the Commissioner of Elections is to hold the Referendum, is the Head of State.

- (iii) The Commissioner of Elections being a Public Officer is covered by Section 24.

APPLICATION under Article 143 and 14(1) of the Constitution.

Cases referred to :

1. *Samaraweera and another v. Sunpower Systems (pvt)Ltd and another* - 1996 - 1 SLR 246.

Petitioner in person.

Saleem Marsoof, P.C., A. S. G., with State Counsel Rajiv Goonetilleke for Attorney - General.

Cur. adv. vult.

August 02, 2001.

J. A. N. DE SILVA, J. (P/CA)

This is an application for a writ of Prohibition preventing the 1st respondent the Commissioner of Elections from holding a Referendum directed to be held by the Proclamation dated 10. 07. 2001 issued by the President in terms of Section 2 of the Referendum Act No 7 of 1982. The petitioner Pattiyage Dharmadasa Gomes, who is an Attorney-at-law has not used the words "Writ of Prohibition" in paragraph (C) of the prayer to his petition. That paragraph merely prays to "prohibit" the holding of the Referendum. The caption of his petition refers to Article 140 of the Constitution. Since the said Article refers to a Writ of Prohibition we proceed on the basis that he has sought by his petition a Writ of Prohibition.

When this application came up for support on 18. 07. 2001, this Court, without formally issuing notice as prayed for in prayer (a) of the petitioner's application, has directed the Hon. Attorney General to appear in this Court to assist the Court and adjourned further hearing for 25. 07. 2001.

When the hearing resumed on 25. 07. 2001, in deference to the request made by this Court, Mr. Saleem Marsoof, President's Counsel, Additional Solicitor General with a State Counsel appeared in this Court to assist Court.

However before we consider the submissions of the petitioner I would like to advert to the pleadings. For this purpose I reproduce below verbatim paragraph 10 of the petitioners application.

(10) "The petitioner humbly states that Article 85 is very clear as to what are the types of bills that be placed before the people. The President ordered under Article 86 to hold a Referendum on a matter of National Importance. But ordering a Referendum under Article 86 has to be ordered subject to Article 85. Where Article 85 is very clear as to what type of bills that can be placed before the people. According to Article 85 no bill which touches the Constitution cannot be placed before the people.

The framers of this Constitution has specifically mentioned in Article 85 there cannot be any change in the Constitution or calling the people for a new Constitution as the framers have included very clear Articles namely Article 82 and 83 to change, to amend, to add or to introduce a new Constitution, replace this Constitution with a new Constitution."

From the paragraph quoted above it is difficult to gather the exact proposition put forward by the petitioner in his petition. However in his oral submissions before this Court the petitioner submitted that in terms of Article 86 the Presidents' power to submit any matter of National Importance to the people by referendum is limited by the words used in Article 85 of the Constitution.

It is relevant to note that the petitioner has prayed for the following reliefs in his petition.

- (a) To issue notice on the respondents.
- (b) To grant interim relief by issuing an Injunction on the 1st respondent taking any steps to hold a Referendum until the determination of the petition. If the 1st respondent is allowed to carry out an illegal order will result an irremediable mischief which might cost millions of public funds.
- (c) To prohibit the 1st respondent holding the Referendum which had been ordered by the President of Sri Lanka who has no Constitutional right to order an Referendum for a new Constitution.

(d) To order the 1st respondent not to carry out any unconstitutional and illegal orders by any person including the President of Sri Lanka.

(e) Costs.

(f) Such other and further relief as to your Lordships Court shall seem meet.

It is also pertinent to note that the petitioner has not prayed to quash the Proclamation of the President directing the Commissioner of Elections to have a Referendum. In these circumstances it is redundant to examine the power of the Hon. President to issue a Proclamation and to have a Referendum. The main contention of the petitioner was that the President has no power to issue a Proclamation and the Commissioner of Elections has a discretion not to carry out the directions given by the President as such directions are illegal. We are not in agreement with this proposition. We hold that the Commissioner of Elections has no judicial power to consider the validity of the acts of the Hon. President in calling for Referendum or Elections.

We are also mindful of the fact that Section 24 of the Interpretation Ordinance has placed limitations on Court with regard to the issuing of injunctions on State Officers.

Section 24(1) of the Interpretation Ordinance precludes any Court from granting injunctions against the State, a Minister or Deputy Minister upon any ground whatsoever. Furthermore, by Section 24(2), a Court is even precluded from granting an injunction against a public officer if the effect of so doing would amount to directly or indirectly restrain the State.

Section 24 mentioned above read as follows.

"(1) Nothing in any enactment, whether passed before or after the commencement of this Ordinance, shall be deemed to confer upon any Court jurisdiction to grant injunctions or

to make orders for specific performance against the State, a Minister or Deputy Minister, upon any ground whatsoever.

- (2) No Court shall upon any ground whatsoever grant any injunction or make any order against a public officer, if the effect of the granting of such injunction or the making of such order would be, whether directly or indirectly, to restrain the State, a Minister or a Deputy Minister from proceeding with, or to compel the performance by the State, a Minister or a Deputy Minister of, any matter or thing.
- (3) Where before the coming into operation of the section, any injunction has been granted by any Court, which injunction such Court would not have had the jurisdiction to grant if this section had then been in operation, such injunction shall for all purpose be deemed to have been and to be null and void and no force or effect in law.
- (4) In this section, "injunction" includes a permanent or interim injunction, whether ex parte or otherwise, an enjoining order, or any other order having the effect of staying or restraining any person or authority referred to in the preceding subsections.
- (5) The preceding provisions of this section shall not be deemed to affect the power of any Court to make an order declaratory of the rights of parties.
- (6) The provisions of this section shall have effect notwithstanding section 6 or any other provisions of this Ordinance or the provisions of any other law."

The decision in *Samaraweera and Another v. Sunpower Systems (Pvt.) Ltd. and Another* has a direct bearing on this issue. It was held in that case, inter alia that where public officers are acting in their official capacity, section 24 of the Interpretation Ordinance would apply and no injunction would lie in the circumstances.

It is observed that if the relief prayed for in this applications is granted, it would amount to an injunction against the State, as the President under whose direction the Commissioner of Elections is to hold the Referendum, is the Head of State.

The Commissioner of Elections being a public officer is covered by Section 24 of the Interpretation Ordinance. Therefore this Court cannot grant any of the reliefs prayed for by the petitioner. In the circumstances this application is dismissed however without costs.

Application dismissed.