

JAYASINGHE AND OTHERS
v.
**R. S. JAYARATNE, SECRETARY, MINISTRY OF PUBLIC
ADMINISTRATION AND OTHERS**

SUPREME COURT
FERNANDO, J.,
GUNASEKARA, J. AND
WEERASEKERA, J.
S.C. APPLICATION NOS. 770/97, 772/97 AND 798/97
JULY 6, 1999.

Fundamental Rights – Reference of an application to the Human Rights Commission – Human Rights Commission Act, No. 21 of 1996 – Powers of the Supreme Court and the duty of the Commission upon a reference made in terms of section 12 of the Act.

The Supreme Court referred three fundamental rights applications to the Human Rights Commission (the Commission) established under the Human Rights Commission of Sri Lanka Act, No. 21 of 1966, in terms of section 12 thereof. The Chairman of the Commission requested clarification from the Court on two matters.

- (1) Section 12 (1) confers powers on the Court to make a reference "in the course of a hearing of an application" : does that provision empower the Court to make a reference only after leave to proceed has been granted?
- (2) Section 12 (2) casts a duty on the Commission to "inquire and report": does that provision require or enable the Commission to express its view upon the question whether the relief prayed for should be granted?

Held:

1. Seeking leave to proceed occurs during the "hearing" of, or the "inquiring" into, a fundamental rights application, and the Court is empowered to make a reference under section 12 (1) even before the grant of leave to proceed.

2. While section 12 empowers the Court to refer a matter to the Commission, it is quite clear that the Court cannot delegate its powers and jurisdiction to the Commission, and will not be bound by the findings and views of the Commission. The Commission itself cannot delegate its powers to one or more of its members. The purpose of a reference under section 12 is to obtain the benefit of the collective wisdom of all the members of the Commission.

Per Fernando, J.

"... a request by this Court for the "views" or "recommendations" of the Commission would be within the scope of the "inquiry and report" contemplated by section 12 read with section 11 (e)."

3. Upon a reference under section 12, the Commission is obliged to inquire into and submit a report containing the Commission's findings upon the matter referred to it, together with the reasons therefor; also to submit its views and recommendations, if so required by the Court; and to take other steps as it may be directed to take by the Court in terms of section 11 (e). Such findings, views and recommendations will not bind either the parties or the Court. (*Obiter*) The provisions of section 26 (2) of the Act provides for non disclosure of any document received by or any matter or thing coming to the notice of, the Commission in the course of any inquiry or investigation under the Act, to any Court. The expression "Court" in that section does not include the Supreme Court.

APPLICATIONS for infringement of fundamental rights (directions to the Human Rights Commission).

D. S. Wijesinghe, PC with *Gayathri Fernando* for the petitioners in No. 770/97 and No. 772/97.

R. K. W. Goonasekera with *Shiranthi Jayatilleke* for the petitioner in No. 798/97.

Asanga Gunawansa for the respondents.

Cur. adv. vult.

September 24, 1999.

FERNANDO, J.

Orders were made by this Court in October, 1997, referring these three fundamental rights applications to the Human Rights Commission (the Commission) established under the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, for inquiry and report. Leave to proceed had not been granted. The Commission submitted a report dated 28.10.98 from which it was not clear what the findings and recommendations of the Commission were. On 27.1.99 the Court called for the Commission's findings and recommendations.

Part II of that Act deals with "Powers of Investigation of the Commission", and section 12 provides:

- "(1) The Supreme Court may refer any matter arising in the course of a hearing of an application made to the Supreme Court under Article 126 of the Constitution to the Commissioner for inquiry and report.
- (2) The Commission shall inquire and report to the Supreme Court on the matters referred to it under subsection (1), within the period, if any, specified in such reference."

The Chairman of the Commission by his letter dated 23.2.99 requested clarification from this Court on two matters:

- (1) Section 12 (1) confers power on this Court to make a reference "in the course of a hearing of an application" : does that provision empower this Court to make a reference only *after* leave to proceed has been granted?
- (2) Section 12 (2) casts a duty on the Commission to "inquire and report": does that provision require or enable the Commission to express its views upon the question whether the relief prayed for should be granted?

All counsel appearing in these three applications, having previously made written submissions, made oral submissions on 6.7.99.

(1) STAGE AT WHICH A REFERENCE MAY BE MADE

A fundamental rights application is in two stages: initially, an *ex parte* request for leave to proceed (at which stage the question for decision is whether an infringement has been established *prima facie*), and then, if leave is granted, the determination of all matters arising in the application after the respondents have been afforded an opportunity of filing pleadings, and both sides have been heard. While the first stage is usually *ex parte*, there have been more than a few occasions on which the Court has heard the Attorney-General, or other respondents, even before granting leave.

A verbal distinction is often drawn between those two stages: by describing the first as being "for grant of leave" or "for support", and the second as being "for hearing", or "for argument". But, that is not of much assistance in determining whether the phrase "in the course of a hearing of an application" used in section 12 covers only the stage after the grant of leave.

In my view, the plain meaning of a "hearing", in the context of adjudication, is a proceeding in the course of which the Court "hears" (or *listens to*) the evidence and/or arguments adduced by or on behalf of one party (if it is an *ex parte* proceeding) or both parties (if it is *inter partes*); and that would usually take place in open Court (and, most exceptionally, in Chambers). When leave to proceed is sought, reference is made to affidavits and documents, and legal arguments are advanced, and I have no doubt whatever that that constitutes "a hearing" of the application. Although that is only a *preliminary* (and not a *final*) hearing, it is nevertheless a hearing. Further, it seems to me that section 12 is not intended to be confined to just two stages – of seeking leave, and the subsequent inquiry – but would apply to all other intermediate stages at which a fundamental rights application comes up for consideration in open Court: including, for

instance, an application for interim relief, or for an order for the production of documents, or for the addition or substitution of parties. If at any stage of the proceedings the Court considers that the assistance of the Commission would be useful, section 12 permits recourse to it.

The Sinhala text draws no distinction between a "hearing" by this Court and an "inquiry" by the Commission: the word "*vibhagaya*" is used in both instances. This Court can therefore make a reference while it is "inquiring" into a fundamental rights application.

I hold that seeking leave to proceed occurs during the "hearing" of, or the "inquiry" into, a fundamental rights application, and that this Court is empowered to make a reference under section 12 (1) even before the grant of leave to proceed.

That interpretation gains support from a consideration of the pre-existing practice of this Court (in the context of which section 12 was introduced) as well as the provisions of sections 14 and 15 of the Act, to which I must now turn.

(a) Previous practice:

This Court does not grant leave to proceed unless a *prima facie* case has been made out. Sometimes counsel who has failed in that respect implores the Court nevertheless to grant leave, confidently asserting that the material which the respondents themselves will produce with their objections will prove the petitioner's case. I have often pointed out that such a submission recognises that if the respondents file no objections, the petitioner must fail. The invariable practice of the Court has been to refuse leave if a *prima facie* case has not been made out.

However, there are exceptions to that rule. When it appears to the Court that a *prima facie* case has not been made out, due to the lack of material which seems likely to be forthcoming from official

or independent sources – to which the petitioner lacks access – the Court often postpones the decision whether or not to grant leave, and makes an attempt (in the interests of justice) to obtain that material. This it does, sometimes by asking the Attorney-General to assist as *amicus curiae*, and sometimes by directing a respondent or a third party to produce documentary evidence. Thus, when petitioners complain of torture, unlawful detention, and denial of access to lawyers, the Court may call for the production of medical records from Prison hospitals, detention orders, and Police reports filed in Magistrate's Courts, in order to determine whether *prima facie* violations of Articles 11 and 13 have been established. If the Court had narrowly interpreted its power to call for such material, so as to confine it to the stage *after* leave had been granted, many a meritorious claim would have failed for want of evidence which – despite the exercise of due diligence – could not have been obtained without a Court order. Not only does the grant of a jurisdiction generally carry with it, by necessary implication, such powers as are necessary to make that jurisdiction effective, but in any event the Constitutional jurisdictions of this Court must be interpreted broadly rather than narrowly, so that "fundamental rights shall be respected, secured and advanced" by this Court in compliance with Article 4 (d).

In like manner, I have no doubt that the purpose of a reference to the Commission under section 12 was to make the fundamental rights jurisdiction more fruitful and effective. In the absence of words of limitation, there is no reason to think that Parliament intended this Court to have the benefit of assistance from the Commission only after leave is granted. Section 11 (e) provides, with no hint of any limitation:

"For the purpose of discharging its functions the Commission may exercise any or all of the following powers: . . . (e) take such steps as it may be directed to take by the Supreme Court, in respect of any matter referred to it by the Supreme Court; . . . "

Likewise, section 28 imposes duties on officials, who arrest or detain persons, to inform the Commission, and the Commission may authorize its agents to visit Police stations, prisons, and places of detention. The Commission will thus have valuable contemporaneous information about the time of arrest and the places and conditions of detention, and whether a detainee has fresh injuries or shows signs of ill-treatment. There is no reason to think that Parliament intended that this Court should be denied the benefit of such information when it is considering whether to grant leave to proceed.

(b) Sections 14 and 15:

Section 12 occurs in the same part as sections 14 and 15. Section 14 empowers the Commission, on its own motion or on a complaint made to it, to investigate alleged fundamental rights infringements. Where such investigation discloses an infringement or imminent infringement by executive or administrative action, the Commission has power to refer the matter for conciliation or mediation. Where the Commission considers such reference inappropriate, or where any of the parties object, or where such conciliation or mediation is unsuccessful, the Commission may, under section 15 (3):

- "(a) recommend to the appropriate authorities that prosecution or other proceedings be instituted against the person or persons infringing such fundamental right;
- (b) refer the matter to any court having jurisdiction to hear and determine such matter in accordance with such rules of court as may be prescribed therefor, and within such time as is provided for invoking the jurisdiction of such Court, by any person;
- (c) make such recommendations as it may think fit, to the appropriate authority or person or persons concerned, with a view to preventing or remedying such infringement, or the continuation of such infringement."

This Court has sole and exclusive jurisdiction to hear and determine any question relating to the alleged infringement or imminent infringement by executive or administrative action of any fundamental right, and hence it is only to this Court that the Commission can refer a matter under section 15 (3) (b). Our attention was not drawn to any relevant regulations or rules of Court which have been made. While it is, therefore, not clear how exactly such a reference may be made, how this Court will decide whether to entertain it, and what procedure should be followed in hearing and determining such matter, what is important, for the present purpose, is that the Commission can only make a reference to this Court if and when its investigations disclose an infringement or imminent infringement of a fundamental right by executive or administrative action. It must, therefore, have evidence before it (and sections 18 and 19 make provision for the taking of evidence), justifying the conclusion that there has been an infringement or that an infringement is imminent. Any reference which it then makes will necessarily be before the grant of leave to proceed.

Thus, when the Commission makes a reference to this Court it will inform this Court – *before* the grant of leave – of the facts found by the Commission and its conclusions. I cannot discern from the Act, or elsewhere, any principle which would justify a different result when the Commission is called upon to make a report to this Court (upon a reference under section 12): what possible prejudice or harm could there be if the Commission similarly discloses to this Court the facts found and its conclusions, *before this Court* grants leave to proceed? If it is suggested that the Court might be "influenced" by the Commission's report, that will apply equally to a reference by the Commission. Since the Act does not expressly prohibit the making of a reference by this Court, or the submission of a report by the Commission, until *after* the grant of leave to proceed, section 12 must be interpreted, harmoniously with sections 14 and 15, so as to permit a reference *before* the grant of leave to proceed.

(2) EXPRESSION OF VIEWS BY THE COMMISSION

While section 12 empowers this Court to refer a matter to the Commission, it is quite clear that this Court cannot *delegate* its powers and jurisdiction to the Commission, and will not be bound by the findings and views of the Commission.

At the same time, the "inquiry and report" contemplated by section 12 is not simply a matter of securing the production of relevant documents and the recording of evidence of witnesses; the Commission is not expected merely to conduct an investigation, and to submit its notes of investigation to this Court. Upon a reference I hold that the Commission must act in much the same way as upon a complaint under section 14 – the Commission must analyse the evidence and ascertain whether it discloses an infringement or an imminent infringement of a fundamental right by executive or administrative action.

The view that the function of the Commission upon a reference under section 12 is not simply to record evidence is supported by another consideration. Section 2 of the Act establishes the Commission as a body corporate, which "shall" consist of five members. It would appear that the Commission must act through *all* its members, because the Act makes provision neither for a quorum nor for the delegation of the powers of the Commission to one or more of its members; section 7 only enables the Commission to act notwithstanding a vacancy or a defect in the appointment of a member. The purpose of a reference under section 12 was thus to enable this Court to obtain the benefit of the collective wisdom of *all* the members of the Commission, and not just its notes of investigation.

Section 15 (3) (b) does not refer to "recommendations". On the other hand, a reference by this Court may involve some rule or practice which a petitioner claims has given rise to the alleged infringement; the Court may wish to have assistance as to the changes which are desirable and/or feasible. Likewise, the Court may wish to be advised whether the grant of the relief sought by the petitioner may give rise

to anomalies or injustices. In that context, a request by this Court for the "views" or "recommendations" of the Commission would be within the scope of the "inquiry and report" contemplated by section 12, read with section 11 (e).

I hold that upon a reference under section 12 the Commission is obliged to inquire into and submit a report containing the Commission's findings upon the matter referred to it, together with the reasons therefor; also to submit its views and recommendations, if so required by this Court; and to take any other steps as it may be directed to take by this Court in terms of section 11 (e). Such findings, views and recommendations will not bind either the parties or this Court.

The provisions of section 26 (2) need consideration:

"A member of the Commission . . . shall not be required to produce in any Court, any document received by, or disclose to any Court any matter or thing coming to the notice of, the Commission in the course of any inquiry or investigation conducted by the Commission under this Act, except as may be necessary for the purpose of proceedings for contempt or for an offence under this Act."

Considered in isolation, that provision would seem to authorize non-production and non-disclosure to this Court, and that would be inconsistent with the duties imposed on the Commission by other provisions of the Act (including sections 11 (e) and 12). I hold that, when section 26 (2) is construed in the context of the entire Act, "Court" does not include this Court.

The Commission is directed to forward its findings and recommendations in all these cases on or before 30.11.99.

GUNASEKERA, J. – I agree.

WEERASEKERA, J. – I agree.

Powers of the Supreme Court and duties of the Human Rights Commission determined.