IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for writs in the nature of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Rasiah Thurairatnam

Petitioner

Vs

CA 178/2012

1. Sivanesathurai Chandraknthan
   Chief Minister- Eastern Province
2. Rear Admiral (Retd) Mohan Wijewickrama
   Governor, Eastern Province.
3. M S Subair, Minister of Health
   Eastern Provincial Council.
4. T Navaratnarajaj Minister of Agriculture
   Eastern Provincial Council.
5. M. S. Uthuma Lebbe, Minister of Road Development, Irrigation Housing and Construction, Rural Electrification and Water Supply – Eastern provincial Council.
6. Wimalaweera Dissanayake. Mimister of Education - Eastern provincial Council.
7. Daya Gamage. Leader of the Opposition. Eastern provincial Council.
8. Mahinda Deshapriya. Commissioner of Elections.

Respondents

Before : Sisira de Abrew J
Anil Gooneratne J
A.W.A.Salam J

Counsel : Kanag Iswaran P.C. with MA Sumanthiran and B Fonseka for the Petitioner
Faiz Musthapa P.C. with Kuwera de Zoysa, NM Shaheed, Ashiq Hassim and J Kroon for the 1st Respondent.
Janak de Silva DSG with Sumathi Dharmawardene SSC and Sanjaya Kodithuwakku for the 2nd and 8th Respondents.
Faizer Mustapa for the 3rd Respondent
Kalinga Indatissa with Niroshan Siriwardene Indika Giragama and Kosala Perera for the 4th Respondent
Kushan de Alwis with Chamath Fernando instructed by Mary Dickman for the 5th Respondent
MUM Ali Sabri with Kasun Premarathne and Athula de Silva for the 6th Respondent
Eroj de Silva instructed byPaul Ratnayake Associates for the 7th Respondent

Argued on : 25.07.2012, 26.07.2012, 30.07.2012
Decided on : 9.08.2012

Sisira de Abrew J.

The Petitioner who was a member of the Eastern Provincial Council states that on 23.04.2012 S.Pushparaja, a member of the Eastern Provincial Council gave notice of an urgent resolution to be taken up on 24.04.2012 and requested that the resolution be included in the agenda of the Provincial Council. The said resolution marked P3 stated *inter-alia* the following matters;

1. There were many reports in the news papers to the effect that the Eastern Provincial Council would be dissolved before expiration of its 5 year term which ends after 10.05.2013.
2. The dissolution of the Eastern Provincial Council would occasion a loss of faith by the people in the Government and the Provincial Council.

3. Eastern Provincial Council should continue to function until the end of its term.

The Petitioner states that the said Resolution was taken up for discussion and adopted without objection. However the 2nd Respondent (2R), by gazette Notification dated 27.06.2012 (P1), dissolved the Eastern Provincial Council with effect from midnight 27.06.2012. The Petitioner in this Petition, among other things, challenged the decision of the 2R. The 8th Respondent (8R) has, as a result of the said dissolution, taken steps to conduct election for the Eastern Provincial Council. The Petitioner filed this Petition in this court seeking following reliefs:

(a). Issue notice on the Respondents

(b). Make an interim Order suspending the second Respondent's decision to dissolve the Eastern Provincial Council reflected in P1 until the hearing and final determination of this application

(c) make an interim order preventing the 8th Respondent and /or his officers, subordinates or agents from taking any steps whatsoever to hold elections to the Eastern Provincial Council until the hearing and final determination of this application

(d). Grant an issue a Mandate in the nature of a Writ of Certiorari quashing the aforesaid advice if the 1st Respondent to the 2nd Respondent to dissolve the Eastern Provincial Council; AND/OR

(e). Grant an issue a Mandate in the nature of a Writ of Certiorari quashing the decision aforesaid of the 2nd Respondent reflected in P1 to dissolve the Eastern Provincial Council on 27th June 2012 ; AND/OR

(f). Grant an issue a Mandate in the nature of a Writ of Prohibition preventing the 8th Respondent and /or his officers, subordinates or agents from taking any steps to hold elections to the Eastern Provincial Council arising as a

consequence of the dissolution complained of in these proceedings; AND/ OR

(g). Grant an issue a Mandate in the nature of a Writ of Certiorari quashing any steps taken by the 8th Respondent and /or his officers, subordinates or agents from taking any steps to hold elections to the Eastern Provincial Council arising as a consequence of the dissolution complained of in these proceedings;

(h) Grant costs;

Learned President's Counsel for the petitioner (PC) drew the attention of Court to several Articles in the Constitution in the 13th Amendment. Article 154F(1) states as follows.

"There shall be a Board of Ministers with the Chief Minister at the head and not more than 4 other Ministers to aid an advice the Governor of a Province in the exercise of his functions. The Governor shall, in the exercise of his functions, act in accordance with such advice, except in so far as he is by or under the Constitution require to exercise his functions or any of them in his discretion."

Learned P.C. for the Petitioner drawing our attention to the above article contended that the Governor (2R) in the exercise of his powers to dissolve the Provincial Council must, in terms of the said Article [154 F (1) of the constitution], act on the advice of the Board of Ministers of the Provincial Council. In order to appreciate this contention it is necessary to consider Article 154 B(8) of the Constitution which reads as follows:

"8(a) omitted

8(b) The Governor may, from time to time, prorogue the Provincial Council.

8(c) The Governor may dissolve the Provincial Council

8(d) The Governor shall exercise his powers under this paragraph in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the provincial Council."

Although learned PC contended on the above lines, Article 154F(1) of the Constitution states that the Governor has to act on the advice of the Board of Ministers of the Provincial Council in accordance with his functions. This article does not talk about the dissolution of the Provincial Council. Article 154B(8) does not talk about a situation where the Governor has to act on the advice of the Board of Ministers of the Provincial Council in the exercise of his powers to dissolve the Provincial Council. In the exercise of the Governor's powers to dissolve the Provincial Council, whose advice he has to act on in terms of Article 154B(8) of the Constitution? It is the advice of the Chief Minister. For these reasons I reject the contention of learned PC for the petitioner.

Learned PC for the petitioner drawing our attention to Article 154B (8) of the Constitution next contended that for the Governor to exercise his powers under this Article, he must form the opinion that the Board of Ministers commands the support of the majority of the Provincial Council **on the question of dissolution.** But when I consider Article 154 B (8) (d), it does not support the above contention. What it says is that the Governor must form the opinion that the Board of Ministers commands the support of the majority of the Provincial Council. Does it say that particular subject must be specified when the Governor forms the opinion envisaged in 154B(8)(d) of the Constitution? The answer is NO. Even the other Articles of the 13th Amendment do not support this contention. What Article 154B(8)(d) says is that the Governor must form the opinion that the

Board of Ministers commands the support of the majority of the Provincial Council. For these reasons I reject the said contention of learned PC.

Learned PC for the petitioner next contended that the Governor could not have dissolved the Provincial Council in view of the resolution P3. What P3 says is that the Eastern Provincial Council should continue to function its full term. In short what it says *inter alia* is that the Provincial Council should not be dissolved before the expiration of its full term. Can the Provincial Council pass such a resolution? Under our Constitution who is empowered to dissolve the Provincial council? Is it the Provincial council? The answer is no. It is the Governor who is empowered to dissolve the Provincial Council. P3 has the effect of nullifying the power of dissolution of Provincial Council given to the Governor by the Constitution. If P3 is accepted as a correct legal document then the Governor cannot act under Article 154B(8)(d) of the Constitution. Therefore P3 has no validity in law. I therefore hold that there is no duty on the part of the Governor to act on P3.

Further according to Section 27(e) of Regulations made under the Provincial Council Act No 42 of 1987 marked as 2R1A, Provincial Council cannot pass resolution indicating the manner in which the President, Governor, Minister, Member of Parliament, Member of Provincial Council, or any officer should work. But P3 has indicated that the Provincial Council should not be dissolved before expiration of its full term. Thus it indicates that as to how the Governor should act on the question of dissolution of the Provincial Council. Therefore it is clear that P3 is against Section 27(e) of the said Regulations. For these reasons I hold that the Governor had no duty to act on P3. Further it has to be noted that after P3 was adopted, the Chief Minister, by document marked 2R3 dated 27.6.2012, advised the Governor to dissolve the Provincial Council. The Eastern

Provincial Council consists of 37 members. The Chief Minister along with his letter of advice marked 2R3 has annexed affidavits of eighteen members of the Provincial Council stating that the Board of Ministers of the Eastern Provincial Council commands their support. Thus the said affidavits and the letter of Chief Minister indicate that the Board of Ministers of the Eastern Provincial Council commands the support of the majority of the Provincial Council. Thus the above material would indicate that even after the adoption of resolution there was evidence for the Governor to form the opinion that the Board of Ministers commands the support of the majority of the Provincial Council. I am therefore unable to agree with the said submission of learned PC for the petitioner.

It was contended on behalf of the petitioner that the letter of advice sent by the Chief Minister to the Governor on 27.6.2012 would tarnish confidence that the Provincial Council members had with the Board of Ministers and that therefore Governor should, after he received the said letter of advice, ascertain from the members of the Provincial Council whether they would still support the Board of Ministers. On this point learned Counsel stressed the fact that the affidavits had been signed on 21.06.2012. Mr Sunanthiran learned counsel for the petitioner (As Mr. Kanag Iswaran President's Counsel was not available after the first day his learned junior Mr. Sumanthiran appeared for the petitioner from the 2nd day) contended that the Governor could not have acted on the said affidavits and he should have gone to the floor of the house of the Provincial Council and ascertained whether the Board of Ministers commanded the support of the majority of the Provincial Council. Cannot the Governor form the opinion on the affidavits signed by the 18 members and the letter of the Chief Minister? It would be pertinent to consider the judgment of the Privy Council in Adegbenro Vs Akintola [1963]AC 614 in order to find an answer to this question. Facts of that

case are briefly as follows: After receipt of a letter signed by a majority of members of the House of Assembly for Western Nigeria stating that they no longer supported the Premier, Governor removed him from office. In removing the Premier from office, Governor acted on receipt of the said letter dated 21st of May 1962, signed by 63 members of the House of Assembly in which it was stated that they no longer supported Chief Akintola. The House of Assembly consisted of 124 members. The proceedings were commenced by a writ of summons dated 21st of May 1962 by the 1st respondent who was then Premier of Western Nigeria against the Governor of Western Nigeria, the 2nd respondent, claiming a declaration that the Governor had no right to relieve the Premier from office in the absence of a prior resolution of the House of Assembly reached on the floor of the House to the effect that the Premier no longer commands the support of the House. When the case came up before the Chief Justice of the Western Region it was agreed by counsel for all parties that the following issues be referred to Federal Supreme Court pursuant to Section 108 of the Constitution of the Federation of Nigeria:

1. Can the Governor validly exercise power to remove the Premier from office under Sec 33 (10) of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House?

2. Can the Governor validly exercise power to remove the Premier from office under Sec 33 (10) of the Constitution of Western Nigeria on the basis of material or information extraneous to the proceedings of the House of Assembly?

After overruling preliminary objections the Federal Supreme Court by a majority answered the question in the following terms:-

The answer to the 1st question is that the Governor cannot validly exercise power to remove the Premier from office under Section 33(10) of the Constitution of Western Nigeria except in consequence of proceedings on the floor of the house whether in the shape of a vote of no confidence or of a defeat on a major measure or of a series of defeats on measures of some importance showing that the Premier no longer commands the support of a majority of the members of the House of Assembly. The court found it unnecessary to answer the 2nd question.

The appellant appealed to the Privy Council. Section 33(10) of the Constitution of Western Nigeria reads as follows:

"Subject to the provisions of sub-ss 8 and 9 of this Section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure: Provided that- (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; and (b) the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier."

Privy Council held: "Under the Constitution of Western Nigeria there is no limitations on the persons whom the Governor may consult or the material to which he may resort in determining whether the condition set out in Sec.33(10) of the Constitution empowering him to remove the Premier from office is satisfied, the condition being that it appears to the Governor that the Premier no longer commands the support of a majority of the members of the House of Assembly. The Governor could validly exercise the power to remove the Premier from office

under Sec.33(10) of the Constitution of Western Nigeria without there having been a prior decision or resolution on the floor of the House of Assembly showing that he no longer commanded the support of the majority of the House; and the Governor could act in this respect on the basis of material or information extraneous to the proceedings of the house of Assembly."

According to this judgment the Governor could act on the basis of material or information extraneous to the proceedings of the House of Assembly. Under the Constitution of Western Nigeria the Governor has to form the opinion under Section 33(10) of the Constitution that the Premier no longer commands the support of the majority of the members of the House of Assembly. Under article 154B (8) (d) of our Constitution too, the Governor has to form the opinion that the Board of Ministers commands the support of the majority of the provincial Council. When I consider this judgment and Article 154B(8)(d) of our Constitution, I hold the view that the Governor could, without going to the floor of the House, form the said opinion on credible evidence before him. But this does not mean that the Governor is precluded from forming his opinion on the floor of the house. In the instant case has anyone of the 18 members withdrawn the affidavits signed by them? The answer is no. Then it is reasonable for the Governor to form the opinion that the stand that they had taken in the affidavits remains unchanged. For the above reasons I hold that the Governor could form the opinion on the affidavits signed by the 18 members and the Chief Minister's letter.

When I consider the contention of learned counsel for the petitioner I have to consider paragraph 8 of the Governor's affidavit which reads as follows: "In the light of the aforesaid communication dated 27th of June 2012 from the Chief Minister of the Eastern Provincial Council and the certified affidavits of 18 Provincial Council members tendered therewith, I form the opinion that the Board

of Ministers of the Eastern Provincial Council commanded the support of the majority of the Eastern Provincial Council. Therefore I, acting in terms of the powers vested in me by Article 154B (8) of the Constitution of the Democratic Socialist Republic of Sri Lanka in accordance with the advice tendered by the Chief Minister of the Eastern Province, dissolved the Eastern Provincial Council with effect from midnight 27th June 2012."

The above paragraph shows that the Governor has formed the opinion after he received the affidavits of 18 Provincial Council members and the Chief Minister's letter. Article 154B(8)(d) of the Constitution provides that the Governor can exercise his powers to dissolve the Provincial Council in accordance with the advice of the Chief Minister so long as Board of Ministers in his opinion, commands the support of the majority of the Provincial Council. The above paragraph of the Governor's affidavit shows that at the time of dissolution he had formed the opinion that the Board of Ministers commanded the support of the majority of the Provincial Council. Therefore the above contention advanced on behalf of the Petitioner has to be rejected.

The Petitioner contends that the Chief Minister, in view of the resolution P3 could not have advised the Governor to dissolve the Provincial Council and that therefore his decision (Chief Minister's decision) is void. The resolution was adopted on 24.04.2012. The dissolution was on 27.06.2012. If the above contention is right when the Chief Minister expresses his opinion that the Provincial Council should run for its full term he cannot later advice the Governor to dissolve the Provincial Council. Cannot the Chief Minister who, on a previous occasion, spoke in support of the period of full term, later change his decision? This question should be answered in the affirmative. If the above argument is

correct, Article 154B (8) (d) and 154F would be rendered nugatory. For these reasons I am unable to accept the said contention.

It appears from the material available, when the Governor decided to dissolve the Eastern Provincial Council, he had the following matters for his consideration

(a) He (the Governor) had the advice of the Chief Minister to dissolve the Provincial Council.

(b) At the time of dissolution he (the Governor) had formed the opinion that the Board of Ministers commanded the support of the majority of the Provincial Council.

Therefore the question that must be asked is whether the Governor, under these circumstances, can rightly dissolve the Provincial Council. On this matter, it is pertinent to consider the judgment of the Supreme Court in Maithripala Senanayake, Governor of the North Central Province and Another Vs Gamage Don Mahindasoma and Others [1998] 2SLR 333. In the said case the Chief Minister advised the Governor not to dissolve the Provincial Council. But the Governor dissolved the Provincial Council. Chief Minister challenged the dissolution in the Court of Appeal which set aside the dissolution. The Governor appealed to the Supreme Court. His Lordship Justice Amarasinghe affirming the judgment of the Court of Appeal at page 363 observed thus: "Since the Board of Ministers in the opinion of the Governor commanded the support of the majority of the Provincial Council, there was only one, uniquely right course of action prescribed – to follow the advice of the Chief Minister in deciding whether to exercise his power of dissolution. There was no discretion. By his failure to act in accordance with the

duty imposed on him by law, the Governor acted illegally." His lordship at page 367 observed further: "Where the Chief Minster advised Governor against dissolution, the Governor had no option in the matter: He was required by Article 154B (8) (d) to act in accordance with the advice of the Chief Minister, for the Governor was of the opinion that the Board of Ministers commanded the support of the Provincial Council."

When I consider the above legal literature I hold the view that the dissolution of the Provincial Council by the Governor which is in terms of Article 154B (8)(d) of the Constitution is right. The petitioner's case should therefore fail.

There is another matter that I should consider. There are 37 members in the Eastern Provincial Council. The petitioner has named only six members of the provincial Council. Thus he has failed to bring the other 30 members of the Provincial Council. What happens if we decide to quash the dissolution when they are content with the dissolution? Will our decision then affect their rights? Should we not hear them before we make a decision in this case? On this point I would like to discuss certain judicial decisions.

Jayawardene and Another Vs Pegasus Hotels of Ceylon Ltd [2004] 2 SLR 39 Court of Appeal observed the following facts: "The petitioner (employee) and the 2nd petitioner (Union) sought to quash the order made by the Commissioner giving approval to terminate the services of 36 employees subject to the payment of compensation. It was contended that the Commissioner failed to apply the law correctly in computing compensation, acted arbitrarily, did not make all inquiries and the order was unreasonable. The 8th respondent opposed the application and contended that all the employees are not named, especially those 30 employees who have accepted compensation, and the record has not been tendered to court."

Justice Saleem Marsoof (Justice Sripavan agreeing) held: "There is no doubt that the 30 employees who have accepted compensation will be affected but it appears that the majority of them were members of the 2nd petitioner union which is entitled to represent them." It appears from the above judgment that Union had represented all 36 members. The facts of the instant case are different to the facts of that case. In the instant case 30 Provincial Members are not represented. They are not parties to this case. Therefore the above judgment has no application to the facts of the instant case.

In Rawaya Publishers and others Vs Wijedasa Rajapaksha Chairman Sri Lanka Press Council & Otheres [2001] 3 SLR 213 Court of Appeal observed the following facts: "The petitioner sought to quash the order made by the respondents wherein they (the Sri Lanka Press Council) directed the petitioner to apologize to the complainant X within one monthfrom the receipt of the said order. The Complainant X was the Secretary General of the Janatha Vimukthi Peramuna (JVP). A preliminary objection was raised, that the said X in whose favour the order which is sought to be made has not been made a party to the application."

Justice JAN De Silva (as he then was) held that: "In the context of writ applications a necessary party is one without whom no order can be effectively made. The order of Press Council is in his (X) favour. The petitioner cannot be permitted to proceed with an application keeping the original complainant out of proceedings."

In Abeywardene and 162 Others Vs Dr. Stanly Wijesundara, Vice Chancellor, University of Colombo and Another [1983] 2 SLR 267 Court of Appeal observed the following facts: "The petitioners sought a writ of mandamus to issue on the respondents to compel them to hold the 2nd MBBS only for students

of the University of Colombo." Court held thus: "The whole petition is directed against the 115 students of the North Colombo Medical College and their exclusion from the 2nd MBBS examination. If a mandamus is issued they will be adversely affected. The 115 students of the North Colombo Medical College are necessary parties and the failure to make them respondents is fatal to the petitioner's application."

In Farook Vs Siriwardene, Election Officer and Others [1997] 1 SLR 145 the appellant was a member of the Colombo Municipal Council. After calling for his explanation, the recognized political party to which he belonged expelled him from the membership of the party by writing. A copy of the communication addressed to the appellant was sent to the Election Officer who gazetted the requisite notice of vacancy in the membership of the Council, in terms of Section 10A(1)(a) of the Local Authorities Election Ordinance. Consequently the recognized political party nominated a new member in terms of Section 65A(2) of the Ordinance. Supreme Court held thus: The failure to make the new member a party to the application is fatal to the validity of the application."

In B. Wijerathne, Commissioner of Motor Traffic Vs Venerable Dr. Paragoda SC Appeal No.84/2007 decided on 14.10.20, His Lordship Gamini Amarathunga (Justice Sripavan and Chandra Ekanayake agreeing) held thus: "A necessary party to an application for a writ of mandamus is the officer or the authority who has the power vested by law to perform the act or the duty sought to be enforced by the writ of mandamus. All persons who would be affected by the issue of mandamus also shall be made respondents to the application."

In my view if we decide to quash the dissolution, our decision would affect the rights of the other Provincial Council members who may be content with the

dissolution and the other Provincial Council members. I therefore hold that they are necessary parties and the petitioner has failed to bring them before Court. Applying the principles laid down in the above judicial decisions, I hold that failure to make them as parties is fatal and that the petitioner's case should be dismissed on this ground alone.

For the aforementioned reasons I dismiss the petition of the petitioner and refuse to issue notice on the respondents.

Petition dismissed.

Judge of the Court of Appeal

Anil Gooneratne J

I agree.

Judge of the Court of Appeal

AWA Salam J

I agree

Judge of the Court of Appeal