

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

In the matter of an application for Orders  
in the nature of Writs of Certiorari,  
Mandamus and Prohibition under Article  
140 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka.

C.A. (Writ) Application No. 373/2017

1. Warusamana Dewage Gedara  
Wijerathne alias Wadugedara  
Wijerathne  
885, William Gopallawa Mawatha,  
Kandy
2. Thotage Sirisena Fernando,  
62/5/A, Alwis Place, Kotahena,  
Colombo 03.
3. Rajapakshage Keerthi Mahinda  
Karunathilake Kumara,  
Temple Road, Kewitiya,  
Halmillawewa.
4. Dilantha Kanishka Ariyaratne,  
“Subhasiri Niwasa”, Enasalbedda,  
Pattiyagedara, Bandarawela.
5. Janaka Kumara Rajapaksha  
Senadheera,  
No P-70, Udawalawa.
6. Piladuwa Hewage Yohan  
Dhanushka,  
51 Handiya, Deniyaya.

**Petitioners**

Vs.

1. Faizer Musthapha,  
Minister of Provincial Councils  
and Local Government,  
No 330, Dr. Colvin R. de Silva  
Mawatha (Union Place),  
Colombo 02.
2. H. T. Kamal Pathmasiri,  
Secretary,  
Ministry of Provincial Councils  
and Local Government,  
No 330, Dr. Colvin R. de Silva  
Mawatha (Union Place),  
Colombo 02

Respondents

- Before** : L.T.B. Dehideniya J. (P/CA)  
: K.K.Wickramasinghe J.  
: Shiran Gooneratne J.
- Counsel** : N.M.Shaheed with Nishani Godellawatta Mohamed Rafi  
and Shihan for the Petitioners.  
: Arjuna Obeysekara SDSG with Nirmalan Wigneswaran  
and Dr. Avanthi Perera SSC for the Respondents.

**Argued on** : 15.11.2017 and 16.11.2017

**Decided on** : 22.11.2017

**L.T.B. Dehideniya J. (P/CA)**

The petitioners are seeking to quash the Gazette notification issued by the 1<sup>st</sup> Respondent, the Minister of Local government dated

17.02.2017 No. 2006/44 marked P3 on the basis that it is ultra vires. The Petitioners contention is that the Minister appointed committee under section 3D of the Local Authorities Elections (Amendment) Act No. 22 of 2012 has no authority to recommend to the Minister to alter the number of members for each ward of the Local Authority and the Minister has no power to issue such *Gazette* emending the number of members allotted to each ward.

The Attorney General first appeared on notice as amicus curiae and later representing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents raised several preliminary objections. Firstly delay, secondly not naming the relevant parties i.e. the Election Commission, thirdly misrepresentation of material facts and fourthly on locus standi. He further submitted that the alteration of the number of the members for each ward is an incidental matter to the alteration to the boundaries of the wards where the wards become larger or smaller with the alteration of the boundaries and sometimes new wards have been created and therefore the alteration of the number of the members allocated to each ward is an incidental matter to the alteration to the boundaries. His contention is the power to alter the boundaries includes the power to alter the number of members allocated for each ward. Further he submits that the alteration of the number of members allocated to wards is done only in about 2.5% of the wards out of more than 4000 wards.

Several parties moved to intervene in to this application on the basis that they are affected parties. They are political parties, civil rights movements, and intended candidates.

The Local Authorities Election (Amendment) Act No. 22 of 2012 has introduced a new Part named as Part 1 to the Principle Act, the Local Authorities Election Ordinance last amended by Act No. 14 of 2002

(hereinafter sometimes called and referred to as the Ordinance) facilitating re demarcation of the wards in Local Authorities.

Under section 3A of the Ordinance the Minister was empowered to establish a National Delimitation Committee. (National Committee) The section 3B mandated the National Committee to make the recommendations to the Minister for the division of each local authority area into wards, determine the boundaries, and assign a name and a number to each ward. Subsection (2) provides the requirements that have to be taken into consideration by the National Committee in doing so. Subsection (3) mandates that the National Committee with the power to recommend the creation of a multi member ward or wards for any local authority area. Under subsection (5) the National Committee is required to submit the report on its recommendations to the Minister.

The subsection 3C (1) makes it mandatory for the Minister to submit the report to the President forthwith. Thereafter subsection (2) makes it an obligation of the President to publish an order in the *Gazette* indicating;

- I. Number of wards,
  - II. The boundaries,
  - III. Names,
  - IV. Number,
  - V. Alphabetical letter in English assigned to each ward,
- in respect of each local authority.

If the National Committee has recommended the creation of multi member wards, then the President has to publish in the same *Gazette* the following details too.

- I. The name,

- II. The number or the alphabetical letter assigned to each such multi member ward
- III. The name of the respective local authority,
- IV. The total number of members to be elected to each multi member ward.

Section 3D (1) of the Amendment Act grants the authority to the Minister to cause alterations to the boundaries of the wards in the order published in the *Gazette* under section 3C. These alterations can be made only on the recommendation of a committee that has to be appointed by the Minister under that subsection. The requirements that have to be taken into consideration by this committee in making their recommendation to alter the boundaries are the same as the requirements that had to be taken into consideration by the National Committee. Subsection (2) requires the alterations recommended by the committee to be published in the *Gazette* by the Minister. The only alterations that can be made under this section are specified as alterations on;

- I. Boundaries,
- II. Names,
- III. Numbers or letters of each ward.

Under sections 3A to 3C the National Committee was empowered to make recommendations in creation of multi member wards and the President has to publish an order in the *Gazette* to that effect. The Legislature, in its wisdom, has taken away the power of creating multi member wards/changing multi member wards into single member wards from the Minister. The committee appointed by the Minister under section 3D (1) is not empowered to make any such recommendations too. Any recommendation made exceeding the power or authority granted to

the committee appointed under section 3D or any publication made on such recommendation is ultra vires.

The learned DSG for the Respondents submitted, referring to Wade and Forsyth on Administrative Law, Tenth Edition page 179 where it is stated that, "*A statutory power will be construed as impliedly authorizing everything which can fairly be regarded as incidental or consequential to the power itself; and this doctrine is not applied narrowly*" and argues that changing a multi member ward into a single member ward and vice versa is incidental to the alteration of the boundaries. He further submits that with the alteration of the boundaries, new wards have been created and unless the number of members allocated to each ward is changed, there is no way to allocate a member to such new wards.

The Legislature has clearly indicated its intention in the Amendment Act. The section 3B (3) has given the power or authority of creating wards in the local authority area to the National Committee. The National Committee was further entrusted with the authority to recommend creating multi member wards. The Legislature has purposely taken away that power from the Minister appointed committee under section 3D. That committee was entrusted only with the power to recommend the alteration of boundaries, names, and the number or the letter of a ward. Therefore the Minister or the committee appointed by the Minister under section 3D, cannot acquire an authority or power which has been kept away from it by the Legislature, on the pretext of it being incidental to alteration of boundaries. It goes beyond the alteration of boundaries. Creating new wards and altering the number of members allocated to wards are matters that are not within the purview of the Minister or Minister appointed committee under section 3D. It is the power given to the National Committee and only the National Committee

can make recommendations to that effect. Publishing an order on the recommendations of the National Committee is vested with the President. The Minister was given a very limited power or mandate in changing the *Gazette* published by the President under section 3C.

The Minister or the committee appointed by the Minister derives authority to alter the boundaries from the statute and therefore the words of the statute that are giving the authority controls the function of the Minister.

The Minister in publishing the *Gazette* marked P3 stated as follows;

*“BY virtue of powers vested in me, by section 3D of the Local authorities Elections Ordinance (Chapter 262), I, ..... do by this order amend the orders published in the Gazette Extra Ordinary No. 1928/26 of 21<sup>st</sup> August 2015 by amending boundaries, number of members and constituent parts of wards.....”*

The Minister acted under section 3D of the Ordinance and altered the number of the members allocated to wards by the President under section 3C which is ultra vires.

The learned DSG raised several preliminary objections. One of the said objections is delay. The impugned *Gazette* was published on 17.02.2017 and the application was filed on 10.11 2017. The Counsel submits that it is a delay and relies on several authorities of this Court as well as of the Supreme Court. In an application for a prerogative writ the petitioners have to seek remedy expeditiously. But if the *Gazette* itself is a nullity, the delay will not make it valid. On the other hand the learned DSG submits that the Election Commission has issued a press release on 01.11.2017 that the Minister had informed the Commission on

01.11.2017 that the *Gazette* indicating the number of members of the local authorities has been published. If the Election Commission was unaware of the *Gazette* until it was informed the Respondents cannot complain that the Petitioners are late.

The locus standi of the Petitioners is also challenged by the learned DSG. The Petitioners are citizens of this country and are eligible voters in the local government elections. Conducting election on an invalid *Gazette* is a matter that will affect the rights of any citizen. The learned DSG further submits that the Petitioners have failed to name the Election Commission as a party. The Election Commission has not yet called for nomination for the local authorities' election. The Commission had issued a press release that it intends to do so. Until the Commission triggered off the election by calling for nominations, the intention of the Commission will not make them a necessary party. The non disclosure of the said press release cannot be considered as a misrepresentation. It discloses only the intention of the Commission to hold the election.

The Petitioners have established a strong case with high probability of winning. It is obvious that if the interim order is not granted, the application will become nugatory.

Any order suspending the operation of the *Gazette* may delay the election process. The Court has to weigh such a delay with holding election on a *Gazette* on the face of it is ultra vires and a nullity. The entire election will be a nullity if it is held under an invalid *Gazette*. Therefore the Court is of the view that the balance of convenience lies in favour of the Petitioners.

It has been held in the case of *Duwearatchi and another V. Vincent Perera and others* [1984] 2 Sri L R 94 that;



*(1) An interim stay order in a writ application is an incidental order made in the exercise of the inherent or implied powers of the Court. The Court should be guided by the following principles*

- (i) Will the final order be rendered nugatory if the petitioner is successful?*
- (ii) Where does the balance of convenience lie ?*
- (iii) Will irreparable and irremediable mischief or injury be caused to either party?*

In the case of [1996] 1 Sri L R 364 Mahindasoma V. Hon. Maithripala Senanayake and others it has been held again that;

*(1) That the Court will be guided inter alia, by the following principles, in granting interim relief:*

- (a) Will the final order be rendered nugatory if the petitioner is successful?*
- (b) Where does the balance of convenience lie?*

As I pointed out above, the Petitioners have established a strong case with a probability of winning and that the balance of convenience lies in favour of the Petitioners. Further it is established that if the interim order is not issued, the application will be nugatory.

Several intervenient petitioners moved permission to intervene in this application. The Court heard their respective cases. We are of the view that these applications have to be considered only after giving the Petitioners also a hearing. The said intervenient petitioners are mostly political parties, intended candidate, civil right movements and citizens. Increasing the number of intervenient petitioners will not bend the balance of convenience towards them.

I hold that an interim order as prayed for in paragraph (f) of the prayer to the petition be issued subject to the following variation.

The Court is mindful of the fact that the franchise of the people should be protected. Therefore the Court does not intend to issue an interim order until the final determination of this case. The interim order is issued until the next day of hearing to enable the Court to re assess the necessity of extending the interim order.

Issue interim order as prayed for in the paragraph (f) of the prayer to the petition to be operative until the next day of hearing.

Issue notice on the Respondents.

President of the Court of Appeal

**K.K.Wickramasinghe J**

I agree

Judge of the Court of Appeal

**Shiran Gooneratne J.**

I agree.

Judge of the Court of Appeal