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

In the matter of an Application in the nature of Writs of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Republic.

Govinnage Wasanthi Padmalatha Perera,
Of No: 47/15A, 1st Lane, Railway Station Road
Homagama.

Petitioner

And 13 others

C. A. Writ Application No. 01/2020

Vs.

1. A. N. Guruge, Commissioner General of Inland Revenue,

Department of Inland Revenue, Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

Respondents

And 73 others

Before: Hon. D.N. Samarakoon J.,

Hon. Sasi Mahendran J.,

Counsel: P. K. Prince Perera with S. Panchadsaran for the Petitioners.

Youresha de Silva D. S. G. for the 01st to 17th and 26th to 74th Respondents.

Written Submissions on: 07.11.2022 by the Petitioner

18.04.2022 by the Respondents

Date: 12.07.2023

D.N. Samarakoon, J.

ORDER

01st to 14th petitioners have filed this application seeking to question the promotions of 18th to 23rd and 25th respondents in the Inland Revenue Department.

The petitioners have made, as they question a cabinet decision the then incumbent President of the Republic Mr. Gotabhaya Rajapakse the 73rd respondent, in his capacity as the Head of the Cabinet.

One of the preliminary objections is that this cannot be done, due to the immunity of the President and hence the application should be dismissed.

Article 35, of the Constitution of the Republic, dealing with the immunity of the President has been finally amended by the 20th Amendment to the Constitution.

It reads,

"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:

Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity:

Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under paragraph (g) of Article 33.

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

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." [Emphasis added in this order]

However, Article 44(2) before the 20th amendment to the Constitution, dealt with, the assignment of subjects to the Ministers.

The saving clause in Article 35(3) is to enable a party to file action against the President, in his capacity as a Minister.

Certain changes were made to Article 44(2) by the 20th Amendment to the Constitution. It added that the President "shall remain in charge of any subject or **function not assigned to any Minister** under the provisions of paragraph (1) of this Article or the provisions of paragraph (1) of Article 45…"

21st Amendment to the Constitution did not amend Article 35 but it amended Article 44(2). Presently Article 44(2) reads,

> "(2) The President shall, in consultation with the Prime Minister, appoint from among Members of Parliament, Ministers, to be in charge of the Ministries so determined".

The assigning of subjects to the Minister is presently governed by Article 44(3). But Article 35(3) continue to refer to Article 44(2) which is non existent as far as the assignment of subjects is concerned.

The written submissions of the 18th to 23rd and 25th respondents admits that an action could be instituted against the President in relation to exercise of any

power pertaining to any subject or function assigned to President or remaining in his charge under Article 44(2). The said written submissions were filed on 20th April 2022, before the 21st amendment to the Constitution. The 21st amendment has made Article 44(2) the above without a corresponding change in Article 35(3) of the Constitution.

The said Written Submission at paragraph 18 further submitted that the provisions which say that "The President shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers" in Article 43(2) of the Constitution.

But after the 21st amendment to the Constitution, this is referred to in Article 43(3) of the Constitution.

In any event, as the petitioners in this case have made the President the 73rd respondent in his capacity as the "Head of the Cabinet of Ministers", the exemption in Article 35(3) does not apply.

Therefore it appears, prima facie, that the petitioners cannot maintain an application for a writ against the 73rd respondent as he was the incumbent President at the time of the filing of the application.

However, the cursus curie of the Supreme Court appears to be otherwise.

In *Karunathilake and another vs. Dayananda Dissanayake, Commissioner of Elections and others, 1999, 01 SLR 177* Mark Fernando J., with the concurrence of G. P. S. de Silva C. J. and Gunesekera J., said,

> "**The immunity conferred by Article 35 is neither absolute nor perpetual**. While Article 35 (1) ***appears to prohibit*** the institution or continuation of legal proceedings against the President, in respect of all acts and omissions (official and private), Article 35 (3) excludes immunity in respect of the acts therein described. It does so in two ways. First, it completely removes immunity in respect of one category of acts (by permitting the institution of proceedings against the President personally); and second, it partially removes Presidential immunity in respect of another category of acts, but requires that proceedings be instituted

against the Attorney-General. What is prohibited is the institution (or continuation) of proceedings against the President. ***Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law.*** *It is also relevant that immunity endures only "while any person holds office as President*". It is a necessary consequence that immunity ceases immediately thereafter; indeed, it would be anomalous in the extreme if immunity for private acts were to continue. Any lingering doubt about that is completely removed by Article 35 (2), which excludes such period of office, when calculating whether any proceedings have been brought within the prescriptive period. The need for such exclusion arises only because legal proceedings can be instituted or continued thereafter. If immunity protected a President even out of office, it was unnecessary to provide how prescription was to be reckoned.

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***. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. ***Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court***. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct. It is for that reason that this Court has entertained and decided questions in relation to emergency regulations made by the President (see Joseph Perera v. A

G, m Wickremabandu v. Herath, and Presidential appointments (see Silva v. Bandaranayake,). ***It is the respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President***".

In *M. N. D. Perera vs. Balapatabendi Secretary to the President and others (2005) 1 SLR 1985* Wigneswaran J., in the Supreme Court said with Thilakawardane J. and Dissanayake J.,

"Article 35 of the Constitution provides only for the personal immunity of the President from proceedings in any Court of Law and that too only during his or her tenure of office. The President cannot be summoned to Court to justify his or her action. **But nothing prevents *a Court of Law* from examining the President's acts**. Justice Sharvananda (as he then was) said as follows in the case of Visuvalingam & Others Vs. Liyanage and Others No. (1) (a) Full Bench consisting of nine Judges. "***Actions of the executive are not above the law and can certainly be questioned in a Court of Law*** . .... Though the President is immune from proceedings in Court a party who invokes the acts of the President' in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden".

It was also said,

"A directive from the President cannot be a defence to the 2nd Respondent if it was manifestly and obviously illegal. A leader of a sovereign country is not expected to be parochial nor vindictive nor spiteful what ever the provocations of his subjects might be, real or imaginary. Leaders no doubt are human beings. But they are humans clothed with power and privileges granted by their compatriots out of their love and respect. This power is not to be used to harass such compatriots. The Chapter on Fundamental Rights as well as Article 35 of the Constitution

have been enacted to curb such harassment by the Executive which is clothed with tremendous power and privileges. Leaders in authority should not transgress the fundamental rights of their compatriots by becoming subjective in their attitudes and decisions. Complementarity the compatriots themselves should not harass their leaders at least while they are in office".

In *Senasinghe vs. Karunatilleke, Senior Superintendent of Police, Nugegoda and others*, (2003) 1 SLR 172 Mark Fernando J., in the Supreme Court with Gunesekera and Wigneswaran JJ., said,

"It is now firmly established that all powers and discretions conferred upon public authorities and functionaries are held upon trust for the public, to be used reasonably, in good faith, and upon lawful and relevant grounds of public interest; that they are not unfettered, absolute or unreviewable; and that the legality and propriety of their exercise must be judged by reference to the purposes for which they were conferred.

In accordance with those principles, this Court has reviewed the acts of the entire Cabinet of Ministers <u>inclusive of the President</u> (Ramupillai v Festus Perera, Perera et al. v Pathirana) SC 453/97 SCM 30.1.2003), and of the President (Wickremabandu v Herath; Karunatilleke v Dissanayake) despite Article 35 which only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review".

Wigneswaran J., in *M. N. D. Perera vs. Balapatabendi*, specifically saying, that,

"Article 35 of the Constitution provides only for the personal immunity of the President from proceedings in any Court of Law arid that too only during his or her tenure of office..." shows that the objection will not hold when the person named as a respondent is no longer the Executive President.

When the petitioners in this application wants to question a Cabinet Decision and not a direct act or omission of the President, the then President was named only as the Head of the Cabinet and he is no longer in office, to dismiss even the application in respect of the 73rd respondent on those grounds is highly technical. The decided cases say that a petitioner can proceed against the others in respect of the act of the President. Therefore in any event this writ application, which is against the whole of the Cabinet of Ministers can proceed. Furthermore, it is true that at least some of the decided cases referred to are fundamental rights applications. **But when Article 35(1) Proviso specifically says that Article 35 is not applicable to an action under Article 126, yet those Courts in those cases considering the effect of Article 35, at length, shows that the intention of the Supreme Court that what it lays down in respect of Article 35 be applied to other Courts too.** This is further evinced by in certain cases, such as, *Perera vs. Balapatabendi*, the Court expressly referring to "***a Court of Law***".

ANIL GOONERATNE, J. in the Court of Appeal in case **PERERA v GEEKIYANA, 2007** followed with approval the dicta of Chief Justice Sir Sydney Abrahams in **Velupillai v Chairman U.C. Jaffna, 39 NLR 464** that,

> " a court of law … should not be trammeled by technical objections [as] it is not an academy of law"

What Sir Sydney Abrahams the Chief Justice said was,

> "I think that if we do not allow the amendment in this case we should be doing a very grave injustice to the plaintiff. It would appear as if the shortcomings of his legal adviser, the peculiarities of law and procedure, and the congestion in the Courts have all combined to deprive him of his cause of action and ***I for one refuse to be a party to such an outrage upon justice. This is a Court of Justice, it is not an Academy of Law***".

In the circumstances, the 1st preliminary objection is overruled.

The other preliminary objection is that the application is out of time and due to this reason the petition has to be dismissed in limine.

The petitioners submit in this respect,

> "I respectfully submit that there is no specific time limit to file a Writ Application in the Court of Appeal. There is no statutory or constitutional time limit.
>
> The Cabinet of Ministers has reached a decision on 10.09.2019 decision is dated 18.09.2019. We have no access to the Cabinet decision. Hence getting a certified copy of the Cabinet decision is also a very difficult one. We file this Application with a copy of the Cabinet decision and seeks the permission of Your Lordships' Court to call the Cabinet decision as prayer (h) of the petition. So far we have not received the original copy of the Cabinet decision. We filed this application before Your Lordship's Court on 07.01.2000. During that time Covid 19 situation is prevailing in the country. Hence we filed this application before Your Lordships' Court on reasonable time. What is reasonable time would be dependent on facts and circumstances of the case. Hence there is no merit in this legal objection".

This Court agrees with the above.

Even if it is assumed, that, this Court decides, that, the petitioners cannot proceed against the 73rd respondent, the petitioners according to Journal Entry dated 28.05.2020, that is, even before this case came before the present Bench

moved to add the incumbent Secretary to the Cabinet, which the Court has allowed and hence the petitioners can proceed.

In *Centre for Policy Alternatives (Guarantee) Ltd., vs. D. M. Jayaratne and others*, Saleem Marsoof J., delivering the judgment of a Five judge Bench, upholding the decision of Mark Fernando J., in Karunatilleke's case quoted,

> ""What is prohibited is the institution (or continuation) of proceedings against the President. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law…."

Therefore in any event the petitioners can proceed against the Cabinet Secretary and the other respondents and dismissing the application against Mr. Gotabhaya Rajapakse, does not warrant as he is no longer the President.

Hence preliminary objections are overruled. There is no order on costs.

Judge of the Court of Appeal

Sasi Mahendran, J.

I agree.

Judge of the Court of Appeal