FUNDAMENTAL RIGHTS

Ref: 01/8-9/2006
SC Spl (LA) No.182/99
CA Appeal No.208/95
HC Colombo 6825/94

Nallaratnam Singarasa V The Attorney General

Determined by :
Chief Justice Sarath N Silva , Justice Nihal Jayasinghe, Justice N. N Udalagama, Justice N. E Dissanayake & Justice Gamini Amaratunga

Decided on 15/09/2006

Articles 3, 4, 5, 33, 75, 76 and 105 of the Constitution - Emergency regulations Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 as amended Findings of the Human Rights Committee established under the International Covenant on Civil and Political Rights Optional Protocol to the Covenant Monist/ Dualist approach European Communities Act of 1972 of the UK

The Petitioner was convicted by the High Court and his appeal to the Court of Appeal was dismissed. The Supreme Court on 28.01.2000 refused to grant special Leave to Appeal from the Judgment of the court of Appeal. The Petitioner, thereafter, made application to the Human Rights Committee in Geneva under the International Covenant on Civil and Political Rights under the Optional Protocol to the Covenant. Pursuant to the findings of the Human Rights Committee the Petitioner filed an application for revision and/ or review of the Supreme Court judgment made on 28.01.2000.

Held:

The Covenant is based on the premise of legislative or other measures being taken by each State Party, "in accordance with its Constitutional processes....to give effect to the rights recognised in the ....Covenant". The general premise of the Covenant is that individuals within the territory of a State Party would derive the benefit and the guarantee of rights as contained therein through the medium of the legal and Constitutional processes that are adopted within such State Party. According to the dualist theory international law and municipal law are two separate and independent legal systems, one national and the other international. International treaties entered into by the President and the Government of Sri Lanka as permitted by and consistent with the Constitution and written law would bind the Republic qua state but have to be implemented by statute enacted under the Constitution to have internal effect. The President, as Head of State, is empowered to represent Sri Lanka and under Customary International Law enter into a treaty or accede to a covenant, the contents of which is not inconsistent with the Constitution or written law. But the President is not a repository of plenary executive power as in the case of the Crown in the UK. If the President enters into a treaty or accedes to a covenant the content of which is "inconsistent with the provisions of the Constitution or written law", it would be a transgression of the limitation in Article 33 (f) of the Constitution and *ultra vires*. Such act of the President would not bind the Republic *qua state*. The Petitioner cannot seek to "vindicate and enforce" his rights through the Human Rights Committee at Geneva, which is not reposed with judicial power under our Constitution. The Covenant is not per se inconsistent with the provisions of the Constitution or written law of Sri Lanka. The accession to the Republic binds the Republic qua state. But no legislative or other measures were taken to give effect to the rights recognised in the Convention as envisaged in Article 2. Hence, the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka. In 1997 the then President acceded to the Optional Protocol and made a declaration. Certain components of the declaration amounted to a purported exercise of legislative power which comes within the realm of Parliament and the people at a Referendum as laid in Article 4 (e) of the Constitution. The only instance in which the Parliament could even by law empower the President to exercise legislative power is restricted to the making of regulations under the law relating to Public Security. Therefore, the accession to Optional Protocol in 1997 by the then President and the Declaration made under Article 1, are inconsistent with the provisions of the Constitution and are in excess of the power of the President.

FUNDAMENTAL RIGHTS

Ref: 02/8-9/2006
SC (FR) No.243/06
SC (FR) No. 244/06
SC (FR) No. 245/06

Jayantha Wijeskera, Mohamed Buhari and Wasantha Piyatissa V The Attorney General and others

Determined by :
Chief Justice Sarath N Silva, Justice Nihal Jayasinghe Justice N. N Udalagama, Justice A. R. N Fernando & Justice Gamini Amaratunga

Decided on 16/10/2006

Violation of Fundamental Rights - Articles 4 (c), 12(1), 35 (1), 76 (1), 76 (3), 80 (3), 105 (1), 126 (2), 155 and 170 of the Constitution 13th amendment to the Constitution Articles 154 A (1), 154 A (2) and 154 A (3) of the Constitution time bar Continuing right/ denial Ultra Vires - Section 37 (1) and section 37 (2) of the Provincial Councils Act No. 42 of 1987 Provincial Councils Election Act No.2 of 1988 Section 5 of the Public Security Ordinance Emergency Regulations - Indo-Sri

Lanka Accord of 1987 - Merger of the Northern and Eastern provinces - Continuing infringement

The Petitioners, being residents of the Eastern Province, alleged infringement of their fundamental rights to the equal protection of the law, guaranteed by Article 12 (1) of the Constitution in that the Proclamation declaring that the provisions of Section 37 (1) of the Provincial Councils Act No.42 of 1987 shall apply to the Northern and Eastern Provinces, which resulted in these two provinces forming one administrative unit.

The Case for the Petitioners was that the merger of the two provinces was "fatally flawed" due to the non observance of the mandatory Conditions Contained in section 37 (1) (b) of the Provincial Councils Act No.42 of 1987. The Petitioners also Contended that they and similarly Circumstanced voters of the Eastern Province have been Continuously denied their rights to have a lawfully elected Provincial Council Constituted for the Eastern Province as required by Article 154 (A) (2) of the 13th amendment to the Constitution.

Held:
The Constitution reserves the power of effecting a merger strictly within the legislative power of Parliament, to be done "by or under, any law". The power reposed in the President is in the nature of a delegated legislative power and the Proclamation issued has to be characterised as subordinate legislation. Section 37 (1) (b) contains a specific condition to be satisfied prior to the making of a Proclamation merging the two provinces as one administrative unit. The condition was that:

i) that arms, ammunition, weapons, explosives and other military equipment which on 29.07.1987 were held or under the control of terrorist militants or other groups having as their objective the establishment of a separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it, and;

ii) that there has been a cessation of hostilities and other acts of violence by such groups in the said province.

The conditions contained in Section 37 (1) (b), as to the surrender of weapons and the cessation of hostilities are contained in clause 2.9 of the Indo Lanka Accord. In the words of the then President, in his address to Parliament on 25.02.1988 there had been only a "formal handing over of arms". The LTTE had violated the agreement and publicly said so in October 1987, within 3 months of the Accord. The power reposed in the President by section 5 of the Public Security Ordinance to make an Emergency Regulation amending any law has to be read subject to the provisions of Article 155(2) of the Constitution and an Emergency Regulation cannot have the effect of amending or over-riding a provision of the Constitution. The Emergency Regulation made by the then President did not come within any of the purposes provided in section 5 (1) of the Public Security Ordinance. The Emergency Regulation had been for a collateral purpose. It was *ultra vires* and in excess of the power reposed in the President. The right to have a Provincial Council constituted by an election of the members of such Council pertains to the franchise being part of the sovereignty of the People and its denial is a continuing infringement of the right to the equal protection of the law guaranteed by Article 12 (1) of the Constitution.

ADMINISTRATIVE LAW

Ref: 03/8-9/2006
CA/WRIT/APP/NO.1602/2003

M. Sharif Shahul Hameed Vs. Divisional Secretary of Kobeygane& 02 others

An application for Writs of Certiorari and Mandamus- S.84, Land Development Ordinance (LDO) Succession - S.106 - inquiry

Determined by :
S. Sriskandaraja, J.

Decided on 30/05/2006

As there was no succession to the land in dispute, Provincial Land Commissioner, N-Western Province (*3rd Respondent*) summoned all children of the deceased permit holder to issue a permit to a suitable child. The Petitioner and other interested parties were informed in terms of S.106 of the LDO and an inquiry held on 07.07.2003 to inquire was into violation of conditions of the permit holder. Inquiry revealed that the land had not been cultivated but alienated. Land occupied by individuals who had no interest in the land. Due to these violations Petitioner was informed of cancellation of the permit by letter. Petitioner took up the position that the 1st Respondent had sent notice dated 19.05.2003 on the original permit holder's name knowing very well that he was dead but admitted that he participated in the inquiry held on 07.07.2003. After arriving at a finding that the permit holder had violated the conditions the decision to cancel the permit was taken and was communicated by letter dated 13.09.2003 to the Petitioner.

Held:
The Petitioner cannot complain that he was not given a hearing in this matter. Under these circumstances, the Respondents have the authority to cancel the permit and they have done it after giving a fair hearing. Hence, Petitioner is not entitled for relief claimed. Application dismissed without cost.

Ref: 04/8-9/2006
CA/NO.555/2006

Centre for Policy Alternatives (CPA) & another Vs. Chandra Fernando (I.G.P.) & 07 others

An application for Writs of Certiorari and Mandamus - Art.155 (G) of the Constitution National Police Commission

(NPC) - Writ of Prohibition preventing I.G.P. from transferring Officer - Instances where writs of Prohibition and Certiorari can be issued.

Determined by :
K. Sripavan, J. & K.S.D. Abrew, J.

Decided on 08.05.2006

The Petitioners sought an interim order against 1st Respondent (I.G.P.) to prevent him from exercising or seeking to exercise any powers of appointment, promotion, transfer, disciplinary control and/or dismissal of Police Officers required to be exercised by the National Police Commission (NPC) under Art.155 (G) of the Constitution.

Petitioner urged that the powers mentioned are vested in the NPC and that the said Commission by Gazette No.1299/9 dated 30.07.2003 delegated such powers of appointment, promotion and transfer of certain Officers in the Police Service to a committee appointed in terms of Art.155 (H) (1) of the Constitution. Thus, he argued that the transfers of certain Officers by the 1st Respondent as contained in documents 'P5A-P5H' were illegal and unconstitutional and sought a writ of prohibition preventing the I.G.P.

Held:
"When an administrative authority takes up a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move Court for a writ of prohibition. It is settled law that while prohibition will issue only so long as there is something pending in the proceedings which the Court can prohibit, Certiorari will not lie until there is an order or decision of the administrative authority which the Court can quash."

"Thus, where decisions have been taken prohibition will not lie unless there are pending proceedings for enforcement of those decisions or proceedings consequential on those decisions, the continuance of which may be prohibited. But, if there are no such proceedings pending, it is too late to issue prohibition and Certiorari would be the proper remedy to resort to."

In ***Ceylon Mineral Waters Ltd. Vs. DJ, Anuradhapura*** *70NLR312*, Supreme Court refused to issue a writ of prohibition as there was no evidence to show that the District Court was about to determine a claim. *"In this application, the petition does not disclose that proceedings are pending before the I.G.P..... The Petitioners therefore cannot finally succeed in getting a writ of prohibition against the I.G.P.* Interim Order sought refused.

ARBITRATION

Ref: 05/8-9/2006
CALA196/2005

Ceylinco Insurance Company Ltd. V. T. Douglas Peiris

An application seeking leave to appeal from the order of the DC - staying further proceedings of the case until the arbitration proceedings are concluded - Preliminary objection on jurisdiction

Determined by :
Andrew Somawansa, J. (P/CA) & Wimalachandra, J.

Decided on 10.03.2006

Plaintiff Respondent filed this action against the Defendant Petitioner Company claiming a sum of Rs.235,000 on insurance policy, 'D1'. The D/Petitioner filed answer and took up a preliminary objection on jurisdiction that in terms of the said policy the parties had agreed to refer any dispute to arbitration and that Court had no jurisdiction to hear and determine the matter.

The District Judge, having considered the written submissions of parties stayed proceedings in the instant action until the conclusion of arbitration. The D/Petitioner sought leave to appeal from this Order.

Held:
"It is to be seen that S.5 of the Arbitration Act No. 11 of 1995 has taken away the jurisdiction of the District Court to hear and to determine any matter where a party to a arbitration agreement objects to hearing of that matter by the Court provided that it is a matter agreed to be submitted to arbitration by the said arbitration agreement."

In terms of Clause 8 of the policy, D1, parties have agreed to arbitration in the event of a dispute with regard to P/Respondent's vehicle which had met with an accident and P/Respondent is claiming damages from the D/Petitioner on the said policy; The D/Petitioner took up the position that he was not liable to pay any sum in terms of the said policy.

"However in terms of the arbitration clause which specifically provides that all differences arising out of this policy shall be referred to arbitration and accordingly the District Court has no jurisdiction to hear and determine this action."

Leave granted to appeal from the impugned order.

PARTITION / REVISION

Ref: 06/8-9/2006
CA/520/2004 DC Matara 20749/P

An application in Revision to set aside the judgement and the interlocutory decree in partition action - Present petitioner not

made a party to this partition action though it was the same corpus and the same pedigree pleaded by the Plaintiff in an earlier land action where the Defendant was a party claiming rights -Petitioner by amended answer claimed title to entire land on the final decree in anther partition action in the same DC Commission issued and preliminary plan and report submitted to Courts - Present Petitioner was present at the survey and claimed rights to the land to be partitioned - Commissioner had not served a copy of the notice to Petitioner before the Surveyor as per S.16(3) - Plaintiff had not taken steps to issue notice on Petitioner who was a claimant before the Surveyor - Even Court had not issued notice or summons on Petitioner who was a claimant before the Surveyor and who's name appears in the Surveyor's report Ss.12(1), 16(3), 25(1) of Partition Law - a "Person concerned" - a victim of a miscarriage of justice

Agnes Ekanayake Vs. H.G. Piyasena & others

Determined by :
Andrew Somawansa, J. (P/CA) & Wimalachandra, J.

Decided on 23/05/2006

The Respondents did not resist this application. When the trial commenced, as there was no contest with regard to the pedigree and corpus, the trial Judge pronounced the judgement on the same day.

Held:
".....The learned Judge had not investigated the title and the shares had been given without evaluation of evidence and deeds. In his judgement, he had merely stated that the corpus should be partitioned according to the evidence of the Plaintiff. The learned Judge merely adopted the Plaintiff's evidence blindly without any evaluation. The learned Judge had completely ignored S.25(1) of the Partition Law which provides that at the trial the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact in that action in regard to the right, share or interest of each party to, if or in the land to which the action relates."

*"In **Somawathi Vs. Madawela & others** (1983)2SLR15, Justice Soza said:*
*But although the Act stipulated that decrees under the Partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, Supreme Court continued in the exercise of it's powers of revision and restitution in integrum to set aside partition decrees when it found that proceedings were tainted by what has been called fundamental vice. In the case of **Ukku Vs. Sidoris**, T.S. Fernando, J declared as follows:*

*The pattern of inference by the Supreme Court followed the traditional lines: failure to effect due service of summons which is a vitiating factor more fundamental than an omission or defect procedure- **Siriwardena Vs. Jayasumana** 59NLR479..... no proper examination of title. **Gunasinghe Vs. Aronappuhamy** 79CLW110"*

"Then at page 26, Soza, J. made the following observation:
*It should be observed that in these provisions for relief found in the Administration of Justice (amendment) Law No.25 of 1975 and later Partition Law No.21 of 1977 "persons concerned" who had not been made parties despite the fact that they had a right, title or interest in the subject matter, are not included. Yet such "persons concerned" who are the victims of a miscarriage of justice can always invoke the powers of revision and restitutio to integrum vested in the Court of Appeal." Court also referred to **W.G Roslin Vs H.B.Maryhamy** (1994) 3SLR262*

A party not disclosed in the declaration filed as per S.12(1), by the Plaintiff who had claimed before the Surveyor at the preliminary survey and when the Surveyor had not given notice to that party and was not issued notice by the Court as required by law constitutes a fundamental vice, due to a fundamental rule of procedure being violated.

District Judge directed to add Petitioner as a party and be allowed to file a statement of claim and to hear the case *de novo*. Application allowed.

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