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

In the matter of an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

K.H.G. Kithsiri,
477 F I,
Deniyawaththa Road,
Battaramulla.

PETITIONER

SC FR Application No. 362/2017

Vs.

1. Hon. Faizer Musthapha MP,
   Minister of Provincial Councils and Local Government,
   No. 206/1,Lake Drive,
   Colombo 08.

2. Hon. Karu Jayasuriya,
   Speaker of Parliament of Sri Lanka,
   No. 02,Amarasekera Mawatha,
   Colombo 05.

3. Jayantha C. Jayasuriya P.C.,
   Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

4. Mahinda Deshapriya,
   Chairman,
   Election Commission.

5. N.J. Abesekere P.C.
   Member,
   Election Commission.

6. Prof. S.R.H. Hoole
   Member,
   Election Commission

   The 4th to 6th Respondents above named

   [All of the
   Election Secretariat,
   Sarana Mawatha,Rajagiriya.]

RESPONDENTS

BEFORE: Buwaneka Aluwihare P.CJ
Vijith Malalgoda P.C J

COUNSEL: M.U.M Ali Sabry P.C with Ruwantha Cooray for the Petitiner
Indika Demuni de Silva P.C ASG with Dr. Avanthi Perera SSC and Noyomi Kahawita SC for the 1st, 3rd, 4th, and 6th Respondents

ARGUED: 13.12.2017

WRITTEN
SUBMISSIONS: Petitioner 14.12. 2017
Respondents 14.12. 2017

DECIDED ON: 10.01.2018

Aluwihare PC. J

The Petitioner has filed the present Application seeking a declaration:

(a) that the 1st and 3rd Respondents had infringed the Petitioner's and/or such other similarly circumstanced persons' fundamental rights guaranteed under Articles 10 and/or 12(1) and/or 12(2) and/or 14(1)(a) and/or 14(1)(g) and/or Article 84 of the Constitution by introducing amendments to the LOCAL AUTHORITIES ELECTIONS (AMENDMENT) Bill in violation of the procedure established by law, particularly in terms of the Constitution;

(b) that the 2nd Respondent namely the Speaker of the House of Parliament had violated the Petitioner's and/or such other similarly circumstanced persons' fundamental rights guaranteed under Articles 10 and/or 12(1) and/or 12(2) and/or 14(1)(a) and/or 14(1)(g) and/or Article 84 of the Constitution by granting the certificate in terms of Article 79 of the Constitution to the impugned Bill entitled LOCAL AUTHORITIES ELECTIONS (AMENDMENT) BILL to become law;

(c) that the 3rd Respondent's opinion submitted in terms of Article 77 of the Constitution that the LOCAL AUTHORITIES ELECTIONS (AMENDMENT) BILL is ready to be submitted to become law is violative of or had violated the Petitioner's and/or such other similarly circumstanced persons' fundamental rights guaranteed under Articles 10 and/or 12(1) and/or 12(2) and/or 14(1)(a) and/or 14(1)(g) and/or Article 84 of the Constitution;

(d) notwithstanding the enactment of the Bill entitled LOCAL AUTHORITIES ELECTIONS (AMENDMENT) the Petitioner and similarly circumstanced officers are entitled in law to contest the election and/or stand as a candidate at an election called for the purpose of electing candidates for the local authorities.

When this matter was taken up for support, the learned Additional Solicitor General appearing for the 1st, 3rd, 4th, 5th and 6th Respondents raised several preliminary objections with regard to the maintainability of this application in particular the jurisdiction of the Supreme Court to entertain and hear the Petitioner's Application. The court, however, permitted the Additional Solicitor General to raise, at the outset, the preliminary objection based on the time stipulation in Article 126(2) of the Constitution, prior to hearing the Petitioner's Counsel in support of his Application. It must be stated that the learned Additional Solicitor General reserved the right to make submissions on the other preliminary objections, subsequently. The learned ASG and the learned Presidents' Counsel for the Respondents were heard on the preliminary objection.

The objection in the main was that the Application of the Petitioner has been filed outside the mandatory period of one month stipulated in Article 126(2) of the Constitution and on that basis, the Respondents moved to have this application dismissed *in limine*.

Article 126(2) of the Constitution reads as follows:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself*

or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges."

It was submitted on behalf of the Respondents that in order to consider whether the Petitioner has complied with Article126(2), relating to the stipulation of time *vis-à-vis* the alleged conduct of the Respondents that the Petitioner is challenging, the following dates would be of relevance:

It is common ground that the Local Authorities Elections (Amendment) Bill was published in the Gazette on 02nd June 2017. The Bill thereafter, was placed on the Order Paper of Parliament on the 20th June 2017. The Bill had been debated in Parliament on 24th August 2017. After the Bill was debated, The Local Authorities Elections (Amendment) Bill, together with committee stage amendments, had been passed by Parliament on 25th August 2017.The Bill had been certified by the Hon. Speaker in terms of Article 79 of the Constitution on 31st August 2017.

Accordingly, in terms of Article 80(1) of the Constitution, the Local Authorities Elections (Amendment) Act, No. 16 of 2017 (P5) came into force as a law, on 31st August 2017.

It was pointed out on behalf of the Respondents that the present Application of the Petitioner has been filed only on the 13th of October 2017, which was more than 30 days after, in relation to all of the relevant dates referred to above.

It was also pointed out on behalf of the Respondents that the Petitioner, in paragraph (e) of the prayer to the Petition, has impugned the introduction of amendments to the Local Authorities (Amendment) Bill at the Committee Stage which had taken place on 25th August 2017, and in that context the Application is time-barred by 18 days. Similarly, in paragraph (g) of the prayer to the Petition, the Petitioner has impugned the opinion of the 3rd Respondent which had been submitted, in terms of Article 77 of the Constitution, on the 25th August 2017. It was pointed out that the Application is once again time-barred by 18 days. It was also pointed out that in paragraph (f) of the prayer to the Petition, the Petitioner is impugning the certificate endorsed by the Hon. Speaker in terms of Article 79 of the Constitution on 31st August 2017.The Petition in that context is time-barred by 12 days. When one considers the date on which the Local Authorities Elections (Amendment) Act, No. 16 of 2017 came into operation, this Application is time-barred by 12 days.

It was the contention of the Learned Additional Solicitor General that the jurisprudence developed over time had made, the application of Article 126(2) in respect of the time limit granted to apply to the Supreme Court on an allegation of breach of fundamental rights, mandatory and not directory.

The learned ASG cited the case of *Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake*, SC 206/2008 (F/R), SC Minutes of 09.12.2016, where Justice Prasanna Jayawardena PC held:

'Article 126(2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may … "within one month thereof" … apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126(2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.

The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution.

In the case of *Ilangaratne* vs. *kandy Municipal Council* [1995 BALJ Vol.VI Part 1 p.10] his Lordship Justice Kulatunga observed that, *"the result of the express stipulation of a one month time limit in Article 126(2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – ie: after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of,. ……. if it is clear that an application is out of time, the Court has no jurisdiction to entertain such application.".*

> His Lordship further observed in the said case; "… *the general rule that had emerged is that, this Court will regard compliance with the 'one month limit' stipulated by Article 126(2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed after the expiry of one month from the occurrence of the alleged infringement or imminent infringement."*

This court, however, in exceptional circumstances where the Petitioner was prevented, by reason beyond his control, from taking measures which would enable the filing of a Petition within one month of the alleged infringement and if there had been no lapse on the part of the Petitioner, has exercised its discretion in entertaining fundamental rights applications and had not hesitated to apply the maxim *lex non cogit ad impossibilia.*

This principle was laid down in the case of *Gamaethige vs. Siriwardena* [1988 1 SLR 384], where Justice Mark Fernando set out the general principle and held that, "*While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*.

If the facts and circumstances of an application make it clear that a Petitioner, by the standards of a reasonable man, should have become aware of the alleged infringement by a particular date, the time limit of one month will commence from that date on which he should have become aware of the alleged infringement:

In *Illangaratne vs. Kandy Municipal Council,* Kulatunga J held that; *"…..it would not suffice for the petitioner to merely assert that he personally had no knowledge of the discriminatory act, if on an objective assessment of the evidence he ought to have had such knowledge."*.

His Lordship justice Prasanna Jayawardena P.C in the case of *Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake,(supra)*, referred to the burden caste on the Petitioner, when an application is filed out of the stipulated period referred to in Article 126(2) of the Constitution and stated:

> *'Needless to say, a Petitioner who seeks an exemption from the time limit of one month stipulated in Article 126(2) of the Constitution by claiming unavoidable circumstances which prevented him from invoking the jurisdiction of this Court earlier, will have to satisfy the Court that, he should be granted that exemption. In this connection, Fernando J commented, in GAMAETHIGE vs. SIRIWARDENA [at p. 401], "… there is a heavy burden on a petitioner who seeks that indulgence". ….*

The learned ASG referred to another principle that has emerged from the decisions of this Court. That is the principle that, other than in limited circumstances, time spent by a Petitioner in making appeals or seeking other administrative or judicial relief would not, normally, be excluded when calculating the period of one month stipulated by Article 126(2) of the Constitution. Therefore, if, upon the occurrence of an infringement of his Fundamental Rights, an aggrieved person does not file an application invoking the jurisdiction of this Court under Article 126(1) of the Constitution but, instead, choses to pursue other avenues of seeking relief, the time he spends

perambulating those avenues will not, usually, be excluded when counting the one month he has to invoke the jurisdiction of this Court under Article 126(1).

In this regard, Fernando J in the case of *Gamaethige vs. Siriwardena* (supra) held that;

> *"If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point in time, the filing of an appeal or application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time limit."*.

In *Gamaethige* vs. *Siriwardena,* Fernando J referred to the principle and stated that:

> *"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both the infringement and knowledge exist (Siriwardena vs. Rodrigo). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*'

In paragraph 10 of the Petition, the Petitioner has averred that "*it came to the Petitioner's domain that, in or around 31st August 2017, the purported Bill which had been subject to committee stage amendments in the manner above, had been enacted as law and has been published as a Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka.*"

Therefore, the fact that the impugned law had been duly enacted by Parliament with Committee Stage amendments appears to have been within the knowledge of the Petitioner by 31.08.2017. It was the contention of the learned ASG that, as per the averments contained in paragraph 26 of the Petition, the Petitioner, in an attempt to circumvent the provisions of Article 126(2), has claimed that he has filed an application in the Human Rights Commission on this matter on 22nd September 2017.

Section 13(1) Human Rights Commission of Sri Lanka Act, No.21 of 1996 reads as follows:

> *"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution."*

In terms of the aforesaid section, the period of one month in Article 126(2) will have no application where an inquiry is pending before the Human Rights

Commission on a complaint made to it. Thus, the relevant period will not be taken into account in computing the period of one month referred to in Article 126(2) of the Constitution.

In the instant case, the Petitioner has marked and produced the complaint he had made to the Human Rights Commission of Sri Lanka on 22.09.2017 (P6) and an acknowledgment made thereon by the Human Rights Commission of receipt of same. It was contended on behalf of the Respondent that although the date of the said application is within a period of one month from the relevant dates referred to hereinbefore, the complaint P6, is insufficient to establish that an inquiry into such application was pending before the Human Rights Commission during the intervening period. It was further contended that in terms of Article 126(2) of the Constitution read with section 13(1) of the Human Rights Commission Act, it is the period within which an inquiry is pending before the Human Rights Commission which is excluded from the computation of the mandatory period of one month.

The scope and application of section 13(1) of the Human Rights Commission Act and the mandatory time period specified in Article 126(2) of the Constitution has been considered in the case of *H.K. Subasinghe v. The Inspector General of Police and others*, SC (Spl) No.16 of 1999, SC Minutes of 11.09.2000.

His Lordship S.N. Silva C J observed as follows:

> *"The Petitioner seems to bring the complaint within the time limit on the basis that he made a complaint to the Human Rights Commission of Sri Lanka within the stipulated time. In this regard the petitioner relies on section 31 of the Human Rights Commission of Sri Lanka Act, No.21 of 1996 which provides that when a complaint has been made within one month to the Human Rights Commission, the*

period within which the inquiry into such complaint was pending will not be taken into account in computing the period within which an application should be filed in this Court.

The petitioner has failed to adduce any evidence that there has been an inquiry pending before the Human Rights Commission. In the circumstances, we have upheld the preliminary objection by learned State Counsel."

The same issue was considered in the case of *Divalage Upalika Ranaweera and others v. Sub Inspector Vinisias and others*, [SC (F/R) Application No.654/2003], S.C Minutes of 13.05.2008. In the said case, His Lordship Amaratunga J. observed as follows:

"The second preliminary objection is that the petitioners' application has been filed out of time. The acts resulting in the alleged infringement of the petitioners' fundamental rights had taken place on 23.09.2003. The petition has been filed in this Court on 5.12.2003, after the expiry of the time limit of one month prescribed by Article 126 for filing an application for relief to be obtained under that Article.

In their petition the petitioners have stated that they had made a complaint to the Human Rights Commission on 22.10.2003, which is within one month from the date of the acts resulting in the alleged violation of the petitioners' fundamental rights. The petitioners have produced the receipt dated 22.10.2003, issued by the Human Rights Commission acknowledging the receipt of their complaint.

The time limit of one month prescribed by Article 126 of the Constitution for filing an application for the alleged violation of fundamental rights is mandatory…

In the written submissions tendered in answer to the learned State Counsel's preliminary objections, the petitioners have sought to invoke the aid of section 13(1) of the Human Rights Commission Act No.21 of 1996 to circumvent the time bar set out in article 126 of the Constitution."

Justice Amaratunga, having considered the provisions of section 13(1) of the Human Rights Commission Act, went on to hold that:

"It is very clear from the section quoted above that ***the mere act of making a complaint to the Human Rights Commission is not sufficient*** *to suspend the running of time relating to the time limit of one month prescribed by Article 126(2) of the Constitution. In terms of the said section 13(1),* ***the period of time to be excluded*** *in computing the period of one month prescribed by Article 126(2) of the Constitution is* ***'the period within which the inquiry into such complaint is pending before the Commission*** *……*

…Thus the Human Rights Commission is not legally obliged to hold an investigation into every complaint received by it regarding the alleged violation of a fundamental right. Therefore a party seeking to utilize section 13(1) of the Human Rights Commission Act to contend that 'the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an

application may be made to the Supreme Court' is ***obliged to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission.***

…

In view of the failure of the petitioners to place any material before this Court to show that an inquiry into their complaint has been held by the Human Rights Commission or that an inquiry is still pending, I hold that the petitioners are not entitled to rely on section 13(1) of the Human Rights Commission Act to seek an exception from the time limit set out in Article 126(2) of the Constitution." (emphasis added)

His Lordship Justice Amaratunga considered the scope of section 13(1) of the Human Rights Commission Act in the case of *Kariyawasam v. Southern Provincial Road Development Authority* and 8 others (2007 2 S.L.R. 33). Having noted that there was evidence that an inquiry was pending before the Human Rights Commission relating to the matters urged before court, held therefore, that the Petitioner was entitled to the benefit conferred by that section.

The cases referred to above have been cited with approval in by her Ladyship Justice Wanasundera PC in the case of Alagaratnam *Manorajan v. Hon. G.A. Chandrasiri, Governor, Northern Province* in [SC Application No.261/2013 (F/R)], decided on 11.09.2014. Wanasundera J. held as follows:

"I am of the opinion that Section 13 of the Human Rights Commission Act No.31 of 1996 should not be interpreted and/or used as a rule to suspend the one month's time limit contemplated by Article 126(2) of the Constitution…The provisions of an ordinary Act of Parliament should not be allowed to be used to circumvent the provisions in the Constitution."

What needs to be considered in the instant Application is whether the Petitioner has made a complaint to the Human Rights Commission to circumvent the time limit imposed by Article 126(2) of the Constitution in view of the fact that, the averments in paragraph 10 of the Petition, demonstrates that the Petitioner was well aware of the impugned acts of the Respondents by 31.08.2017.

The document marked and produced as P3, the General Secretary of the Trade Union in his letter dated 20.09.2017 (of which the Petitioner is the President) refers to an Executive Committee meeting (of the Trade Union) held on 31.08.2017 at which the Petitioner had been authorized to file a case in the Supreme Court with regard to the grievances that had arisen as a result of enacting the Local Authorities Elections (Amendment) Act, No.16 of 2017, which had been passed by the Parliament on 25.08.2017. It was contended on behalf of the Respondents that the Petitioner, therefore, was aware of the impugned Act as far back as 31.08.2017 and had been mandated by the Trade Union to prosecute the matter before the Supreme Court.

The Learned ASG argued that on the face of the documents produced marked P6, the Petitioner appears to have made a complaint to the Human Rights Commission solely for the collateral purposes of circumventing the time limit prescribed in Article 126(2). In fact, the endorsement at the top of the complaint, said to have been made by the Human Rights Commission, states that it has been accepted as it is required for the purpose of filing a fundamental rights application before the Supreme Court:

> "ගරු ශ්‍රේෂ්ඨාධිකරණයේ මූලික අයිතිවාසිකම් පෙත්සමක් ගොනු කිරීමේ අවශ්‍යතාවය මත භාරගන්නා ලදි."

The learned Presidents' Counsel for the Petitioner argued that the above endorsement is not the writing of the Petitioner and he cannot be held

responsible for an endorsement made by an official of the Human Rights Commission. Even if it may be so, it would be reasonable to conclude that the official of the Commission had placed the endorsement based on the knowledge gathered from the Petitioner or else there cannot be a reason for him to have placed that endorsement on the printed format (provided by the Commission) that was used by the Petitioner to lodge his complaint to the Human Rights Commission.

The Petitioner himself has relied on this document to circumvent the period of limitation in Article 126(2) and had written in his own handwriting in two places that he intends to go before the Supreme Court in the future:

,ඉදිරියේදී ශ්‍රේෂ්ඨාධිකරණයේ මූලික අයිතිවාසිකම් "ඉදිරියේ ශ්‍රේෂ්ඨාධිකරණයට යාමට කටයුතු කරමි. (*Vide* the responses to the cages 8 and 11 of the Complaint to the Human Rights Commission).

Therefore, it is clear that the Petitioner had not filed the said application with the intention of pursuing it before the Human Rights Commission in seeking redress but only to obtain an advantage by bringing the application within the provisions of Article 126(2).

Cage 10 of the format used to lodge the complaint to the Human Rights Commission, requires a complainant to state the evidence he expects to place in order to substantiate his claim. The petitioner's response was , "will be furnished in the future". ("ඉදිරියේදී ඉදිරපත් කරමිනී).

The learned ASG contended that, when the foregoing facts are considered, the intention on the part of the Petitioner to circumvent the provisions of Article 126(2) is manifest.

As referred to earlier, the time limit of one month prescribed by Article 126 of the Constitution to invoke the fundamental rights jurisdiction for an alleged violation is mandatory. In a fit case, however, an application made outside the time limit of one month stipulated in Article 126 could be entertained where the

delay had resulted due to a reason or reasons as the case may be that are beyond the control of the Petitioner or where the court is satisfied that the circumstances prevailed at the time relevant, it would have been impossible for the Petitioner to have invoked the jurisdiction within 30 days and to be more precise where the Principle *lex non cogit ad impossibllia* would be applicable.

In the instant case the Petitioner is not relying on any such disability and the exception of time bar is sought on the basis that a complaint had been made to the Human Rights Commission within one month of the alleged infringement in terms of Section 14 of the Human Rights Act.

It is clear from the provision of the Act referred to above, that a mere act of making a complaint to the Human Rights Commission is not sufficient to suspend the running of time prescribed by Article 126(2) of the Constitution.

As held by this court, both in the case of *Subasinghe vs. the Inspector General of Police* - SC Special 16/99 S.C minutes of 11.09.2000 and the case of *Divalage Upalika Ranaweera and others vs. Sub Inspector Vinisias and others* – S.C. Application 654/2003 S.C minutes of 13.05.2008, a party seeking to utilize Section 13(1)of the Human Rights Commission Act to contend that "the period within which the inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court" is obliged to place material before this court to show that an inquiry into his complaint is pending before the Human Rights Commission.

It is, however, evident from what had been stated by the Petitioner in his complaint to the Human Rights Commission, which I have referred to above, his desire had been to invoke the jurisdiction of this court and not to have an inquiry conducted by the Human Rights Commission.

In the above circumstances, I uphold the preliminary objection on time bar raised on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents and dismiss the Application of the Petitioner *in limine*.

JUDGE OF THE SUPREME COURT

Justice Vijith Malalgoda P.C

I agree

JUDGE OF THE SUPREME COURT