IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application under and in terms of Article 121(1) of the Constitution read with Article 120 and Rule 63(1) of the Supreme Court Rules of 1978, against the Bill titled "INDUSTRIAL DISPUTES (SPECIAL PROVISIONS)".

A. V. N. Perera,

No 192, Doowa Road,

Baddegana, Pitakotte.

Petitioner

S.C. (S. D.) No: 30 / 2022

Vs.

Hon. Attorney General,

The Attorney General's Department,

Colombo 12.

Respondent

Before:

Vijith K. Malalgoda PC - Judge of the Supreme Court

A.H.M.D. Nawaz - Judge of the Supreme Court

Janak De Silva - Judge of the Supreme Court

Counsel:

Dharshana Weraduwage with Ms. Dhanushi Kalupahana and Ushani Atapattu for the Petitioner.

Mrs. Suharshi Herath Senior Deputy Solicitor General with Ms. Navodi de Zoysa State Counsel for the Attorney-General.

The Court assembled for the hearing at 10.00 a.m. on 21st and 22nd April, 2022.

A Bill titled "Industrial Disputes (Special Provisions)" was published in the Government Gazette on 25th March, 2022 and was placed on the Order Paper of Parliament on 8th April, 2022. This petition was filed on 18th April, 2022 invoking the jurisdiction of this Court in terms of Article 121 to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution. On receipt of the petitions, the Attorney General was noticed pursuant to Article 134(1) of the Constitution.

The Court heard the Petitioner and the Attorney General.

The preamble to the Bill reads as follows:

> "An Act to make special provisions to deem the Presidents of the Labour Tribunals as Additional Magistrates to hear, try, determine and dispose of all suits or prosecutions under the provisions of specified enactments and for matters connected therewith or incidental thereto."

Clause 1 of the Bill gives the Minister the power to specify when the Bill comes into force. In terms of Clause 2, every President of the Labour Tribunal established in terms of section 31A of the Industrial Disputes Act (Chapter 131) is deemed to be an Additional Magistrate for the purposes specified therein. Clause 3 makes the provisions of the Code of Criminal Procedure Act, No. 15 of 1979 and Evidence Ordinance applicable to such proceedings. In terms of Clause 4, the Sinhala text is to prevail in case of inconsistency.

During the hearing, the learned counsel for the Petitioner raised objections to several clauses of the Bill relating to its constitutionality.

The learned counsel for the Petitioner submitted in general that the Bill, as a whole or in part, is inconsistent with many entrenched provisions of the Constitution, including Articles 3, 4(b), 4(d), 12(1), 27(2)(a) and (b), 27(6), (9) and (12) and 27(15) and hence require the approval of the people at a Referendum by virtue of Article 83.

In particular, it was submitted that the long title and Clauses 2 and 3 of the Bill collectively attempt to dilute the powers of the Commissioner for Workmen's Compensation and accordingly, those provisions violate Articles 3, 4(b), 4(d), 12(1), 42, 43 and 44 of the Constitution and thus require the approval of the people at a Referendum by virtue of Article 83.

Alternatively, the learned counsel for the Petitioner contended that the long title and Clauses 2 and 3 of the Bill attempts to disregard or deviate from Sri Lanka's International Treaty Obligations and accordingly, those provisions violate Articles 3, 4(b), 4(d), 12(1), 27(2)(a), (b), 27(6), 27(9), 27(12) and 27(15) of the Constitution and hence require the approval of the people at a Referendum by virtue of Article 83.

It was further submitted that Clauses 2(1), 2(2) and 2(3) of the Bill collectively go against the principles and/or the provisions of the Workmen's Compensation Ordinance No 19 of 1934 (as amended) and those provisions violate Articles 3, 4(b), 4(d), 12(1) and thus require the approval of the people at a Referendum by virtue of Article 83.

The learned counsel for the Petitioner next drew our attention to the preamble of the Bill and submitted that although it seeks to confer civil jurisdiction on the Presidents of Labour Tribunals, the provisions of the Bill do not confer such jurisdiction. Accordingly, it was submitted that Clauses 3(1) and 3(2) of the Bill violate Articles 3, 4(b) and 12(1) of the

Constitution and thus require the approval of the people at a Referendum by virtue of Article 83.

Finally, it was submitted that the Bill as a whole weakens the office of the Commissioner of Workmen's Compensation, which seriously violate the fundamental rights of the Petitioner and Citizens of the Republic as a whole and thereby the entirety of the Bill negatively affects the Rule of Law and violates Articles 3, 4(d) and 12(1) of the Constitution and thus require the approval of the people at a Referendum by virtue of Article 83.

The objections of the Petitioner to the Bill are principally twofold: Firstly, the inclusion of the Workmen's Compensation Ordinance (Chapter 139) as item 49 in Schedule I of the Bill and secondly, the failure on the part of the provisions of the Bill to confer civil jurisdiction on the Presidents of Labour Tribunals although the preamble refers to such vesting.

During the hearing the learned Senior Deputy Solicitor General informed, and subsequently confirmed by way of a motion dated 22nd April 2022, that the Attorney-General will advise the Minister of Labour to move the Committee Stage amendments annexed to letter dated 22.04.2022 sent by the Legal Draftsman to the Secretary, Ministry of Labour. Two of the proposed amendments are to remove item 49 from Schedule I and the reference to suits in the preamble.

The learned counsel for the Petitioner indicated to Court that his concerns would be resolved if the proposed amendments were made.

In addition to the matters raised by the Petitioner, the Court noted two significant issues.

Firstly, we observe that the Workmen's Compensation Ordinance (Chapter 139) was not included as item 49 in Schedule I of the draft Bill submitted for Cabinet approval by the Minister of Labour by Cabinet Memorandum dated 10th March 2022 for which Cabinet

approval was obtained. The Court has not been provided with any further Cabinet Memorandum by which Cabinet approval has been sought and obtained to include the Workmen's Compensation Ordinance (Chapter 139) in Schedule I. Nonetheless, it has been included as item 49 in Schedule I of the Bill tabled in Parliament.

In terms of Article 43(1) of the Constitution, the Cabinet of Ministers is charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament. These provisions encapsulate two important elements of a Cabinet system of government, namely, unanimity of government and its accountability to Parliament. Lord Salisbury expounded the classic expression of collective responsibility of the Cabinet as follows:

> *"For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues...It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the essential principles of parliamentary responsibility established."* [Official Report, HC Cols 833-34. 8 April 1878]

The decision of the Cabinet of Ministers to introduce the "Industrial Disputes (Special Provisions) Bill" is a policy decision which attracts the collective responsibility of the Cabinet in terms of Article 43(1). However, the draft Bill submitted for Cabinet approval differs from the Bill tabled in Parliament in so far as the Workmen's Compensation Ordinance (Chapter 139) is concerned.

Accordingly, Clause 2(1) read with Schedule I of the Bill is inconsistent with Article 43(1) of the Constitution and may only be passed by the special majority required by Article 84(2).

The learned Senior Deputy Solicitor General informed during the hearing, and subsequently confirmed by way of a motion dated 22nd April 2022, that item 49 will be removed from Schedule I of the Bill by way of a Committee Stage amendment.

Schedule I as so amended will not be inconsistent with the Constitution.

Secondly, the Court observed that in terms of Clause 2(1) of the Bill, every President of the Labour Tribunal established under section 31A of the Industrial Disputes Act (Chapter 131) shall *be deemed to be an Additional Magistrate* for the purposes specified therein.

In ***Jinawathie and Others v. Emalin Perera*** **[(1986) 2 Sri.L.R. 121 at 130]** Ranasinghe J. (as he was then) held:

> "In statutes the expression "deemed" is commonly used for the purpose of creating a statutory function so that the meaning of a term is extended to a subject matter which it properly does not designate. Thus, where a person is "deemed to be something" it only means that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. When a thing is deemed to be something, it does not mean that it is that which it is deemed to be, but it is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing it is nevertheless deemed to be that thing."

By way of Clause 2(1) of the Bill, Parliament seeks to elevate a President of the Labour Tribunal to the status of an Additional Magistrate when in fact he is not.

In terms of Article 111(H)(1)(b) of the Constitution, it is the Judicial Service Commission that is vested with the power to appoint judicial officers. According to Article 111M(a), judicial officer includes a person who holds office as judge of any Court of First Instance. Hence, section 6(1) of the Judicature Act provides for the appointment of Magistrates and Additional Magistrates by the Judicial Service Commission.

In this context, it is pertinent to examine the historical context in which the Judicial Service Commission became part of our constitutional framework in order to appreciate the reasons for its creation.

The Judicial Service Commission was introduced for the first time into our constitutional framework by the Ceylon (Constitution) Order-in-Council 1946. In ***Senadhira et. al. v. The Bribery Commissioner*** **(63 N.L.R. 313)** it was identified as the fourth pillar in the temple of justice. There was no doubt that under the Ceylon (Constitution) Order-in-Council 1946 the legislature was empowered to validly confer judicial power on institutions created by law. However, the Supreme Court in ***Ranasinghe v. The Bribery Commissioner*** **(64 N.L.R. 449)** held that judicial power vested in such institutions cannot be exercised by persons who are appointed to the institution by the Governor-General and not by the Judicial Service Commission. This position was confirmed in ***Senadhira et. al. v. The Bribery Commissioner*** **(Supra.)**, ***Don Anthony v. The Bribery Commissioner*** **(64 N.L.R. 93)**, ***Piyadasa v. The Bribery Commissioner*** **(64 N.L.R. 385)** and ***Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya*** **(65 N.L.R. 185)**. Clearly, judicial power under the Ceylon (Constitution) Order-in-Council 1946 was only exercisable by a judicial officer appointed by the Judicial Service Commission except in the case of the superior courts.

The Privy Council in ***The Bribery Commissioner v. P. Ranasinghe*** **(66 N.L.R. 73)** while affirming the judgment in ***Ranasinghe v. The Bribery Commissioner*** **(Supra.)** held that the framers of the Constitution appreciated the importance of securing the independence of judges and of maintaining the dividing line between the judiciary and executive.

Accordingly, it is seen that the Judicial Service Commission was first introduced into our constitutional framework to protect and foster the independence of the judiciary by ensuring that the appointment and disciplinary control of the minor judiciary is vested with it free from any influence from the executive or legislature.

Although the doctrine of separation of powers and the Judicial Service Commission did not find its way into the 1972 Constitution, it was reinstated under the 1978 Constitution. In ***Ratnasiri Perera v. Dissanayake, Assistant Commissioner of Co-operative Development and Others*** **[(1992) 1 Sri.L.R. 286]** Fernando J. held that the relevant provisions of the 1978 Constitution were not enacted in vacuo, but inter alia in the background of the Constitutional provisions and judicial decisions set out above.

Consequently, there can be no doubt that the framers of the 1978 Constitution reintroduced the Judicial Service Commission to free the minor judiciary from any form of executive and legislative influence as part of the overall objective of establishing the independence of the judiciary.

The importance of securing the independence of the judiciary was expounded by Blackstone (Blackstone's Commentaries Vol. 1 at p. 269) as follows:

> *"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."*

Article 3 of the Constitution states that sovereignty is in the People and is inalienable. This provision seeks to give constitutional recognition to the concept of sovereignty in political theory which was first referred to by Bodin in *The Republic* in 1576. It defines Sovereignty to include the powers of government, fundamental rights and the franchise.

Nonetheless, it seeks to deviate from the traditional meaning attributed to the concept of sovereignty in political theory, which focused only on the power of the State, and extend its meaning to include rights such as fundamental rights and the franchise. It is a non-exhaustive definition as the word used is *inclusive*. Hence there are other rights other than fundamental rights and the franchise that form part of the sovereignty of the people in our constitution.

In terms of Article 3, sovereignty is in the people and according to Article 4, the organs of government exercise the executive, legislative and judicial power of the people. No useful purpose is served by giving constitutional recognition to judicial power if there is no independent judiciary to protect itself from executive and legislative intrusions. Similarly no useful purpose is served by giving constitutional recognition to fundamental rights if there is no independent judiciary to protect them from executive and administrative excesses. Correspondingly, no useful purpose can be achieved if the people are given the power of franchise without the right to an independent judiciary to give practical effect to such right. An independent judiciary is the last bulwark to protect civil liberties against arbitrary action by the executive or the legislature in appropriate proceedings.

In the end, the full implementation of all rights of the people depends upon the proper administration of justice by a competent, independent and impartial judiciary by upholding the rule of law. In this context, it is important to note that the SVASTI of the Constitution assures to all people the independence of the judiciary. Hence sovereignty in Article 3 of the Constitution must be read to include the right to an independent judiciary.

Accordingly, when the sovereign power of the people is to be exercised by organs and institutions of government, it must be understood and interpreted in this context.

In terms of Article 4(c) of the Constitution, the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law. In interpreting this power of the Parliament, it must be read together with the right to an independent judiciary which is part of the sovereignty vested in the people in terms of Article 3.

Therefore, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, Parliament has only the power to provide for the creation of courts, tribunals and institutions for the exercise of the judicial power of the people. This judicial power can only be exercised by a judicial officer duly appointed under the law. Although Parliament has power in terms of Article 105(2) of the Constitution to replace or abolish, or amend the jurisdiction of such courts, tribunals and institutions, it does not have the power to appoint judicial officers directly or indirectly. The Judicial Service Commission and its powers are integral to the protection and promotion of the independence of the judiciary, which forms part of the sovereignty of the people. Consequently, in ***Ratnasiri Perera v. Dissanayake, Assistant Commissioner of Co-operative Development and Others*** **(Supra.)** Fernando J. held that except constitutional jurisdictions, other jurisdictions can be taken away by ordinary law provided that if they are transferred to other bodies, the officers or members thereof must be appointed in terms of Articles 114 and 170.

By Clause 2(1) of the Bill, Parliament is seeking to appoint judicial officers which offends the independence of the judiciary and thereby infringes Articles 3, 4(c), 111(H)(1)(b) and 111 (M) (a) of the Constitution.

We are therefore of the opinion, and determine, that Clause 2(1) of the Bill is inconsistent with Articles 3, 4(c), 111(H)(1)(b) and 111 (M) (a) of the Constitution and may only be passed by the special majority required by Article 84(2) and approved by the people at a Referendum by virtue of the power of Article 83.

The learned Senior Deputy Solicitor General informed during the hearing, and subsequently confirmed by way of motion dated 22nd April 2022, that the deeming provision will be removed from Clause 2(1) of the Bill by way of a Committee Stage amendment.

Clause 2(1) as so amended will not be inconsistent with the Constitution.

The following are the amendments that the Attorney-General will advise the Minister of Labour to move at the Committee Stage:

Page 1, Clause 2 : (1) delete lines 8 to 11 (both inclusive) and substitute the following: -

"2. (1) Every labour tribunal established under section 31A of the Industrial Disputes Act (Chapter 131) shall, in addition to the powers and duties conferred by written law, exercise the powers conferred upon a Magistrate";

(2) delete line 17 and substitute the following :-

"Commissioner or implementation of the provisions incidental hitherto of the";

(3) delete lines 20 and 21 and substitute the following: -

"(2) For the purposes of this Act, the jurisdiction of a labour tribunal as mentioned above shall, subject to the provisions";

Page 2, : (4) delete line 1 and substitute the following: -

"(3) The jurisdiction of a labour tribunal";

(5) delete line 7 and substitute the following: -

"the Magistrate's Court shall continue to exercise such other powers other than the powers under subsection (1) of this section";

Page 2, Clause 3 : (1) delete lines 11 and 12 and substitute the following:-

"3. (1) The President of a labour tribunal specified in Column I of Schedule II shall have the power";

(2) immediately after line 21 insert the following:-

"(2) There shall be a duly appointed Registrar and an incidental staff for the purpose of implementing the functions specified under subsection (1) section 2 of this Act";

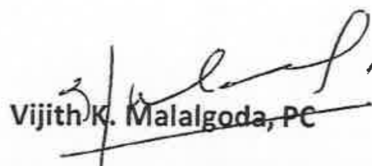
Page 5 : delete item 49 of the Schedule I;

Long title : delete the long title and substitute the following: -

"AN ACT TO MAKE SPECIAL PROVISIONS TO EMPOWER THE LABOUR TRIBUNALS TO HEAR, TRY, DETERMINE AND DISPOSE OF ALL ENFORCEMENT PROCEEDINGS AND PROSECUTIONS UNDER THE PROVISIONS OF SPECIFIED ENACTMENTS AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.".

Upon the Bill tabled in Parliament being amended as undertaken above, it will be consistent with the Constitution. In this regard, we note that it is the constitutional duty of the Hon. Attorney-General in terms of the proviso to Article 77(2) of the Constitution to communicate his opinion of an amendment proposed to a Bill in Parliament to the Speaker at the stage when the Bill is ready to be put to Parliament for its acceptance.

We place on record our deep appreciation of the assistance given by the learned counsel for the Petitioner and by learned Senior Deputy Solicitor General who appeared on behalf of the Hon. Attorney-General.

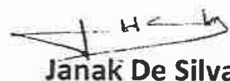


Vijith K. Malalgoda, PC

Judge of the Supreme Court

A.H.M.D. Nawaz

Judge of the Supreme Court



Janak De Silva

Judge of the Supreme Court