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

Jayantha Liyanage
Petitioner-Appellant

SC Appeal 96/2011
SC (Spl) LA No.150/2010
CA (Writ) Application 448/2008

Vs

Commissioner of Elections
Election Secretariat
No.2, Sarana Mawatha,
Rajagiriya

Respondent-Respondent

Before : K SRIPAVAN J
SISIRA J DE ABREW J
SARATH DE ABREW J

Counsel : Manohara de Silva PC with Harsha Munasinghe for the Petitioner-Appellant.
Indika Demuni DSG for the Respondent-Respondent
Argued on : 30.7.2014 and 11.9.2014
Decided on : 17.12 .2014

SISIRA J DE ABREW J.

This is an appeal to set aside the judgment of the Court of Appeal dated 2.7.2010. The Petitioner-Appellant(hereinafter referred to as the Petitioner), who is the

Secretary of Sinhala Jathika Peramuna (hereinafter referred to as the SJP), on 12.8.2010 made an application marked P16 to the Respondent-Respondent(hereinafter referred to as the Respondent) under the provisions of Parliamentary Election Act No.1 of 1981 to recognize his party as a political party. The Respondent by his letter dated 25.8.2000 marked P18, refused the application. Thereafter the Petitioner, by application dated 25.1.2006 marked P34 made the same request to the Respondent but the Respondent ,by letter dated 27.12.2006, again refused the said application. Thereafter the Petitioner, by letter dated 10.12.2007 marked P38, once again made an application to the Respondent under the provisions of Parliamentary Election Act No.1 of 1981 to recognize his party as a political party. But the Respondent this time too by letter dated 21.1.2008 marked P43, refused the said application. Being aggrieved by the said decision of the Respondent, the Petitioner filed a petition in the Court of Appeal seeking, inter alia, the following relief.

1. A mandate in the nature of a writ of certiorari quashing the order referred to in the Respondent's letter sent to the Petitioner dated 21.1.2008 marked P43.

2. A mandate in the nature of a writ of mandamus on the Respondent compelling him to recognize SJP and assigning the symbol Crown as depicted in P17.

The Court of Appeal, by its judgment dated 2.7.2010, dismissed the petition of the petitioner. Being aggrieved by the said judgment of the Court of Appeal the Petitioner has appealed to this Court. This Court by its order dated 8.7.2011, granted special leave to appeal on the following questions raised by the Petitioner.

1. Did the Court of Appeal err in refusing the Petitioner's application challenging the order of the Commissioner of Elections rejecting the

Petitioner's application for recognition as a political party when sufficient material was available before the Commissioner of Elections?

2. Did the Court of Appeal err and/or misdirect itself in holding that the finality clause in Section 9(7) of the Parliamentary Election Act as final.

I will first deal with the 2nd question of law. The Court of Appeal, by its judgment dated 2.7.2010, observed that the decision of the Commissioner of Elections made in terms of Section 7(5) of the Parliamentary Election Act No.1 of 1981 is final and cannot be questioned in any court of law. The Court of Appeal further observed that the relief sought by the Petitioner cannot be granted since the impugned decision of the Commissioner of Elections (hereinafter referred to as the Commissioner) had been taken after an inquiry and giving an opportunity to the Petitioner and as such the impugned decision of the Commissioner was not amenable to judicial review.

The Court has to consider whether the decision of the Court of Appeal with regard to the ouster clause is correct? Section 7(7) of the Parliamentary Election Act No.1 of 1981 reads as follows:

"*The order of the Commissioner on any application made under subsection (4) shall be final and shall not be called in question in any court.*"

In this connection I would like to consider Section 22 of the Interpretation Ordinance which reads as follows:

"Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any

order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal:

Provided, however, that the proceeding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution in respect of the following matters, and the following matters only, that is to say-

(a)where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(b)where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

Provided further that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution of the Republic of Sri Lanka to issue mandates in the nature of writs of habeas corpus."

The writ jurisdiction is conferred to the Court of Appeal under Article 140 of the Constitution of the Republic which reads as follows:

Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person:

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal.

According to Article 140 of the Constitution, the Court of Appeal shall have power and authority to grant and issue, according to law, orders in the nature of writ of certiorari, prohibition, procedendo, mandamus and quo warrento. The Court of Appeal must issue orders always according to law. But this does not mean that the writ jurisdiction conferred on the Court of Appeal by the Constitution can be ousted by the ordinary legislation. Thus the Court of Appeal assumes writ jurisdiction under the provisions of the Constitution of the Republic which is the supreme law of the country.

It is an accepted principle in law that ordinary legislation cannot supersede the Constitution of the country. When the Court of Appeal assumes writ jurisdiction under the provisions of the Constitution, the ordinary legislation cannot supersede the powers conferred on the Court of Appeal by the Constitution and

oust the jurisdiction of the Court of Appeal. This view is supported by the judgment of the Supreme Court in the case of B Sirisena Coory Vs Tissa Dias Bandaranayake [1999] 1SLR 1 wherein His Lordship Justice Dheeraratne held thus: "*The writ jurisdiction of the Superior Courts is conferred by Article 140 of the Constitution. It cannot be restricted by the provisions of ordinary legislation contained in the ouster clauses enacted in sections 9 (2) and 18A of the SPCI Law or section 22 of the Interpretation Ordinance. In fact the first proviso to section 18A (2) specifically confers writ jurisdiction on the Supreme Court. That jurisdiction is unfettered."*

When I consider the above matters, I hold that the writ jurisdiction of the Superior Courts is unfettered and the ouster clause in the Parliamentary Election Act cannot ouster the writ jurisdiction of the Court of Appeal. I further hold that the impugned decision of the Commissioner is subject to the writ jurisdiction of the Court of Appeal and the Court of Appeal has the power to quash the impugned decision of the Commissioner by way of writ of certiorari. Therefore I conclude that the judgment of the Court of Appeal is wrong and should be set aside on this ground alone.

I will now examine the reasons given by the Commissioner (1st Respondent) to reject the application of the Petitioner. The reasons although not given to the petitioner when his application was rejected were produced along with the objection filed in this Court by the Commissioner. They are as follows.

1. The members of the party at certain times have acted independently and not as a party.

2. There is no increase of members since 1999 and the petitioner has a false notion that only a political party can get its members increased.

3. The Petitioner has formed an opinion that in order to engage in political activities it is necessary that his party should be a recognized political party.

4. Although they consider themselves as a party, only a limited number of persons are engaged in their activities.

5. At no stage since 1999, has the petitioner's party contested at an election as an independent party.

6. The petitioner's party is not a breakaway group of a recognized political party.

I would first like to comment on ground No.6 given by the Commissioner. According to him the party making an application to be recognized as a political party, should be a breakaway group of a recognized political party. Does the Commissioner, in order to recognize a party as a political party, advocate the breakaway of recognized political parties? Hence, ground No.6 given by the Commissioner is unacceptable and cannot be permitted to stand. In my view the Commissioner's decision should be quashed on this ground alone.

I now advert to ground No.5 above. Although the Petitioner's party did not contest at an election as an independent group, the National organizer of his party in 1988 contested Sabaragamuwa Provincial Council election under the symbol of Mahajana Eksath Peramuna [vide P8(a) and P8(b)] and the petitioner himself contested at the general election held in the year 2000 under the symbol of Sihala Urumaya [vide documents marked P20(a), P20(b) and P20(c)]. There is no necessity for a political party to contest as an independent group to get recognition

of a political party. This is clear when one considers Section 7(5) of the Parliamentary Election Act. It is unnecessary to comment on each and every ground given by the Commissioner. It is seen that the grounds given by the Commissioner are unacceptable. The Court of Appeal has not considered these matters.

Section 7(5) of the Parliamentary Election Act reads as follows:

Upon the receipt of an application duly made under subsection (4) on behalf of any political party, the Commissioner shall, after such inquiry as he may deem fit,

(a) if in his opinion such party is a political party and is organized to contest any election under this Act, make order

(i)that such party shall be entitled to be treated as a recognized political party for the purpose of elections, subject however, to the provisions of this Act; and

(ii)allotting an approved symbol to such party, being the approved symbol specified in the application or any other approved symbol determined by him in his absolute discretion, but not being the approved symbol of any other political party which is entitled to be so treated; or

(b) if in his opinion, such party is not a political party and is not organized to contest any election under this Act, make order disallowing the application.

Under Section 7(5) of the Act in order for the Commissioner to recognize a party as a political party he must form an opinion on the following two criteria. They are:

1. The party making the application to be recognized must be a political party.

2. Such party must be organized to contest any election under the Act.

As I pointed out earlier the National Organizer of the Petitioner's party has contested a Provincial Council Election in 1998 under the symbol of Mahajana Eksath Peramuna and the Petitioner has contested general election held in 2000 under the symbol of Sihala Urumaya. The Petitioner's party has supported the candidature of Dr.Harischandra Wijetunga at the Presidential Election held in 1999(vide document marked P10 and P11). When the above matters are considered it appears to Court that the Respondent had sufficient material to arrive at a finding that the Petitioner's party is a political party and is organized to contest any election under the Parliamentary Election Act.

When I consider all the above matters I am therefore of the view that the impugned decision of the Commissioner is wrong and the Court of Appeal has failed to consider the above matters. For the above reasons, I quash the decision of the Respondent dated 21.1.2008 marked P43 and set aside the judgment of the Court of Appeal dated 2.7.2010.

In view of the above conclusion reached by me, I answer the questions of law in the affirmative. Accordingly I issue a writ of Mandamus directing the Respondent (Commissioner of Elections) to recognize SJP as a political party and to assign an appropriate symbol to SJP.

JUDGE OF THE SUPREME COURT

SARATH DE ABREW J

I agree.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I have had the advantage and privilege of reading in draft the judgment prepared by my brother, Sisira J. de Abrew. J. I am in agreement with the conclusion reached by my brother on the two questions of law on which special leave to appeal was granted. However, I wish to express my view on the failure of the Commissioner of Elections to communicate reasons when several applications of the Petitioner were rejected.

Any act of the repository of power, whether administrative or quasi-judicial, is open to challenge if it is in conflict with the governing Act or the general principles of law of the land or is arbitrary and unreasonable that no fair minded authority could ever had made it. The **r**ecording and giving of reasons therefore ensures that the decision of the repository of power is reached according to law and not on the basis of caprice, whim or fancy. A person seeking to register his party as a recognized political party is ordinarily entitled to know the grounds on which the Commissioner of Elections has rejected his claim. If the decision of the Commissioner of Elections is subject to appeal or judicial review, the necessity to give reasons is greater, for without reasons, firstly, the persons aggrieved by the decision of the Commissioner of Elections would not be in a position to formulate the legal basis on which he could challenge such decision by way of appeal or judicial review. Secondly, the appellate authority would not have any material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was within the parameters of the Commissioner of Elections.

A speaking order containing the reason will at its best be a reasonable one and ensures fairness and equality of treatment in administrative or quasi-judicial

actions. It may be stated here that by a pronouncement of the Indian Supreme Court in *Seimans Engineering* Vs. *Union of India* , A I R (1976) S.C. 1785 it was observed by Bhagawatti, J. at page 1789 as follows :-

> "*.....It is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.*

In view of the expanding horizon in the sphere of judicial review the necessity of recording and communicating reasons therefore becomes an indispensable part of a sound system of administrative authorities and tribunals exercising administrative and / or quasi-judicial functions.

JUDGE OF THE SUPREME COURT.