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SC S.D. 20/2017 – SC S.D. 32/2017

S.C.S.D. No. 32/2017 Petitioner
Gunawardhana

1. Kiramba Gamaethige
1/100, Clerandenwatte,
Batuhena,
Hidellana.

2. Kulathunga Hettiarachchige
Upul Jagath,
Rohini Palace Niwasa,
Thapal Mawatha,
Hingurakgoda.

Counsel

Nuwan Bopage with Thanuka Madawa
Nandasiri, Jayantha Dehianthage,
Migara Doss, Manju Sri Chandrasena,
Avindini Corea instructed by Manjula
Balasuriya

Vs.

Respondent

Hon. Attorney General
Attorney General's Dept.
Colombo 12.

Counsel

Jayantha Jayasuriya PC, AG with Ms.
Indika Demuni de Silva, PC, ASG, Nerin
Pulle, DSG, Ms. Yuresha de Silva SSC,
Dr. Avanti Perera, SSC and Suren
Gnanaraj SC.

Before

Priyasath Dep, PC, Chief Justice
Anil Gooneratne, J
Vijith K. Malalgoda PC, J

Court assembled for hearing on 06.09.2017, 07.09.2017 and 08.09.2017 at 10.00 am.

Determination:

A Bill in its long title referred to as “An Act to Amend the Constitution of the Democratic Socialist Republic of Sri Lanka” was published in the Government Gazette dated 28-07-2017 and placed on the order paper of the Parliament on 22-08-2017. The short title of the Bill was cited as “Twentieth Amendment to the Constitution.”

Thirteen Petitions numbered above were filed by citizens and associations invoking the jurisdiction of the Supreme Court in terms of under Article 121(1) to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution.

Upon receipt of the petitions the Court issued notice on the Attorney General as required by Article 134 (1) of the Constitution.

The Counsel representing the Petitioners, the Intervient Petitioners and the Attorney General were heard before this bench at the sittings held on 6th, 7th and 8th of September 2017.

The Bill seeks to amend Articles 154D and 154E of the Constitution by inserting new Articles numbered 154DD and 154EE.

Clause 2 of the Bill inserted the following new Article immediately after Article 154D of the Constitution which shall have effect as Article 154DD of the Constitution:---

154DD. The election of members to all Provincial Councils shall be held on the same date and the Parliament shall determine the date on which all the Provincial Councils shall stand dissolved (in this chapter referred to as the “specified date”)

Provided that, such specified date shall not be later than the expiration of the term of the last Constituted Provincial Council.”

Clause 3 of the Bill amend the Article 154E of the Constitution by the substitution for the words “as a dissolution of the Council.” of the following:-

“as a dissolution of the Council:

The Article 154E of the Constitution reads as follows :

A Provincial Council shall, unless sooner dissolved, continue for a period of five years from the date appointed for its first meeting and the expiration of the said period of five years shall operate *as a dissolution of the Council.*

This amendment was effected by deleting the full stop in the last sentence of the Article and including a colon in order to include a proviso to the above Article which reads as:

Provided, however, upon the determination of the specified date under Article 154DD—

- a) The term of office of any Provincial Council ending prior to the specified date shall be deemed to be extended up to the specified date and such Provincial Council shall stand dissolve on the specified date; or
- b) The term of office of any Provincial Council which continues beyond the specified date shall end on the specified date and such Provincial Council shall stand dissolved on the specified date.”.

Clause 4 inserted the following new Article immediately after Article 154E of the Constitution and shall have effect as article 154EE of the Constitution:-

154EE. In the event of dissolution of any provincial Council by reason of the operation of the provisions of sub-paragraph (c) of paragraph (8) of Article 154B or by any other reason specified in any law, the powers of such Provincial Council shall be exercised by the Parliament until the specified date and the provisions of Articles 154L and 154M shall, *mutatis mutandis* apply in relation to the exercise of powers of the Provincial Council.”.

Clause five states that “In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail”.

A preliminary objection was taken by several Petitioners to the effect that the Bill was not properly placed before the Parliament and therefore there is no valid bill to be determined by this Court. It is the position of the of the Petitioners that the mandatory provisions in Article 154G (2) was not complied with. The Article 154G (2) reads as follows:

“No Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and

- (a) where every such Council agrees to the amendment or repeal, such Bill is passed by a majority of the Members of Parliament present and voting ; or
- (b) where one or more Councils do not agree to the amendment or repeal such Bill is passed by the special majority required by Article 82.”

The Honourable Attorney General submitted that the President after the publication in the Gazette and before placing in the order paper had referred the Bill to every Provincial Council for the expression of its views. It is the position of the Petitioner who raised the preliminary objection that there is no proof that the President had referred to the Provincial Councils for the expression of its views. It is further submitted that even if the Bill was referred to every Provincial Council that it is imperative that the views of the Provincial Councils should be conveyed to the President before the Bill is placed in the order paper. It was submitted that this is a condition precedent and failure to comply is fatal and affect the validity of the Bill.

The Attorney General submitted that there is no requirement to await the expression of the views of the Provincial Council before the Bill is placed in the order paper. Mere reference of the Bill by the President to the Provincial Council for the expression of the willingness before placing it on the order paper is sufficient compliance with Article 154G (2).

The placing of the Bill in the order paper is one step in the legislative process. Bills are considered and debated in various readings and stages. Parliament could consider the expression of views by the Provincial Council during the reading and stages and if necessary to bring in amendments to the Bill. There are instances where Parliament has not proceeded with the Bills.

It was suggested that before the bill is placed in the order paper the views of the Provincial Councils are required in order to find out whether every Provincial Council had agreed to the amendment. If so Bill could be passed with a simple majority as envisaged by Article 154G (2) (a). If one or more Councils do not agree, bill has to be passed by two third majority. However the expression of the views of the Councils are required before voting to decide the majority of votes required to passed the Bill. Therefore I am of the view that it is not required that expression of willingness of the Councils to be expressed before the bill is placed in the order paper of the Parliament. However it is imperative that the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament to refer the Bill to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference. If the reference is not made as held in Divinaguma Bill (SC/SD 02/12) the Bill shall not become law.

For the reasons stated above we overrule the preliminary objection and proceed to examine the clauses of the Bill for Constitutionality.

According to the Article 154DD which is proposed to be introduced by the Bill, the Election of the members of the Provincial Council to be held on the same date and the Parliament shall determine the the date on which all Provincial Councils shall stand dissolved which is referred to as the specified date. Under the proviso dissolution shall not be later than the expiration of the terms of office of the last Provincial Council. The last Provincial Council that was constituted is the Uva Provincial Council and its term expires in September 2019.

According to the proviso (A) introduced to Article 154E the term of office of any Provincial Council shall be deemed to be extended up to the specified date and stand dissolved on the specified date.

According to proviso (B) the term of office of any Provincial Council which continue beyond the specified date will stand dissolved on the specified date. The effect of this amendment is to hold Elections for all Provincial Councils on the same date. In order to hold elections all Provincial Councils will be dissolved on a specified date determined by Parliament. The resulting position is that on the specified date there will be Provincial Councils whose term had expired and Provincial Councils whose term will continue beyond the specified date. In other words certain terms of certain Provincial Councils will be extended whereas terms of some Provincial Councils will be curtailed. The Petitioners had given a table indicating the

dates on which the Provincial Councils were constituted and the likely dates of ending of the term. The following table is produced :

Provincial Council	Last Election	Estimated Expiration of Term
North Central	8 th September 2012	In or around September 2017
Sabaragamuwa	8 th September 2012	In or around September 2017
Eastern	8 th September 2012	In or around September 2017
North Western	21 st September 2013	In or around September 2018
Northern	21 st September 2013	In or around September 2018
Central	21 st September 2013	In or around September 2018
Southern	29 th March 2014	In or around April 2019
Western	29 th March 2014	In or around April 2019
Uva	20 th September 2014	In or around September 2019

If this Amendment is passed the Parliament can decide the date of dissolution of all Provincial Councils contrary to the existing Articles in chapter XVII (A) dealing with Provincial Council. The Provincial Council could be dissolved under three circumstances.

- 1) The Provincial Council shall be dissolved under Article 154E by operation of law due to the expiration of 5 years after the appointed date.
- 2) The Governor can dissolve a Provincial Council Under Article 154B(8) (c) (d) which reads as follows:
 - (c) The Governor may dissolve the Provincial Council.
 - (d) The Governor shall exercise his powers under this paragraph in accordance with the advice of the Chief Minister, so long as the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council.
- 3) Under 5(a) of the Provincial Councils (Amendment) Act No. 27 of 1989 which reads as :

“Where the Governor of a Province communicates to the President that:

 - (a) More than one half of the total membership of such Provincial Council has, on or about the date specified in that communication, expressly repudiated or manifestly disavowed obedience to the Constitution or otherwise acted in contravention of the

- oath or affirmation taken and subscribed or made and subscribed; by such members under section 4; or
- (b) That such Provincial Council has for all intents and purposes ceased to function with effect from any date,

The Provincial Council shall stand dissolved with effect from the date specified in such communication”

Under the proposed amendment, for the first time Parliament could determine the date of dissolution of all Provincial Councils. Under the existing law the Provincial Councils could be dissolved by operation of law due to the expiry of the term under Article 154E, The Governor could dissolve under article 154B(8)(c) or under section 5(a) of the Provincial Councils (Amendment) Act No. 27 of 1989. In such circumstances, the Commissioner of Elections under section 10 of the Provincial Councils Election Act No. 2 of 1988 within one week publish a notice to hold elections and call for nominations.

Under the proposed amendment by inserting Article 154 EE, terms of some Provincial Councils will be extended until the specified date without calling for election.

The Petitioners are challenging the Bill on the basis that it violates Articles 3,4,10,12,14 of the Constitution. The Petitioner in S.C.S.D. 20/2017 state that the Bill violates Article 1 & 2 also.

This Bill in the long title referred to as an Act to amend the Constitution.

It is appropriate to consider jurisdiction of the Supreme Court and the function of the Supreme Court under Article 120 which is reproduced below.

The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution :

Provided that –

- (a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;

Article 83 which is reproduced below refers to certain Bills which requires an approval at a referendum.

83. Notwithstanding anything to the contrary in the provisions of Article 82 –

- (a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11 or of this Article ; and
- (b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of, paragraph (2) of Article 62

which would extend the term of office of the President, or the duration of Parliament, as the case may be, to over six years,

shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

Therefore, Court will have to examine whether the amending bill is inconsistent with Articles 1,2,3,6,7,8,9,10 and 11 of the Constitution.

This court will proceed to examine whether the clauses of the bill is inconsistent with Articles referred to in Article 83 which attracts a special majority and the approval by the people at a referendum.

It was submitted on behalf of the Interventient -Petitioners that this amendment relates to amendment under Chapter XVII A which relates to the Provincial Councils and the applicable Article is 154G which reads thus:

154G. (1) Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule (hereinafter referred to as "the Provincial Council List").

(2) No Bill for the amendment or repeal of the provisions of this Chapter or the Ninth Schedule shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference, and -

- (a) where every such Council agrees to the amendment or repeal, such Bill is passed by a majority of the Members of Parliament present and voting ; or
- (b) where one or more Councils do not agree to the amendment or repeal such Bill is passed by the special majority required by Article 82.

The Constitution should be considered as a whole. As this Bill is seeking to amend the Constitution it attracts Articles 82 and 83 which overrides 154 G of the Constitution which deals with Statutes of the Provincial Council.

The Bill seeks to dissolve all Provincial Councils and hold elections on the same day in all nine Provincial Councils. Though desirable it is not essential to hold elections to all nine provinces on the same date. The Article 154A (1) and (2) dealing with the establishment of the Provincial Councils did not require the establishment of the nine Provincial Councils on the same date. It could be establish on different dates.

The Article 154A (1) and (2) reads thus:

154A. (1) Subject to the provisions of the Constitution, a Provincial Council shall be established for every Province specified in the Eighth Schedule with effect from such date or dates as the President may appoint by Order published in the Gazette. Different dates may be appointed in respect of different Provinces.

(2) Every Provincial Council established under paragraph (1) shall be constituted upon the election of the members of such Council in accordance with the law relating to Provincial Council elections.

Unlike Parliamentary elections which is conducted to elect members to the Parliament (one legislature) or the Presidential Elections which is held to elect the President for the whole island there is no compelling reasons to hold Provincial Council elections for all nine provinces on the same date. Election of a Provincial Council is restricted to the province and does not affect the other provinces. Although it may be desirable, the Bill does not provide the valid reason for the proposed amendment.

The learned Attorney General submits that by having elections on the same date for all nine Provincial Councils will prevent abuse of state resources, undue political influence and election related violence. If the elections are held on a staggered basis large number of politicians, supporters of various parties from other provinces and even criminal elements will get involved in the political campaign which would lead to violence or even disruption of the elections. If the elections are held on the same day for all nine Provinces it will minimize violence and election related offences. However the Petitioners take a different view and according to them the proposed amendment is motivated by political expediency and mala fide considerations.

According to the Petitioners the proposed amendments affects the franchise of the voters of the affected provinces. If the amendment is passed in some Provincial Councils term will extend beyond five years and in some Provincial Councils term will be reduced.

The Petitioners challenge the Bill on the basis that it violates Articles 3,4,10,12,14 of the Constitution. The Petitioner in S.C.S.D. 20/2017 state that the Bill violates Article 1 & 2 also. It is appropriate at this stage to reproduced the articles relevant to this case. The relevant Articles are:

The State

1. Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.

Unitary State

2. The Republic of Sri Lanka is a Unitary State.

Sovereignty of the People

3. In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.

Exercise of Sovereignty

4. the Sovereignty of the People shall be exercised and enjoyed in the following manner: :
 - (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum ;
 - (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People ;
 - (c) 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 ;
 - (d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and
 - (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.

FUNDAMENTAL RIGHTS

Freedom of thoughts, conscience and religion

10. Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

12. (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds :

Freedom from speech, assembly, association, occupation, movement

14. (1) Every citizen is entitled to –

- (a) the freedom of speech and expression including publication ;

Romesh De Silva, President's Counsel for the Petitioner in SC/SD 20/2017 submitted that the proposed amendments violates Article 1 and 2 also. As the Sri Lanka is free sovereign and Independent and Democratic Socialist Republic every organ of the Government should promote democratic principles such as rule of law, fundamental rights and franchise. He

submits that proposed amendments is inconsistent with Article 1. It affects franchise which is a fundamental principle in a representative democracy. He refers to the preamble to the Constitution. (SVASTI).

It was submitted by the learned Counsel for the Petitioners that this proposed amendment violates Article 3 as it affects the sovereignty of the people. Sovereignty includes powers of government, fundamental rights and franchise. Dissolution of nine provinces on a specified date which is not mentioned prejudicially affects the fundamental rights of the people. The Petitioners contention is that Article 3 is linked to Article 4 and that both Articles to be read together though Article 4 is not mentioned in Article 83. The Intervening Petitioners submit that election of members of the Provincial Council is not included in Article 4 and therefore is does not fall within Article 3. It was submitted that Provincial Council is a subsidiary body and does not enjoy the status similar to the Parliament.

In SC SD 12/2003 it was held that Article 3 of the Constitution provides that in the Republic sovereignty is in the people and is inalienable. Sovereignty includes the powers of the Government, fundamental rights, and the franchise. Article 4 is an elaboration of the exercise of sovereignty in relation to legislative power, executive power, judicial power fundamental rights and the franchise. The mere fact that in Article 4(e) there is no reference to elections to Local Authorities does not mean that franchise as contemplated in Article 3 would not extend to elections to local authorities. Local authorities have acquired constitutional status, in particular after the enactment of the 13th Amendment, which specifically deals with Local Government as item 4 in list 1 of the 9th schedule. Item 4:3 reads as follows:

Similar views were expressed in Judgement of *Wijesekera vs. Attorney General* (2007) 1 SRI LR page 38 and *Mediwaka vs. Dayananda Dissanayake* (2001) SRI LR 377

Manoharan De Silva PC, for the Petitioner in SCSD 21/2017 submitted that Provincial Council enjoy a constitutional status as it is included in Chapter XV11 of the Constitution. According to Article 154(g)(1) Provincial council can make statutes with respect to any matter set out in list 1 of the 9th schedule referred to as the "Provincial List". This includes several subjects in respect of which Parliament had the power to legislate before the establishment of the Provincial Council. Similarly, the Provincial Council can make statutes in respect of matters in the concurrent list after consultation with the Parliament. Similarly, Governor of the Provincial Council appointed by the President exercises executive powers in respect of matters to which the Provincial Council has the power to make statute either directly or through the Board of Ministers or through officers subordinate to him. Therefore, it is abundantly clear that the Provincial Council within the Province exercise legislative as well as executive powers under the 13th Amendment. Therefore, the exercise of franchise at the election of Members of the Provincial Council comes under Article 4(E). We agree that the Provincial Council has a constitutional status exercising legislative and executive powers pertaining to the subjects devolved on the Provincial Councils.

The Petitioners submit that the proposed amendment violates Article 10 and 14(1) of the Constitution. Right to vote is recognized as a fundamental right and denial or restriction of exercising the franchise amounts not only to violation of Article 10 and 14(1) of the Constitution but also attracts Article 3 of the Constitution. In the proposed amendment Parliament is given the power to dissolve of all nine Provincial Councils on a specified date

which is not mentioned in the Bill. However it is stated that the specified date shall not be later than expiration of the term of last constituted Provincial Council. The last constituted Council is the Uva Provincial Council, whose term will end in September 2019. It is the contention of the learned Counsel of most of other Petitioners that in the absence of a specified date the Parliament with a simple majority could decide on any date which will be suitable to the ruling party.


In view of this proposed amendment in respect of certain Provincial Council the terms will be extended beyond 5 years and in respect of some Provincial Councils the term will be curtailed. In both ways it was submitted that franchise will be affected.

It was held in several determinations that advancing the election date will not violate the Constitution as it will not deprive the voter of his franchise as he will be able to exercise the vote in advance or before the expiry of the term. On the other hand delay in exercising the franchise will affect the fundamental rights of voters..


The majority of this Court is of the view that clauses 2,3 and 4 of the Bill is inconsistent with Articles 3,4 12(1) and 14(1) of the Constitution and under Article 83 shall become law if number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

One member of this Court is not in agreement with the above view.

We wish to place on record our deep appreciation of the assistance given by the Hon. Attorney General, Learned President's Counsel and Learned Counsel who appeared for the Petitioners and the Learned Counsel who appeared for the Intervient Petitioners and made submissions in this matter.


Priyasath Dep
Chief Justice


Anil Gooneratne
Judge of the Supreme Court


Viji K. Malalgoda
Judge of the Supreme Court