Gibbons v. Etpison, 5 ROP Intrm. 273 (Tr. Div. 1992)

IBEDUL YUTAKA M. GIBBONS, et al.,
Plaintiffs,

v.

NGIRATKEL ETPISON,
President of the Republic of Palau, et al.,
Defendants.

SENATE OF THE THIRD OLBIIL ERA KELULAU, et al.,
Plaintiffs,

v.

NGRIATKEL ETPISON,
President of the Republic of Palau, et al.,
Defendants.

CIVIL ACTION NOS. 285-92, 287-92

Supreme Court, Trial Division
Republic of Palau

Order granting preliminary injunction
Decided: July 9, 1992

NGIRAKLSONG, Chief Justice:

PROCEDURAL BACKGROUND

On July 7, 1992 plaintiffs Ibedul Yutaka M. Gibbons, et al., moved this court to issue a temporary restraining order and preliminary injunction to enjoin President Ngiratkel Etpison and Chairman of the Election Commission, August Remoket from conducting a referendum on the amendment to the Palau Constitution proposed by a petition by voters pursuant to Articles XIV and XV of the Palau Constitution. The referendum is scheduled for July 13, 1992 by Executive Order No. 111.

⊥274 On July 8, 1992, plaintiffs the Senate of the Third Olbiil Era Kelulau (OEK) et al., filed a motion for temporary restraining order and preliminary injunction raising similar issues and seeking similar relief.

After reviewing plaintiffs' moving papers the court determined that both cases involve common questions of law and fact. They were therefore consolidated pursuant to ROP R. Civ. Pro. 42(a), and a hearing was set on the requests for preliminary injunction for July 9, 1992 at

2:00 p.m. At the hearing, plaintiffs Gibbons et al. were represented by the firm of Ngiraikelau, Dengokl & Ridpath, plaintiffs the OEK et al. were represented by Legislative Counsel to the Senate Barry Gorelick, Esq. and defendants were represented by Counsel to the President, Mark Horlings, Esq. and Assistant Attorneys General Gerald G. Marugg III and Mark L. Driver.

FACTUAL BACKGROUND

On April 14, 1992, a group of voters called the Popular Initiative to amend the Constitution presented a Petition proposing a Constitutional amendment to the President, the OEK and the Election Commission (hereafter, the "Petition"). The Petition was submitted pursuant to Article XIV, sec. 1(b) and Article XV sec. 11 of the Palau Constitution and proposes an amendment which would purportedly remove inconsistencies between the Constitution and the Compact of Free Association. In essence, the amendment, if approved, would lower the approval requirement for the Compact of Free Association from 75% to a simple majority. The last paragraph of the Petition requests that the President and the OEK "insure that a voting date is scheduled so that the registered voters of Palau vote upon [the] proposed amendment to the Constitution not more than 90 days after" the date of the Petition.

In response to Petitioners' request, on April 23, 1992, the President transmitted a proposed bill to the President of the Senate which purportedly established procedures and an appropriation to carry out the referendum called for by the Petition.

Fifteen days later, on May 8, 1992, the President issued Executive Order No. 111 which set the referendum for July 13, 1992, and gave the Election Commission the power to govern the election, prepare the ballot, and promulgate rules and regulations to certify the election. The Order also reprogrammed funds of not less than $200,000.00 to the Election Commission to carry out its duties.

The referendum has in fact been scheduled for July 13, 1992 and the Election Committee has prepared an official ballot.

⊥275 Plaintiffs assert that the actions taken by the President by Executive Order No. 111 are unconstitutional on the grounds that:

1) The provisions of Article XIV and XV are not self-executing and no enabling legislation has been passed. The OEK is the Constitutionally mandated body to enact such legislation and the President's issuance of Executive Order No. 111 usurps this authority and is therefore unconstitutional as a violation of separation of powers;

2) No enabling legislation grants to the Election Commission the power to do the acts purportedly granted by Executive Order No. 111 and the President's attempt to do so unconstitutionally amends 23 PNC § 1201 *et seq.*, a valid act of the OEK;

3) The procedure established by Executive Order No. 111 effectively denies the

right to vote in the referendum to the class of voters who failed or were unable to register to vote before registration cut-off;

4) The English and Palauan versions of the official ballot are incorrectly translated, confusing, vague, ambiguous and misleading and therefore infringe upon the fundamental right to vote;

5) The President lacked the authority to reprogram funds to finance the referendum; and

6) There is no provision for political education.

Plaintiffs collectively seek a preliminary injunction to enjoin defendants from conducting the referendum on July 13, 1992; from conducting the referendum at all until it is lawfully funded with adequate funds to permit all qualified voters to participate and to provide for political education; from conducting the referendum until ballot ambiguities are corrected; and from unlawfully spending funds in excess of that lawfully authorized and appropriated.

ANALYSIS

"Generally, injunction is the proper remedy to prevent an election of an initiative or referendum petition where the constitutional or statutory procedure for presenting the petition has not been conformed to; [or] where the measure, if adopted, would be unconstitutional . . . ." 42 Am. Jur. 2d § 49, *citing Caine* ⊥*276* *v. Robbins* , 131 P.2d 516 (1942), Gray v. Winthrop, 94 ALR 1447 (1934) and *Bowe v. Secretary of Commonwealth* , 167 ALR 1447 (1946). Palau is in accord with the general rule. *Koshiba, et al. v. Remeliik, et al.*, 1 ROP Intrm. 65, 72 (Tr. Div. Jan. 1983), *citing Bedor v. Remengesau*, 7 TTR 317 (Tr. Div. 1976).

"The object and purpose of an injunction is to preserve and keep things in the same state or condition, and to restrain acts, actual or threatened, which would be contrary to equity and good conscience, and which would presumably give the injured party a cause of action for which the law affords no adequate or complete relief." *Madrainglai v. Emesiochel* , 7 TTR 13, 16 (1974), *citing* 42 Am. Jur. 2d § 728. *See also, Ferry-Morse Seed Co. v. Food Corn, Inc.* , 729 F.2d 589 (1984); *Price v. Block* , 535 F. Supp. 1239 (1982). The status quo is the last uncontested status which preceded the pending controversy. *Aoude v. Mobil Oil Corp.*, 862 F.2d 890 (1988).

The critical factors for the court to consider in determining whether to grant a preliminary injunction are:

1) that plaintiff has a substantial likelihood of success on the merits;
2) that substantial threat exists that plaintiff will suffer irreparable injury if the injunction is not granted;

3) that threatened injury to the plaintiff outweighs threatened harm the injunction will cause the defendant; and

4) where the public interest lies.

Madrainglai v. Emesiochel, supra; Koshiba et al. v. Remeliik et al., 1 ROP Intrm. 65, 72 (Tr. Div. Jan. 1983); *Commonwealth Life Ins. Co. v. Neal*, 669 F.2d 300 (1982).

The plaintiff bears the burden of persuasion on all four elements. *Koshiba, supra*, at 71, *citing Canal Authority v. Callaway*, 489 F.2d 567 (1974); *Commonwealth, supra; Clements Wire & Manufacturing Company, Inc. v. NLRB*, 589 F.2d 894 (5th Cir. 1984).

In the consolidated cases at bar, plaintiffs have met their burden to establish all four elements entitling them to injunctive relief as to their claim that Executive Order No. 111 unconstitutionally usurps the OEK's power to enact enabling ⊥277 legislation which established the procedures for a referendum pursuant to Article XIV of the Constitution. Because plaintiffs have met their burden on this issue, the court will leave the remaining issues for decision by trial on the merits.

1. Substantial likelihood of success

There is a substantial likelihood that plaintiffs will prevail on the merits of their separation of powers claim. The pertinent provisions of Article XIV of the Constitution state:

> Section 1. An amendment to this Constitution may be proposed by a Constitutional Convention, popular initiative, or by the Olbiil Era Kelulau, as provided herein:
>
> (b) by petition signed by not less than twenty-five percent (25%) of the registered voters. . . .

Article XIV, sec. 1(b) does not expressly state whether it is self-executing. "In the absence of [an] express provision, the question of whether a constitutional provision is self-executing is one of construction." *Ngeluul Kiuluul et al. v. Charles I. Obichang*, Civ. Action No. 379-90 (Tr. Div. Sept. 1990), *aff'd*, 2 ROP Intrm. 201 (1991), *citing Clark v. Harris*, 144 P. 109 (1914) and 16 Am. Jur. 2d *Constitutional Law*, 139-149. The most important test for determining whether a constitutional provision is self-executing is the intent of the framers who drafted the provision:

> A provision is self-executing when it can be given without the aid of legislation and there is nothing to indicate that legislation is contemplated to render it operative, and when there is a manifest intention that it should go into *immediate effect, and no ancillary legislation is necessary* . . . .

Ngeluul Kiuluul et al. v. Charles I. Obichang, supra, citing Catting v. Cordell, 172 P.2d 397, 399 (1946).

The Palau Constitutional Convention Committee on General Provisions Standing

Committee Report No. 31 (SCR No. 31) states the intent of the framers regarding whether Article XIV, Sec. 1(b) is self-executing. In discussing the relevant language of Proposal 252, which became Article XIV, the Committee Comments state:

> The Committee further felt that the *specific requirements* of the initiative, *including the time period* [of] ⊥278 collecting signatures; and *the contents of the initiative* should be established *by the National Assembly*, and that the Constitution should not be burdened with the details of the procedures. (emphasis added).

SCR No. 31, p. 4.

The plain intent of the framers leaves no room to argue that Article XIV is either self-executing or that the framers intended that the President has the power to establish referendum procedures by Executive Order: that power rests with the OEK.

Moreover, pursuant to the doctrine of separation of powers, an executive order must be supported by the Constitution or an act of the legislature. *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S.Ct. 863 (1952). *See also, Panama Refining Co. v. Ryan*, 55 S.Ct. 241 (1935)(to satisfy due process, an executive order must be either authorized or ratified by Congress). Defendants have failed to prove that there is some constitutional source beyond Article XIV, or a legislative grant of authority, upon which the President can rely as granting him power to issue Executive Order No. 111. Article VIII, sec. 7 of the Constitution sets forth the President's powers. Nowhere is the President granted the power to enact legislation by executive order.

Defendants argue that the President issued Executive Order No. 111 because the OEK failed to timely respond to the Petitioner's request to set the election within 90 days, and that the OEK cannot defeat Petitioners' constitutional rights by refusing to act. The thrust of defendants' position is meritorious: the OEK cannot by inaction deprive Petitioners of their Article XIV rights. However, this issue is not ripe for adjudication as there are no facts before the court to support a conclusion that the OEK has refused to act. It has merely denied Petitioners' request to set the election within 90 days, which it is free to do. In the event that the pressure of over 3,000 motivated voters is not sufficient to compel the OEK to carry out the will of the people and their constitutionally mandated duties, and they refuse to act, Petitioners will have a ripe claim.

2. Substantial threat of irreparable injury

There is a substantial threat that plaintiffs will suffer irreparable harm if the referendum as scheduled is not enjoined. There is a substantial likelihood that any referendum pursuant to ⊥279 Executive Order No. 111 will be null and void. The holding of such a referendum would be an enormous waste of the Republic's financial resources, which in and of itself constitutes irreparable harm. *Koshiba, supra*, at 72; *Sprigs v. Clark*, 14 P.2d 667 (1932).

3. Injury to Petitioners

The court does not take lightly claims of potential injury to Petitioners by enjoining the elections. The power to call a referendum is not one that is granted to the people by their government: it is a power reserved by them. It is one of the most precious rights of our democratic process and it is the duty of the court to jealously guard it. *Nome v. Town of San Anselmo*, 260 Cal. Rptr. 205 (1989). Under the facts at bar, however, the only potential injury to Petitioners by enjoining the referendum until proper enabling legislation is enacted is that they must wait a period of time before their question is put to the voters of Palau. Whether plaintiffs win or lose the at trial will not prevent Petitioners from having their day at the polls. Petitioners merely having to wait before ultimately getting all they seek must give way to the likely irreparable harm to the plaintiffs that a void election would create.

Defendants' argument of harm caused by the loss of resources already expended for the July 13, 1992 lacks merit. The same argument was disposed of in *Koshiba, supra*, as not being sufficient to out-weigh the harm caused by holding an election likely to be found void.

4. The public interest

As stated in *Koshiba, supra*, "The overriding public interest lies in having a referendum and plebiscite on the Compact of Free Association that is a '. . . free and voluntary choice by the people . . . of their future political status through informed democratic processes." *Id.* at 72, *citing* Title 4, Article I, Section 412 Compact of Free Association. These words rings just as true today as the public interest lies with insuring that this step by referendum which is aimed at a future status determination be according to democratic processes. A referendum pursuant to a probable unconstitutional exercise of power by the President defeats that interest.

⊥280 CONCLUSION

Plaintiffs have met their burden of persuasion and are entitled to a preliminary injunction. Defendants are hereby enjoined from holding a referendum on July 13, 1992 as established by Executive Order No. 111, and from holding any future referendum established by Executive Order or any other mechanism not authorized by the Constitution or statute.