

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

The Parliamentary Elections Act No.1 of 1981(as amended)
Election for the Electoral District No.6 Nuwara Eliya
on the 8th day of April 2010

1. Udayakumara Mylvaganam
No.187A, Dimbula Road
Hatton.
2. Suppiah Sathasiwam
No.17/1 Broomfield Avenue,
Upper Lake Road,
Nuwara Eliya.

Petitioners

Vs

CAEP01/2010

Dayananda Dissanayake
Commissioner of Elections
Department of Elections
Rajagiriya.
And 301 others

Respondents

Before : Sisira de Abrew J

Counsel : Mahinda Ralapanawa for the petitioner.
A.Gnanathan PC Addl. Solicitor General for the
1st and the 2nd Respondents

Argued on : 2.12.2011

Decided on : 26.1.2012

Sisira de Abrew J.

This is an election petition filed under the Parliamentary Election Act No.1 of 1981 (hereinafter referred to as the Act). The petitioner in his petition dated 17.5.2010 has sought the following relief.

- (a) Grant a declaration that the said election for the Electoral District No.6 Nuwara Eliya is void to the extent that the counting of votes by the voters for the candidates nominated by the United Peoples' Freedom Alliance and the United National Party and or the recording of the said votes had not been in compliance with the provisions of the Parliamentary Elections Act No.1 of 1981 as amended and in accordance with the principles laid down in such provisions.
- (b) Grant a declaration that the return of the 6th, 8th, 12th, 13th, 14th respondents of the United Peoples' Freedom alliance and 15th and 22nd Respondents of the United National Party who were declared to be elected as Members of the Parliament for the Electoral District No.6 Nuwara Eliya was undue.
- (c) (i) Grant a declaration that the 1st petitioner was duly elected and ought to have been returned as a Member of the Parliament for the Electoral District No.6 Nuwara Eliya.
(ii) Grant a declaration that the 2nd petitioner was duly elected and ought to have been returned as a member of the Parliament for the Electoral District No.6 Nuwara Eliya.

- (d) Grant a declaration that such of candidates of the United National Party have been duly elected as Members of the Parliament for the Electoral District No.6 Nuwara Eliya at the said Parliamentary Elections held on 8th April 2010 in accordance with the results as may be evidenced by the recount hereinafter prayed for.
- (e) Make an order in terms of section 63(2) of the Parliamentary Elections Act No 1 of 1981 permitting the petitioners and/or their agents to inspect all the ballot papers relating to the votes cast by the voters for the United Peoples' Freedom Alliance and the United National Party at the said election held on the 8th day of April 2010 and all the relevant analysis sheets/statements of preferences and/or to copy same at such time and place and subject to such conditions as Your Lordships Court may deem expedient.
- (f) Make an order for a recount and/or scrutiny of the votes indicated by the voters for the candidates of the United Peoples' Freedom Alliance and the United National Party including the petitioners and including the alleged rejected votes and to grant permission to the petitioners and their agents to be present at such recount and/or scrutiny.
- (g) Grant costs and
- (h) Grant such other and further relief as to Your Lordships Court shall seem meet.

Learned ASG raising a preliminary objection contended that the petitioner cannot maintain the petition in view of the relief prayed for by him. The relief which the petitioner could claim in an election petition is set out in Section 96 of the Act. They are as follows.

- (a) A declaration that the election in respect of any electoral district is void.
- (b) A declaration that the return of any person elected was undue.
- (c) A declaration that any candidate was duly elected and ought to have been returned.

Learned ASG, relying on Section 96 of the Act, contended that the petitioner cannot ask for a declaration that a part of the election in respect of any electoral district to be void. In view of this contention the most important question that must be decided in this case is whether the petitioner has asked for a declaration to declare a part of the election for the Electoral District Nuwara Eliya to be void. From paragraph (a) of the prayer to the petition it is clear that the petitioner has not asked for a declaration to declare that the entire election for the Electoral District Nuwara Eliya to be void. In fact learned counsel for the petitioner at the hearing admitted that he was not seeking a declaration to declare the entire election for Nuwara Eliya district to be void. He admitted that he had asked for a partial avoidance of the election for Nuwara Eliya district. Is the partial avoidance of an election for an electoral district permitted under the provisions of the Act? The answer to this question is found in the judicial decision in *Alexander Vs Chandrananda de Silva, Commissioner of Elections and others* [1996] 2SLR page 301. Supreme Court in the said case observed following facts. “The appellant was a candidate of the Podujana Eksath Peramuna (PA) at the Parliamentary Elections in 1994 for the electoral district No.9 Hambantota. PA won four seats. On the basis of the preference vote for PA candidates the returning officer declared elected as members the 20th, 19th, 17th and 13th respondents in that order. The appellant obtained 388 preferences less than the 13th

respondent and was unsuccessful. In his petition the appellant alleged non compliance with the provisions of the Act in the counting of preferences which is a ground set out in 91(1)(b) of the Parliamentary Elections Act No.1 of 1981 for challenging an election in respect of any electoral district. The petitioner sought inter alia, for a declaration that the return of the 13th respondent as elected was undue and for a declaration after a re-scrutiny of preference votes for the PA, that the appellant is duly elected as a Member of Parliament.

Held: The petitioner ought, on the ground alleged by him, to have prayed for avoidance of the election in respect of the electoral district and not the election of the member.

The Court cannot by giving a purposive interpretation to section 92(1) of the Parliamentary Elections Act permit a partial avoidance of the election. Such an attempt would cross the boundary between construction and legislation.”

Applying the principles laid down in the above judicial decision, I hold that the petitioner cannot ask for partial avoidance of an election for an electoral district.

The petitioner in paragraph (b) of the prayer to the petition seeks a declaration that the return of the 6th, 8th, 12th, 13th and 14th respondents of the United Peoples Freedom Alliance and 15th and 22nd respondents of the United National Party who were declared elected as Members of Parliament for the Electoral District No.6 Nuwara Eliya was undue. Learned ASG contended that since the petitioner had not averred facts to prove grounds set out in Section 92(2) of the Act, he could not succeed in paragraph (b) of the prayer to the petition. Section 92(2) of the Act reads as follows:

“The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of Election Judge, namely-

- (a) that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by any agent of the candidate ;
- (b) that the candidate personally engaged a person as a canvasser or agent or to speak on his behalf knowing that such person had within seven years previous to such engagement been found guilty of a corrupt practice under the law relating to the election of the President or the law relating to Referendum or under the Ceylon (Parliamentary Elections) Order in Council, 1946, or under this Act, by a court of competent jurisdiction or by the report of an election judge ;
- (c) that the candidate personally engaged a person as a canvasser or agent or to speak on his behalf knowing that such person had been a person on whom civic disability had been imposed by a resolution passed by Parliament in terms of Article 81 of the Constitution, and the period of such civic disability specified in such resolution had not expired.
- (d) That the candidate was at the time of his election a person disqualified for election as a Member.”

Since the petitioner in paragraph (b) of the prayer to the petition challenges the election of candidates, for him to succeed in the said prayer, he must prove grounds set out in section 92(2) of the Act. When one reads the petition it is clear that the petitioner has not averred facts to prove the grounds set out in section 92(2) of the Act. Section 92 (2) (a) of the Act

speaks about corrupt or illegal practice. The important question that must be decided is whether the petitioner, in his petition, averred facts to prove the grounds set out in section 92(2)(a) of the Act. Learned counsel for the petitioner at the hearing admitted that he, in the petition, had not averred facts to prove corrupt or illegal practice of candidates. He however contended that it was a matter of evidence. Then the question that arises is if the petitioner has evidence to prove corrupt or illegal practice as to why he did not allege them in his petition. At this stage it is relevant to consider Section 98(d) of the Act which reads as follows:

“An election petition-

(a) omitted

(b) omitted

(c) omitted

(d) Shall set forth full particulars of any corrupt or illegal practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice, and shall also be accompanied by an affidavit in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice.

(e) Omitted.

Since the petitioner has not averred facts to prove grounds set out in section 92(2) of the Act, he cannot succeed in paragraph (b) of the prayer to the petition. Without granting the relief prayed for in paragraph (b) of the prayer to the petition, Court cannot grant relief asked for in paragraph (c) of the prayer to the petition.

For the above reasons, I hold that the petitioner cannot maintain this petition and as such I uphold the preliminary objection and dismiss the petition. No costs.

Petition dismissed

Judge of the Court of Appeal.