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

In the matter of an Election Pétition in terms of the Provisions of the Parliamentary Elections Act No. 1of 1981 (as amended)
Election for the Electoral District of Galle Holden on the 8th day of April 2010

Weersasinghe Arachchige Krishantha Pushpakumaraa
Sughatharama Road, Udawatta, Bataduwa, Galle.
Petitioner

Vs

CAEP02/2010

Dayananda Dissanayake
Commissioner of Elections
Elections Secretariat PO Box 02,
Sarana Mawatha, Rajagiriya.
And 261 others
Respondents

Before : Sisira de Abrew J

Counsel : JC Waliamuna for the petitioner.
A.Gnanathasan PC Addl. Solicitor General for the 1st and the 2nd Respondent
DS Wijesinghe PC for the 4th and the 5th Respondents

Argued on : 1.9.2011

Decided on : 23.9.2011

Sisira de Abrew J.

The petitioner in this case was a candidate nominated by the United National Party (UNP) at the Parliamentary Elections for the District of Galle held on 8.4.2010. The 4th and 5th respondents were declared elected to the Parliament at the said election from the UNP by the 1st respondent.

The petitioner in this petition challenges the election of the 4th and the 5th respondents to the Parliament. Learned PC for the 4th and 5th respondents raising a preliminary objection to the maintainability of the petition submitted that the relief prayed for by the petitioner could not be granted in view of the facts averred by the petitioner. When one considers the relief claimed by the petitioner, it is clear that the petitioner is not challenging the election of the electoral district of Galle but challenging the election of the 4th and the 5th respondents who were elected as members of the Parliament. Since the petitioner is challenging the election of candidates his case must fall within the ambit of section 92(2) of the Parliamentary Election Act No.1 of 1981(hereinafter referred to as the Election Act).

It has to be noted that whilst Section 92(1) of the Election Act deals with election of electoral districts Section 92(2) deals with election of candidates. Thus even if the petitioner establishes grounds set out in section 92(1) of the Election Act, he cannot succeed in this case. Since the petitioner is challenging the election of candidates, for him to succeed in this case, he must establish the grounds set out in section 92(2) of the Election Act which 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." Vide Section 92(2) of the Election Act.

Learned PC whilst pursuing his contention on the above line contended that the petitioner has not averred facts to prove any of the grounds set out in section 92(2) of the Election Act. Learned Counsel for the petitioner contended that if preferential votes were correctly counted by the election

officials, the 3rd and the 4th respondents would not have been elected as members of the Parliament. He further contended that when preferential votes are counted incorrectly the candidate elected by the people would not be in the Parliament and that it would materially affect the result of the election. He relied on the judgment of the Supreme Court in Madiwake Vs Dayananda Dissanayake [2001] 1SLR 177 wherein it states: "The four petitioners were registered voters of the Kandy District, which is one of the three districts of the Central Province. The election of members to the Provincial Council of that Province was held on 6.5.1988 under the Provincial Council Elections Act No.2of 1988 as amended (the Act). The petitioners were members of the United National Party (the UNP) while the 1st petitioner was also a candidate for the Kandy District; the 4th petitioner was a polling agent.

The petitioners alleged that various incidents had occurred on election day at twenty five named polling stations in that district, including the premature closure of one polling station as well as the ballot stuffing, driving away polling agents and intimidation of several others; and that the 1st respondent by his failure to declare the poll at such polling stations void (except at one polling station) under section 46A(2) of the Act, as amended by Act No. 35 of 1988 and to appoint a re-poll thereat under section 46A(7)(a) infringed their fundamental rights. Leave to proceed was granted in respect of the infringement of Articles 12(1) and 14(1)(a) of the Constitution.

It was established that ballot stuffing took place at twelve polling stations; that at eleven other polling stations there were incidents of harrassment and chasing away of UNP polling agents by means of violence or threatening of violence; and that the 12th to 15th respondents were actively involved in four incidents.

The 1st respondent annulled the poll at the Polwatta polling station, but did not appoint a re-poll.

Held:

Section 46A(1)(b) of the Act requires a genuine poll, continuing uninterrupted from beginning to the end, and compels the Commissioner to make qualitative assessment as to whether the poll was free, equal and secret.

Even before the count on 6.4.99 there was prima facie evidence that ballot stuffing and chasing away polling agents had taken place; and there was no proper poll in law. The 1st and 2nd respondents had sufficient notice of those incidents. However the 1st respondent failed to make adequate inquiries in respect of those incidents and decide whether there was a genuine poll. On the available material the 1st respondent should have annulled the poll not only at Polwatte but also at other twenty polling stations."

I would like to note that the above case was in relation to a violation of fundamental rights.

I must consider whether the petitioner has averred facts to prove any of the grounds set out in section 92(2) of the Election Act. I have gone through the petition of the petitioner and note that the petitioner has not averred facts to prove any of the grounds set out in section 92(2) of the Election Act. This observation is strengthened by paragraph 22 of the petition which states as follows:

"The petitioner states that above mentioned acts and omissions of the officers of the 1st respondent including the counting officers amount to non compliance with the provisions of the Parliamentary Elections Act No.1of 1981and that the election was not conducted in accordance with the

principles laid down in law and that such non compliance materially affects the results of the election."

At this stage it is relevant to consider the judgment of the Supreme Court in Alexander Vs Chandrananda de Silva, Commissioner of Eletions [1996] 2SLR 301 The Supreme observed: "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.1of 1981for 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."

When I apply the principles laid down in the above judicial decision, I am of the opinion that there is no merit in the contention raised by learned counsel for the petitioner and that the petitioner cannot maintain this action.

I have earlier held that the petitioner had not averred facts to prove any of the grounds set out in section 92(2) of the election Act. For these reasons I hold that the petitioner cannot maintain this petition. I therefore uphold the preliminary objection raised by learned President's Counsel for the 4th and 5th respondents and dismiss the petition.

Petition dismissed.

Judge of the Court of Appeal.