

1.

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

In the matter of an application for mandates in the nature of writs of Certiorari, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Republic of Sri Lanka.

Tissa Attanayaka,

General Secretary

United National Party

“Sirikotha”

No. 400, Pita Kotte Road,

Pita Kotte.

Petitioner.

C.A. Writ 155/2011

Vs.

1. Commissioner General of Elections

Election Secretariat

No. 365, Old Kotte Road

Rajagiriya.

2.

2. M. Kinsley Fernando
Returning Officer
Puttalam District
Divisional Secretariat
Puttalam

3. Assistant Commissioner of Election for the
Local Government Election of Chilaw
Pradeshiya Sabha
Puttalam.

4. S.A.D. Susil Premajyantha
Secretary
United People's Freedom Alliance
No. 301, T.B. Jaya Mawatha
Colombo-10.

AND
24 Others

Respondents.

BEFORE: Hon. Sathya Hettige P.C. J, President of the Court of Appeal

Hon. Upaly Abeyrathna J, Judge of the Court of Appeal.

COUNSEL: Upul Jayasooriya for the petitioner.

Shavindra Fernando DSG with Sanjaya Rajaratnam DSG, Nerin
Pulle SSC and Yuresha de Silva SC for 1st, 2nd 3rd and 28th
respondents.

Nihal Jayamanne PC with Manohara de Silva PC, Kushan de Alwis ,
C. Ratwatte and Chamath Fernando

for 4th respondent.

3.

SUPPORTED ON: 21/02/2011

Written Submissions tendered on 25/02/2011

DECIDED ON: 04/03/2011

SATHYA HETTIGE P.C J P /CA

The petitioner in this application is the General Secretary of the United National Party which is a recognized political party in terms of provisions of the Parliamentary Elections Act No. 1 of 1981.

The 4th respondent is the General Secretary of the United people's freedom Alliance (UPFA) under whose signature the nomination paper of the UPFA was submitted for the Local Authorities Elections to be held on 17th March 2011 for Chilaw Pradeshiya Sabha

The 5th respondent is a person nominated by the United People's Freedom Alliance who was included in the list of candidates of the UPFA to contest the Local Authorities Election for Chilaw Pradeshiya Sabha scheduled for 17th March 2011.

The petitioner states that the 5th respondent was not competent to be included in the list of nominated candidates of the UPFA since the 5th respondent did not satisfy the age requirement. The petitioner states that a person nominated to contest for a local Authorities election must have been over the age of 18 years as at 01st June 2009 and below the age of 35 years as at the closing date of the nominations as stated in the letter sent by the Commissioner of Elections marked P 1. It is stated that the 5th respondent was born on 20/12/1991 and as a result 5th respondent does not satisfy the age requirement.

4.

The complaint of the petitioner is the nomination paper submitted by the United people's Freedom Alliance for Local Authorities election for Chilaw Pradeshiya Sabha for 2011 was not in compliance with provisions in section 28 of Local Authorities Elections Act as amended in that when one of the candidates is disqualified and is liable to be struck off from the nomination list of that party the nomination paper should have been rejected by the Returning Officer as the required number of youth candidates are not included in the nomination list.

The petitioner in this application complains that the 2nd and or the 3rd respondent have committed a fatal error by accepting the relevant nomination paper of the UPFA for Chilaw Pradeshiya Sabha and the acceptance of nomination paper by the 2nd or the 3rd respondent is a flagrant violation of the provisions of law contained in the Local Authorities Election Ordinance as amended and is ultra vires and illegal

The petitioner is seeking inter alia, a Writ of Certiorari quashing the decision of the 2nd and 3rd respondents in accepting nomination paper of the UPFA for Chilaw Pradeshiya Sabha 2011 and Writ of Mandamus directing the 1st to 3rd respondents to conduct the election for Chilaw Pradeshiya Sabha consequent to the rejection of the nomination paper submitted by the United People's Freedom Alliance

The petitioner also seeks an Interim Order restraining 1st to 3rd respondents from inserting the purported nomination paper of the UPFA or the names of the candidates in the said purported nomination list into the ballot papers for Chilaw Pradeshiya Sabha election 2011.

5.

When this application was taken up for support on 21/02/2011 by the petitioner's counsel, learned President's Counsel for 4th respondent raised the following preliminary objections on the maintainability of the petitioner's application and moved for a dismissal of the application in limine.

- a) The returning officer merely performs a ministerial function under section 31 and the power of the returning officer is limited to "examination of the nomination paper" and cannot decide as to whether a candidate is qualified or not at that stage.
- b) The Returning Officer is not required to hold an inquiry and or proceed on a voyage of discovery to ascertain the accuracy of the information furnished in the nomination paper and or supportive documents submitted along with the nomination paper.
- c) The Returning officer is only required as regards the number of candidates , to determine whether there are the required number of adults candidates listed by name and whether the required number of youth candidates are listed by name and whether the youth candidates have filed affidavits or a birth certificates to establish the fact that they are over 18 years of age and under 35 years of age. The petitioner's position is that the 5th respondent has filed a false affidavit regarding the age and to establish that position he has annexed a copy of the birth certificate alleging that it is the Birth Certificate of the 5th respondent.
- (d) The Returning officer examined the documents tendered to him as required in terms of the law and accepted the nomination paper delivered by the UPFA.

6.

It is to be noted that the petitioner or his Authorized Agent did not raise any objection to the UPFA nomination paper although it was exhibited by the Returning officer to give an opportunity for interested parties to examine and file objections within the time frame granted by the Commissioner.

The learned President's Counsel submitted that the Returning officer when accepting a nomination Paper only performs a ministerial act in terms of section 31 of the Local Authorities Ordinance and as such the returning officer is not required to hold any inquiry or go in to facts and decide which facts are to be accepted or rejected even if there is an ambiguity on the face of the nomination paper. Section 31 of the Local Authorities Election Ordinance as amended by Act No. 25 of 1990 reads as follows:

“The Returning Officer shall , immediately after expiry of the nomination period , examine the nominations papers received by him and reject any nomination paper-...”

The learned President's Counsel cited the unreported judgment in case of **A.M. Azmy and N.P.M. Iqbal V Tissa Attanayake and 5 Others** 2010 BLR 42 wherein the Court of Appeal observed inter alia, the nature of the functions of an Election officer under section 10 of the Ordinance quoting

“The Principles of Administrative Law” by Jain and Jain 1988 4th edi. at page 325) as follows:

“ Functions dischargeable by the administration may be either ministerial or discretionary . A ministerial function is one where the relevant law prescribes the duty to be performed by the concerned authority in certain specific terms leaving nothing to the discretion or judgment of the authority . It does not involve investigation into the disputed facts or making of choices. The authority concerned acts in strict obedience to the law

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which imposes on it a simple and definite duty in respect of which it has no choice."

In the case of Vigneshvaran and Stephen V Dayananda Dissanayake and Others 2002 3 Sri L.R. 59 wherein His Lordship Justice Gamini Amaratunga J held considering the provisions in the Parliamentary Elections Act 1 of 1981 inter alia, that

"The law does not contemplate any inquiry or investigation before rejecting a nomination paper on those grounds and no discretion is involved in the process"

Jayasinghe J in the unreported case of CA 438/2002 decided on 08/03/2002 held that

" Returning officer's authority for rejection of a nomination paper is confined to a visual examination of the nomination paper to determine whether the nomination paper suffers from any difficulty set out in section 31 (1)"

It is pertinent to cite the judgment of Indrakumar V Dayananda Dissanayake and Others 2001 1 Sri. L.R. 89 at page 93 wherein Justice J.A.N de Silva J (as he then was) held considering the similar provisions contained in Parliamentary Election Act No. 1 of 1981 as follows:

" In any event, the scheme of the Parliamentary Elections Act No 1 of 1981 does not require the Returning Officer to conduct a formal inquiry. In section 7(5) of the Act it is specifically provided that an inquiry should be held in considering whether or not to recognize a political party. it is clear from the wording of the section 19 (1) that all that the Returning Officer is required to examine are the nomination papers received by him. He has only to check that the nomination papers contain the total number of candidates. Thus he only does a count of the names of

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candidates in the list. Whether a candidate is qualified or not is not a matter for him at that stage."

His Lordship , in the same judgment held that ,inter alia, at page 94 ***that " this court could only examine the nomination papers the Returning Officer was required to examine and nothing more. I am in agreement with with this submission . The new material placed before the court cannot be taken into account to decide the correctness or legality of the decision of the Returning Office to whom such material was not available."***

The learned counsel for the petitioner strenuously contended that the 5th respondent was born on 20.12.1991 and result does not satisfy the age requirement. Court's attention was drawn to the provisions contained in section 28(4A) of the amended by Act no. 25/1990

Which reads as follows:

" A certified copy of the birth certificate of every youth candidate whose name appears in the nomination paper or an affidavit signed by such youth candidate certifying his date of birth shall be attached to such nomination paper."

The counsel further contended that the list of youth candidates nominated by the UPFA for the Chilaw Pradeshiya Sabha 2011 did not contain the total number of youth candidates in terms of section 31 (1) (bb) which is a ground for rejection of the nomination of the UPFA.

9.

It was strongly submitted by the counsel for the petitioner that the Returning Officer failed to recognize the existence of a minor candidate in the list of candidates submitted by the UPFA.

The petitioner has annexed to the petition a copy of the relevant Electoral Register marked P 4 and the petitioner seeks reliefs from this court based on additional material submitted along with this application. The question that arises is whether this court can consider the additional material placed before the court which the 2nd respondent could not call for at that time. The law does not permit the Returning officer to call for additional material in terms of section 31 of the local Authorities Election Ordinance as amended. The returning officer has a limited power under section 31 of the above Law when examining the nomination paper. The 5th respondent's affidavit was attached to the nomination paper to establish the date of birth of the 5th respondent. The total number of youth candidates were included in the nomination paper. The nomination paper was signed by the Secretary of the recognized political party attested by the justice of the peace as required by the Local Authorities Law. On the material available and submitted to court no objection was raised by any rival party to the nomination paper or to any candidate of the UPFA during the objection period.

The returning officer cannot under the law, investigate further and hold inquiry by calling for additional material and witnesses to ascertain the accuracy of the details stipulated in the nomination paper at that stage.

It seems to me that the petitioner in this application, has failed to challenge the 5th respondent's eligibility to contest the election during the objection period. However, the petitioner may have a remedy in law to challenge the qualification of the 5th respondent at the appropriate stage if the 5th respondent is elected at the election.

10.

On considering the above judgments it is clear that our courts have held that the returning officer's function is limited to simply examine the nomination paper visually and satisfy himself that requirements stipulated in the section 31 (1) of the Law are met by the candidates nominated for local authorities election. The returning officer is not required to investigate and find out the correctness of the age of the youth candidates or their qualification provided that total number of youth candidates required by law are included in the nomination paper and a birth certificate or an affidavit to establish the age of the candidate is annexed to the nomination paper.

The Deputy Solicitor General strongly submitted that the Returning Officer cannot investigate into the correctness of the age of the youth candidate by calling for witnesses or any other documents to ascertain the age of the candidates provided a legally valid affidavit has been attached to the nomination paper as required by law to establish the date of birth.

And it is purely a ministerial function performed by a returning officer which is a simple procedure. The Returning Officer is not required to investigate and call for new material to ascertain the accuracy of the information provided in the nomination paper.

The learned counsel for the petitioner heavily relied on the judgment in the case of Weheragoda V Dayananda Dissanayake reported in CA No 330/06 which was upheld by the Supreme Court and submitted that Weheragoda's case is held to good law on the issue before court.

However, in the Weheragoda's case the nomination paper was rejected and the facts seem to be different from the present case before this court. In the present case the petitioner is seeking to quash the decision

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to accept the nomination paper which is not covered by section 31 of the Local Authorities Election Ordinance as amended .

I agree with the submission of the learned President's Counsel and the submission of the learned deputy Solicitor General that the functions of an Returning Officer is ministerial in nature and there is no provision of law for him to reject a nomination paper already accepted after the objection period was over. The law contained in section 28 (5) of the Local Authorities Election Law provided for the interested parties to raise any objection to a candidate or nomination paper. It was the contention of the respondents that the petitioner never raised any objection to the nomination paper or any candidate if the list of candidates of the UPFA during the objection period provided by law.

It can be seen that the petitioner is challenging the acceptance of the nomination paper without objecting to the nomination paper or any particular candidate nominated in the list of candidates submitted by the UPFA for Chilaw Pradeshiya Sabha 2011. The failure on the petitioner to object to the any particular candidate , the 5th respondent in this application, or the entire nomination paper on the ground of disqualification or any other ground in terms of the law cannot be considered at this stage. Had the petitioner objected to the nomination paper at the time provided for such objection that objection would have been considered by the returning officer at that stage.

I have very carefully considered the material placed before this court and the Written submissions of both parties and observed that the petitioner has not been able to satisfy this court that the 2nd and or the 3rd respondent have acted in excess of their powers and or outside the law . It is my view that the 2nd and or 3rd respondent has acted within the provisions of law contained in local

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authorities elections Ordinance as amended in accepting the nomination paper delivered by the United People's Freedom Alliance which is the recognized political party in question.

I also find that petitioner or his Authorized Agent did not object to the UPFA nomination paper although it was exhibited by the returning officer giving the opportunity for interested parties to examine it and file objections within the time period stipulated in the law. And thereby the returning officer has complied with the principles of natural justice as required by law.

In the circumstances I uphold the preliminary objections raised by the learned President's Counsel for the 4th Respondent and the Learned Deputy Solicitor General and I come to the conclusion that the petitioner is not entitled to the reliefs sought and the application of the petitioner for notice and interim relief should be refused.

Accordingly I refuse and dismiss the application . No costs.

PRESIDENT OF THE COURT OF APPEAL

Upaly Abeyratne J,

I agree.

JUDGE OF THE COURT OF APPEAL