

1.

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

In the matter of an application to obtain a
mandate in the nature of Writ of Certiorari
and Mandamus in terms of Article 140 of
the Constitution.

1. Lanka Samasamaja Party
2. Prof. Tissa Vitharana
General Secretary
Lanka Samasamaja Party.

Both of No. 457, Dr. Colvin R . De Silva

Mawatha,

Colombo-02.

Petitioners.

CA 89/2011, CA 148/2011, CA 176/2011

and CA 196/2011

Vs.

1. Dayananda Dissanayake
Commissioner General of Elections
Elections Secretariat
Rajagiriya.

2.

2. P.R.N.H. Ratnayake
Returning Officer
Kuchchaveli Pradeshiya Saba
Electins Offrice
Fort Fedrick, Trincomalee

3. A.D. Susil Premajyantha
General Secretary
Eksath Janatha Nidahas Sandanaya
301, T.B. Jaya Mawatha,
Colombo-10.

4. Tissa Attanayake
General Secretary
United National Party
“Sirikothe”
400, Kotte Road
Sri yajawardenepura.
And others.

Respondents.

3.

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

COUNSEL: Ms . Chamantha Unamboowa with Kumudunii Keerawella
for the petitioner
Shavindra Fernando DSG with S. Rajaratnam DSG , Nerin Pulle
SSC and
Ms Yuresha de Silava SC for 1st, 2nd and 10th respondents
Jayatissa de Costa PC for the 3rd respondent
Mr. Mohideen for the 4th respondent

SUPPORTED ON: 01/03/2011

Decided on 14th March 2011

SATHYAA HETTIGE PC. J, P/CA

Counsel in all the applications above referred to the parties agreed that since the issues to be determined by court involved are similar and identical in all the applications , the parties will

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abide by the decision in this application in respect of all the applications except CA application no. 176/2011.

However, Learned Deputy Solicitor General for respondents submitted that facts in CA application No. CA 176 /2011 are in dispute. As such I will determine the issue in CA application 176/2011 on the question as to whether the notice should be issued separately.

The petitioner in this application is a recognized political party for the purpose of local elections and the 2nd petitioner is the General Secretary of the said Recognized Political party.

For the purpose of the local authorities election scheduled to be held on 17th March 2011 for the Kuchchaveli Pradeshiya Sabha the 1st petitioner nominated and authorized one Abdul Latif Mohamed Ishak to be the "Authorized Agent" of the 1st petitioner political party and duly communicated the said authorization to the 2nd respondent who accepted same by the letter dated 18/01/2011 marked P 1.

The petitioners state that on 26th January 2011 the Authorized Agent went to the Trincomalee Elections office with another candidate by the name of M.A.M Aswer of the 1st petitioner recognized political party to deliver the nomination paper. It is stated in the petition that A.L.M. Ishak, the authorized agent was a diabetic patient and was exhausted and unwell on that day having had to break rest and skip meals in the preceding 2 or 3

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days .It is also stated that the authorized agent , A.L.M. Ishak had a knee problem due to an injury he had suffered a few years ago and climbed the stairs with the assistance of Aswer when they went to the hall for handing over the nomination papers.

Since the authorized Agent , Ishak was sick and feeling dizzy he was asked by the officials of the election office to be seated a few feet away from the Returning officer's table. The other candidate Aswer who went with Authorized Agent thereafter delivered the nomination paper to the returning officer.

On 27th January 2011 when the Authorized Agent and Aswer went to the election office they were informed that their nomination paper had been rejected on the basis that their nomination paper had not been delivered by the Authorized Agent . The said letter of rejection of the nomination paper addressed to the 2nd petitioner is annexed marked P 8.

The complaint of the petitioner is that the rejection of the nomination paper is unreasonable and contrary to law and the petitioner states that the 2nd respondent has acted unreasonably and erred in law in rejecting the nomination paper when in fact the Authorized Agent had been present and attended to the handing over of the nomination paper.

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The petitioners are seeking inter alia, the following reliefs

- a) Writ of Certiorari quashing the decision of the 2nd respondent rejecting the nomination paper contained in P 8 and
- b) an Interim Relief restraining the respondents more particularly the 1st respondent from holding the election for Kuchchaveli Pradeshiya Sabha until final determination of this application

The respondents strongly objected to this application on the basis that rejection of the nomination paper by the 2nd respondent is within the law since the petitioners have failed to strictly comply with the provisions contained in section 28 (5) of the Local Authorities Election Ordinance as amended.

It is conceded that the nomination period had commenced on 20th January 2011 and had expired at 12.00 noon on 27th January 2011 as per the document marked P 2.

A nomination paper in terms of section 28 (5) of the Local Authorities Election Law is required to be delivered to the returning officer by the General Secretary or authorized Agent of the recognized political party or the Group Leader in case of an Independent Group within the nomination period stipulated above.

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The provisions contained in section 28 (5) of the Local Authorities Election Ordinance as amended reads as follows:

“Section 28(5) - Such nomination paper shall be delivered to the returning officer within the nomination period by the Secretary or the Authorized agent, in the case of a recognized political party, or the group leader in the case of an independent group.”

In this application One A.L.M Ishak has been appointed as the Authorized Agent for the Kuchchaveli Pradeshiya Sabha for the Local Authorities election to be held on 17th March 2011.

However, the nomination paper had been delivered to the Returning officer by one Aswer who was one of the candidates in the list of candidates of the 1st petitioner party and the said nomination paper had been rejected in terms of section 31 (1) (a) of the said Act as the nomination paper was delivered by a person other than the Authorized Agent.

The respondents contended that it is mandatory that the nomination paper must be delivered by the **Party Secretary** or his **Authorized Agent** within the nomination period and failure to comply with that requirement will result in the said nomination paper being rejected Under section 31 (1) (a) of the said law.

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Counsel for respondents strongly submitted that the argument of the learned counsel for the petitioner that the Authorized Agent was present does not satisfy the legal requirement contained in section 28 (5) of the law.

The learned Deputy Solicitor General cited several judgments decided by this court and the Supreme Court in support of the contention that it is mandatory to comply with the provisions of section 28 (5)

In the case of **Ediriweera Returning Officer for Akuressa Pradeshiya Sabha V Kapukotuwa General Secretary United National Party** 2003 1 SLR 228 it was held that when examined the scheme of the Local Authorities Election Ordinance as amended, the requirement of section 28 (5) was mandatory and calls for compliance .

In Writ application No. **320/2002** decided on 26/03/2002 the Court of Appeal held that the impossibility of compliance and performance under section 28 (5) of the Law had not been proved and accordingly application of the petitioner was dismissed . Even the Special Leave to Appeal application to the Supreme Court was also refused by the Supreme Court.

In the **Special Leave to Appeal application no. 78/ 2002** to the Supreme Court against the CA application No. 320/2002 it was further held that

" In the light of the facts and circumstances as then known to the 1st respondent , there was a breach of section 28 (5) and even assuming that impossibility was an acceptable excuse , she had no option but to reject the nomination paper. The correctness of her act cannot be judged by reference to other fact and circumstances not communicated to her due to lapses on the part of those concerned."

CA Writ application 378/2006 decided on 09-03-2006 was an application pertaining to the rejection of the nomination paper, which was delivered by a person other than the authorized agent where the authorized agent had been present. It was held that,

"Hence the provisions in section 28(5) have to be construed as mandatory. In the event of non-compliance, section 31(a) places a firm sanction by mandating the rejection of the nomination paper. Therefore, the petitioner cannot claim that the nomination paper has to be accepted as there is substantial compliance. In these circumstances, the decision of the 1st Respondent cannot be construed as unreasonable.

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Mr. Fernando DSG for the 1st and 2nd respondents and other counsel for the respondents argued that in view of the case law decided by our courts and the reasons set out above the petitioner is not entitled to any relief sought in this application and other similar applications and the notice should be refused in limine.

The learned counsel further argued that there is no public duty on the part of the 1st and the 2nd respondents to accept a nomination paper under these circumstances delivered by a person other than the Secretary of the party in question or his Authorized Agent.

It seems to me that when considering the scheme of the diverse provisions of the Local Authorities Election Ordinance as amended the primary purpose of the Law is to ensure and safeguard the election process and I observe that the election law requirements should be strictly observed by the parties contesting the election and the failure to comply with statutory provisions is fatal to the petitioners' application .

Having carefully considered the legal provisions in the Local Authorities Law and submissions of the parties and the facts and circumstances in this application and other similar applications, I observe that the Returning Officer has acted in good faith and within the legal provisions stipulated in section 31 (1) of the Local Authorities Election Ordinance as amended

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and I uphold the objections raised by the learned counsel for the respondents .

And as such I am of the view that the reliefs sought by the petitioners cannot be granted in their favour and the application of the petitioners should be dismissed .

Accordingly I refuse to issue notice and dismiss this application and application Nos. CA 148/2011, CA 196/2011 . The Order in this application is binding and applicable to the application Nos. CA 148/2011 and CA 196/2011

No costs.

PRESIDENT FO THE COURT OF APPEAL.

Upaly Abeyratne J,

I agree.

JUDGE OF THE COURT OF APPEAL.