

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application for
mandates in the nature Writs of Certiorari
and Mandamus under and in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

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

2. Lalith U. Gamage
Lane Bann Street, Galle.

Petitioners.

CA 84/2011, CA 78/2011

CA110/2011 & CA 133/2011

Vs.

1. Dayananda Dissanayake
Commissioner of Elections Elections
Secretariat
Sarana Mawatha, Rajagiriya.
2. Anthony Bimal Indrajith de Silva
Senior Assistant Commissioner of
Elections/ Returning Officer
Akmeemana Pradeshiya Sabha Area
Elections Office, Galle.
3. Wijerathna Sakalasuriya
District Returning Officer
Galle District Secretary,
Elections Office, Galle.
And others.

Respondents.

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

COUNSEL: D.S.Wijesinghe PC with Priyantha Jayawardane,
Kaushalya Molligoda, Chamila Jalagaala and Isusru Somadasa
for the petitioner.
Shavindra Fernando DSG with Sanjaya Rajaratnam DSG ,Nerin
Pulle SSC Ms. Yuresha de Silva SC and Ms Vichitri Jayasinghe SC
for 1st , 2nd 3rd and 4th respondents
Jacob Joseph for 25th to 43rd respondents.
Chrismal Warnasooriya with Himali Kularatne for 44th
respondent

Argued on 22/03/2011

Decided on 12/05/2011.

SATHYA HETTIGE PC. J. P/CA

The petitioner in this application is the General Secretary of the Eksath Janatha Nidahas Sandanaya , a recognized political party established under and in terms of Parliamentary Elections Act no. 1 of 1981. The same party is called and known as “United People’s Freedom Alliance” (UPFA) in English.

At the outset of the hearing of this application all parties agreed that the issue involved in this application and all other connected CA applications above referred to is the same and similar and all parties agreed that the judgment in this application is applicable and binding on all parties in the connected applications as well.

The petitioner is seeking ,inter alia, a Writ of Certiorari to quash the decision of the 2nd respondent rejecting the nomination paper of “United People’s Freedom Alliance” (UPFA) in respect of Akmeemana Pradeshiya Sabha for the Local Authority Election that was scheduled for 17/03/2011 A copy of the letter dated 28/01/2011 is annexed to the petition marked P 5.

A writ of Mandamus is also sought by the petitioner directing the 1st, 2nd and or the 3rd respondents to forthwith accept the nomination paper of the United People’s Freedom Alliance for the Akmeemana Pradeshiya Sabha for Local Authority Election.

The petitioner also sought an Interim order to stay the operation of the purported decision of the 2nd respondent contained in P5 to reject the

nomination paper of the United People's Freedom Alliance for Akmeemana Pradeshiya Sabha for Local Authority Election scheduled for 17/03/2011.

The petitioner also an Interim Order to restrain the 1st, 2nd and or the 3rd respondents and or their servants and agents from conducting or causing to be conducted the Local Authority Election for Akmeemana Pradeshiya Sabha for Local Authority Election scheduled for 17/03/2011 until final determination of this application. This court accordingly , having heard all the parties , issued notice and Interim Order on 18/02/2011 on the 1st, 2nd and 3rd respondents.

The petitioner in this application as the General Secretary of the United People's Freedom Alliance (UPFA) duly appointed the 2nd petitioner as the Authorized Agent of the said party for the electoral area of Akmeemana Pradeshiya Sabha for Local Authorities Election that was scheduled for 17/03/2011.

The petitioner states that this application is in relation to an unlawful and arbitrary rejection of nomination paper of the UPFA for Akmeemana Pradeshiya Sabha communicated to the petitioner by the letter dated 28/01/2011 by the 2nd respondent marked P5.

It is stated in the petition that the 2nd petitioner as the duly Authorized Agent on 27.01.2011, consequent to the notice published by the 1st respondent under section 26 of the Local Authorities Elections Ordinance as amended submitted the Nomination paper within the time frame stipulated therein to the 3rd respondent who was the District Returning officer for Akmeemana Pradeshiya Sabha containing the names of Nineteen (19) candidates (5th to 23rd respondents) nominated by the UPFA for Akmeemana Pradeshiya Sabha for the Local Authorities election scheduled for 17/03/2011. The petitioners state that the nomination paper was duly complied with in accordance with the law and was complete without any short comings.

Petitioners further state that after the "nomination period" ended at 12.00 noon on 27/01/2011 and no objection was raised by any of the contesting rival parties during the period of one and half hours from 12.00 noon the 2nd respondent made an announcement stating that the nomination paper handed over by the UPFA was rejected owing to a purported defect in the nomination paper.

By the letter dated 28/01/2011 marked P 5 the 2nd respondent formally communicated to the 1st petitioner that the nomination paper of UPFA was rejected by him under section 31(2) of the Local Authorities Elections Ordinance as amended and also intimated the following reason.

"It is hereby informed that the nomination paper tendered on 27/01/2011 by the United People's Freedom Alliance which is a recognized political party, in respect of Akmeemana Pradeshiya Sabha for Local Authorities Election scheduled to be held on 17/03/2011 was rejected in terms of sub section 31 ((1) (d) of the Local Authorities Elections Ordinance as amended by Local Authorities Elections (Amendment) Act No. 25 of 1990 for failure to comply with the provisions of sub section 28 (4) of the said Act.

Reason : " The oath /affirmation as the case may be in the form prescribed in the Seventh Schedule to the Constitution , of one candidate not being signed by the Justice of the Peace/Commissioner for Oaths."

It is obviously clear that the rejection of the nomination paper had been made under section 31(1) (d) of the Local Authorities Elections Ordinance as amended for the above reason.

It should be noted that the petitioners in this application have failed to annex a certified copy the nomination paper to the petition . However, on a direction by court learned DSG assisted court by producing the original of the rejected nomination paper for perusal by court.

On a careful perusal of the rejected nomination paper the court observed that one of the candidate's oath/affirmation in terms of Seventh Schedule to the Constitution has not been signed by the Justice of the peace who stamped his official frank thereon. It also appeared that all other candidates' oath /affirmation had been signed by the Justice of the Peace and with his official seal . The court observes that it may be due to a genuine lapse on the part of the Justice of the peace to place his signature thereon.

However, Mr Wijesinghe PC contended strenuously that there is no legal requirement in terms of the Seventh Schedule to the Constitution that the oath /affirmation of the candidate has to be made before the Justice of the Peace and candidate's signature is sufficient in terms of the law.

At this stage it is necessary to examine the provisions contained in sections 28 (4) and section 31 (1) (d) of the Local Authorities Elections Ordinance as amended which reads as follows.

Section 28(4) *"The written consent of each candidate to be nominated by a recognized Political Party or Independent Group shall be endorsed on the nomination paper , an oath or affirmation , as the case may be, in the form set out in the Seventh Schedule to the Constitution , taken and subscribed or made and subscribed , as the case may be, by every such candidate."*

Section 31 (1) (d) reads as follows:

" Where the consent of one or more of the candidates nominated has or have not been endorsed on the nomination paper or where the oath or affirmation in the form set out in the Seventh Schedule to the Constitution of one or more candidates has or have not been annexed to the nomination paper"

On a careful reading of section 28(4) of the Local Authorities Election Ordinance as amended there are two requirements to be satisfied.

- a) That the written consent of each candidate to be nominated (by a political party or Independent group) shall be endorsed on the nomination paper; and
- b) That there shall be annexed to the nomination paper, an oath or affirmation, as the case may be, in the Form set out in the Seventh Schedule to the Constitution, taken and subscribed or made and subscribed, as the case may be, by every such candidate.

Learned President Counsel for petitioner contended that only requirement is oath/affirmation in the form prescribed in the Seventh Schedule to the Constitution must be taken and subscribed/ made and subscribed, as the case may be by each candidate and all such oaths and affirmations were signed and or subscribed by relevant candidate and were in the form prescribed in the Seventh Schedule to the Constitution .

Mr Wijesinghe PC further submitted that the rejection of the nomination paper is based on the fact that one such oath/affirmation did not contain the signature of the Justice of the Peace. However, the requirement that such oath // affirmation must be signed by a Justice of the Peace is not stipulated in section 28 (4) or sec. 31(1) (d) of the Law. There is no reference whatsoever in the Seventh Schedule to the Constitution that oath/ affirmation must be taken / made and subscribed before any particular person or body.

It was further submitted that in the absence of any such requirement the returning officer who merely performs a ministerial function of examining the nomination paper tendered to him has no power to go in to the legality of an oath/ affirmation which has been duly signed annexed to the nomination paper.

It is also pertinent to consider the provisions contained in section 28 (5) of the same law which provides as follows:

Each nomination paper shall be signed by the Secretary of a Recognized Political Party and in the case of an Independent Group by the candidate whose name appear in the nomination paper of that group and is designated therein as the Group leader of that group (such candidate is hereafter referred to as the Group Leader) and shall be attested by a Justice of the peace or by a Notary Public.

It was strongly argued by the learned President's Counsel for petitioner that section 28 (5) specifically states that the nomination paper shall be attested by a Justice of the Peace or a Notary Public. And if the Legislature intended that the oath/affirmation by the candidate had be endorsed and attested by a Justice of the Peace it should have been specifically stated in the statute itself. The Constitution does not provide for such a requirement since the specimen oath /affirmation is given in the Seventh Schedule without such a legal requirement.

Mr Chrismal Warnasooriya appearing for the 44th respondent strongly objected to any relief being given to the petitioner on the basis that the section 28 (4) requires that the candidate's oath /affirmation has to be taken and made before a Justice of the peace or a Notary Public . The leaned Counsel relied on the Judgment of Justice Tilakawardane in CA application no. **378/2002** (unreported) decided on **26/03/2002** wherein her Ladyship refused and dismissed the application on the basis that it is set out in the Seventh Schedule to the Constitution stating that oath has to be **taken and subscribed** before a person or body referred to in the Article 157 (a) (7) of the Constitution.

Mr Warnasuriya also cited a judgment in the case of **Sathasivam v. Ratnayake & Others CA Writ 325/06** decided on 06/03/2006 in support of his submission wherein the court observed that the requirement in section 28 (4) cannot in any manner be considered as less important than the requirement in section 28 (5).**"But once the nomination period expires the**

duty of the returning officer is to examine the nomination paper ... and reject any nomination paper under section 31 (1) ...the returning officer's function is a ministerial act and there is no decision or determination made by him capable of being quashed by a Writ certiorari..”

However, I have carefully considered the submission of the learned counsel for 44th respondent who relies on the judgment of Justice Tilakawardane in the above case wherein the court took the view that oath and affirmation has to be taken and subscribed before a person or body referred to in Article 157A(7) of the Constitution. With utmost respect to Her Ladyship, I do not agree with the conclusion in that judgment on the basis that article 157 (A) (7) of the Constitution has no application to the present case before us.

While appreciating the effort made by the counsel for 44th respondent to support his contention, I do not agree with the submission of the learned counsel on the basis that the provisions of Article 157 (A) (7) of Constitution do not apply to the present case.

Article 157 (A) (7) of the Constitution reads as follows.

“ Every officer or person who was or is required by Article 32 or Article 53 , Article 61 or Article 107 or Article 165 or Article 169 (12), to take and subscribe or make and subscribe an oath or affirmation , every member of , or person , in the service , of a local authority, Development Council Pradishiya Sabha Mandalaya, Gramodaya Mandalaya or public corporation and every Attorney-at-law shall –

- (a) If such officer or person is holding office on the date of coming into force of t his Article , make and subscribe , or take and subscribe, an oath or affirmation in the form set out in the Seventh Schedule, before such person or body if any, as is referred to in that Article , within one month of the date on which this Article comes into force;*
- (b) If such person or officer is appointed to such office after the coming into force of this Article , make and subscribe or take and subscribe ,*

an oath or affirmation in the form set out in the Seventh Schedule , before such person or body, if any, as is referred to in that Article within one month of this appointment to such office”.

On a careful reading of the above Article it appears that the Constitutional requirement contained therein is not applicable to candidates who are not members in such service. In this application the impugned nomination paper contains names of the candidates who may become members if elected at the local authorities election on a future date. Therefore I do not agree with the submission of Mr. Warnasuriya on that issue and also I do not think that this court should consider the judgment referred to in CA 378/02 decided on 26/03/2002 as applicable and that judgment is not relevant.

It should be also noted that one can argue that the functions performed by the returning officer was ministerial in nature and that the returning officer does not exercise any discretionary power as he merely performs a “rubber stamp duty”. The returning officer has to examine carefully the nomination paper before accepting or rejecting . he is also empowered to make any corrections under section 28 (8) of the law if he is satisfied that there is error or mistake due to inadvertence.

The decision of the 2nd respondent rejecting the nomination paper of the petitioners in this application does not seem to be one that falls within any one of the limbs namely section 31 (a), (b) , (c) (d) and (e) stipulated in section 31 of the Local Authorities Elections Ordinance as amended.

The learned Deputy Solicitor general submitted that in view of provisions contained in section 31 (1) (d) of the Local Authorities Elections Ordinance as amended which provides

“ Where the consent of one or more of the candidates nominated has or have not been endorsed on the nomination paper or where the oath or

affirmation in the form set out in the Seventh Schedule to the Constitution of one or more candidates has or have not been annexed to the nomination paper”

Section 31 (1) (d) does not require the oath or affirmation to be taken and subscribed but merely requires for the same to be annexed to the nomination paper.

The issue to be determined by this court is as to whether the rejection of the nomination paper by the Returning Officer , the 2nd respondent is bad in law or whether the 2nd respondent has arbitrarily acted in excess of his powers vested under section 31 of the Local Authorities Elections Ordinance as amended.

In view of the above provisions of law this court has to consider as to whether the reason given by the 2nd respondent for rejection of the nomination paper is in fact a ground for rejection of the entire nomination paper under the above provisions in section 31 of the Local Authorities Election Ordinance as amended. It seems to me that 2nd respondent' powers of rejecting a nomination paper is limited to the grounds stipulated in section 31 of the Local Authorities Elections Ordinance as amended above referred to.

The returning officer has no power to reject a nomination paper on any other ground in terms of the law. The returning officer's powers are limited to the grounds stipulated in section 31 of the Statute. He cannot extend the power conferred on him beyond that limit.

As Sharvananda J (as he then was) observed in

Sirisena and Others vs. Kobbekaduwa, Minister of Agriculture and Lands 80 NLR 1 at 172) that

“ It is of the utmost importance to uphold the right and indeed the duty of the courts to ensure that powers shall not be exercised unlawfully which have been conferred on a local authority ,or the executive or indeed anyone

else , when the exercise of such powers affect the basic rights of an individual. The courts should be alert to see that such powers conferred by such statute are not exceeded or abused”

The basic principle that legality should prevail has been discussed in the unreported judgment of Lord Green MR., in the case of

Minister of Agriculture and Fisheries vs Hulkin 1950 1 KBD at page 154 which reads as follows.

“The power given to an authority under a statute is limited to the four corners of the powers given. It would entirely destroy the whole doctrine of ultra vires if it was possible for the donee of a statutory power to extend his power by creating an estoppel”

The returning officer , the 2nd respondent appears to have acted outside the law exceeding his powers warranting the intervention of this court to consider the petitioner’s grievance. It appears that one single and arbitrary action of the 2nd respondent has caused unnecessary harassment and greater damage to the petitioner and also has deprived the electors of their democratic rights of electing a candidate or candidates of their choice.

In the unreported case of **Dr. A..L.M.Hafrath Secretary General Sri Lanka Muslim Congress V L.L.C Siriwardane Returning Officer C.A.Appl. 413/2002** Justice Ms.Tilakawardane held that

“ The returning officer’s decision to reject the nomination paper affected not only the rights of all the candidates of the political party in question but also the rights of the voters who exercise their franchise for that party and for the particular candidate of that political party.”

Mr Wijesinghe PC also submitted that the provisions contained in Article 157 (1) (7) of the Constitution apply only to members of the Local Authorities and not to the candidates and the legal obligation for candidates to annex the oath in the form set out in the Seventh Schedule of the Constitution arises by virtue of the section 28 (4) of the Local Authorities Elections Ordinance and not under Article 157 (A) (7) of the Constitution. The provisions of section 28 (4) stipulating the requirement of an oath by candidates for local Authorities election was introduced by the amendment No 48 of 1983 to the Local Authorities Elections Ordinance subsequent to the 6th amendment to the Constitution which brought in Article 157 (A) (7). Therefore the Learned President's Counsel argues that the Constitutional provisions in Article 157(A) (7) is inapplicable to candidates contesting local authorities elections.

It seems to me that the decision of the returning officer, the 2nd respondent for Akmeemana Pradeshiya Sabha would affect not only the rights of the petitioners of Recognized political party in question but also the rights of other candidates reflected in the same nomination paper and the rights of voters who exercise their franchise. This court's judicial power of review in determining prerogative writs has not been taken away by law in applications of this nature when the rights of the subjects are affected as a result of one single and arbitrary action of the public officers.

The learned Deputy Solicitor General had no objection to a Writ being issued quashing the decision of the 2nd respondent rejecting the nomination and issuing a Writ of Mandamus in accepting the nominations of the petitioner.

As such I hold that there is no legal requirement for the oath /affirmation of candidate to be taken /made before any person or body in respect of local Authorities election.

I therefore conclude that the rejection of the nomination paper by the 2nd respondent by the letter marked P 5 based on the absence of an attestation by a Justice of the Peace is not a ground for rejection under section 31 (1) (d) of the Local Authorities Elections Ordinance as amended.

For the reasons set out above I am of the view that the application of the petitioner should be allowed and relief sought should be granted.

Accordingly, a Writ of Certiorari is issued quashing the decision of the 2nd respondent contained in P5 rejecting the nomination paper as per paragraph "d" of the prayer to the petition.

Court also issues a Writ of Mandamus directing the 1st and 2nd respondents to accept the nomination paper submitted by the petitioner according to law and take all other consequential steps in terms of the law as per sub paragraph "e" of the prayer to the petition.

I order no costs.

The judgment in this application is applicable and binding on all parties in the connected applications CA 78/2011, CA 110/2011 and CA 133/2011 as well.

PRESIDENT OF THE COURT OF APPEAL

Upaly Abeyratne J,

I agree.

JUDGE OF THE COURT OF APPEAL