

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an application for writ of Certiorari, Prohibition and Mandamus under and in terms of the Article 140 of the Constitution.

Jayasiri Jayasinghe

No. 14, Bangama Road,

Akuressa.

Petitioner.

CA 116/2011

Vs.

1. Dayananda Dissanayake
Commissioner of Elections
Elections Secretariat
Sarana Mawatha
Rajagiriya.

2. Mrs. W.K.K. Athukorala
District Secretary/ Returning Officer
Assistant Returning Officer
Election Office
District Secretariat
Fort, Matara.

3. Suneth Lochana
Assistant Commissioner of Elections
Assistant Returning Officer
Election Office
District Secretariat
Fort, Matara.

4. Tissa Attanayake
General Secretary, United National
Party,
"Sirikotha", No. 400, Kotte Road,
Pita Kotte
Sri Jayawardenepura.

5. M. Tilvin Silva
General Secretary
Janatha Vimukthi Peramuna
198/19, Panchikawatta Road,
Colombo-10.

6. Susil Premajyantha

**General Secretary/ Eksath Janatha
Nidahas Sandanaya, No. 301,**

**T.B. Jaya Mawatha,
Colombo-01.**

7. Kamal Nissanka

**Secretary Liberal Party
88/1, Rosmead Place,
Colombo-07.**

8. R.G. Samantha

**Leader Independent Group
158/10, Amalagoda
Akuressa.**

9. Hon. Attorney General

**Attorney-General's Department
Colombo-12.**

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: Rasik Zarook PC with Rohana Deshapriya

For the petitioners.

Shavindra Fernando DSG with Sanjaya Rajaratnam, Nerin Pulle SSC

Ms Yuresha De Silva Sc & Ms Vichthri Jayasinghe SC for 1st, 2nd, 3rd
and 9th respondents.

Palitha Kumarasinghe PC 6th respondent

Daya Palpola for 4th respondent.

ARGUED ON: 23/03/2011

DECIDED ON: 12/05/2011

SATHYA HETTIGE P C J, (P/CA)

The petitioner in this application is the Group Leader of the Independent Group which has submitted the nomination paper for the Akuressa Pradeshiya Sabha for the Local Authorities Elections 2011. The petitioner has filed this application for and on behalf of the members of the

Independent Group whose nomination paper was not accepted by the 2nd and 3rd respondents.

The petitioner is seeking a Writ of Certiorari quashing the purported order made by the 2nd respondent not accepting the nomination paper of the Independent Group headed by the petitioner for Akuressa Pradeshiya Sabha for the Local Authority Election 2011 and a Writ of Mandamus directing the 1st and 2nd respondents to forthwith accept the nomination paper submitted by the Independent Group led by the petitioner for Akuressa Pradeshiya Sabha for the Local Authority election 2011.

Further ,Inter alia, a Writ of prohibition is sought by the petitioner to prohibit the 1st and 2nd respondents and or their servants and agents from conducting the election of members to the Akuressa Pradeshiya Sabha without the nomination paper of the petitioner being accepted for Local Authorities Election for 2011.

This application was supported for notice and Interim relief on the 1st and 2nd respondents as per sub paragraphs (f) and (g) of the prayer to the petition. The court having heard the parties issued notice and interim order on 1st and 2nd respondents on 18/2/2011 .The petitioner does not seek any reliefs from the 4th,5th,6th, 7th, and 8th respondents who are secretaries of political parties which submitted Nominations for Akuressa Pradeshiya Sabha for Local Authorities Election 2011.

It is submitted by the petitioner that the petitioner as the Group leader prepared the nomination paper containing the names of the 16 candidates namely 10 candidates in Group 1 and 6 youth candidates as contemplated in terms of Local Authorities Elections 2011 as amended.

On 27th January 2011 the petitioner , as the Group leader with his assistant named one Kathaluwa Wellage Shantha Kumarage were permitted by the police at the gate and were escorted by a police officer to enter the hall of the 2nd respondent at **11.55 am** 5 minutes prior to the closing time of the nominations and immediately thereafter at **11.57 am** the petitioner duly

submitted the Nominations together with required attachments to the 2nd respondent. The petitioner states in paragraph 15 of the petition, the 2nd respondent has stated that ***“ the committee has decided not to accept nominations and now it is closed since the announcement was made”***

All the attempts made by the petitioner to convince the 2nd respondent that there were 3 (three) more minutes and accept the nominations by pointing out to the clock of the Nomination hall she refused to accept the nominations. It is alleged by the petitioner in paragraphs 19 and 20 of the petitioner that the 2nd respondent refused to state the reasons for not accepting the nominations though requested by the petitioner.

Learned President’s Counsel further submitted that at the time the 2nd respondent refused the nominations, the petitioner’s assistant, K.W, Shantha Kumara, one Samson Mallikaarachchi a leader of an Independent Group for Athurugiriya Pradeshiya Sabha and Suraweera Arachchige Saman Kumara a Group leader of Janatha Vimukthi Perumuna Akuressa Pradeshiya Sabha were present in the nomination hall witnessing the refusal process by the 2nd respondent. The petitioner has annexed three affidavits from those persons in support of the refusal process by the 2nd respondent at 11.57 am marked P6, P7 and P8.

Mr. Zarook PC strenuously submitted that the non-acceptance of nomination papers which consisted of attached documents marked P3, P4 and P 5 (1) to P 5 (16) of the Independent Group led by the petitioner, by the 2nd respondent is unreasonable, ultra vires, illegal, null and void and of no avail or force in law in as much as, inter alia,

- a) Non-acceptance of the nomination papers of the Independent Group headed by the petitioner for Akuressa Pradeshiya Sabha for 2011 Local Authorities Election was on erroneous basis that the same was submitted after the closing was announced prematurely whereas the petitioner was allowed to enter the office of the 2nd respondent and

it was duly handed instantly at 11.57 am to the 2nd respondent the office of the 2nd respondent.

- b) The refusal of the Nomination papers by the 2nd respondent constitutes a grave error of law on the face of the record . and it is furthermore vitiated by the failure to follow the fundamental principles of natural justice and offends the principle of reasonableness , fairness and proportionality.
- c) The 2nd respondent had no jurisdiction to determine closing time three minutes prior to 12 noon and contrary to law which stipulated the time of closure as 12.00 noon.
- d) The refusal to accept the nomination papers seriously impugned upon and gravely undermined the lawful franchise of the people which is protected by the Constitutional provisions
- e) The 2nd respondent , in any event , failed to give reasons for purported refusal to accept and as such the decision is null and void.
- f) In any event , the 2nd respondent should have accepted the nominations papers and initialed the same after recording the time of handing over .

The 1st , 2nd respondents filed a Statement of objections by way motion on the **23rd March 2011** on which date that this matter was taken up for hearing. The Affidavit filed by the 2nd respondent is dated **19th March 2011** which is prior to the date of the motion , being 23rd March 2011. The Statement of objections filed by the 1st, 2nd 3rd and 9th respondents is undated and have been filed out of time . In view of the urgency of this application court ordered the respondents on 18/02/2011 to file objections if any , on or before 28th February 2011. As such the affidavit of the 2nd respondent dated 19th March 2011 cannot be accepted as it has not been filed in terms of the Rules of the Court of Appeal.

It was submitted by the learned President's Counsel for petitioner that in the totality of the circumstances the impugned order constituting the subject matter of the application warrants intervention of this court as the refusal of the nominations papers of the petitioner by the 2nd respondent undermines and affects not only the rights and interests of the independent Group of the petitioner but also the entire constituency as well as indeed, the public and the nation at large.

The learned DSG appearing for and on behalf of 1st and 2nd respondents contended and submitted that as per the records available (2 R 1) with the 1st and 2nd respondents the petitioner submitted the nomination papers to the 2nd respondent after 12.00 noon on 27/01/2011 and the 2nd respondent could not accept the nominations. Learned DSG submitted that the petitioner states that the nomination paper was tendered prior to 12 noon on 27th January 2011 and the facts are in dispute. Therefore this court cannot grant the relief sought by the petitioner. I have carefully perused the document filed by the respondents marked 2 R 1. I do not find any entry or the name of the petitioner entered therein to establish that the petitioner came to hand over the nomination paper after 12 noon. I observe that had the petitioner come after 12 noon, an entry to that effect should have been made in 2 R1 and his signature should have been obtained by the 2nd respondent. I further observe that the mere assertions of facts without proof cannot be accepted.

The learned DSG relied on the case in CA Application No. **Thadjudeen v Sri Lanka Tea Board and Another 1981 (2) SLR 474** wherein it was held that when the question of facts are in dispute they can and must only be settled by a regular action before the appropriate court.

Mr Fernando cited the unreported judgment of **Sri Pavan J** in a similar application **no.CA 424/2006** wherein the court refused to issue notice on the same basis and the facts were in dispute as to the time of submitting the nomination papers.

However, on perusal of the court order in the above case I find that the respondents tendered to court the relevant Journal which was marked R 1 in that case and found that the time had been recorded that no nominations had been received after 11.50 am .

It should be noted in this application that the document filed and annexed to the statement of objections marked 2 R1 by the State cannot be accepted as proof to establish that the petitioner came to hand over nomination paper after 12 noon on 27/01/2011 and accordingly Respondents have failed to establish the time recorded by the 2nd respondent by producing any Journal or any other document maintained by the 1st and 2nd respondent when the court questioned the learned DSG as to recording of time.

As such I do not agree with the submission of the learned DSG that the in this application are in dispute as the respondents have failed to prove by producing the relevant documents to establish the time of closure for nominations prior to 12 00 noon or the time petitioner handed over the nominations to the 2nd respondent.

Mr Palpola appearing for the 4th respondent associated himself with the submissions of Mr. Fernando and submitted that the facts are in dispute as to the time of handing over of the nominations and as such the petitioner's application should be dismissed in limine.

Mr Palitha Kumarasinghe PC appearing for the 6th respondent strongly submitted that the 2nd respondent was statutorily bound in law to accept the nomination papers of the petitioner and refuse thereafter if the nomination papers were submitted after 12.00 noon in terms of the law. Learned PC submitted that there has been a statutory illegality on the part of 2nd respondent and the refusal of nomination papers by the 2nd respondent seriously and gravely undermined and affected the lawful franchise of the people guaranteed by the Constitution.

Section 26 of the Local Authorities ordinance as amended provides for the elections officer of the district in which the electoral area of the local authority is situated to publish a notice of his intention to hold an election specifying the period for nomination to be received by the returning officer.

The relevant portion of the section 26 of the Ordinance as amended reads as follows.

“.....the elections officer of the district in which the electoral area of such authority is situated shall publish a notice of his intention to hold such election. The notice shall specify the period (hereinafter referred to as the nomination period) during which nomination papers shall be received by the returning officer during office hours at his office . Such nomination shall commence on the fourteenth day after the date of publication of the notice and shall expire at twelve noon on the twenty first day after the date of publication of the notice....”

It is common ground that twenty first day being 27/01/2011 at 12.00 noon was the date and time fixed by the elections officer of the Matara District for accepting the nomination papers by the returning officer for local authority election for Akuressa Pradeshiya Sabha 2011.

It appears from the above statutory provisions of law contained in the Local Authority Elections Law the returning officer shall receive the nomination papers until 12.00 noon and the time fixed by the statute shall expire at 12.00 noon and not prior to 12.00 noon. It is mandatory for the returning officer to receive nominations until the time expires at 12.00 noon.

It should be noted that the returning officer has no power under the above provisions of law to announce the closure of time for nominations prior to 12.00 noon. There is no material placed before this court by the 1st and 2nd respondents that the nomination paper of the petitioner was submitted

after 12.00 noon on 27/01/2011 apart from the affidavit of the 2nd respondent and the submissions of the learned DSG.

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 the single and arbitrary action of the 2nd respondent has caused unnecessary harassment and greater damage depriving the electors of their democratic rights of voting in electing a candidate or candidates from an Independent Group of their choice. This court must consider the competing interests of all the parties to this case when considering the application. The refusal to accept the nomination paper of the petitioner by the 2nd respondent appears to have prevented the independent Group led by the petitioner contesting the local authority election and at the same time affected the franchised population of the electoral district.

The returning officer's powers are limited to the grounds stipulated in section 31(1) of the Local Authorities Elections Ordinance as amended to reject a nomination paper.

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”

In the circumstances of this case and having considered material placed before this court and the submissions of all counsel the court is not satisfied that the respondents except the 6th respondent have established that the petitioner did come after 12 noon on 27/01/2011 to hand over the nomination paper of the Independent group and therefore I conclude that the relief sought by the petitioner should be granted. This court exercises its discretionary power in favor of the petitioner.

For the reasons set out above I am of the view that the Writ should be issued to quash the decision of the 2nd respondent not to accept the nomination paper of the petitioner.

Accordingly court issues the Writ of Certiorari quashing the decision of the 2nd respondent refusing to accept the nomination paper of the petitioner on 27/01/2011 as prayed for in paragraph (C) of the prayer.

Court issues a Writ of Mandamus directing the 1st and 2nd respondents to accept the nomination paper of the petitioner Independent group according to law and take all other consequential steps in terms of the law.

I order no costs.

PRESIDENT OF THE COURT OF APPEAL

Upaly Abeyrathne J,

I agree.

JUDGE OF THE COURT OF APPEAL.