

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

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

1. A.D. Susil Premajyantha
Secretary
Eksath Janatha Nidahas Sandanaya
(United Peoples Freedom Alliance)
301, T.B. Jaya Mawatha
Colombo-10.

Petitioner.

CA 122/2011 & CA 131/2011 Vs.

1. P.A.S. Senaratna
Returning Officer
Elections Office, Ratnapura.

2. Dayananda Dissanayake
Commissioner of Elections
Election Secretariat
Rajagiriya.

3. M.M. Sunil Premasiri
Mawela, Balangoda.

4. M.N. Wijayananda
Maddakanda , Balangoda.

5. W.A. Jayaratna
Rajawaka
Balangoda
And others.

Respondents.

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

COUNSEL: Nihal Jayamanne PC with Priyantha Jayawardane & Dilhan Silva
for the petitioner

Shavindra Fernando DSG with Sanjaya Rajaratnam DSG , Nerin
Pulle SSC ,

Ms Yuresha de Silva SC & Ms Vichithri Jayasinghe SC for 1st, 2nd &
31st respondents

AP Niles with Saman de Silva for 28th respondent Chrismal
Warnasuriya for 29th respondent

Argued on 22/03/2011

Argued on 22.03. 2011

Decided on 12/05/2011

SATHYAA HETTIGE PC, P/CA

The petitioner is the General Secretary of the United People's Freedom Alliance a recognized political party under the Parliamentary Elections Act No. 1 of 1981. The said Party is called and known as "Eksath Janatha Nidahas Sandnaya" in Sinhala.

The petitioner states that 3rd to 27th respondents were nominated by the United People's Freedom Alliance as its candidates to contest the local authorities election for Balangoda Pradeshiya Sabha. The duly completed nomination paper as required in terms of the Local Authorities Elections Ordinance as amended along with the required documents were submitted to the 1st respondent by Sumith Parakrama , the authorized agent of the UPFA in compliance with the law. The petitioner states that the nomination paper submitted by the UPFA consisted of 25 candidates including the 10 youth candidates who signed the nomination paper and the signature of the Secretary of UPFA was also attested by an Attorney at Law and Notary Public as required by law.

It is stated in the petition that all nominated candidates duly signed the oath /affirmation in compliance with the provisions in section 28 (4) of the Ordinance and all the youth candidates whose names appeared in the nomination paper complied with section 28(4) A of the Ordinance by submitting affidavits in proof of their dates of birth. All the affidavits were attached to the nomination paper.

The petitioner states that although the duly completed nomination paper and the relevant documents in compliance with section 28(1)A , 28 (4) , 28(5) and section 28 (4)A of the Ordinance on the same day the 1st respondent

announced that the nomination paper submitted by the UPFA was rejected.

Thereafter the returning officer on 28/01/2011 by the letter dated notified his decision for rejection of the nomination paper and the reason for rejection was that one of the youth candidates failed to submit the birth certificate or an affidavit to confirm the date of birth or has submitted a defective affidavit to prove the date of birth. A copy of the said decision rejecting the nomination paper is annexed to the petition marked P 7.

It was submitted that the decision of the returning officer did not contain a valid and lawful reason for rejection. Therefore the returning officer's decision in document marked P 7 is bad in law, ultra vires, arbitrary, unlawful and not accordance with the provisions of the Local Authorities Elections Ordinance as amended. It was the contention of the petitioner that the unlawful decision in P7 deprived a large number of voters of their rights to be represented at the said election affecting the franchise of the people.

It was also submitted by the learned President's Counsel that the decision of the returning officer does not identify which one of the 10 youth candidates had failed to submit the birth certificate/affidavit and failed to set out the defect in the affidavit. By not identifying the particular candidate out of 10 candidates the 1st respondent failed to comply with section 31(2) of the Law. It was contended that in the absence of the 1st respondent by identifying the youth candidate there is no valid reason in law or decision to reject the entire nomination paper. And the said rejection of the nomination paper is arbitrary, capricious and grossly unreasonable.

Therefore, the petitioner is seeking inter alia, a writ of certiorari to quash the decision rejecting the nomination paper marked P 7

And a writ of Mandamus directing the n 1st and 2nd respondents to accept the nomination paper submitted by the UPFA for local election for

Balangoda Pradeshiya Sabha for 2011 and to take all consequential steps as mandated by law.

It appears that the submissions of the learned DSG the discrepancy with regard to the name in the affidavit when affirming and signing by the candidate do not satisfy the requirement in law.

The relevant provisions in section 28(4) A of the Local Authorities Elections Ordinance as amended 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 candidate , certifying his date of birth shall be attached to such nomination paper".

The learned DSG submitted that due to the discrepancy in the name of one of the youth candidates in the affidavit annexed to the nomination paper the affidavit was not accepted by the returning officer as the requirement in section 28 (4) A of the Ordinance had not been satisfied. Therefore, there was no legally valid affidavit submitted in this case. As a result, since the birth certificate or affidavit in proof of date of birth had not been attached , the requirement in law for the candidate to comply with was not satisfied.

As per Section 28(4) A of the Ordinance it is mandatory for a youth candidate to furnish either a certified copy of the birth certificate or affidavit annexed to the nomination paper.

However, I do not agree with the submission of the learned DSG that the difference between the names of the same person in the affidavit will vitiate the whole affidavit. The requirement under the law in section 28(4)A is that a birth certificate or an affidavit should be annexed to the nomination paper in proof of the date of birth . There is no objection taken that the candidate has failed to state the date of birth in the affidavit. Obviously the same candidate has submitted the affidavit to substantiate the date of birth. The returning officer is required to conduct

a visual examination of the nomination paper and undoubtedly the correct name of the candidate is mentioned in the affidavit .

It should be noted that 1st and 2nd respondents have not filed objections or written submissions in this application. Without the material placed before court it is difficult for the court to infer the correct position . Only the 29th respondent has filed objections and written submissions which I have considered.

I will now consider the submissions of the counsel who attempted to justify the decision of the returning officer as correct. Counsel for the 3rd respondent submitted that the returning officer's decision is ministerial and the decision in P 7 is not subject to judicial review. The returning officer merely performs a ministerial function.

The contention of the learned DSG that the under section 28(4) A of the Ordinance that it is mandatory for a youth candidate to furnish either a birth certificate or an affidavit must be attached to the nomination paper in proof of the date of birth and his argument may be correct in law.

However, this court has to consider the fact that the reason given by the returning officer for rejection of the nomination paper is within the law. Only issue in this case is that there was a discrepancy in the name of the youth candidate in the affidavit and whether it is a material and serious discrepancy that would warrant the rejection of the nomination paper.

The purpose of attaching the affidavit was to substantiate the date of birth of the candidate. By perusing the above two names can the returning officer determine that the particular youth candidate described in the affidavit was a different person. Was the date of birth given in the affidavit correct and accurate in order to prove the date of birth of the

candidate. If the determination of the returning officer rejecting the nomination paper in P 7 is accepted by this court will the intention of the legislature be achieved. I do not think that the decision for rejection of the nomination paper for the reason given above is acceptable in law.

In any event, there is substantial compliance of the law by the youth candidate. The discrepancy in the name of the candidate considered by the returning officer is not a ground under section 31 (1) to reject the nomination paper. The returning officer's decision cannot be justified as correct and legal on the basis of franchise of the people. It is necessary for the returning officer to identify the particular candidate who appears to have defaulted or failed to comply with the legal requirement and formulate the reason accordingly to be communicated to the petitioner.

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 the limits of the section.

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”

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.”

In view of the reasons stated above I observe that the returning officer has acted beyond his powers conferred upon him under section 31(1) of the Local Authorities Elections Ordinance as amended when making the determination to reject the nomination paper of the petitioner.

Halsbury Laws of England, Vol. 15, 04th edi., paragraph 476 at page 370 which reads under the heading **“Particulars of Candidate in the Nomination Paper:** as follows:

“NO misnomer or inaccurate description of any person or place named in a nomination paper affects the full operation of the nomination paper where the description of the person or place is such as to be commonly understood. Thus it has been held that a mere misspelling of a surname , not calculated to mislead electors , does not give good ground for

objection. It has also been held that the use of abbreviation which everybody understands instead of setting out the forename in full, such as "Wm" for "William" is permissible."

The discrepancies of this nature with regard to the names which are negligible should not be considered as serious discrepancies for rejection of nomination paper.

CA 131/2011

The petitioner in this application is the General Secretary of the "United People's Freedom Alliance" a recognized political party under the provisions of Parliamentary Elections Act No. 1 of 1981. The same party is called and known as "Eksath Janatha Nidahas Sandanaya" in Sinhala. The nomination paper of the UPFA was submitted by the authorized agent of the UPFA appointed for the local election area of Siyambalanduwa Pradeshiya Sabha.

The nomination paper submitted by the UPFA to the 2nd respondent was rejected for the reason that the **"the affidavit certifying the date of birth submitted along with the nomination paper had been defective"**.

It appears that the nomination paper of the UPFA in respect of Siyambalanduwa pradeshiya Sabha was rejected on the same basis of failing to comply with section 28(4) of the Ordinance. Since it is a similar issue that had been discussed by this court in the connected case I come to same conclusion that the returning officer has acted arbitrarily in rejecting the nomination paper of the UPFA in respect of Siyambanduwa Pradeshiya Sabha and the decision of the returning officer cannot be justified in law.

In the circumstances I am of the view that the relief sought by the petitioner should be granted by quashing the decision contained in P 7 rejecting the nomination paper of the political party in question.

Accordingly, the Court issues a Writ of Certiorari quashing the decision of the returning officer rejecting the nomination paper in respect of Balangoda

Pradeshiya Sabha as prayed for in paragraph (b) of the prayer to the petition.

Court issues a Writ of Mandamus directing the 1st and 2nd respondents to accept the nomination paper submitted by the political party in question according to law and to take consequential steps as mandated by law.

I order no costs.

This judgment will be applicable and will be binding on all parties CA application No. 131/2011 as well.

PRESIDENT OF THE COURT OF APPEAL.

Upaly Abeuratne J,

I agree.

JUDGE OF THE COURT OF APPEAL.