

**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. Masihudeen Naeemullah  
Authorized Agent of Sri Lanka Muslim Congress  
to hand over nominations for Akuresa  
Pradeshiya Sabha  
95, Ambagamuwa Road,  
Gampola.
  
2. M.T. Hasan Ali  
Secretary General  
Sri Lanka Muslim Congress  
51, Vauxhall Lane  
Colombo-02.

**Petitioners.**

CA 87/2011 & CA 147/2011

Vs.

1. Dayanada Dissanayake  
Commissioner of Elections  
Department of Elections  
Sarana Road, Rajagiriya.
2. U. Amaradasa  
Returning Officer, Akurana  
Pradeshiya Sabha  
Assistant Returning Officer  
Kandy District  
District Secretariat , Kandy.
3. Hon. Susil Premajayantha,  
General Secretary  
United People's Freedom Alliance.
4. Hon. Tissa Attanayake  
Secretary,  
United National Party  
Sirikotha, Pitakotte
5. Tilvin Silva  
Secretary  
Janatha Vimukthi Peramuna  
Nugegoda.

And others.

## **Respondents.**

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

Upaly Abeyratna J Judge of the Court of Appeal

**COUNSEL:** Nizam Kariappar with M.I.M.Iyanullah for the petitioner

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

Ms Yuresha de Silva SC & Ms Vichithri Jayasinghe SC for 1<sup>st</sup> , 2<sup>nd</sup>  
and 11<sup>th</sup> respondents

Ali Sabry for the 3<sup>rd</sup> respondent

Daya Palpola for the 4<sup>th</sup> respondent

Faisz Musthapha PC with Faizer Musthapha, Shantha Jayawardane  
and Isuru Balapatabendi for petitioner in CA 147/2011

**ARGUED ON:** 23/03/2011

**DECIDED ON:** 12/05/2011

**SATHYA HETTIGE P.C. J, (P/CA)**

The 1<sup>st</sup> petitioner in this application is the Authorized Agent of the Sri Lanka Muslim Congress who was appointed by the 2<sup>nd</sup> petitioner for handing over of the nomination paper for Akurana Pradeshiya Sabha for 2011.

The 2<sup>nd</sup> petitioner is the Secretary General of the Sri Lanka Muslim Congress a recognized political party under the Parliamentary Elections Act No. 1 of 1981.

Consequent to the notice issued and published by the 2<sup>nd</sup> respondent calling for nominations for holding local elections for the electoral area of Akurana Pradeshiya Sabha the 1<sup>st</sup> petitioner on behalf of Sri Lanka Muslim Congress delivered the nomination paper on 27/01/2011 along with relevant documents required by law to the 2<sup>nd</sup> respondent, the Returning Officer for Akurana Pradeshiya Sabha

On 27/01/2011 the respondent summoned all the authorized agents of all political parties and independent group leaders and informed the decisions regarding the nomination papers submitted by them. The petitioner states that the 2<sup>nd</sup> respondent read out the list of names that were rejected by him and announced that the nomination paper of the Muslim Congress submitted for Akurana Pradeshiya Sabha was rejected

The reason for rejection of the nomination paper of Sri Lanka Muslim Congress was that the 2<sup>nd</sup> petitioner's signature had not been attested by the Justice of the Peace as required by section 28(5) of the Local Authorities Elections Ordinance as amended.

At the outset of the hearing of this application and the connected application counsel for the parties agreed to consolidate both the applications and agreed to abide by the decision of one application since the issue involved in both the cases is the same and similar. The petitioners in this application are challenging the decision of the returning officer marked P 3 rejecting the nomination paper of the Sri Lanka Muslim Congress.

The petitioners are seeking ,inter alia, the following reliefs

- a) A Writ of Certiorari quashing the decision to reject the nomination paper of Sri Lanka Muslim Congress for the Akurana Pradeshiya Sabha.
- b) A writ of Mandamus directing the 2<sup>nd</sup> respondent to accept the nomination paper of Sri Lanka Muslim Congress for Akurana Pradeshiya Sabha.

The nomination paper of Sri Lanka Muslim Congress marked P 3 had been rejected by the returning officer under section 31 (1) (e) of the Local Authorities Elections Ordinance as amended for not complying with the requirement stipulated in section 28 (5) of the said law. The respondents submitted that the signature of the Secretary of Sri Lanka Muslim Congress , a recognized political party had not been attested by a Justice of the Peace or Notary Public as required by section 28(5) of the Law.

Section 31 (1) (e) of the above Law reads as follows:

*“ Where the signature of the secretary in the case of a recognized political party or the group leader in the case of an independent group does not appear on the nomination paper or where such signature has not been attested as required by subsection (5) of section 28.”*

Learned DSG submitted that in terms of the law in section 28(5) of the Law if the signature of the Secretary of the political party does not appear on the nomination paper or the signature of the secretary has not been attested by a Justice of the Peace the returning officer shall reject the nomination paper on the basis that it is mandatory for the candidates to comply with the requirement.

The petitioners in this application state in paragraph 21 of the petition that “ to the best of the 2<sup>nd</sup> petitioner’s recollection party secretary’s signature was attested by the justice of the peace for local authorities election for Akurana Pradeshiya Sabha supported by an affidavit filed along with the petition.

However, the court observes that respondents have not filed any objections controverting the position taken up by the petitioners apart from the written submissions and the oral submissions made on the law. It appears that the very basis of the petitioners' case is that in fact the petitioners have delivered the nomination paper properly signed by the Secretary General of Sri Lanka Muslim Congress the recognized political party attested by a Justice of the Peace

I have carefully perused the decision of the returning officer, the 2<sup>nd</sup> respondent marked P 3 dated 28/01/2011 wherein the reason given by him for rejection of the nomination paper reads "that the signature of the Secretary of the party or the independent group leader has not been attested."

It is very strange to observe on perusal of the said impugned decision marked P 3 that the returning officer has referred to an "Independent Group leader of an independent group" in the said decision rejecting the nomination paper whereas the 2<sup>nd</sup> petitioner is the General Secretary of a recognized political party who signed the nomination paper. It seems that the returning officer has committed an error of law on the face of the record. The decision in P3 is bad in law and has been made in excess of the powers conferred on him under section 31(2) of the Local Authorities Elections Ordinance as amended.

It was the contention of the learned counsel for petitioner that the original nomination paper that was tendered by the 1<sup>st</sup> petitioner was signed by the secretary of the party, the 2<sup>nd</sup> petitioner and was attested by the Justice of the Peace. The 2<sup>nd</sup> respondent had not filed any objections to contradict the version of the petitioners.

There is no material placed before court by the respondents to establish the fact that there were objections raised to the nomination paper of the petitioners during the period for objections provided by

law. The correctness, authenticity or the genuineness of the nomination paper has not been challenged by any of the contesting rival parties.

It seems to me that the returning officer by making the wrongly worded decision ( P3) to reject the nomination paper of the Sri Lanka Muslim Congress appears to have acted in a confused state of mind whereas that it was absolutely clear that the nomination paper was tendered by the petitioners' recognized political party.

I observe that the erroneous decision of the returning officer has caused unnecessary harassment and undermined the entire electoral process depriving the people in the electoral area for Akurana Pradeshiya Sabha of electing a candidate of their choice and the rights of the franchised people.

The returning officer has no power to reject a nomination paper on any other grounds except the grounds in Section 31 (1) in terms of the law. The returning officer's powers are limited to the grounds stipulated in section 31 (1) of the Statute. He cannot extend the powers 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”***

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.”**

Accordingly I hold that the decision of the returning officer cannot be justified in law and relief should be granted to the petitioner in the circumstances.

I will now deal with the connected case no CA 147/2011 briefly which is of similar nature

The petitioners are candidates of the United People’s Freedom Alliance nominated for election for Wilgamuwa Pradeshiya Sabha One Gunaratne Gallage who was nominated as the authorized agent of the UPFA for Wilgamuwa Pradeshiya Sabha delivered the nomination paper to the 1<sup>st</sup> respondent. During the period provided for objections after handing over the nominations, a leader and or a candidate had raised an objection to the nomination paper of the UPFA and the 1<sup>st</sup>



respondent rejected the nomination paper which decision is marked P3.

The reason given in P3 for rejection was that the signature of the Secretary of the political party had not been attested.

In this application too the petitioners complain that the rejection of Nomination paper is ultra vires , unfair , unreasonable, and is a denial of franchise.

The learned DSG argued that the provisions of law contained in section 28 (5) of the Law are mandatory.

Her Ladyship Justice Tilakawardane in the judgment in the case of **Dr. Hafrath Secretary SLMC and others v L.L.C. Siriwardane & others CA 413/2002** CA minutes of 15/03/2002 referred to the judgment in

**Malik Mohamed Ikthiyar v Khana and another 28 AIR Lahore 310**

wherein it was held that the word "shall" in an Act does not always mean that the compliance with the condition is obligatory.- the intention of the legislature should be gathered by reference to the whole scope of the Act. As such when interpreting the word "shall" the court must consider nature and design of the statute. If the court considers and construes the word "shall" as contained in section 28(5) as directory then the returning officer has a discretion not to reject the nomination paper of the petitioners by giving the franchised population to exercise their rights .

The respondents in this application have not filed any objections to the application except the submissions made on the law.

The court must exercise its discretionary powers to ensure that the justice is done. I observe that by granting relief to the petitioners in the circumstances , in both applications no prejudice would be caused to any party.

For the reasons set out above I am of the view that the returning officer has acted arbitrarily and without due regard to the interests of the franchised population and therefore, the relief should be granted to the petitioners

Accordingly, this court issues a Writ of certiorari to quash the decision of the returning officer contained in P3 rejecting the nomination paper of the petitioners.

This court issues a writ of Mandamus directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to accept the nomination papers of the petitioners in both the applications for local authorities election for Akurana Pradeshiya Sabha and Wilgamuwa Pradeshiya Sabha according to law and to take all consequential steps as mandated by law.

I order no costs.

This judgment is applicable and binding on all parties in this application and the connected application no.CA 147/2011.

**PRESIDENT OF THE COURT OF APPEAL**

Upaly Abeyrathne, J

I agree.

**JUDGE OF THE COURT OF APPEAL.**