

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

Jainudeen Mohamed Laheer
No. 99/01, Main Road,
Muttur- 01

PETITIONER

C.A 306/2012 (Writ)

Vs.

1. Mr. Mahinda Deshapriya
The Commissioner of Elections,
Elections Secretariat,
No. 02, Old Kotte Road,
Rajagiriya.
2. T. Ranjith De Silva
The Returning Officer of Trincomalee
District, District Secretariat,
Trincomalee
3. Nalaka Rathnayake
The Assistant Returning Officer,
Assistant Commissioner of Elections,
Fort Fredrick,
Trincomalee.

And 14 others

BEFORE: Anil Gooneratne J.

COUNSEL: Ruwantha Cooray with S. Alwis for Petitioner

Janak de Silva D.S.G. for Respondents

ARGUED ON: 20.11.2013

DECIDED ON: 20.02.2014

GOONERATNE J.

This is a Writ Application filed by the Petitioner who contested the Provincial Council Elections held on 08.9.2012 from the Sri Lanka Muslim Congress (SLMC) for the Provincial Council of Eastern Province. A Writ of Certiorari is sought to quash the final results of the preferential votes pertaining to SLMC candidates as in document P7 and Gazette Notification P9 (sub paragraph 'd' of the prayer). A Mandamus is sought as per sub paragraphs 'e' & 'f' of the prayer to the petition to have a re-count of the preferential votes held at the above elections and to declare the election results according to the re-count as in sub paragraph 'e' of the prayer to the petition. There are several other prayers to the petition, inclusive of interim relief (i).

At the hearing of this application learned Deputy Solicitor General who appeared for the 1st – 3rd Respondents, raised certain preliminary objections as regards the maintainability of this Writ Application as follows:

- (a) Application is not amenable to the writ jurisdiction of this court, more particularly Writ of Certiorari (prayer 'D') does not lie as its only a ministerial act, or function.
- (b) Petitioner seeks to partially quash the election results. Partial quashing of results not allowed by law.
- (c) Availability of alternative remedy.
- (d) Mandamus does not lie – counting of preferences and declaration of the results had been duly completed.

According to the petition of the Petitioner the 6th Respondent was the group leader of the SLMC. The 6th Respondent had falsified the number of preferential votes of the Petitioner at the election to prevent the Petitioner being elected. The Petitioner gives details of the counting of votes in paragraphs 12 to 16 of the petition.

It is pleaded that the Petitioner had secured more preferential votes than the 6th & 8th Respondents (paragraph 15). We have perused the entire petition and noted the contents in paragraphs 17 – 23 by which the petitioner attempts to demonstrate his grievances, and highlight certain irregularities, as regards the counting of preferential votes. Petitioner also plead in paragraph 25 of the petition, where different news papers had given details of preferential votes

which are different to that of another and each other to establish the purported irregularities.

I have also noted the following material contained in the affidavit of the 3rd Respondent which provides important details as far as this case is concerned and the method adopted in counting of votes.

- (a) The final results are prepared at the center for declaration of results at which results received from all the counting centers are added manually. In addition to the manual calculation the results received from the center are also added up on a computer as a double check. The computers are also inside the center for declaration of results. The results arrived manually are compared with the computer generated figures as a double check. If there was a discrepancy the calculations are checked again before the final results are announced. Each recognized political party and independent group contesting the election is permitted to send two agents to the center for declaration of results in terms of the Provincial Council Elections Act. The SLMC nominated the 6th and 8th Respondents as its agents. In addition to these agents, the candidates of recognized political parties or independent groups that had at least one candidate elected were allowed to enter the center for declaration of results. The Petitioner therefore had the opportunity to visit the center and observe its proceedings.
- (b) Provincial Councils Elections Act provides for a recount to be made by an agent of the recognized political party contesting the elections if there is

any doubts about the counting process. No such request was made. The Petitioner also did not make any such request.

- (c) Election was duly conducted, the counting of votes accurately done and the results correctly declared in accordance with the provisions of the Provincial Councils Election Act No. 2 of 1988.
- (d) Counting of results for each hall was issued to the agents as a carbonized copy before the formal issue of the result in the counting center. They had the opportunity to make a request for a recount at that stage.
- (e) No attempt was made or a request made by the Petitioner or his agents or his representatives to meet these Respondents after the declaration of the results.

I also had the opportunity to peruse the judgment of Sri Skandarajah J. in CA/Writ 291/2011 which deals with almost all the above preliminary objections raised by learned D.S.G. The said judgment has very correctly considered the judgments reported in Gamini Atukorala Vs. Dayananda Dissanayake, Commissioner of Elections 1988(3) SLR Pg. 206 at 219; Anthony and others Vs. Chandradasa 1996(2) SLR 311.

In the above 'Gamini Atukorala' case it was held that the decision of the results by the Returning Officer in terms of Section 65 of the Local Authorities Elections Ordinance is not a decision which attracts the Writ Jurisdiction of this court, as there is no discretion involved. It is only an announcement of the results.

Anthony's case referred to above held that in an election to proceed as void and to have another few members declared duly elected is not possible.

In other words to quash the preferential votes is a partial quashing of the said election. That would not be possible, under the scheme of the statute i.e Provincial Council Elections Act No. 2 of 1988.

I also agree with the submissions of learned D.S.G that there is an effective and an adequate remedy provided by the Provincial Councils Elections Act No. 2 of 1988 (Section 58). Petitioner has failed to resort to those provisions of the statute. I am also convinced that 1st to 3rd Respondents being officials of the Elections Department only performs a ministerial act and as such no discretion is involved and no Writ is available to grant relief in the manner pleaded by the Petitioner.

Further the complaints of the Petitioner are more or less on disputed facts. These are matters to be decided if at all by leading evidence. The procedure by way of Writ of Certiorari will not be available to decide on disputed facts (vide *Tajudeen Vs. Sri Lanka Tea Board and Another* 1981 (2) SLR 47; 2001 (3) SLR 330).

Petitioner had ample opportunity to ask for a re-count at the time of counting the preferential votes. Petitioner has failed to exercise that right, counting of votes and preferences were duly completed and performed. There

cannot be re-count to a Writ of Mandamus. No discretion involved, and no identifiable public duty to be performed after completion of counting of votes and announcement of results by the election officials.

In all the above circumstances I uphold all the above preliminary objections raised by the learned D.S.G on behalf of the above Respondents. This application is not amenable to the Writ jurisdiction of this court. I accordingly dismiss this application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL