

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

**In the matter of an Application for order in the
nature of Writ of *Quo Warranto*, certiorari and
Mandamus under and in terms of Article 140 of
the Constitution.**

General Sarath Fonseka of
No.461/7, Pubudu Pedesa,
Wali Road,
Thalawathugoda.

PETITIONER

CA/ WRIT/ 89/2015

Vs,

1. Dhammika Kitulgoda,
Former Secretary- General of Parliament,
Parliament of Sri Lanka,
Sri Jayewardenepura,
Kotte.
2. Dayananda Dissanayake,
Former Commissioner of Elections,
83/C Honnantara South,
Samupakara Mw,
Piliyandala.
3. Dhammika Dasanayake,
Secretary- General Parliament,
Parliament of Sri Lanka,
Sri Jayewardenepura,
Kotte.
4. Mahinda Deshapriya,
Commissioner of Elections,
Elections Secretariat,

Rajagiriya.

5. H.K. Kamal Padmasiri,
Returning Officer,
District Secretariat,
Colombo 05.
6. Lakshman Nipunarachchi of
No.07 Rajaye Niwasa,
Bokundara,
Piliyandala.
7. Jayantha Ketagoda of
No.12/A, Dambughawatta,
Malabe.
8. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before : **Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel : Faiz Musthapha PC with Upul Jayasuriya, S.P. Sriskantha and Ifthikar Asihq
for the Petitioner,
Ms. Farzana Jameel Senior DSG with Sumith Dharmawardhane DSG and
Yuresha de. Silva for the 3rd, 4th, 5th and 8th Respondents,
Srinath Perera PC with Buddhika Wansharatne for the 7th Respondent

Argued On : 13.05.2015
Written Submissions On : 29.05.2015, 03.06.2015
Order On : 18.06.2015

Order

Vijith K. Malalgoda PC J (P/CA)

The Petitioner has filed the present Application before this Court seeking inter alia;

b). Issue a mandate in the nature of a Writ of *Quo Warrantor* calling upon the 7th Respondent to show cause by what authority he claims to function as a Member of Parliament and declare that such claim is null and void and that the said 7th Respondent is not entitled in Law to hold office as a Member of Parliament for the Electoral District of Colombo,

c). Issue a mandate in the nature of a Writ of *Certiorari* quashing;

- I. The decision of the 2nd Respondent informing the 1st Respondent that in terms of section 64 of the Parliamentary Elections Act the Petitioner's seat as a Member of Parliament has fallen vacant,
- II. The direction made by the 2nd Respondent to fill the vacancy in terms of Article 99 13 (b) of the Constitution
- III. The return by the 5th Respondent to the effect that 6th Respondent was elected to Parliament for the said Electoral District
- IV. The notification in Government Gazette, by the 2nd Respondent, causing the name of the 7th Respondent to be published as being elected as a Member of Parliament

d). Issue a mandate in the nature of a Writ of *Certiorari* quashing;

- I the decision of the 2nd Respondent informing the 1st Respondent that in terms of section 64 of the Parliamentary Elections Act the Petitioner's seat as a Member of Parliament has fallen vacant,

- II the decision of the 2nd Respondent informing the 1st Respondent that in terms of section 64 of the Parliamentary Elections Act that the Petitioner's seat which had been purportedly filled by the 6th Respondent had become vacant,
- III the direction made by the 2nd Respondent to the 5th Respondent to fill the vacancy in terms of Article 99 13 (b) of the Constitution,
- IV the return by the 5th Respondent to the effect that the 7th Respondent was elected to Parliament for the said Electoral District,
- V the Notification in the Government Gazette by the 2nd Respondent, causing the name of the 7th Respondent to be published as being elected as a Member of Parliament,

e). Issue a mandate in the nature of a Writ of Mandamus directing the 3rd Respondent to take all necessary steps according to Law to enable the Petitioner to sit and vote in Parliament and exercise the powers, privileges and immunities as a Member of Parliament;

The Petitioner is the Leader of the Democratic Party and has contested the parliamentary elections 2010 as a candidate of the Democratic National Alliance and secured 98456 preference votes, which is the highest number of preference votes received by the said Alliance.

Two members were selected as Members of Parliament from the said Alliance namely the Petitioner and one Sunil Handunnetti who placed second in the number of preference votes.

The Commissioner of Election by **Government Gazette 1649/2 dated 12.04.2010** has declared them as Members of the Parliament under section 62 of the Parliamentary Elections Act No. 1 of 1981.

In February 2010 the petitioner was charged before two General Court Martial. He was also indicted in the High Court of Colombo in 3 cases under the Penal Code and Emergency Regulations.

On 13.08.2010 the petitioner was found guilty by the 1st Court Martial of having committed offences under the Army Act and on 17. 08. 2010 he received a letter from the Army Commander that the President had confirmed his sentence and that he was cashiered from the Sri Lanka Army.

On 17.09.2010 the Petitioner was found guilty by the 2nd Court Martial of having Committed offences under the Army Act and was sentenced to 30 months rigorous imprisonment. The President had confirmed the sentence of 30 months imprisonment and on 30.09.2010 the Commander informed the petitioner of this decision.

The Petitioner was also convicted of offences under the Penal Code by the High Court of Colombo and sentenced for three years rigorous imprisonment.

Section 64(1) of Parliamentary Elections Act which refers to filling of vacancies reads thus,

64 (1); Where the seat of a Member of Parliament becomes vacant as provided in Article 66 of the of Constitution [*other than paragraph (g) of that Article*] or by virtue of provisions of paragraph 13 (a) of Article 99 of the constitution, the Secretary – General of Parliament shall inform the Commissioner who shall direct the returning officer of the electoral district which returned such member to fill the vacancy as provided for under paragraph 13 (b) of article 99 of the Constitution within one month of such direction.

Article 66 of the Constitution refers to various instances where vacation of seats can take place in the Parliament and Article 66 (d) refers to;

66 (d); If he becomes subject to any disqualification specified in Article 89 or 91

Article 91 of the Constitution speaks of the circumstances under which a person becomes disqualified to be elected as a Member of Parliament or sit and vote in Parliament and section 91 (a) reads as follows,

91 (a); If he is or becomes subject to any of the disqualifications specified in Article 89

Therefore it is understood that if a person become disqualified to become an elector under any provision in Article 89, with the operation of Article 91 read with Article 66 of the Constitution, any sitting member of the Parliament will be unseated and his seat become vacant.

Article 89 (d) of the Constitution reads as follows;

89 (d); If he is serving or has during the period of seven years immediately preceding completed serving of a sentence of imprisonment (*by whatever name called*)

for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded in lieu of execution of such sentence;

Provided that if any person disqualified under this paragraph is granted a free pardon such disqualification shall cease from the date on which the pardon is granted;

Therefore it is understood that, with the convictions and the sentences imposed on the Petitioner as referred above, by operation of Article 89 of the Constitution the petitioner was disqualified to be an elector, and therefore he was unseated from the Parliament with the operation of Articles 91 and 66 of the Constitution.

Since the appointment of Members of Parliament are based on the proportional representation basis; filling of vacancies were also to be carried out on the same basis.

Article 99 13(b) provides “the candidate from the relevant recognized political party or independent group who has secured the next highest number of preferences **shall be declared** elected to fill such vacancy”

The term “shall be declared “referred to in the said Article plays a significant role, when considering the extent to which Article 99 (13) (b) is binding the relevant officials, who are responsible for the implementation of the said Article.

In the case of *CST V. Super Cotton Bowl Refilling Works (1989) I SCC 463; AIR 1989 SC 922* the term “shall be final” was considered by a bench comprising of Sabyasachi Mukharji and S. Ranganathan JJ and concluded that “shall be final” means it is final and there is an end.

In *Kydd V. Watch Committee of City of Liverpool (1980) AC 327-331-32* Lord Loreburn L.C construing the provisions of S. 11 of Police Act 1890 of England which provides an appeal to quarter sessions as to the amount of a constable’s pension and also stipulated that the court shall make an order which would be just and final, observed;

Where it says, speaking of such an order, that it is to be final. I think it means there is to be an end of the business at quarter session...”

The decision in *Kydd V. Watch Committee of City of Liverpool* was followed in the case of *Aundal Ammal V. Sadasivan pillai (19878) ISCC 183; AIR 1987 SC 203* considering to the expression “shall be final” used in section 18(5) of Kerala Buildings (Lease and Rent Control) Act.

In the case of *Indo - China Steam Navigation Co Ltd V. Jasjit Sing Adtl Collector of Customs AIR (1964) SC 1140* the phrase shall be Liable to Confiscation occurring in section 167 (12-A) of the Sea Customs Act 1878 was considered by A Constitution Bench of Supreme Court and concluded “that once an offence had been committed the vessel had to be confiscated and there was no discretion with the Adjudicating Officer in this behalf. In other words, such a phrase indicated that confiscation was a statutory corollary in the event of contravention of section 520A and that it was not open to the customs Authorities not to confiscate the vessel.

Under these circumstances this court is of the view that the term “shall be declared” has to be given a similar interpretation and therefore the officials who are responsible for the implementation of the said Article has no discretion but are bound to implement the said provisions of the Constitution.

As admitted by both parties, and as evident by P-5, on the information provided by the 1st Respondent under section 64 (1) of the Parliamentary Elections Act No 1 of 1981 the 2nd Respondent had directed the Returning Officer Colombo District to fill the said vacancy provided for under paragraph 13 (b) of Article 99 of the Constitution.

When the said Returning Officer Acting under section 64 (2) of the afore said act, declared Mr. Lakshman Nipuna Arachchi as elected member of the Parliament, the 2nd Respondent notified the afore said appointment to the General Public by **Government Gazette 1675/8 dated 12.10.2010** document marked P-5.

It was further admitted by both parties that, and as evident by P-6 when the 1st Respondent acting under section 64 (1) of the Parliamentary Elections Act No 1 of 1981 and informed the 2nd Respondent that a vacancy has occurred in the seventh Parliament by reason of Mr. Lakshman Nipuna Archchi who was declared elected, by absenting himself from the sitting of Parliament during a continuous period of three months without the leave of Parliament first obtained, the 2nd

Respondent had directed the returning officer Colombo district under section 64 (1) of the aforesaid act to fill the said vacancy provided for under paragraph 13 (b) of Article 99 of the Constitution.

When the said returning officer acting under section 64 (2) of the aforesaid act declared Mr. Ketagoda Gamage Jayantha Perera as elected Member of Parliament the 2nd Respondent notified the aforesaid appointment to the General Public by **Government Gazette 1692/1 dated 17.02.2011** document marked P-6.

Learned Senior Deputy Solicitor General who represented the 1st to 6th Respondents submitted that upon the occurrence of a vacancy, the provisions contained in the Parliamentary Elections Act, becomes operative, as regard the manner in which the said vacancy ought to be filled. She further submitted that these officials are not at liberty to inquire into or examine the legality or validity of the grounds on which the vacancy arose, but are merely required to carry out the functions as stipulated in the Parliamentary Elections Act to ensure the meaningful exercise of the franchise.

In the case of **Vignaswaran and Stephen V. Dayananda Dissanayake and other (2002) 3 Sri LR 59** Gamini Amarathunga (J) whilst discussing the role of a returning officer submitted; “the function of the returning officer under section 19 (1) of the Parliamentary Elections Act is ministerial in nature and there is no decision or determination made by him capable of being quashed by a Writ of *Certiorari*. He is entitled to rely on the certificate signed by a candidate in column 4 of the nomination paper to say that such candidate is not disqualified in terms of the Constitution.”

When considering the material discussed above the court observes that the aforementioned duties cast on the Secretary General of the Parliament, Commissioner of Elections and the Returning Officer as set out above, are mandatory, purely ministerial in nature and exclude the exercise of any discretion what so ever.

The Petitioner did not challenged the decisions of the 1st to 5th Respondents in declaring the 6th Respondent as Member of Parliament at the time the petitioner’s seat was declared vacant upon his conviction. But the entire argument of the Petitioner focused on the ‘Free pardon’ granted by His Excellency the President to the petitioner and submitted that “the pardon automatically reverses the said decisions of the 1st to 5th Respondents.”

According to the Petitioner, His Excellency the President acting under Article 34 of the Constitution granted free pardons to the Petitioner on 21.01.2015 in respect of the conviction by the General Court Martial on 17.09.2010 and by the High Court in Case No. 5311/2011. On 23.01.2015 His Excellency the President granted free pardon in respect of the conviction by the General Court Martial on 13.08.2010.

Papers pertaining to the granting of free pardon by His Excellency the President were produced marked P-7 and P-8 by the petitioner and in addition to the above, a clarification with regard to the effective date of the free pardons issued on the direction of His Excellency by the Secretary to the President had been produced marked P-9.

Article 34 of the Constitution speaks of Granting Pardon by His Excellency the President and Article 34 (1) (a) which deals with free pardon provides;

34 (1); The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka-

a. Granted a pardon, either free or subject to lawful conditions

When a person becomes disqualified to be an elector under Article 89 (d) the proviso to the above subsection, provides for the exception for the rule as follows,

“Provided that if any person disqualified under this paragraph is granted a free pardon such disqualification shall cease from the date on which the pardon is granted.

With regard to the free pardon granted to the Petitioner, the position taken up by the Petitioner was that, according to the clarification marked P-9, the free pardon granted by His Excellency the President are effective from the date of the conviction and therefore, in the eyes of Law the petitioner had never been convicted by any Court of Law and had continued to enjoy his civil rights including his right to sit in Parliament as the legitimately elected representative of his electorate.

In other words what is contended by the petitioner was that, the pardon granted by His Excellency the President wipes out the conviction imposed on the petitioner and the steps taken by the 3rd – 5th Respondents under the Parliamentary Elections Act, to fill the vacancies that arose as a result of the

Petitioner and the 6th Respondent ceasing to be the Members of the Parliament and furthermore , that the effect of the pardon should be to restore the Petitioner to his seat as an elected Member of Parliament.

Even though the petitioner submitted that the free pardon granted to him has a retrospective effect with the clarification given, the Argument of the Respondent before this court was that the plain reading of the proviso to Article 89(d) makes it clear that in regard to this particular disqualification, it was the intention of Parliament to make it effective only prospectively.

However, what is observed as important by this court on the free pardon granted to the petitioner is not the date on which it operates but to what extent the pardon will work within the provisions of the Constitution.

Article 89 of the Constitution deals only with “disqualification to be an elector”, but when the above Article reads along with Article 91 (1) (a), the provisions in Article 89 extends to set out disqualification to be elected or sit and vote in the parliament. The proviso to Article 89 (d) makes a person who had become disqualified under Article 89 (d) to be an elector, to a person qualified to be an elector.

The constitutional provisions I have already discussed such as Article 91 and Article 99 13(b) taken along with section 64(1) of the parliamentary Elections Act, proceed to fill the vacancy which arose as a result of the disqualification but, none of these provisions provides, provisions to unseat a person when proviso to Article 89(d) is invoked. It is further observed by this court that the only instances under which an elected member of parliament could be unseated are the instances specified in Article 91 of the Constitution.

As admitted by the petitioner, none of the acts committed by 1st to 5th Respondents, in declaring a vacancy in parliament or filling such vacancy as evident in P-6 and P-7 were illegal at the time those acts were committed.

However, the petitioner argued that the said legal authority given to them by the relevant provisions of the Constitution and the Parliamentary Elections Act get removed, the moment the free pardon is granted and therefore their respective actions become amenable to the prerogative writs and could be quashed by a Writ of *Certiorari*.

We cannot agree with the petitioner on this submission, in the absence of specific provision in the Constitution to support of his Argument. As pointed out by me previously, Articles 91 and 99 13 (b) of the Constitution are silent with regard to the Proviso to Article 89 (d) and therefore the argument put forward stating that the legal authority given to the 1st to 5th Respondents gets removed once free pardon is granted, provides no legal basis.

On the foregoing I conclude that the decisions / determinations that were made by the 1st to 5th Respondents as evident in P-6 and P-7 were valid and legal decisions that were made within the existing Constitutional provisions and the statutory provisions of the Parliamentary Elections Act No. 1 of 1981. Therefore I further conclude that, from the date on which the free pardon granted by His Excellency the President under proviso to Article 89 (d) of the Constitution, his disqualification to be an elector under Article 89 of the Constitution, shall cease but it does not wipe out the legitimate actions taken prior to the date of pardon either on Constitutional provisions or any other statutory provision.

Hence, I hold that the petitioner is not entitled to seek a Writ of *Certiorari* to quash the decisions / determinations as evident in P-6 and P-7 as prayed for in paragraphs (c) and (d) to the Petition.

I further conclude that, for the reasons adduced above, the petitioner is not entitled for mandates in the nature of Writ of *Mandamus* and Writ of *Quo Warrantor*. As prayed for in paragraphs (b) and (e) of Petition.

Application by the petitioner for the Writ of *Quo Warrantor*, *Certiorari* and *Mandamus* is dismissed with cost fixed at Rs. 25,000/-.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala,

I agree,

JUDGE OF THE COURT OF APPEAL