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

In the matter of an application under section 63 (1) of the Provincial Councils Elections Act No. 2 of 1988 read with Article 138 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA/175/2015, CA /176/2015 and CA/177/2015

(EXPULSION),

Hatha Kapuralalage Ashoka Dayaratne,
C/B/4/16 Ranpokunugama,
Nittambuwa.

Petitioner in CA/175 15

H.I.Pathmasiri de Silva,
"Kumudu"
Boralukada,
Baddegama.

Petitioner in CA/176/15

R.M. Malhamy Ratnayake,
No. 162, Gamunu Place,
Aluthmalkaduwawa,
Kurunegala.

Petitioner in CA/177/15

Vs,

1. Sarath Fonseka,
   Party Leader,
   Democratic Party,
   62B, Parliament Road,
   Pelawatta, Battaramulla.

2. Ananda Manawadu,
   General Secretary,
   Democratic Party,
   62B, Parliament Road,
   Pelawatta, Battaramulla.

3. Major General Y. Sunil A. de Silva,
   No.26, Army Quarters,
   Thunbowa, Piliyandala.

4. Captain Gayan Withanage,
   No. 54B, Gungamuwa,
   Bandaragama.

5. K.D. Aruna Deepal,
   "Mihiri" Perera Mw,
   Alubomulla.

6. Democratic Party,
   62B, Parliament Road,
   Pelawatta, Battaramulla.

7. Hemantha Samarakone,
   The Secretary,
   Western Provincial Council,
   5th Floor, Sethsiripaya,
   Battaramulla.

8. Mahinda Deshapriya,
   Commissioner General of the Elections,
   Election Secretariat,
   Rajagiriya.

Respondents

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

Counsel: Manohara de Silva PC with P. Wickremarathne -

-instructed by Thushara Dissanayake for the Petitioners,

Dharshana Weraduwage for the 1st to 6th Respondents,

Janak de Silva DSG for the 7th and 8th Respondents.

Argued On: 26.06.2015, 07.07.2015

Written Submission On: 14.08.2015, 21.08.2015

Order On: 03.11.2015

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioners to the three applications namely Hatha Kupuralalage Ashoka Dayaratne (CA/175/15) Hikkaduwa Liyanage Padmasiri de Silva (CA/176/15) and Ratnayake Mudiyanselage Malhamy Ratnayake (CA/177/15) have come before this court under section 63 (1) of the Provincial Council's Elections Act No. 2 of 1988 challenging their expulsion;

All three petitioners are members of the Democratic Party and Petitioner in CA 175 /12 is a Provincial Council Member in the Western Provincial Council. Petitioners in CA/176/15 and 177/15 are Provincial Council members of Southern Provincial Council and North Western Provincial Council respectively.

Since all three expulsions are based on similar facts, with identical charge sheet served against each Petitioner and the expulsion process carried out by a disciplinary board consists of 3rd to 5th Respondents, it was agreed by the counsel for all the parties that all three cases should be heard together since they essentially related to similar issues.

Petitioners alleged that, the second respondent by letter dated 12/11/2014 suspended their party membership and the said letter was produced marked P- 4 in all three Petitions filed before this court. In the said letter it was alleged that the petitioners have acted in breach of the disciplinary rules by attending a media briefing organized by another political party on 10/11/2014 without informing or obtaining the consent of the Democratic Party and acting in such a manner to discredit the party leader Sarath Fonseka and by publishing through media that the petitioners support a candidate of another political party. It was further stated that the petitioners have violated the memorandum of understanding entered into with the party prior to contesting the Provincial Council's Election.

Subsequent to the said suspension, the 2nd Respondent had issued charge sheets dated 21/11/2014 on all three petitioners. The said charge sheets contained 5 charges against each petitioner alleging that;

a) Without obtaining approval of the Democratic Party, engaging in discussions with a leader and activists of another political party on or about 10/11/2014.

b) Enabling the said discussion to be covered and telecasted by media in such a manner as to bring the party to disrepute.

c) Causing the media to publish that the petitioner supports the leader of the said political party at the upcoming presidential elections.

d) At the time the said discussion took place, the petitioner being well aware that the Democratic Party was taking steps with regard to the upcoming presidential elections, proceed to held discussions regarding the same without any approval from the party, acted in support of a member of another political Party and thereby brought the party and its leader to disrepute and acted in contravention of the decisions of the Executive Council of the Party.

e) At the said discussions, acting with several other members in such a manner as to conspire against the party and causing the public to believe that a large number of members had left the party.

A disciplinary committee consist of 3rd to 5th Respondents were appointed by the Executive Committee of the said party and the Petitioners were represented before the said disciplinary committee. At the

conclusion of the said Inquiry the Disciplinary Committee has found the petitioners guilty of the charges against them and recommended to expel the petitioners from the said party. The said recommendations were approved at the executive committee and accordingly the executive committee of the said party decided to expel all three petitioners from the said party with effect from 09/03/2015 and to inform the said decision to the Secretaries of the respective Provincial Council in order to expel them from their respective positions under the Provisions of the Provincial Council's Elections Act No. 2 of 1988 as amended by Act No. 29 of 1990, 7 of 1993 and 5 of 2004. Against the said decisions of the executive committee the Petitioners have come before this court under section 63 (1) of the said Act.

Section 63 (1) of the said Act reads as follows;

> **63(1),** Where a member of a Provincial Council ceases, by resignation, expulsion or otherwise, to be a member of a recognized political party or independent group on whose nomination paper his name appeared at the time of his becoming such member, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member.
>
> Provided that in the case of expulsion of a member of a Provincial Council his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Court of Appeal by Petition in writing and the Court of Appeal upon such application determines that such expulsion was invalid. Such Petition shall be inquired into by three Judges of the Court of Appeal who shall make their determination within two months of the filing of such Petition. Where the Court of Appeal determines that the expulsion was valid the vacancy shall occur from the date of such determination.

When this matter was taken up for inquiry before us, the Counsel for the 1st to 6th Respondents raised several preliminary objections challenging the maintainability of this application.

This court at that stage after hearing the submission by both parties, decided to consider both matters, i.e. the preliminary objection and the main application together, and the inquiry into the main matter too was proceeded before us.

However, before deciding the preliminary objection on maintainability of this application and the main application filed under section 63 (1) of the Provincial Council's Election Act No 2 of 1988 (as amended) this court will have to consider the proviso to the said section which provides that this court shall make its determination within two months of the filing of such Petition, is mandatory to be followed by this

court. This issue was raised in the case of ***Waruna Deeptha Rajapakse V. Janatha Vimukthi Peramune and others CA/103/2012,*** and His Lordship Justice Sisira Abrew has concluded as follows;

"One must consider the provision that the Court of Appeal shall make its determination within two months of the filing of the case is directory or mandatory. Similar provision is found in the Code of Criminal Procedure Act No. 15 of 1979 (CPC) section 203 of the CPC reads as follows;

> "When the case for the prosecution and defence are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving reasons therefore and if the verdict is one of conviction pass sentence on the accused according to Law."

In ***Anura Shantha Vs, Attorney General [1999] I Sri LR 299*** Court of Appeal considering section 203 of the CPC held; the provisions of section 203 of the code are directory and not mandatory. This is a procedural objection that has been imposed upon court and it's none compliance would not affect the individual a failure of justice.' Applying the principle laid down in the above judicial decision, I hold failure by Court of Appeal to make its determination within the prescribed period will not nullify the Petition and that section 63(1) of the Act is only directory and not mandatory."

This court prefers to follow the above decision and therefore concludes that the above provisions are only directory and therefore it should not be strictly adhered to as Mandatory.

At the commencement of the Inquiry before us, both parties informed that they would not be leading any evidence before us and agreed to make oral submission in support of their respective cases. Thereafter the counsel representing 1st to 6th Respondents raised several preliminary objections with regard to the maintainability of this application before this court. Of several preliminary objections raised, following are the main objections raised by the Respondents.

1. The purported appointment of the Attorney-at -Law for the Petitioner by way of written proxy is defective in Law and /or contrary to Law and to the practice of the Court and hence there is no proper application before Court.
2. There is deliberate concealment of facts and misrepresentation of material facts which warrant dismissal of this application in limine.

In support of the 1st objection the respondents have raised several grounds before this court. Drawing the attention of Rule 12 of the Supreme Court rules, the respondents submitted that the Attorney -at -Law on record in all three applications before this court had,

a) Failed to divulge the fact that he acted as the defending officer in all three disciplinary inquires against the three Petitioners
b) Appeared as the instructing attorney on record, knowingly and /or having reasons to believe that he would be required as a witness in the present case.

An Attorney -at-Law who represents a client before a court of law has no legal duty to divulge his commitments in the pleadings filed before the court. As an officer of court he has a duty to be truthful to his client as well as to court, but the respondents have failed to establish a specific instance where the conduct of the said Attorney-at-Law has disturbed the functions of this court.

Respondents have further argued that, when the disciplinary inquiries were in progress, certain settlements were proposed by the Petitioners and it is their defending officer, who could give evidence before this court with regard to the said settlements and therefore under the provisions of Rule 12 he cannot acted as the instructing attorney in the present cases.

Rule 12 of the Supreme Court Rules (conduct and Etiquette for Attorney-at-Law) 1985 reads as follows,

> "An Attorney-at-Law shall not accept any professional matter in respect of which he knows or has reason to believe that he would be required as witness.
>
> The same principle would apply where an Attorney-at-Law after accepting any professional matter finds that he would be required as a witness in the same matter; provided however an Attorney-at-Law may accept any professional matter in which he may required only as a witness in respect of any formal on non- contentious matter.

As I have referred at the very inception of this Judgment, at the commencement of this inquiry all the parties agreed to limit the proceeding to oral submissions without leading any evidence. Therefore it can be argued that there was no likely hood of calling the said Attorney-at-Law as a witness in the present case. On the other hand I find that the role played by the Attorney-at-Law on record, in the said

disciplinary inquiry was purely professional in nature and therefore I see no reason for him to believe that he would be required to be called as a witness at the present case, Unless he deliberately continued to appear after such warning by the opponent party is given.

The Respondents during their oral submissions and also in the written submissions tendered before this court, referred to several judgments in support of the above contention but I see no relevance in any of the judgments to the preliminary objections raised in the present case.

Based on the above submissions the Respondents submitted that there is no valid proxy before this court from the instructing attorney and for the said reason there is no proper application before this court. I see no merit in the said argument and therefore reject the said preliminary objections.

Respondents have further argued that there is deliberate concealment of facts and misrepresentation of material facts which warrants dismissal of this application. In support of the above contention the Respondents have submitted,

I True identity of Defending officer was deliberately concealed from this court

II Petitioner had willfully concealed the fact that he had entered into an agreement between the Party and himself.

As I have pointed out earlier, in this judgment an Attorney-at-Law has no legal duty to divulge his commitments in the pleadings filed before court. The pleadings in a case referrers to the matters pertaining to the action before the court but not to the relationship of the Attorney-at-Law with the action pending.

Therefore I cannot agree with the 1st argument of the Respondent that the failure by the Attorney-at-Law on record to divulge that he acted as the defending officer in the pleadings of the present case amounts to a deliberate concealment of facts.

I further observe that the argument by the 1st to 6th Respondents to the effect that "the Petitioner has willfully concealed the fact that he had entered into an agreement between the party and him" had based on a wrong premis.

When raising the said argument, the respondents have forgotten the fact that the counsel for both parties agreed to limit their cases to oral submissions, even though this court was inquiring into the application of the Petitioners. The parties could have placed evidence in challenging the position taken up by the

opposing parties. Therefore if the Petitioners have concealed any material fact it is the duty of the Respondents to elicit the above facts before this court by leading additional evidence.

This court consistently followed the principle of full and fair disclosure of all material facts in considering the grant of Prerogative Writs, but I am not inclined to apply the same standard in an inquiry where the parties are free to place evidence before this court.

I therefore overrule the preliminary objections raised by the counsel for the 1st to 6th Respondents for the maintainability of these three applications.

I will now proceed to consider the material placed before us by all the parties in the three main cases.

Petitioners in all three applications rested their cases on several points raised by them. The salient issues raised by the above Petitioners are summarized as follows;

a) The Democratic Party did not have duly adopted constitution nor a duly appointed Executive Council as at the date of the alleged incident and therefore the charge sheets issued to the Petitioners are bad in Law

b) The charge sheets did not specify the charges against the Petitioners with sufficient certainty

c) The Petitioners did not act in contravention of the constitution

d) Principles of Natural Justice were not followed in conducting the inquiry

    I. Charge sheets did not contain details of the evidence against the Petitioners

    II. The 2nd Respondent misled the Petitioners that media publications would not be produced at the inquiry and therefore the Petitioners prepared their answers to the charge on that basis

    III. Evidence against Petitioners were not made available to them prior to the inquiry and was produced for the first time on the second day of the inquiry

IV. The Petitioners were denied the opportunity to respond to/contradict the evidence against them nor to defend their case

V. Copies of media publications were not made available to the Petitioners even prior to preparing written submissions

VI. The position of the 1st to 5th Respondents that there is no requirement to provide copies of media publications to the Petitioners is flawed

VII. There was apparent bias on the part of the disciplinary committee especially the 5th Respondent

VIII. Petitioners were not given an opportunity to defend their case

a. Democratic Party did not have a duly adopted constitution nor a duly appointed Executive Council as at the date of the alleged incident and therefore the charge sheet issued to the Petitioner is bad in Law;

The position taken up by the Petitioners with regard to the above objections was that the Petitioners were members of the Democratic Party since its inception in January 2012 and at no stage a constitution was adopted at a General Convention.

Upon its registration as a recognized political party on 01.04.2013, the main events organized by the Democratic Party were the May Day rallies of 2013, 2014 and the General Convention which was held on 22. 11. 2014 but, the party constitution was not adopted at any one of these meetings. In support of the above contention the Petitioners have annexed marked P- 8A, P- 8B and P- 8C, three affidavits from another provincial council member, namely Rajitha Hapuarachchi, R.P. Haputhanthre and H.A.Chandrika two members from the Democratic Party.

At the Inquiry the Respondents failed to challenge the above contention, by placing any additional, oral or documentary evidence, other than referring to the objections already filed to the effect that the constitution was duly adopted at the Party May Day rally on 01.05.2014 (D-2) and at the Executive Council on 10.04.2014 (D-3), which was challenged in the annexures marked P 8A -8C.

According to annexure 8A a member of the Democratic Party and a Provincial Counselor, Rajitha Hapuarachchi had submitted that he has attended the two May Day rallies held on 01.05.2013 and 01.05.2014 and the General Convention on the 22.11.2014 but the party constitution was never adopted

at any of these occasions. This position was confirmed by the other two affidavits submitted by two members of the Democratic Party namely R.P. Haputhanthre (party membership No.90) and H.A. Chandrika (party membership No. 91)

The Democratic Party Constitution submitted before this court is a certified copy issued by the Additional Commissioner of Election and the covering letter signed by the Secretary to the Democratic Party Ananda Manawadu, indicates the adoption date of the said constitution as 01.05.2014.

When the said position was challenged by the Petitioners by submitting affidavits, the respondents have failed to counter the said position. Therefore this court has no alternative other than concluding that the position taken up by the Petitioners that the Constitution of the Democratic Party has not been adopted up to 10.11.2014, the day on which the alleged violation of the Party constitution took place, is acceptable.

When the Petitioners have challenged the existence of the Party Constitution on 10.11.2014, the fact that a document purported to be the Party Constitution was submitted to the Election Commissioner is not proof of its existence. The Respondents have failed to satisfy the court of the Existence of a Party Constitution at the time the alleged violation of the Constitution took take place.

The Respondents have further alleged that the alleged acts committed by the Petitioners were in violation of the Memorandum of Understanding (MOU) signed between the party and the each petitioner prior to the Provincial Councils Election in 2014.

The said MOU is before us produced marked "C" on behalf of the Respondents. The said MOU dated 02.02.2014 has no reference to the Party Constitution either to the constitution which was in operation on 10.11.2014 or any other Constitution which was in operation prior to that.

The next matter to be considered by this court is whether there is a valid charge sheet before this court based on my conclusion that the Respondents have failed to satisfy this court the existence of the Party Constitution.

As referred by me earlier in this judgment, the Respondents has produced marked "C" the MOU signed between the Party and the each Petitioner prior to the Provincial Councils Election 2014. However the Petitioners in their affidavit tendered before this court submitted that,

> **29 (d)** I have not entered in to any memorandum of understanding with the Party prior to the Provincial Councils Election.

In reply to the said averment the Respondents whilst denying the said position in their objections had submitted the said memorandum of understanding marked "C". The Petitioners had not contested the existence of the said MOU thereafter either in their counter objection or at the inquiry before us, which in my view confirms the existence of the said MOU signed between the Party and the each Petitioner.

In the said MOU, paragraph 4 and 5 refers to the conduct and the disciplinary procedure of the said Party and even though there is no reference to the existence of the Party constitution in the said MOU there is clear reference to the existence of the Executive Council and its powers.

In the said MOU the Petitioners have agreed that if the leader of the party on information he himself received or on recommendation of the Executive Council satisfies that the second party to the MOU (each petitioner) had acted in violation of any of the conditions in paragraph 1, 2, 3, and 4 of the MOU, the said leader or the Executive Council can expel him from the membership and also to inform the Commissioner of Elections of the said decision. (Paragraph 5)

The petitioners have further agreed that the second party (each petitioner) has renounce all the rights, entitlements, privileges guaranteed under any law with regard to the conduct of an inquiry, serve a charge sheet or any other pre requisite prior to the expulsion from the said party as agreed in the said paragraph 5 (paragraph 6).

Even though the Petitioners have renounced their rights to face a disciplinary inquiry in case of a violation of the said paragraphs by the conduct of the Petitioners, Rules of Natural Justice will not permit the respondents to act arbitrary in expelling the Petitioners.

As discussed in several cases decided by the Supreme Court including the cases of ***Jayatillake and Another Vs, Kaleel and Others 1994 (1) Sri L R 319 and Thilak Karunarathne V. Ms. Sirimavo Bandaranayake and Others 1993 (2) Sri L R 90*** that the relationship of a member of a Political Party rests on contractual basis.

Therefore I am in agreement with the Respondents that where there has been a breach of party discipline and the contractual relationship with the Party by violating the provisions of the MOU, the party has discretion to mete out punishment which is appropriate in the circumstances of each case.

In the said case of ***Jayatillake and Another Vs. Kaleel and Others*** *Justice Kulatunga* had observed "A Political Party must be allowed a discretion to decide what sanctions are appropriate for violations of Party discipline; and if Party decides, bona fide, to expel any member guilty of repudiating the Party, as the Petitioners have done this court will not in the exercise of its constitutional jurisdiction impose such

member on the Party. If that is done Parliamentary Government based on the Political Party System will become unworkable".

I have already ruled out the existence of the Party Constitution at the time the alleged violations took place, but I am of the view that the existence of the MOU between the Party and the each Petitioner provides a basis for the Party to hold disciplinary proceeding against the Petitioners and therefore I conclude that the Respondents had a legal basis to issue the said charges against the Petitioners and said charge sheets are valid in law.

The charge sheet did not specify the charges against the Petitioners with sufficient certainty

Petitioner have alleged before this court that the charge sheet do not contain precise charges against the Petitioners. It was further submitted that the charges are vaguely worded and do not indicate details of the Political Party and/or its members with whom the Petitioners have allegedly had discussions with or details of the media institutions which have allegedly published the purported discussion.

In support of their contention Petitioner relied on the decision by the Supreme Court in ***Sarath Amunugama and Others V. Karu Jayasuriya 2000 (1) Sri L R 172.***

In this regard I would like to discuss the circumstances under which decision had arrived in the said case of Sarath Amunugama and Others V. Karu Jayasuriya.

It was observed in the said case; that "Admittedly as far as the Petitioner in Application (E) 4/99 Dr. Sarath Amunugama, is concerned, a letter dated the 3rd of November 1999 had been sent to him by the General Secretary of the U.N.P that letter as follows;

The Daily News in its publication of Monday 1st November 1999 under the headline Sarath Amunugama tells BBC he will quit U.N.P as stated, he will definitely leave U.N.P if there is no proper response from the party for his National Government concept, it is further noted that there has been no denial by you as to the making of this statement or the accuracy of the contents of the article under reference.

You have thus acted in breach of the Party Constitution, Party Discipline and contrary to the conduct required of a U.N.P Member in Parliament and the decision of the Parliamentary Group at its meeting held on 22.10.1999 that no member makes any statements to the media without prior approval of the Party.

I would be grateful to have your immediate explanation and response to the aforesaid to reach me not later than Sunday 7th November 1999.

Even though Dr. Sarath Amunugma had responded to the said letter on 5th November the submission of the Petitioner (Dr. Sarath Amunugama) in the Supreme Court was; "that No explanations were called for, no charge sheets were served, No notice of the date, time and place of inquiry were given and that the Petitioners were not called upon to attend the inquiry" and the Supreme Court had observed that the said position was not challenged by the Respondents during inquiry before Supreme Court.

When consider the circumstances under which the decision in the above case has arrived I am of the view that the said decision has no relevance to the presents case in the context "the charge sheet did not specify the charges against the Petitioner with sufficient certainty.

Section 165 of the Code of Criminal Procedure Act No. 15 of 1979 refers to the ingredient of a charge in the context of a criminal prosecution before a court of law. Even though these provisions are not applicable to a disciplinary proceeding which is conducted purely on a contractual relationship between the Petitioners and the Respondents (1st to 6th), it can certainly be considered as guide lines to arrive at a fair decision.

Section 165 (1) of the Code of Criminal Procedure Act No 15 of 1979 reads as follows;

165 (1) the charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the things (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matters with which he is charged and to show that the offence is not prescribed.

When going through the above provisions it is clear that what is required under law is a statement which is reasonably sufficient to give the accused notice of the matters with which he is charged.

In the present case not like in the case of Dr. Sarath Amunugama a charge sheet has been served on the each Petitioner by the secretary of the Political Party, in which the Petitioners are members, and each of the said charge sheet contained 5 charges. The date of the alleged incident took place and the manner under which such act took place and the purpose of the said meeting, which is against the interest of the Democratic Party is explained in the charge sheet even though with whom the said discussion took place and to whom the Petitioner supported was not clearly indicated.

In the case of ***Jayatilake and Another V, Kaleel and Others 1994 (1) Sri LR 319*** it was held that, "while natural justice entities a person to a fair and accurate statement of the allegations against him, the mere fact that he had not been given formal notice of all the matters in which his conduct was to be called in question, did not necessarily entitle him to contend that the inquiry was breach of the *audi alteram*

partem rule. However it is further observed by this court that the entire case against the Petitioners were based on audio, video and documentary material but, proper notice of such material was not given to the Petitioner is also to be considered by this court. I intend discussing this issue separately when I am considering whether the Principle of Natural Justice were followed, but subject to the above, I observe that the charges are reasonably sufficient to give adequate notice of the matters with which the Petitioners are charged.

The Petitioners did not act in contravention of the Constitution

Petitioners further argued that, by the conduct as alleged by the Party, the Petitioners have not violated the provisions in section 3.7 and 3.8 of the Party Constitution.

However at this stage the court is mindful of the very first argument raised by the Petitioners before this court to the effect "Democratic Party did not have a duly adopted Constitution nor a duly adopted Executive Council as at the date of the alleged incident and therefore the charge sheet issued to the Petitioner is bad in law" and therefore observe that the present argument is contradictory to the said Argument.

As I have already decided infavour of the Petitioner but concluded that the charges are valid on a different basis, that is under the MOU signed between the Party and the Complainants. I am not inclined to consider this submission in my judgment.

Principles of Natural Justice were not followed in conducting the inquiry

Our courts were mindful of the requirement of following the principles of Natural Justice in deciding applications made against the decisions by political parties for expulsion of their members. This is evident in a series of cases including ***Jayathilake and Another V. Kaleel and Others 1994 (1) Sri L R 319***, ***Goonarathne and Others V. Premachandra and Others 1994 (2) Sri L R 137***, ***Ramamoorthy and Rameshwara V. Douglas Devananda and Others 1998 (2) Sri L R 278*** and ***Sarath Amunugama and Others V. Karu Jayasuriya and Others 2000 (1) Sri L R 173***.

All three Petitioners were members of the Democratic Party from its inception. In the year 2013 they obtained nominations to contest the 2013 Provincial Councils Election from the said Party and the Petitioner Hatha Kapuralalage Ashoka Dayaratne contested for the Western Provincial Council. Hikkaduwa Liyanage Padmasiri de Silva Petitioner in CA 176/2015 contested the Southern Provincial Council and Rathnayake Mudiyanselage Malhamy Ratnayake contested the North Western Provincial Council and elected as members of the respective Provincial Councils from the Democratic Party.

Petitioners have complained that the 1st-6th Respondents failed to follow the rules of Natural Justice when conducting the inquiries against them and therefore it is necessary to consider the sequence of events took place with regard to the charge sheets served on the Petitioners;

According to the Petitioners, by letter dated 12.11.2014 (P-4) the 2nd Respondent informed them that their membership of the Democratic Party has been suspended with immediate effect. It was further alleged by the said letter that,

> "the Petitioners have acted in breach of Disciplinary rules and the MOU entered into with the Party, prior to contesting the Provincial Councils Election by attending a media briefing without obtaining permission from the party on 10.11.2014 organized by another political party in support of a candidate of another political party and thereby discredit the party and its leader and therefore steps would be take to have a disciplinary action against them."

Subsequent to the said suspension, by letter dated 21.11.2014 (P-5) the Petitioners were served with a charge sheet which contained 5 charges, against each Petitioner, requesting them to reply within 07 days of the receipt there of.

The Petitioners by letter dated 30.11.2014 acknowledge the receipt of the said charge sheets and requested a copy of the Party Constitution in order to answer the said charge sheet and further 14 days time to reply the said charge sheets. (P-9)

On receipt of the said request the 2nd Respondent had written to the Petitioners on 4th December 2014 informing them to collect the Party Constitution from the Party Head Officer between 11th and 12th December 2014 and granting them a further period of 14 days to reply the said charge sheet with effect from 12.12.2014.

On 16th December 2014 the 2nd Respondent informed the Petitioners, the date and place for the disciplinary Inquiry as 31st December at 2.00 pm at the Party Head Quarters and requested them to be present at the said Inquiry (P-12).

However the petitioners, by their letters dated 19.12.2014 requested further fourteen days from the date of receipt the said letters in order to reply the charge sheet (P-13). 2nd Respondent by letter dated 24.12.2014 informed the Petitioners the new date of inquiry as 06.01.2015 (P-14).

The Petitioners by their letters dated 2nd January 2015 and 3rd January 2015 informed their inability to be present for the disciplinary inquiry fixed for the 6th for two reasons, (P-15)

1. Their defending officer Attorney –at –Law Niroshan Siriwardena has suddenly fallen ill
2. Paper articles and video tapes relevant to charges are not provided to them and requested the copies of the same

By telemail dated 5th January, the 2nd responded informed the Petitioners that no further date will be given to them and therefore requested them to be present for the inquiry with their defending officer. It was further informed the Petitioners that the paper articles and video tapes would not be submitted for the inquiry on that day (P-16).

Petitioners protested to the said telemail by their letters dated 06.01.2015 that the above decision of the party and /or the 2nd Respondent is in violation of the principles of Natural Justice and requested to grant a fresh date for the above inquiry, preferably a date after 10. 01.2015. (P-17)

By letter dated 12.01.2015 the 2nd Respondent informed the Petitioners that the said inquiry was held on 06.01.2015 as scheduled but decided to grant the Petitioners another opportunity to come before the disciplinary committee and put off the inquiry for 28.01.2015. It was further informed that the News Paper articles and video tapes would not be submitted on that day (P-18)

The Petitioners replied the charge sheets issued to them by the party, by their letters dated 25.01.2015 which were produced marked P-19 to each petition. They denied all the charges against them and further, raised objections to the said charges on the ground that there was no Constitution adopted by its membership to the Democratic Party and therefore no violation of the provisions of the so called Constitution has taken place as alleged by the charge sheets served on them.

The disciplinary committee consists of 3rd-5th Respondents met on 28.01. 2015 as scheduled and the three Petitioners were present and represented by their defending officer.

The disciplinary inquiry against the Petitioner in CA 175/15 H.K. Ashoka Dayaratne was commenced before the said disciplinary committee. The Petitioner had renewed his objection with regard to the non adoption of the Party Constitution, but the said objection was overruled by the disciplinary committee and thereafter the 2nd Respondent had submitted the charges against the Petitioner.

It was evident from proceeding of the said inquiry produced marked, P-20 that the Petitioner has denied the 1st charge and submitted that the Petitioner had not participated a meeting with a leader of another political party and not acted in violation of party discipline by attending discussions against the party.

With regard to the 2nd, 4th and 5th charges the 2nd Respondent had undertook to lead audio and video evidence on the next inquiry date. However the proceeding does not indicate any submission with regard to 3rd count in the charge sheet.

At the end of the proceedings of that day it was recorded that "with the consent of the parties the inquiry is put off for another date which will be informed in due course, for leading audio, video and documentary evidence and for the rest of the proceedings of the disciplinary inquiry. The other two inquires against L.H. Padmasiri de Silva (Petitioner in CA 176/15) and R.M.M. Ratnayake (Petitioner in CA 177/15) were put off with the consent of all the parties with further agreement to decide a date later in consultation with the parties. It is important to observe at this stage that, the charge sheets were not read out and an opportunity to plead for those charges were not given to the two Petitioners in CA 176/15 and CA177/15 on 28.01.2015.

The 2nd Respondent by letter dated 03.02.2015 had informed all the petitioners, the next date of inquiry as 22.02.2015. It was further informed the Petitioners by the said letter that six items of audio, video and print material (with a list attached) will be submitted as evidence on that day. (P-21)

However when the inquiry was commenced on 22.02.2015 as informed to the Petitioners by the 2nd Respondent, it is not clear whether the inquiry was commenced against all the three Petitioners or the inquiry was commenced only against the Petitioners in CA 176/15 and CA177/15 namely L.H. Padmasiri de Silva and R.M.M. Ratnayake.

According to the proceeding dated 22. 02.2015 which was produced marked P-20 it was recorded that Petitioner in CA 175/15 H.K. Ashoka Dayaratne has already denied the charges and proceeded to explain the charges to the other Petitioners. When consider the proceedings taken place on 28.01.2015 I observe that the plea of the Petitioner in CA 175/15 was separately recorded and the other two matters were postponed. If there was a decision to take up all three inquiries together, the disciplinary committee could have taken up all three Petitioners one after the other but it is clear from the proceeding of 28.01.2015, the disciplinary committee has taken up the disciplinary inquiry against H.K. Ashoka Dayaratne separate to the disciplinary inquiries of the other two Petitioners, and the two disciplinary inquires against L.H. Padmasiri de Silva and R.M.M. Ratnayake were also postponed separate to each other.

According to the proceedings of 22.02.2015 the plea of Petitioners Padmasiri de Silva and R.M.M. Ratnayake were taken up together. The Petitioners have renewed their objection with regard to the non adoption of the Party Constitution as their first objection and in addition to the above; another objection was raised against one of the members of the disciplinary committee. The said two objections were overruled by the disciplinary committee and thereafter moved to lead the audio, video and documentary evidence.

At that stage the Petitioners have raised several objections for producing the said evidence; the main objections the Petitioners raised can be summarized as follows;

a) 2nd Respondent had given an undertaking by P-16 and P-18 that the said evidence would not be called.

b) Charge sheet did not contain details of the evidence against the Petitioners.

c) Copies of the said documents were not made available to the Petitioners

d) No proper notice had been given to the Petitioners before leading the said evidence.

As I have observed earlier, by letters dated 21.11.2014 the 2nd Respondent served charges against all the Petitioners. However the said charge sheets does not contain details of the evidence relied by the complainant to establish charges against the Petitioners. Out of the 5 charges framed against the Petitioners charges 2-5 are solely based on Media Publications, press releases and press conferences published in Print Media and Electronic Media but the 2nd Respondent has failed to give sufficient notice of the said material relied by him, to the Petitioners. It is also observed by this court that the Petitioners were given time to respond to the said charge sheets but when the Petitioners requested by P-15 copies of relevant paper articles, video and audio tapes, the response of the 2nd Respondent was that the said material will not be submitted for the inquiry on 06.01.2015. (P-16 and P-18)

After several postponements granted on the request of the Petitioners the inquiry was finally commenced on 28.01.2015 and it is evident from the proceeding of the said inquiry produced marked P-20 that the inquiry which commenced on that day was only the inquiry against Petitioner in CA 175/15, H.K. Ashoka Dayaratne. According to the said proceedings, at the end of the proceedings on that day it was recorded that, "Both parties agree to postponed the inquiry to a date, which will be agreed later for leading of audio, video and news paper evidence and for the balance proceedings of the disciplinary inquiry. In between the said inquiry date and the next date decided by the disciplinary committee, the 2nd

Respondent had given notice to the Petitioners of six news items he intends leading as evidence on the next date, but failed to provide copies of the same to the Petitioners.

When the Petitioners objected to the production of the said material on 22.02.2015 at the inquiry, it was submitted before the disciplinary committee that, the Petitioners have agreed that the postponement was obtained on the previous day to lead the said, material and for the balance proceedings of the inquiry. The said position was accepted by the disciplinary committee as follows,

"මේ අනුව පෙනී යන්නේ ශ්‍රව්‍ය දෘශ්‍ය සාක්ෂි ඉදිරිපත් කිරීම සම්බන්ධයෙන් 2015.01.28 පරීක්ෂණ මණ්ඩලය හමුවේ සියලු පාර්ශවයන් හා රුකවල් නිලධාරී එකඟව අත්සන් තබා ඇති බවත් එකඟතාව මත පැමිණිල්ල විසින් අදාල ශ්‍රව්‍ය දෘශ්‍ය සාක්ෂි පිලිබඳව ලිපියක් 2015 .02 .03 තැපැල් කර ඇති බැවින් එකී සාක්ෂි ඉදිරිපත් කිරීමට නියමිත බවය.

However I observe that the above conclusion of the disciplinary committee is erroneous. As I have observe earlier, the disciplinary inquiry which commenced on 28. 01.2015was only against the Petitioner in CA 175/15 H.K. Ashoka Dayaratne and therefore it is wrong to conclude that all Petitioners had agreed to lead documentary, audio and video evidence on the next date of inquiry.

According to P-20 the disciplinary committee had over ruled the objections raised by the Petitioners for the production of the said audio, video and news paper items on 22.02.2015 and proceeded to lead the said evidence before them.

The proceeding of the disciplinary inquiry was concluded thereafter even though the Petitioners have denied the said news items.

This court further observes that, from the Proceedings of the disciplinary inquiry held on 22. 02. 2015 it is not clear whether the inquiry held on that day was conducted against all the Petitioners or against the Petitioner's in the applications 176/15 and 177/15 only. However, as observed by me earlier it is clear that the disciplinary inquiry held on 28.01.2015 was only against the Petitioner in the application 175/15. In the absence of a specific order by the disciplinary committee to the effect that they have decided to take up all three inquiries together, I cannot conclude that a proper disciplinary inquiry was held against the Petitioner in Application 175/15 on 22.01.2015.

In the case of ***Ramamoorthi and Rameshwaran V. Douglas Devananda and Others*** it was held that, the expulsion was invalid, as there was failure to comply with the *Audi Altaram Partem* rule. There was no

charge sheet served and no explanation for alleged acts of misconduct was called for. A request by telephone to come for an inquiry is totally inadequate.

In the case of ***Sarath Amunugama and Others V. Karu Jayasuriya and Others*** Supreme Court observed that; no explanations were called from the Petitioners, no charge sheets were served and no inquiry was held giving an adequate opportunity to the Petitioners to defend themselves and held that, there was no justification for the failure of the Respondents to observe the principles of natural justice and grant the Petitioners a hearing before they were expelled. The expulsions of the Petitioners were therefore invalid.

However in the present case, as evident from the documents I have already referred to in this judgment, a charge sheet comprising of 5 charges were served on each Petitioner and the Petitioners were given more than two months to answer the said charge sheet. When the Petitioners requested for a copy of the Constitution of the Party in order to answer the charges against them, by letter marked P-10 the second Respondent had given them an opportunity to obtain copies from the Party Head Office.

The Respondents have also permitted the Petitioners to be represented by an Attorney-at-Law as their defending officer.

However Respondents have alleged before this court that the Respondents have failed to follow the rules of Natural Justice and demonstrated several instances where the Respondents said to have violated and /or failed to follow, the rules of Natural Justice.

In the case of ***Canara Bank V. Debasis Das (2003) 4 SCC 557*** *Arijit Pasayat (J)* discussed the "**Rules of Natural Justice**" as follows;

> "Over the years by process of judicial interpretation two rules have been evolved as representing the Principles of Natural Justice in judicial process, including therein quasi judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "*nemo judex in causa sua*" or "*nemo debet esse judex in propria causa sua*" that is "no man shall be judge in his own cause". The second rule is "*audi alteram partem*, that is "hear the other side" a corollary has been deducted from the above two rules and particularly *the audi alteram partem* rule, namely "*qui aliquid statuerit, parte inaudita altera acqumlicet dixerit, haud acqum fecerit*" that is "he who shall decide anything without the other side having been heard, although he may have said what is

right, will not have been what is right" or in other words, as it is now expressed "justice should not only be done but should manifestly be seen to be done"

As observed by me earlier the 1st to 6th Respondents had given several postponements to the Petitioners to get ready for their case, but without giving them and /or informing them the evidence against them. As pointed out by me earlier, the said material which was not made available to the Petitioners was the only evidence against the Petitioners in their disciplinary inquiries. The conduct of the disciplinary inquiries on 28.01.2015 and 22.02.2015 are confusing as pointed out by me earlier. Therefore it appears to me that the Respondents, specially the 3rd, 4th and 5th Respondents have failed to afford a fair disciplinary inquiry to the Petitioners in all three cases before us. Therefore I conclude that the expulsion of all three parties in cases 175/15, 176/15 and 177/15 were invalid.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA,

I agree,

JUDGE OF THE COURT OF APPEAL

K.K. WIKREMASINGHE,

I agree,

JUDGE OF THE COURT OF APPEAL