

**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 *Writ of Certiorari and
Prohibition* under article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka**

CA/WRIT/ 355/2015

K.P.G.P. Wijewardena,
No. 752/61, Dahambugahawatta Road,
Thalahena,
Malabe

PETITIONER

Vs,

1. M. Deshapriya,
Commissioner of Elections,
Department of Elections,
'Election Secretariat'
Sarana Mw,
Rajagiriya.
2. K. Hashim,
General Secretary,
United National Party,
'Sirikotha House'
No.400, Kotte Road,
Pitakotte.

3. Welimahara Sarukkali Patabendige Pragathi
Anushalya,
No. 231,
Haldumulla.
4. Murugan Sachichithanandan,
No. 49, Temple Road,
Bandarawela.
5. Ibrahim Mohamed Najir,
No. 42/3,
Deiyannewela.
6. Abdul Kafoor Ameer Mohomed,
No. 01, Nuwara Eliya Road,
Welimada.
7. Digayu Badathuruge Ananda Karunanayake,
Percy Samaraweera Mw,
Meegahakiula.
8. Hewa Vitharanage Thushara Mihimal Munasinghe,
No.28/1, Judges Hill,
Badulla.
9. Wimal Wijethunga,
No. 284, Mahiyangana Road,
Badulla.
10. Murugan Periyasami Loganatha,
United National Party,
'Sirikotha House'

No.400, Kotte Road,
Pitakotte.

11. Ponnusami Buminathan,
'Sirikotha House'
No.400, Kotte Road,
Pitakotte.

12. Badana Mudiyanseelage Ajantha Kadurugamuwa,
'Sirikotha House'
No.400, Kotte Road,
Pitakotte.

13. Rajapaksha Pathirage Kapila Ananda Rajapaksha,
Opposite 'Yamuna Stores,'
Karametiya,
Meegahakiula.

14. Hewa Arachchi Kulathunga Mudalige Wishwanatha
Ranapathi Kulatunga,
Sherwood Price Road,
Bandarawela.

15. Secretary,
Uva Provincial Council,
Raja Veediya,
Badulla.

RESPONDENTS

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

Counsel: Santha Jayawardhana with Chamara Nanayakkarawasam for the Petitioner
Ronald Perera PC with Farman Cazim and Y. de Silva, N. Gamage and Amila -
Ammunugama for the 2nd - 10th and 13th, 14th Respondents
Manohara Jayasinghe SC, for the 1st and 15th Respondents

Inquiry on: 13.10.2015

Written submissions on: 22.10.2015, 23.10.2015

Order on: 01.12.2015

Order

Vijith K. Malalgoda PC J

Petitioner to the present Application K.P.G.P Wijewardena had come before the Court of Appeal seeking inter alia,

- c). Grant and issue an order in the nature of a *Writ of Prohibition*, Prohibiting the 1st Respondent from declaring elected as a member of the Uva Provincial Council any person other than the Petitioner to fill the first vacancy created by the said Harin Fernando and/or Ravindra Samaraweera becoming Members of Parliament;
- d). Grant and issue an order in the nature of a *Writ of Prohibition*, Prohibiting the 1st Respondent from declaring elected as a member of the Uva Provincial Council in pursuance of a nomination, if any, made by the 2nd Respondent, any person other than the Petitioner to fill the first vacancy created by the said Harin Fernando and/or Ravindra Samaraweera becoming Members of Parliament;

- e). Grant and issue an order in the nature of a *Writ of Mandamus* directing the 1st Respondent to declare elected the Petitioner as a member of the Uva Provincial Council to fill the first vacancy created by the said Harin Fernando and/or Ravindra Samaraweera becoming Members of Parliament;
- f). Grant and issue an order in the nature of a *Writ of Certiorari* quashing the declaration of the 1st Respondent, if any declaring elected as a member of the Uva Provincial Council any person other than the Petitioner to fill the first vacancy created by the said Harin Fernando and/or Ravindra Samaraweera becoming Members of Parliament;
- g). Grant and issue an order in the nature of a *Writ of Certiorari* quashing the declaration of the 1st Respondent, if any, made in pursuance of a nomination by the 2nd Respondent, declaring elected as a member of the Uva Provincial Council any person other than the Petitioner to fill the first vacancy created by the said Harin Fernando and/or Ravindra Samaraweera becoming Members of Parliament;
- h). Grant and issue an *interim order* restraining the 1st Respondent from the declaring elected as a member of the Uva Provincial Council any person other than the Petitioner to fill the first vacancy created by the said Harin Fernando and/or Ravindra Samaraweera becoming Members of Parliament, until the final hearing and determination of this application;

Petitioner when supporting the application before this court submitted that he contested the Uva Provincial Council Election held on 20.09.2014 as a candidate from the United National Party (U.N.P) for the Administrative District of Badulla and polled 18,302 preferential votes and was placed 9th in order of preferential votes amongst the UNP candidates for the Badulla District. The U.N.P secured 8 seats from the Badulla District at the said Provincial Council Election.

Petitioner has further submitted that since the conduct of the Provincial Council Election in 2014, he continued to work for the U.N.P and in recognition of his work by letter dated 21.07.2015 the Chairman of the U.N.P appointed the Petitioner as a coordinator for the Electoral Division of Mahiyangana for the purpose of the Parliamentary Election held on 17.08.2015.

Subsequent to the General Election held in August 2015 two members from the Uva Provincial Council, elected from the Badulla District, elected as members of Parliament and therefore two vacancies has now arisen to represent the Administrative District of Badulla from UNP.

Section 65 (2) of the Provincial Council Elections Act which refers to filing of vacancies of Provincial Council reads as follows.

65(2); if the office of a member falls vacant due to death, resignation or for any other cause, the Commissioner shall call upon the secretary of the recognized political party or the group leader of the independent group to which the member vacating office belonged, to nominate within a period to be specified by the Commissioner, a person eligible under this Act for election as a member of that Provincial Council, to fill such vacancy. If such secretary or group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation, as the case may be, in the form set out in the Seventh Schedule to the Constitution, taken and subscribed or made and subscribed, as the case may be, by the person nominated to fill such vacancy, the Commissioner shall declare such person elected as a member of that Provincial Council from the administrative district in respect of which the vacancy occurred. If on the other hand, such secretary or group leader fails to make a nomination within the specified period, the Commissioner shall declare elected as member, from the nomination paper submitted by that party or group for the administrative district in respect of which the vacancy occurred, the candidate who has secured the highest number of preferences at the election of members to that Provincial

Council, next to the last of the members declared elected to that Provincial Council from that party or group. The Commissioner shall cause the name of the member as declared elected to be published in the Gazette.

With regard to the filling of the said vacancy petitioner took up the following position before this court.

As per the number of preferential votes obtained by each candidate the Petitioner and the 3rd Respondent are the persons who are qualified to fill the said two vacancies, Petitioner being the 9th and the 3rd Respondents being the 10th in order of preferential votes received by them. Petitioner further argued that he is entitled to be elected to fill the 1st vacancy among the two vacancies.

However Petitioner submitted before this court that the 2nd Respondent who is the secretary to the U.N.P is contemplating to appoint persons who had obtained lesser number of preferential votes to the above vacancy.

In support of the above position he submitted before this court the objections filed by the 2nd Respondent in the District Court Proceedings.

When supporting the application before this court, Petitioner relied on two decisions, one by the Supreme Court and the other by the Court of Appeal.

Firstly, the Petitioner relied in the case of *Centre for Policy Alternative (Guarantee) Ltd and Another V. Dayananda Dissanayaka Commissioner of Elections and Others 2003 (1) Sri LR 277* and submitted that in section 65 (2) the power to nominate is confined to candidates whose names appear in the original nomination paper and secure some preferences at the election.

Petitioner's drew our attention to the case of *Arattana Gedara Susiripala V. Commissioner of Elections and Others C.A Writ 985/2007* (decided on 10.11.2009) where identical provisions in the

Local Authorities Elections (Amendment) Act No. 24 of 1987 in filling the vacancies was considered by the Court of Appeal and submitted that, in the said case the Court of Appeal granting a Writ to quash a decision and concluded that “the wishes of the electorate must take precedence.”

When considering the above submission made on behalf of the Petitioner, Court whilst issuing notices on the Respondents decided to grant interim relief as prayed in paragraph ‘h’ to his prayer.

When the matter came up before us thereafter the 2nd to 10th, 13th and 14th Respondents through their counsel raised objections for the extension of the said interim order and therefore this court decided to inquire in to the said matter.

During the inquiry before us the President’s Counsel who represented the 2nd to 10th, 13th and 14th Respondents drew our attention to section 65 (2) of the Provincial Councils Election Act which provides for the filling of vacancies and submitted that, the said provision refers to two situations, firstly where the secretary to the party nominates a person eligible under the said act, and secondly if the said secretary fails to make a nomination within the specified period how the Commissioner is going to fill the vacancy.

Under the second situation if the secretary to the party fails to nominate, the Commissioner shall declare the candidate who has secured the highest number of preferences at the election of members to that Provincial Council next to the last of the members declared elected to that Provincial Council from that party or group.

Based on the above provision the Learned President’s Counsel argued that there is no purpose of giving an opportunity to the secretary of the party if no discretion is given to him to select a “person eligible”, if he is also bound to nominate the candidate who has secured the highest number of preferences at the election, next to the last of the members declared elected to Provincial Council from that party”

Learned President's Counsel further argued that, the fact that the Commissioner of Election is empowered to nominate "the candidate who has secured the highest number of preferences at the election, next to the last of the members declared elected to the Provincial Council from that party," when the secretary to the party failed to nominate clearly indicates that the secretary to the Political Party has a discretion to nominate a "person eligible" to the Commissioner of Elections.

According to the Learned President's Counsel, this discretion was discussed in the case of *Centre for Policy Alternative (Guarantee) Ltd and Another V. Dayananda Dissanayaka* by Fernando J as follows,

"According to the wide language of the first limb of section 65 (2) must be restrictively interpreted, in the context of section 65 (3) as well as the general scheme of the Act and basic democratic principles. I hold that, despite the general words used, the secretary's power to nominate is confined to candidates whose names appeared in the original nomination paper and who secured some preferences at the election."

The argument based on the said decision was that, the secretary's discretion is restricted to two issues by the said judgment and the said restrictions are,

1. Person nominated has to be a person whose name appeared in the original nomination paper
2. He has secured some preferences at the election

and therefore submitted that the person nominated by the secretary need not be the person "who has secured the highest number of preferences at the election of members to the Provincial Council next to the last of the members declared elected to that Provincial Council from party."

It was further submitted by the Learned President's Counsel that the decision in *Arattana Gedara Susiripala V. Commissioner of Elections and Others* was overturned by the Supreme Court and the said decision of the Supreme Court was produced before the inquiry.

In the said case of *Commissioner of Elections and Others V. Arattana Gedara Susiripala SC Appeal 75/2010*, the Supreme Court has concluded that, "the right and choice given to the secretary to the recognized Political Party and the group leader of the Independent Group to nominate an "eligible person" to fill such vacancy in the Local Authority by statute cannot be taken away or disregarded by the returning officer and the returning officer has no discretion but to give effect to such nomination and declared as elected such person as member. Furthermore it is to be noted that 3rd Respondent nominated by the 4th Respondent is a "person eligible from the nomination paper itself and therefore the nominated 3rd Respondent is not an outsider. I also hold that the 3rd Respondent's nomination is a valid and lawful nomination as declared by the returning officer. For the reasons stated above and having considered the written submissions of all the parties, I hold that the judgment of the Court of Appeal dated 10th November 2009 was erroneously decided and should be set aside."

We observe that the above decision of the Supreme Court has taken in line with the decision in the case of *Centre for Policy Alternative (Guarantee) Ltd and Another V. Dayananda Dissanayaka*.

We observe that the counsel for the Petitioners had relied a part of the Centre for Policy Alternative Judgment and fully relied on the Court of Appeal Decision in Susiripala's Case.

However during the inquiry Learned Counsel for the Petitioner submitted that he was not aware of the Supreme Court decision in Susiripala's case.

As submitted by me earlier, the case for the Petitioner, specially the issuance of interim relief preventing the 1st Respondent from declaring elected as a member other than the Petitioner to the 1st vacancy created, was influenced by the said decision of the Court of Appeal in the Susiripala's case.

In the light of the decision by the Supreme Court in SC Appeal 75/10 and also considering the submission made by all the parties before this court I see no reason to extend the stay order already issued by this court.

Extension of stay order is refused.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL