

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

C.A. Application No.
CA/EXP/01/2017

In the matter of an application under Section 63(1) of the Provincial Councils Elections Act No. 2 of 1988 as amended by Act No. 55 of 1988, Act No. 28 of 1990, Act No. 29 of 1990, Act No. 7 of 1993 and Act No. 5 of 2004 against the expulsion of a member of the Central Provincial Council.

Abeyrathne Chitra Shrimathi Manthilaka
Kenagalla Street, Kengalla.

PETITIONER

-Vs-

1. **The United National Party,**
“Sirikotha Mandiraya”,
No. 400, Kotte Road,
Pita Kotte.
2. **Hon. Kabir Hasheem,**
General Secretary,
United National Party
“Sirikotha Mandiraya”,
No. 400, Kotte Road,
Pita Kotte.
3. **Hon. Ranil Wickramasinghe,**
National Leader,
United National Party

“Sirikotha Mandiraya”,
No. 400, Kotte Road,
Pita Kotte.

4. **Mr. Mahinda Deshapriya,**
Chairman,
Elections Commission,
Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.
5. **Prof. Ratnajeevan Hoole,**
Member,
Elections Commission,
Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.
6. **Mr. N.G. Abeyasekera,**
Member,
Elections Commission,
Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.
7. **T.A.C.N. Thalangama.**
Returning Officer,
Kandy District,
Elections Office,
Kandy.
8. **T.M.S. Bandara Tennekoon,**
The Secretary,
Central Provincial Council,

P.O. Box 1, Pallekele,
Kundasale.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.
K.K. Wickramasinghe, J. &
S. Thurairaja, PC J.

COUNSEL : Kalinga Indatissa, PC with Vindya Gunwardena,
Harin Saddhasena, Dhanushika Sigera and
Waseemul Akram for the Petitioner.

Heejaz Hisbullah with Naveen Hettiyadurage for
the 1st to 3rd Respondents.

Written Submissions : 23.11.2017 (for the Petitioner)
04.12.2017 (for the 1st to 3rd Respondents)

Decided on : 29.06.2018

ORDER OF COURT

By a petition dated 05.01.2017, the Petitioner prayed for an order in terms of Section 63 of the Provincial Councils Elections Act, No. 02 of 1988, challenging her expulsion from 1st Respondent-United National Party. When this matter came up for support on 05.12.2017, a date was moved for on behalf of the Petitioner to furnish further documents as the documentation was insufficient for support. The matter was fixed to be supported on 22.03.2017. On 22.03.2017, on the application of junior Counsel for a date on behalf of the President's Counsel for the Petitioner, this Court granted another date namely 02.06.2017 to have this matter supported for notice. When the matter came up again on 02.06.2017 for support by a motion dated 01.06.2017 and filed by the Petitioner, an application was made to have the matter taken off the

support list. Thus this matter was taken off the support list on 02.06.2017 and fixed to be supported again on 05.09.2107. As a holiday fell on this day, the matter was re-fixed to be supported on 12.10.2017. On 12.10 2017 this Court had to narrate the chronology of events to show as to how the matter was getting postponed for support and even on this day an application was made to have the support re-fixed as the learned Counsel for the Petitioner was otherwise engaged at a Commission. Finally this Court fixed the matter for support on 02.11.2017-a date which was notified by junior Counsel to be convenient to the learned Counsel for the Petitioner.

When the matter came up on 02.11.2017, all Counsel agreed that the Court could dispose of the question of notice on written submissions to be filed by parties and thus all Counsel invited Court to dispense with oral arguments for notice. Mr. Heejaz Hisbullah the learned Counsel for the 1st, 2nd and 3rd Respondents stated that he would be tendering his limited objections to the application of the Petitioner. Now that the objections on behalf of the 1st, 2nd and 3rd Respondents and the written submissions of the Petitioner have since been filed, this Court proceeds to consider the question of whether notice should be issued or not based on the aforesaid objections and the written submissions.

The pleadings filed in the case reveal that the United National Party decided to support the candidature of His Excellency the President-Maithripala Sirisena, when he contested the Presidential Elections held on 05.01.2015. At the time of the election campaign the Petitioner was admittedly the UNP Organizer for Pathadumbara, Central Province.

Upon a perusal of the material before this Court, it is apparent that whilst the elections campaign was in progress on 26.12.2014, the Petitioner resigned from her position as Organizer and joined the campaign of the SLFP.

Consequent to these events, Mr. Asendra Siriwardena, the Secretary to the Disciplinary Committee of the UNP notified the Petitioner informing her *inter alia* the following:-

- a) That the Petitioner had acted contrary to the decision taken by the United National Party, its Executive Committee and the Party Convention and had supported the candidature of the Hon. Mahinda Rajapakse,
- b) That the Petitioner had criticized the United National party and its leadership,
- c) That the Petitioner did not support the candidature of Hon. Maithripala Sirisena,
- d) That the Petitioner had addressed political rallies and meetings in support of Hon. Mahinda Rajapakse,
- e) That all the evidence against the Petitioner had been collected by the 1st Respondent and it had referred the same along with the complaints received to the Disciplinary Committee of the United National Party,
- f) That the United National Party Disciplinary Committee considered the above material and came to the conclusion that the Petitioner, during the 2015 Presidential Elections, had not acted as a member of the United National Party and acted contrary to the decisions and the directions of the United National Party,
- g) That the Petitioner had accordingly violated several provisions of the United National Party Constitution.

The communication that was dated 06th March 2015 and addressed to the Petitioner by Mr. Asendra Siriwardena called upon the Petitioner to show cause for the allegations. The communication notified the Petitioner that since the Disciplinary Committee had decided to hold an inquiry into the allegations made against the Petitioner, she should submit a written cause on or before 27th March 2015. The letter further informed the Petitioner that in the event she did not submit an acceptable explanation on or before 27th March 2015, she would be deemed to have accepted the charges and the Disciplinary Committee would proceed to take further steps. In the written submissions filed on 23.11.2017, the Petitioner points out that she responded to the show cause letter both by registered post and courier by a repudiation of all charges dated 20th March 2015. By 28th April 2015, the petitioner also instituted an action in the District Court of *Nugegoda* seeking a declaration that the show cause notice dated 06th

March 2015 was null and void and an injunction to restrain the 2nd, 3rd and Asendra Siriwardena from going ahead with an inquiry. The learned District Judge of *Nugegoda* refused the enjoining order sought by the Petitioner. Consequently, the Petitioner filed WP/HCCA/Mount/MT/11/2015/LA by way of a Leave to Appeal application in the Civil Appellate High Court of *Mount Lavinia*. On 20.10.2016 the Civil Appellate High Court of *Mount Lavinia* granted Leave to Appeal to the Petitioner. This Court has not been apprised of the current position of the leave to appeal application.

But the fact remains that as for the show cause that was required of the Petitioner, there was no order inhibiting the United National Party-the 1st Respondent to receive it and continue with an inquiry if it was unacceptable and upon a perusal of the pleadings it is apparent that the repudiation forwarded by the Petitioner in response to the show cause does not categorically and expressly deny the charges levelled against the Petitioner. In those circumstances the Disciplinary Committee of the 1st Respondent party had proceeded to appoint a panel of inquiry to investigate the charges made against the Petitioner and by his letter dated 15th September 2015, the Secretary to the Disciplinary Committee notified the Petitioner of the appointment of the members of the panel of inquiry. A charge sheet dated 16th September 2015 was also issued on the Petitioner notifying her that the disciplinary inquiry would be held on 30.09.2015 and she could lead oral and written evidence at this inquiry with legal assistance of her choice.

By a letter dated 29th September 2015, the Petitioner responded stating that she would not be participating at the inquiry on 30.09.2015 as the notice summoning her for the inquiry was too short.

Chronology of events surrounding the Disciplinary Inquiry

As could be seen, the first day the petitioner was summoned for the inquiry was 30th September 2015 on which date she did not participate owing to the short notice. The petitioner was informed again by a letter dated 14th October 2015 that a future date would be notified to her in due course. Accordingly, she received a notification by a

letter dated 15th October 2015 that the next date would be 31st October 2015. The Petitioner submitted a medical certificate and excused herself from participating at the enquiry on that day owing to illness. Then between November 2015 and 18th September 2016, there were four dates of enquiry, namely 14th November 2015, 2nd July 2016, 06th October 2016 and 18th September 2016, but on none of those dates, the Petitioner appeared at the inquiry having cited reasons of ill health or overseas travels. At last the Petitioner herself admits to making an appearance at the inquiry on 18th September 2016 and handing over preliminary objections on that day. Adverting to this brief appearance, the Respondents state in their objections that after bringing up various objections the Petitioner left without participating at the hearing.

It is averred in the objections of the Respondents that since the Petitioner did not take part at the proceedings of the inquiry, the panel of inquiry proceeded with the inquiry *ex parte* and the evidence of witnesses was led. Upon the conclusion of the inquiry, the panel submitted its decision to the Disciplinary Committee of the 1st Respondent party, which in turn forwarded its decision to the working committee of the party.

After considering the report submitted by the Disciplinary Committee, the Working Committee of the 1st Respondent party decided to terminate the membership of the Petitioner and the 2nd Respondent informed the Petitioner and the Secretary of the Central Provincial Council by letters dated 14th December 2016 and 15th December 2016 of the decision-vide the letters dated 14th December 2016, 15th December 2016 and proceedings of the inquiry that have been produced before this Court as **R23, R24** and **R25**.

The proceedings dated 18th September 2016-the day on which the Petitioner appeared and submitted her preliminary objections indicate that the objections had been considered and rejected. The panel of inquiry comprising Mr. Joy Nanayakkara, Chairman and Mr. Yayas de Silva, Attorney-at-law makes the observation that between the service of the charge sheet on 16.09.2015 and 18.09.2016, there had been no attempt to deal with the charges on the part of the Petitioner and the objective of the Petitioner appeared to be dilatory in order to delay the proceedings. We cannot but fail to observe

that the 1st Respondent has taken steps to afford the Petitioner *audi alteram partem* but one cannot complain of absence of it if the Petitioner herself renders it incapable of being accorded to her by not fully participating at the inquiry and challenging the witnesses. One cannot just tender preliminary objections and walk away from an inquiry. The fact that the Petitioner walked away from the inquiry is quite evident from the disciplinary proceedings and in the view of this Court it was a denial to oneself the benefits of natural justice that were being offered.

Expulsion / Termination of Membership

The Petitioner received a letter by registered post from the General Secretary of the United National Party, notifying the Petitioner that she was removed from the United National Party. The said letter was dated 14th December 2016. This letter narrates in detail the process that was adopted to arrive at the decision to expel the Petitioner from the party. The letter from the Secretary of the 1st Respondent party quite clearly stated that the Petitioner had violated Articles 3.3 (a), (b), (d) and 3.4 (a), (b), (c), (d) and (e) of the Constitution of the United National Party. The removal of the membership of the Petitioner from the 1st Respondent party came into effect on 08.12.2016. This letter had been copied to the Secretary, Central Provincial Council and it is on record that the Petitioner received a letter by registered post from the Secretary of the Central Provincial Council, notifying her of the decision of the United National Party regarding her membership. The said letter was dated 21st December 2016.

Having thus alluded to the process that had taken place preceding the removal of the Petitioner, this Court would now set out the law pertaining to applications under Section 63 of the Provincial Councils Elections Act, No. 2 of 1988.

Scope and Ambit of the Inquiry under Section 63 of the Provincial Councils Elections Act No. 2 of 1988

Before this Court proceeds to pronounce its determination on the expulsion, this Court would bear in mind the scope and ambit of the provisions setting out the remit of the inquiry under Section 63(1) of the Provincial Councils Elections Act, No. 2 of 1988.

Section 63(1) of the Provincial Councils Elections Act, No. 2 of 1988 sets out the following:-

“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 the 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.....”

The aforesaid provision clearly sets out as to when the jurisdiction of this Court to embark on the inquiry to ascertain the validity or otherwise of an expulsion of an elected member of a Provincial Council is triggered. If the Petitioner invokes the jurisdiction of this Court prior to the expiration of one month of the expulsion, this Court could assume jurisdiction to ascertain the vires of the expulsion and upon such invocation of the jurisdiction of the Court of Appeal within one month of the expulsion, the Petitioner continues to enjoy his status as a member of the Provincial Council until that status is determined by a declaration of this Court that the expulsion is valid. The question before this Court is whether the Petitioner in the instant application has made out a case of invalidity of her expulsion.

Jurisdiction of the Court of Appeal identical to that of the SC

As is apparent, the jurisdiction conferred on the Court of Appeal by the proviso to Section 63(1) of the Provincial Councils Elections Act, No. 2 of 1988, is similar to the jurisdiction conferred on the Supreme Court by the proviso to Article 99(13)(a) of the Constitution in relation to members of Parliament. Fernando J. in *Gamini Dissanayake*

*and Others v. M.C.M. Kaleel and Others*¹ expressed his view on the extent of the Supreme Court's jurisdiction under Article 99(13)(a) thus:-

“Our jurisdiction under Article 99(13) (a) is not a form of judicial review or even of appeal, but rather an original jurisdiction analogous to an action for a declaration, though it is clearly not a rehearing. Are we concerned only with the decision making process or must we look at the decision itself? Article 99 (13) (a) requires us to decide whether the expulsion was valid or invalid. Some consideration of the merits is obviously required ... The burden, if any, must be on the respondents, for it is the denial of natural justice by them which has resulted in these proceedings. I have therefore to consider whether on the merits the respondents have shown that the decision was a good one, thereby dissenting the petitioners to relief.”

Dheeraratne, J. described the boundaries of the court's jurisdiction thus in *Tilak Karunaratne v. Mrs. Bandaranaike and Others*²

“it is not disputed that court's jurisdiction includes an investigation into the requisite competence of the expelling authority; an investigation as to whether the expelling authority followed the procedure if any which was mandatory in nature, an investigation as to whether there was a breach of principles of natural justice in the determining process; and an investigation as to whether in the event of the grounds of expulsion being specified by way of charges at a domestic inquiry, the member was expelled on some other grounds which were not so specified.”

It is clear from the foregoing and on the strength of the authority of *Gooneratne and Others v. Premachandra and Others*³ that this court in exercising the jurisdiction conferred on it by Section 63 of the Provincial Councils Elections Act, should inquire whether the expelling body had:

- i. acted within its jurisdiction;
- ii. followed the procedure laid down in the Constitution of the party;

¹ (1993) 2 Sri L.R. 135 at 198.

² (1993) 2 Sri.LR 90.

³ (1994) 2 Sri.LR 137.

- iii. acted in compliance with the principles of natural justice before taking the decision to expel the petitioners;
- iv. and the grounds adduced for expelling the petitioners could be sustained; and
- v. whether their alleged misconduct if proved, merited the extreme punishment meted out to them.

Breach of Principles of Natural Justice

The Petitioner has no doubt pleaded that there was an infringement of the rules of natural justice in denying her a proper inquiry and there was no evidence to expel the Petitioner from the United National Party. As regards this complaint this Court draws in aid the pertinent observations of Justice Kulatunga, in *Gamini Dissanayake*⁴. The learned Judge declared that:-

“the right of a M.P. to relief under Article 99(13)(a) is a legal right and forms part of his constitutional right as a M.P. If his complaint is that he has been expelled from membership of his party in breach of the rules of natural justice, he will ordinarily be entitled to relief; and this court may not determine such expulsion to be valid unless there are overwhelming reasons warranting such decision. Such decision would be competent only in the most exceptional circumstances permitted by law and in furtherance of the public good the need for which should be beyond doubt.”

The letter of expulsion dated 14th December 2006 traces the reason for expulsion of the Petitioner from the United National Party to the Petitioner taking an individualistic decision quite contrary to that of her party at the Presidential Elections in 2015. On the propositions laid down by Kulatunga, J. the 1st, 2nd and 3rd Respondents no doubt bear the burden of satisfying this Court that the decision to expel the Petitioner was a natural corollary consequent to a due process that had observed rules of natural justice. The test that has to be applied is an objective test and not a subjective test. The Respondents have placed material before this Court to satisfy this objective test that

⁴ See *Supra fn 1* at p.234

the Rules of Natural Justice was followed and that an overwhelming reason or exceptional circumstances existed which merited the expulsion of the Petitioner or that it was done for the public good.

Expulsion from an organisation *ipso facto* gives rise to misgivings of indiscipline and suspicions of infractions of the rules, beliefs or customs of the association concerned. In such a situation the member of such an organization against whom doubts about his suitability to continue to be a member have been created should be afforded a hearing before the specific charges are vindicated.

In this context it is apposite to quote the pertinent observations of Paul Jackson in his seminal work on Natural Justice.⁵

“There are at least three justifications for requiring a hearing even where there appears to be no answer to a charge. First, experience shows that unanswerable charges may, if the opportunity be given, be answered; inexplicable conduct be explained. Secondly, the party condemned unheard will feel a sense of injustice. Thirdly, suspicion is inevitable that a body which refuses a hearing before acting does so because of the lack of evidence not because of its strength.”

As the sanction of expulsion spells a grave punishment, it is nothing but fair that this consequence follows upon the observance of *audi alteram partem*-the time honoured incantation for everyone who decides anything.

Two principles of procedural impropriety have vied for observance by all inclusive of judges who decide rights and liabilities. They are often classified as aspects of fair play in action and have proved to be bulwarks for preserving rule of law in their peremptory declarations that no man shall be condemned unheard and no man shall be a judge in his own cause, as they are famously couched in the Latin tags *audi alteram partem* and *nemo iudex in re sua*.

Having regard to the host of communications sent to the Petitioner, her participation became essential at the inquiry as a result of the serious charges that had been laid

⁵ Natural Justice, Paul Jackson (Second Edition) 1979 at page 137

against her but the Petitioner let the opportunity go a begging. So this Court is not persuaded that the Petitioner was expelled without having been afforded a proper inquiry. There is material to the contrary and we find against the Petitioner on this threshold question of a proper inquiry.

Applying the ratio of *Dissanayake*⁶ and *Gooneratne*,⁷ to the facts of this application, we find it patent that the Respondents have duly complied with the principles of natural justice and as such the expulsion-the final decision that was reached is supportable having regard to the evidence that emerged at the inquiry.

Another gravamen of the complaint of the Petitioner is that the Petitioner had filed the DC *Nugegoda* Case No. 282/15/Special and an appeal from the decision of the District Court was pending in the Civil Appellate High Court of *Mount Lavinia*, whilst the 1st Respondent went ahead with the inquiry. As we observed before, there was no stay order prohibiting the continuity of the disciplinary inquiry and therefore it is preposterous to contend that the Respondents completely disregarded the order granted by the Court and took a decision to expel the Petitioner from the United National Party.

The Respondents on the contrary have taken up the argument that the institution of the DC action was a bar to this application but we have not been put on notice of the exact stage of the matter in the Civil Appellate Court in order to appreciate the merit of this argument. Be that as it may, we do bear in mind that the Petitioner faced a charge sheet that alluded to allegations of party indiscipline which she could have well met by participating and impeaching the oral and documentary evidence that was arraigned against her. In fact fealty to one's party was adverted to in *Gamini Dissanayake v. M.C.M. Kaleel*⁸ wherein the duty of a member of a party to owe allegiance to one's party was emphasized:-

⁶ See *Supra* fn 1.

⁷ See *Supra* fn 3.

⁸ See *Supra* fn 1 at pp 169 and 170.

“A voluntary association is a collection of individuals who have agreed to come together, for a common purpose, under the single leader or a collective leadership. A political party is a voluntary association the common objective of whose members is to secure governmental power on the basis of its declared political, economic and social principles, policies and programmes.

All political parties, seeking mass support, need to be cohesive; this requires internal unity and loyalty. To attain their objectives, they need to be effective; problems and conflicts have to be internally resolved. These are features common to all groups.”

Thus the misgivings raised against the Petitioner on the grounds of indiscipline and disloyalty were not sought to be removed or explained at the inquiry that the party had instituted for the vindication of the innocence of the Petitioner. Therefore we take the view that both procedurally and on the merits the decision taken by the 1st Respondent to expel the Petitioner from the party is beyond reproach and impugnation.

Thus we determine that this application ought to be rejected and notice is accordingly refused.

A.H.M.D. Nawaz, J.

K.K. Wickramasinghe, J.

S. Thurairaja, PC J.