

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

In the matter of an Application under
Article 143 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

C.A. (Inj) Application No.03/2018

R. Ashok Kumar,
Delveen B, Rakwana.

Petitioner

Vs.

1. Democratic People's Front,
No. 72, Bankshall Street, Colombo 11.
2. United Progressive Alliance,
No.72, Bankshall Street, Colombo 11.
3. Mano Ganeshan,
Leader,
United Progressive Alliance/
Democratic People's Front,
No. 72, Bankshall Street, Colombo 11.
4. Dr. Nalliah Kumaraguruparan MPC
General Secretary,
Democratic People's Front/
United Progressive Alliance,
No. 72, Bankshall Street, Colombo 11.

5. S. Rajendran,
National Organizer,
Democratic People's Front /
United Progressive Alliance,
No. 72, Bankshall Street, Colombo 11.
6. P. Jayabalan,
Vice President,
Democratic People's Front/
United Progressive Alliance,
No. 72, Bankshall Street, Colombo 11.
7. The Commissioner of Elections,
Sarana Mawatha, Rajagiriya.
8. The Hon. Attorney General,
Attorney General's Department,
Colombo 12.
9. Annamalai Boshimadawan,
Stubton, Rakwana.

Respondents

Before: P. Padman Surasena, J/ President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: V.K.Choksy with Ms. Sherine Gomez for the Petitioner

Supported on: 16th July 2018

Decided on: 17th July 2018

Arjuna Obeyesekere, J

The Petitioner has filed this application under Article 143 of the Constitution, which reads as follows:

“The Court of Appeal shall have the power to grant and issue injunctions to prevent any irremediable mischief which might ensue before a party making an application for such injunction could prevent the same by bringing an action in any Court of First Instance”

The Petitioner had been elected as a member of the Godakawela Pradeshiya Sabha as a candidate of the 1st Respondent Democratic People’s Front. By a letter dated 11th April 2018 annexed to the petition marked ‘P2’, the 3rd Respondent had requested the Petitioner to show cause as to why disciplinary action should not be taken against him. The explanation given by the Petitioner had been rejected and the Petitioner had been requested by a letter dated 18th May 2018 annexed to the petition marked ‘P3’ to present himself before a Panel of Inquiry on 30th May 2018. The Petitioner claims that he got the letter ‘P3’ only on 1st June 2018. By letter dated 19th June 2018, annexed to the petition marked ‘P6’, the 3rd Respondent had informed the Chairman of the Election Commission that the Petitioner has been removed from the membership of the 1st Respondent on disciplinary grounds and requested that steps be taken to appoint the 9th Respondent to fill the vacancy created by the said removal.

Section 10A(1)(a) of the Local Authorities Elections Act No. 53 of 1946, as amended (the Act), reads as follows:

“If the elections officer of the district in which a local authority area is situated, is satisfied that any person whose name has been included as a candidate for election as a member of that local authority, in the nomination paper of a recognized political party, has ceased to be a member of that party, the elections officer shall, subject to the provisions of subsection (2), by notice published in the Gazette declare that such person has vacated his office of member, if he had been elected as a member of that local authority and thereupon, such person shall vacate his office as member of that local authority, as from the date on which such declaration is published in the Gazette.”

In terms of Section 10A(2) of the Act, the elections officer shall publish the notice referred to in Section 10A(1)(a) of the Act only after notice is given to such person and after the expiry of a period of twenty-one days from the date of such notice.

By letter dated 26th June 2018 annexed to the petition marked 'P7', the Returning Officer for the Godakawela Pradeshiya Sabha had informed the Petitioner that the notice provided for in Section 10A(1)(a) of the Act would be published in the Gazette.

It is in this factual background that the Petitioner is seeking an injunction, preventing:

- (a) The 1st – 6th Respondents from expelling the Petitioner from the 1st Respondent Alliance and taking steps in pursuance of the said expulsion;
- (b) The 7th Respondent Commissioner of Elections from removing the Petitioner from his membership of the Godakawela Pradeshiya Sabha and/or filling any vacancy arising from such removal,

until the Petitioner is able to give notice in terms of Section 461 of the Civil Procedure Code and file action in the District Court seeking injunctive relief in respect thereof.

This Court must note that the Petitioner has already been removed from the membership of the 1st Respondent political party¹ and that steps have already been taken by the 1st – 6th Respondents in pursuance of the said removal. Hence, the question of granting an injunction to prevent any act that has already taken place does not arise and therefore it would be futile to grant the injunctive relief prayed for against the 1st – 6th Respondents.

Article 103 of the Constitution has established the Election Commission and it shall be the object of the Commission to conduct free and fair elections and Referenda. In terms of Section 49(3)(a) of the 19th Amendment to the Constitution, the person holding office as the Commissioner of Elections on the day preceding the date on which the said amendment came into operation, shall

¹ By letter dated 6th June 2018 sent by the 3rd Respondent, annexed to the petition marked 'P8'.

cease to hold office as the Commissioner of Elections from and after the date on which the Election Commission is so constituted. Thus, with the appointment of three members to the Election Commission, the post of 'the Commissioner of Elections' has ceased to exist. The Petitioner has nonetheless named the 'Commissioner of Elections' as a party to this application.

For reasons best known to the Petitioner, he has chosen not to bring in the members of the Election Commission, the Returning Officer or the Commissioner General of Elections² as parties to this application. Hence, this Court cannot consider the granting of any relief against an officer who no longer exists in law and the Petitioner must bear the consequences of this failure.

This Court must note that the letter 'P6' has in fact been addressed to the Chairman of the Election Commission and copied to the Returning Officer. Thus, the Petitioner cannot feign ignorance of the existence of the Election Commission and the Returning Officer and their involvement under the Act. In this background, when one considers that only three days notice was given to the Respondents of this application and that too to a non-existent respondent, and in the absence of any other material to the contrary, it appears to this Court that the Petitioner has deliberately refrained from naming as respondents, the Chairman and members of the Election Commission and the Returning Officer, so that there will not be any resistance to this application from the real respondents. Such conduct on the part of the Petitioner cannot be condoned as a Petitioner who

² The Commissioner General of Elections is appointed by the Election Commission in terms of Article 104E of the Constitution

invokes the discretionary jurisdiction of this Court must come with clean hands, which the Petitioner has failed to do.

The Petitioner was informed of his expulsion from the 1st Respondent political party as far back as 6th June 2018 by letter marked 'P8'. However, the Petitioner failed to take any meaningful steps to challenge the said expulsion, until this application was filed on 11th July 2018. This conduct of the Petitioner is a clear demonstration that the Petitioner has not been diligent in pursuing his legal remedies.

In the above circumstances, this Court is of the view that the application of the Petitioner is misconceived and that this is not a fit case in which the jurisdiction conferred on this Court by Article 143 of the Constitution should be exercised. Accordingly, the application of the Petitioner is dismissed, without costs.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal