

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

Dr. K.P.G. Pradeep Wijewardena,
No. 23/6,
Rest House Road,
Mahiyanganaya.
And also of
No. 752/81,
Dahambugahawatta Road,
Thalahena,
Malabe.
Petitioner

CASE NO: CA/WRIT/355/2015

Vs.

Mahinda Deshapriya,
Commissioner of Elections,
Department of Elections,
“Elections Secretariat”
Sarana Mawatha,
Rajagiriya.
And 14 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Faisz Musthapha, P.C., with Shantha Jayawardena for the Petitioner.
Indula Ratnayake, S.C., for the 1st and 15th Respondents.
Yasas de Silva for the 2nd-10th, 12th and 13th Respondents.
Sanjeeva Ranaweera for the 11th and 14th Respondents.

Decided on: 07.03.2019

Samayawardhena, J.

The petitioner had contested the Uva Provincial Council Election held on 20.09.2014 as a candidate of the United National Party (UNP) for the Administrative District of Badulla and polled 18,302 preferential votes and was placed 9th in order of preferential votes among the UNP candidates for the said District. The UNP secured 8 seats from the Badulla District.

At the General Election held on 18.08.2015, two members from the Uva Provincial Council for the Badulla District had been selected as members of Parliament and therefore two vacancies were created thereby.

The petitioner filed this application seeking mandates in the nature of writs of prohibition, mandamus and certiorari basically preventing the 1st respondent—Commissioner of

Elections from declaring elected as a member of the said Provincial Council any person other than the petitioner to fill the first vacancy as he obtained the next highest number of votes. It is significant to note that the reliefs sought by the petitioner are only against the 1st respondent and no other.

The previous Bench of this Court first issued an *ex parte* interim order granting that relief, but after hearing the respondents vacated the same. Thereafter, upon nomination by the 2nd respondent—the General Secretary of the UNP, those two vacancies have been filled by two other candidates who have obtained lesser number of preferential votes than the petitioner.

The law governing this limited question is admittedly embodied in section 65(2) of the Provincial Councils Elections Act, No. 2 of 1988, as it stood at that time.¹ It 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

¹ Section 65(2) was further amended by Act No. 17 of 2017.

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 makes 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.

According to this section, the secretary of the political party gets the first opportunity to nominate to the Commissioner of Elections an eligible person (whose name appears in the original nomination paper and who secured some preferences at the election²) to fill such vacancy.

If there is no such nomination by the secretary of the political party, then the Commissioner of Elections gets the next opportunity to declare elected as a member the candidate who secured the next highest number of preferences in the nomination paper to fill such vacancy.

It is clear that, in that process, the secretary of the political party has the discretion to nominate an eligible person to fill

² Vide Centre for Policy Alternatives (Guarantee) Limited v. Dayananda Dissanayake, Commissioner of Elections [2003] 1 Sri LR 277 (SC)

such vacancy, but the Commissioner of Elections has no such discretion.

Simply stated, the former shall not mandatorily nominate the candidate who received the next highest number of preferences in the nomination paper to fill such vacancy³, but, when it comes to the latter, he has no alternative but to declare elected as a member the candidate who secured the next highest number of preferences in the nomination paper to fill such vacancy.

The learned President's Counsel for the petitioner admits that the party secretary under section 65(2) has the discretion in that regard, but his contention is that the secretary shall exercise that discretion reasonably and not capriciously.⁴

It is the position of the 2nd respondent—Party Secretary that the petitioner, during the Presidential Election held on 08.01.2015 and the Parliamentary Election held on 17.08.2015, supported the opposing candidate and/or the rival party. This was corroborated by a photograph marked P1 in the District Court action.⁵ The petitioner denies this allegation. However, it is not his position that, even if that allegation is true, he must be nominated to fill the vacancy as the candidate who secured in order of preferential votes the next highest number of votes. That means, if the allegation is correct, exercising the discretion against the petitioner is not unreasonable. These internal disputes cannot be adjudicated in a writ application. When

³ Vide Commissioner of Elections v. Susiripala, SC Appeal Nos. 75/2010 & 55/2011 decided on 12.02.2014 (SC)

⁴ Vide paragraph 2.1 of the written submissions of the petitioner filed with the motion dated 03.12.2018.

⁵ Vide pages 13-14 of the written submissions of the petitioner tendered with the motion dated 22.10.2015.

major facts are in dispute, writ, especially mandamus, will not lie.⁶

Application of the petitioner is dismissed with costs.

Judge of the Court of Appeal

⁶ Thajudeen v. Sri Lanka Tea Board [1981] 2 Sri LR 471, Dr. Puvanendran v. Premasiri [2009] 2 Sri LR 107, Wijenayake v. Minister of Public Administration [2011] 2 Sri LR 247