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

In the matter of an application in terms of Article 140 of the Constitution for a Mandate in the nature of Writ of Quo Warranto.

CA/WRIT/369/2020

Ven. Bambarawane Saddhathissa
Punchi- Sigiriya Rajamaha Viharaya,
Kothmale Janapadaya, Ampara.

PETITIONER

Vs.

1. Raja Manthreelage Thilak Rajapaksha,
   No.46/13, Pirivena Pedesa,
   Ampara.

2. Dhammika Dassanayake,
   Secretary- General of Parliament
   Parliament of the Democratic Socialist Republic of Sri Lanka.

3. Mahinda Deshapriya,
   Chairman,
   Elections Commission of Sri Lanka,
   Elections Secretariat,
   P.O. Box 02,
   Sarana Mawatha, Rajagiriya.

4. N.J. Abeysekara President's Counsel
   Member,

Elections Commission of Sri Lanka,
Elections Secretariat,
P.O. Box 02,
Sarana Mawatha,
Rajagiriya.

5. Prof. Rathnajeewan Hoole
Member,
Elections Commission of Sri Lanka,
Elections Secretariat,
P.O. Box 02,
Sarana Mawatha,
Rajagiriya.

6. D.M.L. Bandaranayake
Returning Officer,
Digamadulla Electoral District,
District Election Office,
Kachcheri Road,
Ampara.

7. M.A.B. Daya Senarath,
Secretary,
Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

Respondents

Before: **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel: Faiz Musthapha, PC with Shantha Jayawardena and Pulasthi Rupasinha for the Petitioner.
Sanjeeva Jayawardena, PC with Rukshan Senadheera for the 1st Respondent Manohara Jayasinghe DSG for the 2nd-7th Respondents

Argued On : 14.10.2022

Written Submissions: On 22.12.2022 (by the Petitioner) 05.01.2023 (by the 1st Respondent)

Decided On : 26.01.2023

B. Sasi Mahendran, J.

The Petitioner, by Petition dated 25th September 2020, invoking this Court's Writ jurisdiction in terms of Article 140 of the Constitution challenges by way of a Writ of Quo Warranto the 1st Respondent's authority to hold office as a Member of Parliament of Sri Lanka. It is the Petitioner's contention that at the relevant time, the nomination papers were submitted leading to the date on which the Parliamentary election was conducted the 1st Respondent continued to serve the State as a "Public Officer" with a salary in excess of the quantum stipulated in Article 91(1)(d)(vii) of the Constitution and is thereby disqualified for election as a Member of Parliament in terms of the said Article. This would, it is argued, make his election bad in law, resulting in the vacation of his seat as a Member of Parliament under Article 66 of the Constitution.

It is pertinent to set out the chronological sequence of events culminating in this application prior to dealing with the merits of the same.

His Excellency the President, by Proclamation published in the Extraordinary Gazette bearing No. 2165/8 dated **2nd March 2020** ("**X2(a)**"), dissolved the Parliament with effect from midnight on the said date and summoned the new Parliament to meet on the 14th of May 2020. The date for the election of Members of Parliament was declared as the 25th of April 2020. The nomination period, during which nomination papers were to be received by the Returning Officers, was from the **12th of March 2020** to **Twelve Noon on the 19th of March 2020**. Thereafter, the Sri Lanka Podujana Peramuna Party submitted its nomination papers for the Digamadulla Electoral District, in which the 1st Respondent was nominated as a candidate. Subsequently, with the emergence of the Covid-19 Pandemic, the election could not be conducted on the date it was originally declared to be held. A series of postponements ensued, and at last, the date for the election was declared as the **5th of August 2020** by the Election Commission (Vide Extraordinary Gazette bearing No. 2179/17 dated 10th June 2020 "**X2(f)**").

The 1st Respondent contested the said Parliamentary elections held on the 05th of August 2020 and was elected to represent the Digamadulla Electoral District. Accordingly, notification of his election was published along with the names of all those elected as Members of Parliament for their respective Electoral Districts in the Extraordinary Gazette bearing No. 2187/26 dated **8th August 2020** ("**X3**"). His Excellency the President, by Proclamation published in the Extraordinary Gazette bearing No. 2187/2 dated 3rd of August 2020 ("**X4(a)**") summoned the new Parliament to meet on the **20th of August 2020**. On the 20th of August, the 1st Respondent took oaths as a Member of Parliament.

It is at this point in time, that is after the election and swearing-in of the 1st Respondent, that the Petitioner claims he became aware of the impediment in the 1st Respondent's eligibility to contest the said election. This apparent disqualification was that the 1st Respondent was a Grade II Medical Officer in the Department of Health Services attached to the Office of the Regional Director of Health Services, Ampara receiving a salary of more than Rs. 6,720 per annum, during the time of signing his nomination papers and conducting the elections. A Right to Information request was filed requesting the date of appointment of the 1st Respondent and the details of his resignation from his post ("**X6**"). In response to this, the Health Service Committee of the Public Service Commission attached the letter dated **10th August 2020** ("**X7(b)**"). In the said letter ("**X7(b)**") addressed to the Secretary of the Ministry of Health and Indigenous Medical

Service by the Secretary of the Health Service Committee of the Public Service Commission, it is stated that:

"වෛද්‍ය ආර්.එම් .ටී. රාජපක්ෂ මහතා, ආයතන සංග්‍රහයේ xxxii වැනි පරිච්චේදයේ 1:3 හි විධිවිධාන අනුව, 2020.03.02 දින සිට රජයේ සේවයෙන් ඉල්ලා අස්වීමට කරන ලද ඉල්ලීම සඳහා අනුමැතිය ලබාදීමට රාජ්‍ය සේවා කොමිෂන් සභාවේ සෞඛ්‍ය සේවා කමිටුව නියෝග කර ඇති බව එහි නියමය පරිදි කාරුණිකව දන්වමි."

It is noted that the Health Service Committee of the Public Service Commission had granted approval for the 1st Respondent's resignation **with effect from the 2nd of March 2020** in terms of Regulation 1:3 of Chapter XXXII of the Establishment Code.

It is not in dispute that the 1st Respondent tendered his resignation letter to the Health Service Committee of the Public Service Commission through the Regional Director of Health Services, Ampara, the Provincial Director of Health Services of the Eastern Province, the Director General of Health Services, and the Secretary of the Ministry of Health on the 2nd of March 2020 ("**1R1**"), and that he falls within the salary scale stipulated Article 91(1)(d)(vii) of the Constitution.

It is also not in dispute that in order for a resignation to be effective that resignation must be accepted by the appointing authority. The resigner has a right to resign but the resignation can be effective only after it is accepted by the "Appointing Authority". Unless the two acts are completed, the transaction remains in inchoate form and termination of service is not brought about. Hence the resignation sent by a public officer is no resignation in the eye of the Law until its acceptance by the proper authority (vide Abeywickrema v. Pathirana [1986] 1 SLR 120 at page 130).

Thus, the Petitioner is before this Court challenging the 1st Respondent's authority to hold office as a Member of Parliament, or from sitting and voting in Parliament, on the ground that the 1st Respondent was disqualified in terms of Article 91 of the Constitution from contesting the election because *ex facie* the 1st Respondent's resignation was not accepted by the relevant authority at the time of 12 Noon on the last day for handing over nominations (19th March 2020) and it was accepted only on the 10th of August 2020, that is after the date of the Parliamentary election, which was held on the 5th of August 2020.

This would mean that the 1st Respondent was serving as a Public Officer (at the stipulated salary scale) at the time of his election in contravention of Article 91 of the Constitution.

Articles 90 and 91 which deal with qualification and disqualification for election as a Member of Parliament are set out as follows for the purpose of convenience:

Article 90

Every person who is qualified to be an elector shall be qualified to be elected as a Member of Parliament unless he is disqualified under the provisions of Article 91.

Article 91

(1) No person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament –

(a)….

(b)…

(c)….

(d) if he is -

(vii) [a public officer or a member of the Sri Lanka State Audit Service holding any office] created prior to November 18, 1970, the initial of the salary scale of which was, on November 18, 1970, not less than Rs. 6,720 per annum, or such other amount per annum as would, under any subsequent revision of salary scales, correspond to such initial,

……..

A Writ of Quo Warranto, one weapon in the judicial armoury that is conferred on the Court of Appeal by virtue of Article 140 of the Constitution is a mechanism of impugning the validity of an appointment to a public office on the basis that the holder of that office is not entitled to hold the same. As M.P. Jain and S.N. Jain wrote in 'Principles of Administrative Law' (7th Edition Volume 2 at page 2347) "**the basic purpose of Quo Warranto is to protect the public from an illegal usurpation of a public office by an individual**" [emphasis added].

Another mechanism, which must be distinguished from this Writ, is an 'Election Petition', which is provided for by the Parliamentary Elections Act No. 1 of 1981, as amended, read together with Article 144 of the Constitution. By this, the validity of an election of Members of Parliament may be questioned.

The latter is more limited in its application because an Election Petition can only be presented by a person claiming to have had a right to be returned or elected at such election or some person alleging himself to have been a candidate at such election (vide Section 95 of the Parliamentary Elections Act). This is in contrast to the rather liberal test of locus standi in a Quo Warranto application. His Lordship Yapa J. in Dilan Perera v. Rajitha Senaratne [2000] 2 SLR 79 (at pages 100 and 101) held:

"any person can challenge the validity of an appointment to a public office irrespective of whether any fundamental or other legal right of that person is infringed or not. But the Court must be satisfied that the person so applying is bona fide in his application and that there is a necessity in public interest to declare judicially that there is an usurpation of public office.... Even though the applicant may not be an aspirant to the office, nor he has any interest in the appointment, he can still apply as an ordinary citizen. A member of a municipal body or a mere rate payer can challenge the right of a member to sit as a member in a municipality. Any person though not personally interested in the results of an election can apply for the writ of quo warranto."

Further, in terms of Section 108 of the Parliamentary Elections Act, an Election Petition must be presented within twenty-one days of the publication of the results of the election in the Gazette. In contrast, an application for Quo Warranto is not subject to a strict time limit but rather it is available so long as the usurper continues to hold office which such usurper is not legally qualified to hold. Although on a perusal of earlier authorities, it is seen that applications have been rejected where there is an unexplained undue delay since the day of usurpation of office, the dictum of his Lordship Yapa J. in Dilan Perera (supra) at page 101 is more apt because its reasoning is sound. That is:

"there can be no delay in this case for the reason that ***the mischief complained of is a continuing one****. In other words, the 1st respondent's* ***continuance in office affords fresh cause of action each day till he is removed****. Therefore, it would appear that there is no question of delay as far as this writ is concerned."* [emphasis added]

This is in line with the Indian authorities on the subject as well. As C.K. Thakker wrote in his book titled 'Administrative Law' (1992) at page 438, "the usurper's continuance in office gives cause of action each day and every hour till he is ousted". By usurpation of such public office, there is an illegality that is perpetuated.

The reason we feel it is important to stress this distinction will be made clear in the paragraphs to follow after we have set out an explanation of the Writ of Quo Warranto.

M. P. Jain and S.N. Jains' 'Principles of Administrative Law' (7th Edition Volume 2 at page 2345) define Quo Warranto thus:

"The writ of quo warranto is used to judicially control executive action in the manner of making appointments to public offices under relevant statutory provisions. Through this writ, appointment of a person to a public office can be challenged if the person concerned is not qualified to hold the office in question, or if his appointment suffers from any legal flaw."

C.K. Thakker in 'Administrative Law' (at page 434) notes:

"Quo warranto literally means 'what is your authority?' Quo warranto is a judicial remedy against an occupier or usurper of an independent substantive public office or franchise or liberty."

Dr. Sunil F.A. Coorey's 'Principles of Administrative Law in Sri Lanka' (4th Edition Volume II at page 1056) explains:

"An order in the nature of a writ of quo warranto is applied for to have it declared by Court that someone who is in de facto possession of a public office is not de jure entitled to it because his election or appointment to it is a nullity for some reason (or else because the public office in question does not exist in law.) In such an application the person whose election/ appointment to a public office is being challenged as being invalid, is called upon to show by what valid authority (appointment/election) he claims to be legally entitled to that public office. Such an order is also available to have it declared by Court that someone who was earlier de jure entitled to a public office and who earlier exercises the powers of that office, has since become disentitled to such public office on account of some supervening circumstance".

In Dilan Perera (supra), his Lordship Yapa J. (at page 100) observed:

"Quo warranto is a remedy available to call upon a person to show by what authority he claims to hold such office. Therefore, the basic purpose of the writ is to determine whether the holder of a public office is legally entitled to that office. If a person is disqualified by law to hold statutory office the writ is available to oust him."

The importance of the distinction between those remedies is that, as can be inferred logically from the above explanations, the Writ of Quo Warranto can only be invoked if the usurper is *de facto* holding office, even though he is not *de jure* entitled to it. Meaning that it is only once the usurper assumes office can the remedy be availed of.

The remedy cannot be availed of if the usurper has not assumed office. The following authorities solidify this position.

In Ukku Banda v. Government Agent, Southern Province (1927) 29 NLR 168, the Petitioner's application for a Writ of Quo Warranto failed because there was no holding of office as the existing Committee had to continue until 30th June, although the new Committee was elected on 10th March. The new Committee would come into office only on the 1st of July. His Lordship Drieberg A.J. (at page 170) held:

"The mere fact that the 2nd to 13th respondents had been elected was not sufficient, as they had not entered on their office and could not do so until July 1. "No instance has been produced in which the courts have granted an application in the nature of quo warranto where the party against whom it was applied for has not been in the actual possession of the office. No such instance can have happened; and all the cases cited are the other way. In Rex v. Ponsonby the court expressly held that there must be an user as well as a claim in order to found such an application" (Buller J. in the King against Whitwell). It is necessary to show that the party against whom application is made is in office de facto and for this purpose it is not enough if the affidavit states simply that the party has "accepted the office" without specifying, the mode of acceptance."

In Dharmaratne v. The Commissioner of Elections (1950) 52 NLR 429 (at page 430) his Lordship Swan J. held:

"As the application was made before the elected members assumed office I would hold that the proper remedy was by way of mandamus and not by quo warranto."

Citing the judgment of Dharmaratne (supra) his Lordship De Kretser J. in K. Andiris v. D.F. Thomaratna (1969) 75 NLR 238 (at page 240) observed:

"As was pointed out in Re Armstrong the Writ of Quo Warranto does not lie unless the Court is satisfied that the person proceeded against has been in actual possession and user of the office.

Halsbury Vol. 11 Page 148 points out that a mere claim to be admitted to office was not sufficient; there had to be a possession or user as well as a claim. In the instant case the Respondent could not be the Member for Ward 2 until July 1969 for Section 11 (2) of Cap. 257 provided that his predecessor continued in office until that time.

Swan J. pointed out in Dharmaratne v. The Commissioner of Elections that where a person has been irregularly elected as a member of a local body but had not yet assumed office the proper remedy to have his election set aside is not by Quo Warranto."

The corollary is that if the usurper is no longer holding office the writ would not lie. For example, in the judgment of Fernando v Peiris (1943) 44 NLR 390 (at page 392), his Lordship Wijeyewardene J. observed that:

"*As a general rule a Court will not grant an information to question the title of a respondent to an office, after he has actually ceased to hold it. No doubt, this general rule is subject to certain well known exceptions, e.g., where the resignation has taken place only after the issue of the rule nisi or where the applicant's purpose is to substitute another candidate at once in the office.*"

This contrasts with an Election Petition which does not require an assumption of office. Abeywickrema (supra) is a case in point to illustrate the effect of an Election Petition. There the 1st Respondent was a principal of a school under the purview of the Department of Education with a salary of more than Rs. 6,720 per annum. He was disqualified in terms of Article 91(1)(d)(vii) of the Constitution since had not ceased to be a public officer even on election day on the basis that his resignation was not properly accepted.

It is then incumbent upon us to determine what an assumption of office or holding office for the purposes of issuance of a Writ of Quo Warranto means.

In the instant case, the issue surrounds the fact that the 1st Respondent's resignation was *ex facie* valid only on the **10th of August 2020**. This is prior to his taking oaths as a Member of Parliament, but, subsequent to the date of the Parliamentary Election, which was on the **5th of August 2020**.

Article 91 which deals with the disqualification of a Member of Parliament envisages two points of time: At the time of election or at the time of sitting and voting. Sitting and voting has been considered a necessary or incidental consequence of the election of members to Parliament, but it cannot be automatic since an oath or affirmation must be taken or made and subscribed. This distinction is appreciated in the cases of Dilan Perera (supra) and Geetha Samanmali Kumarasinghe v. N.W.E. Buawaneka Lalitha SC Appeal 99/2017 decided on 02.11.2017 (reported in (2017) BLR 34).

In the latter case, his Lordship Sisira De Abrew J. (with their Lordships Priyasath Dep PC C.J., B.P. Aluwihare PC J., Anil Gooneratne J., and Nalin Perera J. agreeing) having analysed Article 91(1)(d)(xiii) which dealt with the issue of citizenship wrote (at page 13):

"*What is the day on which a candidate becomes elected to be a Member of Parliament? It is the day of the Parliamentary Election. What is the day on which a candidate becomes qualified to sit and vote in Parliament? It is the day of taking oaths as a Member of Parliament and thereafter. When I consider the Article 91(1)(d)(xiii) of the Constitution, I hold that* ***if a candidate in a Parliamentary Election is a citizen of Sri Lanka and any other country 1. on the day of the Parliamentary Election or 2. on the day of taking oaths as a Member of Parliament he cannot be considered as a Member of Parliament and that the office of such person as a Member of Parliament is a nullity****. I further hold that* ***after taking oaths as a Member of Parliament, if he becomes a citizen of any other country or continues to be a citizen of any other country, he too cannot be considered as a Member of Parliament*** *and that the office of such person as a Member of Parliament is a nullity*." [emphasis added]

There then is a subtle distinction between the "**election" of a Member, i.e. the day of the Parliamentary election** (5th of August 2020, in the instant matter) and the **day on which a candidate becomes entitled to "sit and vote", i.e. the day of taking oaths as a Member of Parliament** (20th August 2020). As **Article 63** of the Constitution provides, "Except for the purpose of electing the Speaker, no Member shall sit or vote in Parliament until he has taken and subscribed the following oath, or made and subscribed the following affirmation before Parliament".

In Geetha Samanmali Kumarasinghe's case (supra) the disqualification was at the point of time at "election" and that disqualification continued well after the day of taking oaths.

In the instant case, there is no suggestion that the 1st Respondent is disqualified from being an "elector", meaning that there is no allegation that he is subject to a disqualification under Article 89 of the Constitution. The contention is whether he is disqualified from being elected because of Article 91(1)(d)(vii) of the Constitution.

Notwithstanding this, the disqualifications under Article 89 will not apply to the instant case because of **Article 102** of the Constitution which is applicable specifically to

public officers. This Article, which has remained untouched by any amendment since the promulgation of the original Constitution reads:

> **When a public officer** or an officer of a public corporation **is a candidate at any election**, **he shall be deemed to be on leave from the date on which he stands nominated as a candidate until the conclusion of the election**. Such a public officer or an officer of a public corporation shall not during such period exercise, perform or discharge any of the powers, duties, or functions of his office. [emphasis added]

Although we are mindful that Constitutional interpretation is within the ambit of the Supreme Court, and that it would be ironic if we sitting in a matter dealing with an allegation of usurpation of public office, usurp that power of interpretation, we will refrain from embarking on ascertaining the intention of the framers in including such a provision, we cannot, however, turn a blind eye to that provision which is plain.

Related to this is a pragmatic consideration that weighs in our minds. That is, if a public officer of that Constitutionally stipulated pay grade or above intends to run for public office at any election, an election which is proclaimed and then completed within a legally mandated period (unless there are force majeure instances such as a Pandemic), by the time the Officer follows the proper channel in order for him or her to resign and completes all the antecedent steps to resignation, such an officer might be deprived of his or her chance to stand for elections. We recognise that public service transcends a mere contract and is a "status" or a "privilege" and that it is a noble service that is constituted upon principles such as impartiality and political neutrality, the wisdom of Article 102 goes somewhat of a distance to address that pragmatic consideration of the unfairness that may otherwise be occasioned.

Implicit in this analysis, and what must logically follow, is that if like in the present case, where the resignation was accepted only in the interim period between the day of the election and the day of taking oaths, then there is no operative disqualification or continuing violation after the date of taking oaths, unlike in Dilan Perera (supra) or Geetha Samanmali Kumarasinghe (supra). If the resignation had not been duly accepted by the appointing authority by the time the oaths were taken, then this Writ could have been granted as there would have been an operative disqualification or continuing violation after the point of time of taking oaths i.e. sitting and voting. That would be

within the period of holding office. This is buttressed by **Article 66(e) of the Constitution** which provides that "the seat of a Member shall become vacant if he becomes a member of the Public Service or an employee of a public corporation **or, being a member of the Public Service** or an employee of a public corporation, **does not cease to be a member of such Service or an employee of such corporation, before he sits in Parliament**." [emphasis added].

It must be reiterated that the resignation must have been duly accepted by the appointing authority prior to the point in time of taking oaths. Until it has been duly accepted as such, there cannot be a valid resignation in the eyes of the law, as alluded to above.

This distinction in the time period then becomes instrumental when determining what assumption of office or holding of office is for the present purpose. **We are of the view that the assumption of office or holding of office is when there is an oath-taking, that is the day on which a candidate becomes entitled to "sit and vote" in Parliament**. An application for a Writ of Quo Warranto prior to such date may be refused on the ground of 'futility' as the nature of the Writ requires the usurper to hold office, unlike an Election Petition (as explained above).

The letter ("**1R6**") issued by the Ministry of Health puts the matter beyond doubt that the resignation had been accepted by the Health Service Committee of the Public Service Commission, in accordance with the principle set out in the judgment of Abeywickrema (supra), prior to the taking of oaths, which means the writ will not issue as the 1st Respondent was not a public officer at the time of his "holding office" as a Member of Parliament. Further, it should be noted that the said letter notes that the resignation is effective from the 2nd of March, which then has the effect of placing the resignation well before his nomination was submitted as well. The appointing authority set an effective date of resignation. The matter or effect of "backdating" even if it is disputed, whether such a decision falls within the ambit of our review must be seen because this Court's writ jurisdiction is subject to the provisions of the Constitution, which include Article 61A. We do not think there is a necessity for us to venture into that discussion, as we have noted above that the 1st Respondent was not a public officer at the time of taking oaths.

Therefore, we are unable to grant a Writ of Quo Warranto because it is beyond doubt or dispute that at the date of "sitting and voting" the 1st Respondent was no longer a public officer, in terms of Article 91(1)(d)(vii) of the Constitution. It must be reiterated that this is a Quo Warranto application which is to ascertain the authority by which the usurper holds such office, a necessary precondition being the *de facto* holding of such office.

In the instant case, the Petitioner who is exercising his rights, to use the oft-cited words of Lord Diplock in R v. IRC ex parte National Federation of Self Employed and Small Businesses Ltd. 1982 AC 617 (at page 644) as *"a public-spirited" person in "bringing the matter to the attention of the court to vindicate the rule of law"* must be appreciated.

This application is dismissed. We make no order for costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL