

**DILAN PERERA**  
**v.**  
**RAJITHA SENARATNE**

COURT OF APPEAL.

YAPA, J.

DE. SILVA, J.

CA 1164/98.

16<sup>TH</sup>, 28<sup>TH</sup>, 29<sup>TH</sup>, 30<sup>TH</sup> SEPTEMBER, 1999.

06<sup>TH</sup>, 11<sup>TH</sup>, 25<sup>TH</sup>, 26<sup>TH</sup> OCTOBER, 1999.

04<sup>TH</sup> NOVEMBER, 1999.

10<sup>TH</sup> DECEMBER, 1999.

*Constitution, Articles 66(d), 89, 90, 91(1)(e), 101(1)(c), 171 - Member of Parliament - Contracts with Government Institutions and Public Corporations - Is he disqualified - Right to hold office as a Member of Parliament - Is the appointment void - Donoughmore Constitution - Soulbury Constitution - Article 13(3)(c) - 1972 Constitution Articles 12(1), S.70(1)(d) S.73(f) - Ceylon (Parliamentary Elections) Order in Council 1946, S.77(e) - Act, No. 44 of 1980 - Act, No. 1 of 1981 - Delay - Continuing offence.*

The Petitioner a Member of Parliament, complained that the 1<sup>st</sup> Respondent who is also a Member of Parliament, nominated from the National List, has entered into various contracts with Government institutions - as a partner and a Director to supply Dental Equipment and therefore is disqualified under Article 91(1)(e) of the Constitution, and sought a declaration that the 1<sup>st</sup> Respondent has no right to hold office as a Member of Parliament (M.P.) and that his appointment is void.

It is the position of the Petitioner that the 1<sup>st</sup> Respondent whilst holding the office of a M.P. is carrying on a partnership business under the name and style of M/s Senaratne Dental Suppliers engaged in the business of importing and distributing dental equipment and material.

It was contended by the 1<sup>st</sup> Respondent that in any event as there is no law prohibiting a M.P. from entering into contracts with any Government institution, there was no possibility of taking action against the 1<sup>st</sup> Respondent in respect of the alleged contracts.

**Held :**

(1) Parliament has not prescribed the law necessary under Article 91(1)(e) that will provide for the disqualification of a person to be elected

as a M.P. Therefore Ceylon (Parliamentary Elections) Order in Council 1946 will continue to operate subject to - Act, 44 of 1980 and Act, No. 1 of 1981. It is kept alive by Article 101(2) of the 1978 Constitution.

(2) Once the Ceylon (Parliamentary Elections) Order in Council 1946 continues to operate then one has to apply Section 13(3)(c) of the 'Soulbury Constitution' for the purpose of considering any disqualification by reason of contract.

(3) The reason being that section 77 of the Ceylon (Parliamentary Elections) Order in Council 1946, refers to the grounds for the avoidance of Elections, more specifically section 77(e) gives the disqualifications for election as one of the grounds.

(4) In these circumstances section 13(3) of the Soulbury Constitution should be considered for any disqualification by reason of any contract.

*Per Yapa, J.*

**"Decision in the case of *Dahanayake vs De Silva*<sup>(1)</sup> is part of the law in force."**

(5) The position regarding contracts under the Soulbury Constitution is laid down in section 13(3)(c) of the said Constitution.

*Per Yapa, J.*

"From an examination of the provisions of section 13(3)(c) it is seen that a member could be held disqualified at the point of election (by an election Petition) and thereafter (by *quo warranto*) from sitting and voting if he has entered into a prohibited contract after his election";

(6) The Petitioner who is a M.P. has *locus standi* to file the application.

(7) In respect of the question of delay, it is to be observed that there can be no delay for the reason that the mischief complained of is a continuous one. The 1<sup>st</sup> Respondent's continuance in office affords fresh cause of action each day till he is removed.

(8) The 1<sup>st</sup> Respondent cannot function as a M.P. and his office as M.P. would become vacant in terms of Article 66(d) of the 1978 Constitution.

**APPLICATION** for Writs in the nature of *Quo Warranto*/Mandamus

**Cases referred to :**

1. *Dahanayake vs De Silva* [1978-79-80] 1 Sri.L.R. 41
2. *Dahanayake vs Pieris* 45 NLR 385
3. *Chandler Sons vs D.P.P.* (1964) AC 763
4. *Walker Sons & Co. U.K Ltd., vs Gunatilake* [1978-79-80] 1 Sri.L.R. 231
5. *Somasundran vs Kotelawala* 40 NLR 205
6. *Coorey vs De Zoysa* 41 NLR 121
7. *Kulasingham vs Thambiyah* 49 NLR 505
8. *Thambiyah vs Kulasingham* 50 NLR 25
9. *Gunasekera vs Wijesinghe* 65 NLR 303
10. *Martin Perera vs Madadombe* 73 NLR 25
11. *Nesamony vs Varghese* (52) Tr. C66
12. *Sana Sampat vs Jalgaon Borough Municipality* 1 LR (1958) Bom 113, 566

*Wijedasa Rajapakse* with *S. Wimalasekera* for Petitioner.

*K.N. Choksy P.C* with *Daya Pelpola* for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

*Saleem Marsoof P.C.* Additional Solicitor General for 3-5 Respondents.

*Cur. adv. vult.*

March 31, 2000.

**HECTOR YAPA, J.**

The petitioner is a Member of Parliament. He contested as a candidate at the General Elections held on 16<sup>th</sup> August 1994 for the Badulla District Electorate from the People's Alliance and was elected as a Member of Parliament. The 1<sup>st</sup> respondent to this application is also a Member of Parliament. He was nominated as a Member of Parliament from the national list by the United National Party with effect from 18<sup>th</sup> August 1994 as referred to in the gazette notification marked P1. The petitioner in this application has alleged that the 1<sup>st</sup> respondent who is a Member of Parliament has entered into various contracts with Government Institutions to supply dental equipment and material. Further he (1<sup>st</sup> respondent) has tendered for several contracts and some of them have been awarded to him. He has entered into these contracts as a partner of Senaratne Dental

Supplies and as a director of a company called Senaratne Dental Supplies (Private) Ltd. Therefore petitioner has stated in his petition that the 1<sup>st</sup> respondent is guilty of having such interest in such contracts entered into with the State Institutions or Public Corporations as contemplated by Article 91(1)(e) of the Constitution of the Democratic Republic of Sri Lanka 1978. In the circumstances the 1<sup>st</sup> respondent is disqualified in terms of the said Article i.e. 91(1)(e) of the Constitution to sit and vote in Parliament and further that the 1<sup>st</sup> respondent's office as a Member of Parliament has become vacant in terms of Article 66(d) of the Constitution with effect from 9<sup>th</sup> November 1995. In view of the said disqualification of the 1<sup>st</sup> respondent, the petitioner moved this Court for a declaration that the 1<sup>st</sup> respondent has no right to hold office as a member of Parliament and that his appointment is void. Further the petitioner has moved for a writ of Mandamus on the 3<sup>rd</sup> respondent, erroneously referred to as the 2<sup>nd</sup> respondent in the prayer, directing him (3<sup>rd</sup> respondent) to prevent the 1<sup>st</sup> respondent from functioning, sitting and voting as a Member of Parliament.

It is stated by the petitioner that the 1<sup>st</sup> respondent while holding the office of a Member of Parliament is carrying on a partnership business under the name and style of M/s Senaratne Dental Supplies engaged in the business of importing and distributing dental equipment and material. It would appear from the document marked P37 dated 21. 06. 1991 and P38 dated 09. 03. 1992 that the partnership had commenced its business on 31. 07. 1985. Further by documents marked P2-P10, P13-P17, P25 and P26 annexed to this application, it would show that the said partnership business had not been dissolved but had continued to do business up to 25. 08. 1998. In addition, the petitioner has stated that the 1<sup>st</sup> respondent has also incorporated a company called Senaratne Dental Supplies (Private) Limited, under the provisions of the Companies Act and has registered the company on 13. 12. 1995, (vide P33) which is engaged in the import and distribution of dental equipment and material.

In support the petitioner has produced the following documents i.e. the Memorandum of Association and the Articles of Association of the said company Senaratne Dental Supplies (Private) Limited dated 11. 12. 1995 marked P30 and P31 respectively, where the three subscribers are N.H.R.H. Senaratne the 1<sup>st</sup> respondent, Sujatha Senaratne and N.H.M.P. Senaratne, the certificate for registration of office dated 11. 12. 1995 marked P32, the Company Registration Certificate dated 28. 07. 1998 marked P33, form 48 under the Company's Act dated 11. 12. 1995, 10. 06. 1996 and 24. 01. 1998 marked P34, P35 and P36 respectively which give the particulars of the Directors and the Secretaries of the Company.

The petitioner alleges that the 1<sup>st</sup> respondent while holding the office of the Member of Parliament, has entered into various contracts with the Government Institutions to supply dental equipment and material. It is the position of the petitioner that 1<sup>st</sup> respondent's partnership business M/s Senaratne Dental Supplies and his company Senaratne Dental Supplies (Pvt) Ltd. have entered into these contracts. In proof the petitioner has marked and produced several documents to show that the 1<sup>st</sup> respondent's partnership and his company have entered into eight contracts with Government Institutions and briefly they are as follows:

- i The 1<sup>st</sup> respondent's partnership has entered into a contract dated 16. 11. 1995 on behalf of M/s Suz-Dent (India) Pvt. Ltd. with the Ministry of Health, Highways and Social Services to supply 25 Nos. dental units with Hydraulic Chair and Micro with certain other accessories. The contract document has been marked P5 and certain supporting documents leading to the signing of the said contract have been produced. These documents are the letter dated 09. 11. 1995 marked P2, written by the 1<sup>st</sup> respondent as the Managing Director of his partnership to the Ministry of Health relating to the award of the said tender, the proforma invoice bearing No. SDS/321/95

dated 09. 11. 1995 marked P3, and the letter dated 01. 11. 1995 marked P4, written by the Ministry of Health to the 1<sup>st</sup> respondent's partnership i.e. Senaratne Dental Supplies, intimating the approval of the tender.

- ii. 1<sup>st</sup> respondent's partnership i.e. Senaratne Dental Supplies, as the registered supplier of "Osu Sala" has supplied dental products to the Sri Lanka Air Force. In support the petitioner has produced the following documents which are true copies of the originals i.e. a letter dated 06. 12. 1995 marked P6, written by the 1<sup>st</sup> respondent as Managing Partner to the Manager "Osu Sala" giving the quotations for the supply of dental products. Order form dated 28. 12. 1995 marked P7, made by Sri Lanka Air Force to "Osu Sala" for the purpose of purchasing dental products from "Osu Sala". 1<sup>st</sup> respondent's partnership Senaratne Dental Supplies in turn has sold and delivered the said items referred to in P7, to "Osu Sala" (to be supplied to Air Force) on invoices bearing Nos. 5803, 5804, 5805 dated 02. 01. 1996 marked P8, P9 and P10 respectively. Two credit sale invoices dated 04. 01. 1996 in respect of the said items issued by "Osu Sala" to the Sri Lanka Air Force have been marked as P11 and P12 respectively.
- iii. 1<sup>st</sup> respondent's partnership Senaratne Dental Supplies has entered into several contracts with the Sri Lanka Navy for the supply of dental material and it continues as a supplier to the Sri Lanka Navy. In support the petitioner has produced the following documents. A true copy of the invoice No. 6436 dated 13. 09. 1996 issued by the 1<sup>st</sup> respondent's partnership for the supply of certain items to the Sri Lanka Navy marked P13,
- iv. A true copy of invoice No. 6449 dated 19. 11. 1996 issued by the 1<sup>st</sup> respondent's partnership for the supply of certain items to the Sri Lanka Navy marked P14,

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- v. A true copy of invoice No. 6472 dated 30. 05. 1997 issued by the 1<sup>st</sup> respondent's partnership for the supply of certain items to the Sri Lanka Navy marked P15,
- vi. A true copy of invoice No. 6473 dated 30. 05. 1997 issued by the 1<sup>st</sup> respondent's partnership for the supply of certain items to the Sri Lanka Navy marked P16,
- vii. With regard to a tender for the supply of drugs, the 1<sup>st</sup> respondent's partnership i.e. Senaratne Dental Supplies, by letter dated 05. 01. 1998 marked P17, has written to the Chairman, Tender Board Sri Lanka Navy, quoting certain prices and attaching to it the literature documents marked P18 and P19. Thereafter Sri Lanka Navy by letter dated 19. 05. 1998 marked P25, has requested M/s Senaratne Dental Supplies for the delivery of items quoted in P17. Accordingly by invoices (delivery orders) bearing Nos. 2702, 2703, 2705, 2706, 2707 dated 24. 03. 1998 marked P20, P21, P22, P23 and P24 1<sup>st</sup> respondent's Company i.e. Senaratne Dental Supplies (Pvt) Ltd. has supplied the said items to the Sri Lanka Navy.
- viii. The Sri Lanka Navy by letter dated 25. 08. 1998 marked P26, with the annexure marked P27, has written to M/s Senaratne Dental Supplies, i.e. the 1<sup>st</sup> respondent's partnership business, that the quotation submitted by Senaratne Dental Supplies has been accepted by the Sri Lanka Navy Department tender board and therefore has requested for the supply of the items referred to in P26. Thereafter by invoice No. 2407 dated 18. 09. 1998 marked P28, 1<sup>st</sup> respondent's Company i.e. Senaratne Dental Supplies (Pvt) Ltd. has supplied the said items.

It would appear therefore that the 1<sup>st</sup> respondent's partnership business and his company have entered into eight contracts with the Government Institutions such as the Ministry of Health, High ways and Social Services, Osu Sala, Sri Lanka Air Force and the Sri Lanka Navy. Further 1<sup>st</sup>

respondent's partnership and his company have entered into these contracts while the 1<sup>st</sup> respondent continues to remain as a Member of Parliament. It is to be observed that the contracts referred to in P2 to P10, P13 to P17, P25 and P26 have been entered into with M/s Senaratne Dental Supplies, the partnership business of the 1<sup>st</sup> respondent and they are contracts entered into directly with the State Institutions. Further contracts referred to in documents marked P2 to P5 and P6 have been entered into on a date prior to the incorporation and registration of the 1<sup>st</sup> respondent's company Senaratne Dental Supplies (Pvt.) Ltd. Another observation to be made in respect of the document marked P2 is that, it has been signed by the 1<sup>st</sup> respondent as Managing Director, and in the case of documents marked P3 and P6, these two documents have been signed by the 1<sup>st</sup> respondent as Managing Partner. In the documents marked P2 and P3 the 1<sup>st</sup> respondent has used the abbreviated designation M.P. which stands for Member of Parliament. It is also seen from the statement made to the police by the 1<sup>st</sup> respondent on 27. 03. 1996 marked P29, he has admitted the fact that he is a supplier of dental equipment and material to Government Institutions and has so registered himself as a supplier to such Government Institutions.

In the objections filed by the 1<sup>st</sup> respondent, he has simply denied the several averments in the petition where the contracts entered into by the 1<sup>st</sup> respondent on behalf of his partnership business M/s Senaratne Dental Supplies, and on behalf of his Company Senaratne Dental Supplies (Private) Ltd. are mentioned. It is clear from the documents marked by the petitioner in connection with his partnership business and his company, that they are really family concerns of the 1<sup>st</sup> respondent which are being managed by him. Therefore from a close scrutiny of the related documents marked by the petitioner, it is pretty obvious that the 1<sup>st</sup> respondent has entered into various contracts with the Government Institutions while being a Member of Parliament. Some contracts were entered into in the name of M/s Senaratne

Dental Supplies (1<sup>st</sup> respondent's partnership) and some contracts in the name of Senaratne Dental Supplies (Pvt) Ltd. (1<sup>st</sup> respondent's Private Company). Perhaps it may be due to this reason that at the hearing of this application, the learned Senior Counsel for the 1<sup>st</sup> respondent did not seriously contest the submission of learned Counsel for the petitioner, that the 1<sup>st</sup> respondent held various contracts with the Government Departments and Institutions and has been doing business with them.

The main point that was very strenuously argued by Mr. Choksy, learned Senior Counsel for the 1<sup>st</sup> respondent was the absence of any law prohibiting a Member of Parliament from entering into contracts with any Government Institutions, and therefore there was no possibility of taking any action against the 1<sup>st</sup> respondent in respect of the alleged contracts. Before considering this argument of Mr. Choksy, it is necessary to keep in mind the following salient features. That Article 91(1)(e) of the 1978 Constitution prohibits a person from being elected as a Member of Parliament or sitting and voting in Parliament, if he has entered into any prohibited types of contracts. This is very clearly provided for in the 1978 Constitution. The position was the same under the 1972 Constitution in view of Section 70(1)(d). In the 1978 Constitution Article 91(1)(e) provides as follows:-

91(1) No person shall be qualified to be elected as a Member of Parliament or sit and vote in Parliament:

- (e) if he has any such interest in any such contract made by or on behalf of the State or a public corporation as Parliament shall by law prescribe;

Therefore it is to be observed that unlike in the case of the Donoughmore Constitution and the Soulbury Constitution where there were self contained disqualifications in regard to contracts with the State or State Institutions, 1972 and 1978 Constitutions required the legislature to specify by law enacted by the National State Assembly or by Parliament, to

lay down the prohibited types of contracts and the prohibited interests in such contracts. But in both these Constitutions i.e. 1972 and 1978, it is very clearly laid down that no person shall be qualified to be elected as a Member of Parliament (National State Assembly in the case of 1972 Constitution) or to sit and vote in Parliament if he has any such interest in any such contract made by or on behalf of the State or a Public Corporation as Parliament shall by law prescribe. However it is common knowledge that neither the National State Assembly nor the Parliament passed the necessary law to give effect to the disqualification referred to above. Further it is also clear that the necessary law had to be passed by the National State Assembly in terms of the provisions of Section 73(f) in the case of the 1972 Constitution and by Parliament in terms of the provisions of Article 101(1)(i) in this case of the 1978 Constitution.

The argument of learned Senior Counsel for the 1<sup>st</sup> respondent is that, the Soulbury Constitution was repealed by Section 12(1) read with schedule A of the 1972 Constitution. The 1972 Constitution was repealed by Article 171 of the 1978 Constitution. Further Part ii and Part iii of the Ceylon (Parliamentary Elections) Order in Council, 1946, were repealed by the Registration of Electors Act, No. 44 of 1980 (vide Section 27(1)) and Part i and Parts iv to vi (both inclusive) of the Ceylon (Parliamentary Elections) Order in Council, 1946, were repealed by Parliamentary Elections Act, No. 1 of 1981 (vide Section 130). Therefore learned Senior Counsel contended that in view of the repeal of the Soulbury Constitution, the 1972 Constitution and the Ceylon (Parliamentary Elections) Order in Council, 1946, there is no law applicable, which would prohibit a member from entering into contracts at the time of election or at the time of sitting and voting in Parliament. In other words it was Mr. Choksy's submission that today a Member of Parliament cannot be disqualified either at the time of election by means of an election petition or thereafter from sitting and voting by means of a writ of *quo warranto* on the ground of having any interest

In any such contract with the State or State Institutions. First situation Counsel submitted is due to the repeal of the Ceylon (Parliamentary Elections) Order in Council, 1946, and the second situation is due to the failure of Parliament to pass the necessary law under Article 91(1)(e). Learned Counsel even went to the extent of submitting that the predicament is such that the relevance and applicability of earlier decisions on the subject and more particularly the case of *Dahanayake vs. De Silva*<sup>(1)</sup>, will require careful consideration and scrutiny in the present context.

However, before considering this argument of learned Senior Counsel, it is appropriate to examine the manner in which the Supreme Court approached a similar argument raised by Counsel under the 1972 Constitution in the case of *Dahanayake vs. De Silva* referred to above. In that case the Supreme Court had to consider whether a contract between a Member of Parliament (at the time of Election) and a State Corporation entailed any disqualification in terms of section 70(1)(d) of the 1972 Constitution. As observed above, even under the 1972 Constitution, the National State Assembly had failed to specify by law the disqualifications contemplated by Section 70(1)(d). In the case of *Dahanayake vs De Silva*(*supra*) the main issue was whether there was any law applicable even though the National State Assembly had admittedly failed to specify by law "such interest" in any "such contract" for the purpose of disqualifications contemplated by Section 70(1)(d). In the present case also we are faced with a similar issue. Therefore in my view the following passage in the judgment of Samarakoon C.J. in *Dahanayake vs De Silva*(*supra*) is not only illuminative but would provide the necessary background from which one should approach the arguments advanced by Counsel. Samarakoon, C.J. in the course of his judgment at 49 stated as follows:

"It is an admitted fact that the National State Assembly did not, during the whole of the period that it was in existence, specify by law "such interest" in any "such contract" for the

purpose of the disqualification contemplated by Section 70(1)(d). The National State Assembly was empowered to do this by the provisions of Section 73(f) but chose not to do so. Therefore, Counsel contend, the question of disqualification by reason of contract does not arise for decision. It is as simple as that: A provision such as the one in Section 70(1)(d) is one that is enacted for "securing the Freedom and Independence of Parliament" (Vide 22 Geo. iii c. 45 of 1782) and to secure" the independence of members of the Legislature and their freedom from any conflict between their duty to the public and their private interests" (*per de Kretser J. in Dahanayake vs. Pieris*<sup>(2)</sup> at 394.) That the National State Assembly deliberately left wide open the doors of corruption for its members is not a proposition we can lightly entertain. We have had a healthy tradition in this regard and it is unthinkable that any fundamental departure from this tradition of maintaining honesty and purity in public life has been made in the 1972 Constitution. By 1972 numerous State Corporations had come into existence regulating and servicing wide areas of public life. Since their activities touched the lives of the people at many points, sometimes even bringing about contractual relations in respect of their ordinary day to day activities, there was undoubtedly a need for a clear-cut decision as to what contracts and what interests should or should not constitute a disqualification for candidates to Parliament. If there was any intention to do away with this particular disqualification, we would not have expected to find a provision like Section 70(1)(d) incorporated in the Constitution. This Section, far from doing away with such a disqualification, appears to have added to its ambit and now contains the twin concepts of State and Corporation, where previously only one term "Crown" existed. What appears to have been left to the Legislature, considering the wider context of State regulation now in existence was the duty to demarcate the limit beyond which such contractual relations should constitute a disqualification for membership in the House. Over seven years have passed, and two successive Parliaments have still

not addressed their minds to this matter. It is against this background that we have to consider the arguments as to whether the draftsman of the Constitution left a vacuum in this respect or whether the transitional provisions contained in Section 75 are adequate to take charge of this situation until such time as Parliament decides to lay down afresh the necessary criteria."

Mr. Choksy submitted that Article 91(1)(e) of the 1978 Constitution covers both points of time namely the time of election and sitting and voting. However he contended that this Article does not incorporate or keep alive the provisions of the Ceylon (Parliamentary Elections) Order in Council, 1946, or Section 13(3)(c) of the Soulbury Constitution until such time Parliament passed the necessary law. Learned Counsel also submitted that Ceylon (Parliamentary Elections) order in Council, 1946, is retained only in Article 101 which deals with the point of time of an election and therefore there is no statutory provision keeping alive the Ceylon (Parliamentary Elections) Order in Council, 1946, after the point of time of the election and making it applicable to the subsequent period of sitting and voting in Parliament. Mr. Choksy further submitted that if the framers of the Constitution intended or desired they could have incorporated in Article 91(1)(e) itself the Ceylon (Parliamentary Elections) Order in Council, 1946, as temporary measure until Parliament passed the necessary law, which they have failed to do. The only provision of the 1978 Constitution which keeps alive the Ceylon (Parliamentary Elections) Order in Council, 1946, is Article 101 and the said Article deals with two specific matters namely Registration of electors and Election of Members of Parliament. As referred to in sub Article (a) to (d) of Article 101(1), it deals with the preparation of the Registers of Electors and sub Article (e) to (i) of the said Article deals with the conduct of elections, election petitions and such other matters as are necessary or incidental to the election of Members of Parliament. Therefore learned Counsel submitted that Article 101 in no way applies to the post election period of sitting and

voting in Parliament. Further he contended that the marginal note and the wording of the Article and its contents all make this clear. According to Mr. Choksy "such matters" as contained in Article 101(1) is clearly a reference to the matters covered by Article 101(1) only and the Parliament passed the necessary laws to provide for such matters when it enacted the Registration of Electors Act, No. 44 of 1980 and the Parliamentary Elections Act, No. 1 of 1981.

With regard to this submission of Mr. Choksy, it would appear that to place such a restriction on the operation of Article 101(1) would be to do violence to the intention of the framers of the Constitution. As stated above the necessary law to cover both points of time, namely, at the time of election or at the time of sitting and voting have to be made in terms of Article 101(1) and more specifically in terms of Article 101(1)(i). This was the view expressed by the Supreme Court in the case of *Dahanayake vs. De Silva* (*supra*) in relation to the 1972 Constitution, where it was stated very clearly that Section 73(f) of the 1972 Constitution was the empowering provision to create the law for the purpose of disqualification contemplated by Section 70(1)(d). It should be noted that sitting and voting is a necessary or incidental consequence to the election of members to the National State Assembly or to the Parliament. In addition in that case, the argument advanced by Counsel to place a restriction with regard to the operation of Section 73 to procedural matters as opposed to the creation of necessary substantive law was rejected. The Court in that case accepted the position that two of the items in respect of which laws can be made by the National State Assembly was section 73(e) the grounds for avoiding elections, and section 73(f) such other matters as are necessary or incidental to the election of members to the National State Assembly: Provided, however, that a law made under this section shall not add to the disqualifications enumerated in Section 70. Therefore on the strength of this reasoning by the Supreme Court, we are of the view that it would not be correct to place the restriction as suggested by Mr. Choksy on Article 101(1) namely that it deals

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only with the point of time of the election and not applicable to the subsequent period of sitting and voting in parliament. As held by the Supreme Court in the case of *Dahanayake vs. De Silva*, (*supra*) that the National State Assembly had the power to pass substantive laws on certain matters in terms of Section 73(e) and (f), in the same way, we hold that in terms of Article 101(1)(i) Parliament still has the power to pass laws necessary in respect of disputed elections and such other matters as are necessary or incidental to the election of Members of Parliament. But as stated in the proviso, no such law shall add to the disqualifications specified in Articles 89 and 91. It is inherent in the proviso that the Parliament has the power to pass the necessary laws. In the result it would appear that the framers of the Constitution had in mind the need to take action to implement the provisions of Article 91(1)(e) in terms of Article 101(1)(i). The term necessary or incidental to the election of Members of Parliament is wide enough to empower Parliament to pass the necessary laws as required by Article 91(1)(e) to cover not only the point of time of an election but the subsequent period of sitting and voting in Parliament. Further it would be seen that Article 101(1) is the empowering provision for the Parliament to pass the necessary laws, to implement the provisions of Article 91(1)(e). Learned Additional Solicitor General Mr. Marsoof in the course of his submissions contended that according to Article 101(1)(i) Parliament could make provision with regard to "the manner of determination of disputed elections and such other matters as are necessary or incidental to the election of Members of Parliament" and the phraseology used in this sub Article would catch up disqualifications that could arise after elections and during the tenure of office of a Member of Parliament. Further he submitted that when a Member of Parliament is elected his sitting and voting as a Member of Parliament is necessary or incidental to such an election. Therefore in our view, it would be erroneous to think that the framers of the Constitution having stated in no uncertain terms in Article 91(1)(e) that no person shall be qualified to be elected as a Member of Parliament or to sit and vote in

Parliament, if he has any such interest in any such contract made by or on behalf of the state or a public corporation, left a big vacuum to ponder on several years later.

Mr. Choksy made a further submission the effect of which would be to restrict the operation of Article 101(1) by referring to the marginal note to the said Article which states the "Parliament may make provision in respect of elections." In other words Counsel submitted that in view of the marginal note Parliament can only make provision in respect of elections and not in respect other matters such as sitting and voting in Parliament. On this matter it should be borne in mind that marginal notes are not a proper guide in the Interpretation of Statutes. Maxwell on "The Interpretation of Statutes", Twelfth Edition by P. St. J. Langan at page 9 on marginal notes states thus: "The notes often found printed at the side of Sections in an Act, which purport to summarize the effect of the Sections, have sometimes been used as an aid to construction. But the weight of the authorities is to the effect that they are not parts of the statute and so should not be considered, for they are "inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons." This view was confirmed by the House of Lords in the case of *Chandler v. D.P.P.*<sup>(3)</sup> where Lord Reid at 789, 790 observed as follows:

"In my view side notes cannot be used as an aid to construction. They are mere catchwords and I have never heard of it being supposed in recent times that an amendment to alter a side note could be proposed in either House of Parliament. Side notes in the original Bill are inserted by the draftsman. During the passage of the Bill through its various stages amendments to it or other reasons may make it desirable to alter a side note. In that event I have reason to believe that alterations is made by the appropriate officer of the House-no doubt in consultation with the draftsman. So side notes cannot be said to be enacted in the same sense as the long title or any part of the body of the Act."

In view of the above reasoning it follows that the Ceylon (Parliamentary Elections) Order in Council, 1946, would apply not only to the point of time of an election but to the subsequent period of sitting and voting in Parliament. This is because the Parliament is empowered to prescribe by law "such interest" in any "such contract" for the purpose of the disqualification contemplated by Article 91(1)(e), in terms of Article 101(1)(i). Even though the Parliament has passed the necessary laws in respect of some of the matters required under Article 101(1), such as 101(1) sub Article (a) to (h), Parliament has not provided for some of the matters as required by Article 101(1)(i), more specifically such other matters as are necessary or incidental to the election of Members of Parliament, which would cover the point of time of an election or sitting and voting in Parliament. Therefore when Ceylon (Parliamentary Elections) Order in Council, 1946, was repealed by Registration of Electors Act, No. 44 of 1980 and Parliamentary Elections Act, No. 1 of 1981, it was repealed for the limited purpose and to the extent of the operation of the said two Acts (Act, No. 44 of 1980 and Act, No. 1 of 1981) and no further. This is because the Parliament passed the said two Acts providing for some of the matters required under Article 101(1) and therefore it became necessary to repeal, the Ceylon (Parliamentary Elections) Order in Council, 1946, to avoid a conflict with the said two Acts. However it must be borne in mind that Ceylon (Parliamentary Elections) Order in Council, 1946, will continue to apply in respect of the matters not provided for by Parliament, namely, the laws that are necessary or incidental in order to provide for the matters required under Article 101(1)(i) that would cover the point of time of an election or sitting and voting in Parliament. Therefore until the Parliament performs its obligation of passing the other necessary laws in terms of Article 101(1)(i) to comply with the requirements of Article 91(1)(e), the Ceylon (Parliamentary Elections) Order in Council, 1946, will continue to operate. Further one should not forget the fact that Article 101(2) keeping alive the Ceylon (Parliamentary Elections) Order in Council, 1946, is a constitutional

provision. Therefore ordinary legislation such as the Act, No. 44 of 1980 and Act, No. 1 of 1981 cannot repeal the Ceylon (Parliamentary Elections) Order in Council, 1946, wholesale, if there are such other matters like what is required to be done to comply with Article 91(1)(e) has not been done by Parliament acting in terms of Article 101(1)(i). In these circumstances Ceylon (Parliamentary Elections) Order in Council, 1946, shall continue to operate in respect of such matters not provided for by Parliament, and only when all such matters have been provided for by Parliament that the operation of the Ceylon (Parliamentary Elections) Order in Council, 1946, will cease to operate.

Mr. Choksy sought to argue that the framers of the 1978 Constitution should have retained Ceylon (Parliamentary Elections) Order in Council, 1946, under Article 91(1)(e) to avoid any problem arising in respect of the law applicable to the Members of Parliament at the time of election or sitting and voting in Parliament. But as referred to above what the framers of the 1978 Constitution have endeavoured, is to make Article 101(1) the empowering provision for the Parliament to pass the necessary laws and retained the Ceylon (Parliamentary Elections) Order in Council, 1946, under that Article {101 (2)} until such time as the Parliament make provision for "such matters". The term "such matters" in Article 101(2) is wide enough to cover the law necessary to decide the question of the qualification of a person to be elected as a Member of Parliament or to sit and vote in Parliament. The restriction that Mr. Choksy sought to place on the term "such matters" in Article 101(2) to mean in respect of elections cannot be accepted in view of the reasoning in the decision of *Samarakoon C.J. in Dahanayake vs. De Silva*(*supra*).

It is now clear that the Parliament has not prescribed the law necessary under Article 91(1)(e) that will provide for the disqualification of a person to be elected as a Member of Parliament or to sit and vote in Parliament. Therefore Ceylon (Parliamentary Elections) Order in Council, 1946, will

continue to operate subject to the provisions of Act, No. 44 of 1980 and Act, No. 1 of 1981. Once the Ceylon (Parliamentary Elections) Order in Council, 1946, continue to operate, then, one has to apply Section 13(3)(c) of the Ceylon (Constitution) Order in Council, 1946, (hereinafter referred to as the Soulbury Constitution) for the purpose of considering any disqualification by reason of contract. The reason being that Section 77 of the Ceylon (Parliamentary Elections) Order in Council, 1946, refers to the grounds for the avoidance of Elections and more specifically Section 77(e) gives the disqualification for election as one of the grounds. In these circumstances Section 13(3)(c) of the Soulbury Constitution should be considered for any disqualification by reason of any contract. This was the view taken by the Supreme Court in the case of *Dahanayake vs. De Silva (supra)*. In that case Samarakoon C.J. considered the scope of Sections 73, 75 and 12(1) of the 1972 Constitution and held that Section 75 kept alive the election laws that were in operation on 21<sup>st</sup> May 1972 and Section 13(3)(c) of the Soulbury Constitution was one such law. The analogous provisions to the said Sections of the 1972 Constitution are found in Article 101(1) & (2) and Article 168(1) in the 1978 Constitution. Further the definition of "law" in Article 170 of the 1978 Constitution includes an Order in Council.

In the instant case learned Additional Solicitor General Mr. Marsoof, sought to argue that Section 13(3)(c) of the Soulbury Constitution is also kept alive in terms of Article 168(1) of the 1978 Constitution. Mr. Choksy countered this argument on the basis that the reasoning of learned Additional Solicitor General was wrong because Section 13(3)(c) of the Soulbury Constitution was not in force immediately before the commencement of the 1978 Constitution, since Soulbury Constitution had been repealed by the 1972 Constitution. However, the application of Section 13(3)(c) to the present situation as the law applicable should be considered for the following reason. At the hearing of this application a

submission was made by Mr. Rajapakse, learned Senior Counsel for the petitioner that the decision in the case of *Dahanayake vs. De Silva*, (*supra*) is part of the law now in force. Even though learned Counsel for the petitioner did not support this argument with any authority, his contention was that irrespective of whether resort is made to the Ceylon (Parliamentary Elections) Order in Council, 1946, or not, Section 13(3)(c) of the Soulbury Constitution has been kept alive and in force now, in view of the decision of the Supreme Court in the case of *Dahanayake vs. De Silva* (*supra*). Therefore it was submitted by him that Section 13(3)(c) of the Soulbury Constitution should be considered for the purpose of giving effect to Article 91(1)(e) of the 1978 Constitution. However this argument has to be considered in relation to Article 168(1) of the 1978 Constitution. In other words the question in issue is whether, Article 168(1) would permit the Supreme Court decision in the case of *Dahanayake vs. De Silva* (*supra*) to be treated as unwritten laws in force. On this matter the Supreme Court decision in the case of *Walker Sons & Co. (U.K.) Ltd. vs. Gunatilake*<sup>(4)</sup> is relevant and important. According to this five bench decision of the Supreme Court, the *ratio decidendi* of judicial decisions belongs to the category of unwritten laws within the meaning of Article 168(1). Therefore it is to be observed that the decision in the case of *Dahanayake vs. De Silva*, (*supra*) where it has been held that under the 1972 Constitution, Section 13(3)(c) of the Soulbury Constitution was in operation to be considered for any disqualification by reason of contract, should now be considered as part of the unwritten laws in force for the purpose of Article 168(1) of the 1978 Constitution. Once the highest Court of the land has interpreted the law it becomes part and parcel of the law in force. Decision in *Dahanayake vs. De Silva*, being a decision of the Supreme Court, this Court is bound by this decision.

The position regarding contracts under the Soulbury Constitution is laid down in Section 13(3)(c) of the said Constitution. Section 13(3)(c) provides as follows:

“13(3) A person shall be disqualified for being elected or appointed as a Senator or a member of this House of Representative or for sitting or voting in the Senate or in the House of Representatives-

(c) if he, directly or indirectly, by himself or by any person on his behalf or for his use or benefit, holds, or enjoys any right or benefit under any contract made by or on behalf of the Crown in respect of the Government of the Island for the furnishing or providing of money to be remitted abroad or of goods or services to be used or employed in the service of the Crown in the Island;”

From an examination of the provisions of Section 13(3)(c) of the Soulbury Constitution it is seen that a member could be held disqualified at the point of election (by an election petition) and thereafter (by *quo warranto*) from sitting and voting, if he has entered into a prohibited contract after his election. Therefore Section 13(3)(c) would apply to both situations, namely, at the point of election and thereafter at the time of sitting and voting in Parliament. Under the Donoughmore Constitution of 1931 the question of disqualification for membership on account of the existence of any contract with the Crown was dealt with in Article 9(d) of the Ceylon (State Council Elections) Order in Council 1931. In the case of *Dahanayake vs. Peiris*(*supra*) where the petitioner challenged the election of the respondent under Article 9(d) of the Ceylon (State Council Elections) Order in Council, 1931, on the ground that the respondent held contracts with the Government of Ceylon and the Court held that the respondent's election was void on that ground. Also vide *Somasundaram vs. Kotalawala*<sup>(5)</sup>, *Cooray vs. De Zoysa*<sup>(6)</sup>. Under Section 13(3)(c) of the Soulbury Constitution, vide the case of *Kulasingham vs. Thambiayan*<sup>(7)</sup> and *Thambiayah vs. Kulasingham*<sup>(8)</sup>. In the present case there is no doubt that the contracts entered into by the 1<sup>st</sup> respondent with Government Departments and Institutions are contracts entered into by the said Institutions as agents of the State. Therefore we hold

that the 1<sup>st</sup> respondent while being a member of Parliament has been a party to several contracts (eight contracts) entered into with him (i. e. 1<sup>st</sup> respondent's partnership and company) by several Government Departments and Institutions on behalf of the State. They are contracts prohibited in terms of Section 13(3)(c) of the Soulbury Constitution. The term "crown" has now been replaced by the Republic of Sri Lanka and therefore the 1<sup>st</sup> respondent by holding the contracts referred to above with the Republic of Sri Lanka has disqualified himself from sitting and voting in Parliament. In other words the 1<sup>st</sup> respondent is disqualified to function or sit and vote as a member of Parliament of Sri Lanka.

In this application question has been raised on behalf of the 1<sup>st</sup> respondent with regard to the *Locus Standi* of the petitioner to file this application. It is to be observed that *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. Vide *Gunasekera vs. Wijesinghe*<sup>(9)</sup>. This writ would not be issued unless the statute itself clearly disentitles a person from holding such office. Vide *Martin Perera vs. Madadombe*<sup>(10)</sup>. In *mandamus* the petitioner must show that he is a person aggrieved but this requirement is not necessary in *quo warranto*, since this writ seeks to prevent an occupier or a usurper of an office of public nature from continuing in that position. Therefore in these proceedings it would appear that 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. On the contrary if the applicant concerned is not *bona fide* in his application, he cannot claim this remedy. 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*. Learned Counsel for the petitioner referred us to the case of *Nesamony vs. Varghese*<sup>(11)</sup> cited by H. M. Seervai, "Constitutional Law of India" Third Edition Volume ii Page 1218, where the Indian Supreme Court has held that: "If a stranger, acting *bona fide*, can, apply for a writ of *quo warranto*, *a fortiori* person having a special interest in the office would be entitled to do so. Accordingly, a member of a legislative assembly had *locus standi* to apply for *quo warranto* if he *bona fide* believed that the speaker held his office without legal authority."

Therefore we hold that the petitioner who is a Member of Parliament clearly has the *locus standi* to file this application.

It is also alleged on behalf of the 1<sup>st</sup> respondent that there has been delay in making this application by the petitioner. In respect of the question of delay, it is to be observed that, there can be no delay in this case for the reason that the mischief complained of is a continuing one. In other words the 1<sup>st</sup> 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. On this matter learned Counsel for the petitioner referred us to the case of *Sanu Sampat vs. Jalgaon Borough Municipality*<sup>(12)</sup> cited in V. G. Ramachandran's Law of Writs Fifth Edition page 798, where it was observed that "If the appointment of an officer is illegal every day that he acts in that office a fresh cause of action arises; there can, therefore, be no question of delay in presenting a petition for a writ of *quo warranto* in which his very right to act in such a responsible post has been questioned."

From the material referred to above, it is manifestly clear that Section 13(3)(c) of the Soulbury Constitution should be considered as the law applicable as at present, when considering the disqualification referred to in Article 91(1)(e). Further it is quite clear that the 1<sup>st</sup> respondent has entered into several prohibited contracts with the Government Departments and Institutions, and therefore he has disqualified himself in terms of Article 91(1)(e) from sitting and voting in Parliament. In other words the 1<sup>st</sup> respondent cannot function as a member of parliament and his office as a member of Parliament would become vacant in terms of Article 66(d) of the 1978 Constitution.

For the aforesaid reasons we make order granting the writ of *quo warranto* as prayed for by the petitioner, declaring the appointment of the 1<sup>st</sup> respondent as a member of Parliament void and that he has no right to continue to hold office as a member of Parliament. Therefore by granting a writ of *mandamus* as against the 3<sup>rd</sup> respondent (Secretary General of Parliament) we direct him to take necessary and consequential steps in terms of the law. Further we deeply appreciate the assistance given to us by Counsel.

**DE SILVA , J.** - I agree.

*Writs of Quo Warranto and Mandamus issued.*