

**MASAHIR
VS
RETURNING OFFICER, KEGALLE DISTRICT AND OTHERS**

COURT OF APPEAL
IMAM, J. AND
SRISKANDARAJAH, J.
CA 1298/2003.
JULY 22, 2005.

Local Authorities Elections Ordinance, No. 53 of 1946 – section 65A—Elected candidate resigns-Vacancy—Could a person who was not a candidate be nominated to fill vacancy-Provincial Councils Elections Act - Section 65 compared.

The petitioner contested the elections of the Mawanella Pradeshiya Sabha from the United National Party (UNP). Sixteen candidates were appointed to the Sabhawa; the petitioner was the seventeenth in the list. One candidate elected from the list resigned; the UNP sought to nominate the 3rd respondent who was not a candidate and the 3rd respondent was declared by the 1st respondent elected to the Mawanella Pradeshiya Sabha.

The petitioner contends that, the said nomination is *ultra vires*.

HELD:

1. The power of the Secretary of the UNP in the instant case is restricted to nominate a person from the list of candidates which appears in the relevant nomination paper who has secured some preference at the election.
2. As the 3rd respondent was not a candidate and his name does not appear in the nomination paper of the relevant election the nomination of the 3rd respondent to fill the vacancy created by the resignation of the 4th respondent is *ultra vires*.

APPLICATION for writs in the nature of certiorari/mandamus.

Case referred to :

Centre for Policy Alternatives (Guarantee) Ltd. and Another vs. Dayananda Dissanayake and 3 others 2003 1 Sri LR 277.

Dr. J. de Almeida Gunaratne, P. C. with Kishali Pinto Jayawardane and Maduranga Ratnayake for petitioner. Janak de Silva, State Counsel for 1st-5th respondents.

H. I. M. Azver for 3rd respondent.

Daya Pelpola for 6th respondent.

Cur. adv.vult.

September 19, 2005.

S. SRISKANDARAJAH., J.

The Petitioner contested the elections of the Mawanella Pradeshiya Sabha from the United National Party which was held on 20.03.2003. The results of the said election for the Mawanella Pradeshiya Sabha was declared by the 1st Respondent and according to the said results sixteen candidates were appointed to the Mawanella Pradeshiya Sabha from the list of the United National Party. The Petitioner submitted that he had come seventeenth on the list according to the preference given by the voters, and his name appears immediately below the last candidate who had been elected. The Petitioner also submitted that according to the list the difference in votes between the candidate who had come sixteenth on the list and the Petitioner was negligible. On 15.03.2003 he was informed that one candidate who had been elected to Mawanella Pradeshiya Sabha from the United National Party list namely the 4th Respondent had resigned from his post as member of the Mawanella Pradeshiya Sabha for personal reasons. Consequently a vacancy arose in the Mawanella Pradeshiya Sabha and he had expected that he would be elected as he was the seventeenth on the list of preference obtained by the candidates and immediately below the last to be elected on the list as aforesaid.

On or about the 23rd of May, 2003 the Petitioner submitted that he came to know that the United National Party General Secretary the 2nd Respondent had issued a letter to the 1st Respondent nominating the 3rd Respondent to fill the said vacancy created by the resignation of the 4th Respondent. Consequent to the said nomination by the 2nd Respondent the 1st Respondent declared the 3rd Respondent elected to the Mawanella Pradeshiya Sabha from the Kegalle District (P6).

The Petitioner submitted that the 1st Respondent was obliged in law to reject the said nomination of the 3rd Respondent by the 2nd Respondent by virtue of section 65A of the Local Authorities Election Ordinance No. 53 of 1946 as amended. The said decision of the 1st Respondent and/or the

2nd Respondent has been arrived at without taking into account relevant facts into consideration and the said decision was arrived at through a misconstruction of the aforesaid section of the said Ordinance. The 1st and 2nd Respondents have contravened the principles of natural justice and reasonableness and for these reasons the Petitioner has sought to challenge the order of the 1st Respondent by way of a writ of certiorari to quash the election of the 3rd respondent to the Mawanella Pradeshiya Sabha, a writ of quo warranto declaring that the 3rd Respondent is not lawfully entitled to hold the office of the member of the Mawanella Pradeshiya Sabha and to issue a writ of mandamus directing the 1st Respondent to declare as elected to the said vacancy from the list of the United National Party, the candidate most qualified according to law.

It is common ground that the Petitioner was a candidate from the United National Party and contested at the Mawanella Pradeshiya Sabha Elections on 20.03.2002. According to the preference obtained by the candidates of the United National Party the Petitioner was placed 17th in the preferential list and he was placed immediately below the last candidate who had been elected. The 4th Respondent had resigned from his post as member of the Mawanella Pradeshiya Sabha and the 2nd Respondent nominated the 3rd Respondent who was not a candidate in the aforesaid election to fill the said vacancy created by the 4th Respondent's resignation from his post. The 1st Respondent declared the 3rd Respondent elected to the Mawanella Pradeshiya Sabha.

The only question that has to be determined is whether 3rd Respondent who was not a candidate in the Mawanella Pradeshiya Sabha Election could be nominated by the 2nd Respondent to a vacancy that occurred in the Mawanella Pradeshiya Sabha and whether he could be declared elected as a member of the said Pradeshiya Sabha by the 1st Respondent under section 65A of the Local Authorities Elections Ordinance as amended.

Section 65A of the Local Authorities Elections Ordinance as amended in all respect contains similar provisions to the section 65 of the Provincial Councils Elections Act, to nominate a person to fill a vacancy that occurred due to death, resignation or for any other cause. Section 65 of the Provincial Councils Elections Act, was interpreted by the Supreme Court in *Centre for Policy Alternatives (Guarantee) Limited and Another vs. Dayananda Dissanayake and three Others*¹¹ Fernando J in this judgment held :

“To sum up, section 65(2) is not plain and unambiguous; section 65(3) takes precedence over section 65(2); section 65(3) manifests a legislative intention that vacancies should be filled either by qualified candidates or by election; If section 65(2) is interpreted to mean that the secretary may nominate any person who is qualified at the time of such nomination, that gives rise to an anomaly or inconsistency; the general scheme of the Act, from nomination up to the declaration of the results of the poll is that the electorate should be represented by persons who have contested the election; the fact that the nomination paper is required to have three candidates more than the number of members to be elected and cannot be altered indicates that the nomination paper is the pool from which subsequent vacancies should be filled. Accordingly the wide language of the first limb of section 65(2) must be restrictively interpreted, in the context of section 65(3) as well as the general scheme of the Act and basic democratic principles. I hold that despite the general words used, the secretary’s power to nominate is confined to candidates whose names appear in the original nomination paper and who secured some preference at the election.”

In view of the interpretation of the provisions of the above section the power of the Secretary of the United National Party in the instant case is restricted to nominate a person from the list of candidates which appears in the relevant nomination paper who has secured some preference at the election. As the 3rd Respondent was not a candidate and as his name does not appear in the nomination paper of the relevant election, the nomination of the 3rd Respondent to fill the vacancy created by the resignation of the 4th Respondent is *ultra vires*. Hence the Court issues a writ of certiorari quashing the election of the 3rd Respondent to the Mawanella Pradeshiya Sabha. The Court directs the 1st Respondent to take steps according to law to fill the vacancy ‘occurred’ in the Mawanella Pradeshiya Sabha by this order. The application for the writ of certiorari and writ of mandamus is allowed without costs.

IMAM, J.—I agree.

Application allowed.