

KOBBEKADUWA

v

JAYEWARDENE AND OTHERS

SUPREME COURT,
SHARVANANDA J., WANASUNDERA J.,
VICTOR PERERA J., SOZA J. AND
RANASINGHE J.
ELECTION PETITION NO.3/82.
DECEMBER 13,14 and 15, 1982.

Election - Election petitions - S 93 (a) of Presidential Act No. 15 of 1981 - corrupt practice of false statement of fact in relation to the personal character or conduct of opposing candidate-Illegal practice of causing to be printed, published and distributed a publication not bearing on its face the names and addresses of the publisher by agent of 1st respondent - S80 (c), 12(1) and 133(1), S91(c) S85, S95(1)(b), S96, S96(d), S97 of the Presidential Elections Act No.15 of 1981 - Should unincorporated body be made a party respondent - Material facts - Particulars - Affidavit.

At the Presidential election held on 20th October 1982 the 1st respondent was declared duly elected as the President of the Democratic Socialist Republic of Sri Lanka. The petitioner who was a candidate at the said election sought to have the said election of the 1st respondent avoided on four counts of the commission of the corrupt practice of making false statements relating to the personal character and conduct of the petitioner by the 2nd respondent as agent of the 1st respondent and /or with his knowledge and consent, and on a fifth count of the commission of the illegal practice of causing to be printed, published and distributed the document marked X which did not bear on its face the names and addresses of the printer and publisher by the 3rd respondent and the United National Party as agents of the 1st respondent.

(1) In order to establish the commission of the corrupt practice of false statement of fact in relation to the personal character or conduct of a candidate the petitioner must prove:

(i) That there had been a publication by the candidate or with his knowledge or consent or by his agent

(ii) The statement is a false statement of fact

(iii) The statement is in relation to the personal character or conduct of the opposing candidate and not to his public or political character or conduct

(iv) The statement is made for the purpose of affecting the result of the election. It must be reasonably calculated to prejudice the prospects of the candidate's election. It need not be defamatory at common law so long as it is a statement calculated to influence the electors.

(2) The words of the statement will be interpreted

according to their real and true meaning and not necessarily according to their literal sense. The true meaning will depend on the occasion of the publication, the persons published, the person attacked and the readers intended to be addressed. Reference to character or conduct must be direct and not inferential or by indirect implication.

A distinction must be drawn between a false statement of fact which affects the personal character or conduct of a candidate and a false statement of fact which deals with the political position or reputation or action of the candidate.

(3) The alleged false statement that the petitioner sent his nomination papers through Mr. Ratnasiri Wickremanayake is at the worst merely a criticism of the petitioner's public conduct. Reading an indirect implication of arrogance into the statement will not still bring it within the ambit of s.80(c) and no corrupt practice is disclosed.

(4) The document X does bear on its face the name of a printer and publisher. The allegation that there are false names represents a divergence from the allegation in the petition. Further the document must refer to an election under the Act. 'X' does not refer directly or by implication to the Presidential election held on 20th October 1982. Further the agent must be the election agent or an authorised agent.

The word "agent" in s.85 does not embrace everybody who comes within the wide concept of agent in election law but only an election agent or an authorised agent. It is not the petitioner's case that either the 3rd respondent or the United National Party was the election agent or authorised agent of the 1st respondent.

(5) Although the United National Party is an unincorporated body it should have been cited as a respondent in compliance with the imperative

provisions of s.95(1)(b) of the Act and then applied for directions from the Chief Justice as to the further steps to have the party represented in the proceedings. The provisions of s.96 are mandatory and failure to duly comply with them renders the whole petition and not merely the particular charge invalid and a nullity.

(6) Failure to give the names of the supporters of the United National Party referred to in the affidavit is not a good ground of objection as no complaint has been made that the supporters of the United National Party had committed an illegal practice. Only persons who are alleged to have committed an illegal practice are required to be made respondents.

Section 96 makes a distinction between material facts and particulars. Material facts are those which go to make out the petitioner's case against the respondent. The word 'material' means necessary for the purpose of formulating the charge and if any one material fact is omitted the statement of claim is bad and liable to be struck out. The present petition cannot be flawed on this ground.

The function of particulars is quite different. It is to fill the picture of the petitioner's charge against the respondent with information sufficiently detailed to enable the respondent to become aware of the case he has to meet and to prepare for the trial. An election petition is not liable to be dismissed *in limine* merely because full particulars of the corrupt practice alleged are not set out because amendment or amplification can be ordered by the Court under s.97 (1) of the Act.

(7) The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. In an affidavit a person can depose only to facts to which he is able to testify

of his own knowledge and observation. There is substance in the allegation that the petition is not accompanied by the necessary affidavit in support of the alleged illegal practice.

Cases referred to -

1. North Louth Case (1910) 6 O'M&H. 103
2. Sunderland Case (1896) 5 O'M&H. 53
3. Cockermonth Division case (1901) 50 'M&H' 155,159,160.
4. Ram Singh v. Inder Singh (Indian Election Cases (1935-1950) by H.S. Dhobia Vol. 1 p. 341,347.
5. Illangaratne v. G.E.de Silva 49 NLR 169,172,173,179.
6. Don Phillip v. Illangaratne 51 NLR 561,571,573.
7. R.v.I.CR. Haulage [1944]1 All ER 691,693.
8. Willis v. Association of Universities [1964]2 All ER 39,42.
9. Bonser v. Musicians Union [1956]AC 104
10. Nair v. Teck[1967] 2 All ER 34 P.C.
11. Wijewardena v. Senanayake 80 C.L.W. 1.

Election Petition challenging election of the President K. Shanmugalingam with Gomin Dayasiri instructed by Nimal de Silva for the petitioner.

P. Navaratnerajah Q.C. with J., W. Subasinghe S.A., K.N.Choksy S.A., L.C.Seneviratne and Lakshman Perera instructed by John Wilson for 1st respondent.

Eric Amerasinghe S.A., with George Candappa, N.S.A. Goonetillke, Ajit Tilakawardene, Quintus Palliyaguru, Dudley Fernando and Sarath Ratnayake instructed by H.A.P. Perera for 2nd respondent.

K.N.Choksy S.A. with Mark Fernando, Daya Pelpola, D.H.N. Jayamaha, Ronald Perera and Miss. I.R.Rajepakse instructed by D.F.R. Jayamaha for the 3rd respondent.

January 10th ,1983
SHARVANANDA, J.,

At the Presidential Election held on the 20th October,1982, the 1st Respondent was declared duly elected as the President of the Democratic Socialist Republic of Sri Lanka. The Petitioner was one of the candidates at the said election. He has filed this petition in terms of section 93(a) of the Presidential Act No.15 of 1981 (hereinafter referred to as the 'Act').

The 1st Respondent was a candidate nominated by the United National Party, which was a recognised Political Party and the Petitioner was a candidate nominated by the Sri Lanka Freedom Party which is also a recognised Political Party.

The nomination of candidates took place on 17th September 1982. By his petition filed on 11.11.1982 the Petitioner has challenged the validity of the election of the 1st Respondent on the following grounds.....

Allegations.

1. That the 2nd respondent, as agent of the 1st respondent and/or with his knowledge or consent committed the corrupt practice of making or publishing during the election for the purpose of affecting the result of the said election, a false statement of fact in relation to the personal character or conduct of Sri Lanka Freedom Party candidate H.S.R.B. Kobbekaduwa (the Petitioner) in terms of section 80(c) of the said Presidential Election Act, in that :-

" the 2nd Respondent did at an election meeting held in support of the candidature of the 1st Respondent at the Road Reservation in front of Beruwela Railway Station on 18th day

of September 1982; make a speech in which he stated inter alia -

"It was seen over the television at the handing over of the nominations, who is the suitable person to be the President of this country. Mr. Hector Kobbekaduwa without going to the Election Commissioner to hand over the nomination papers sent Mr. Ratnasiri Wickramanayake, the Party Secretary instead. Yet it was possible for everyone to view how modestly our President behaved on that occasion.

The Petitioner states that the said statement was made by the 2nd respondent as agent of the 1st Respondent and/or with his knowledge or consent, and that the said words are false and constitute a false statement of fact in relation to the personal character or conduct of the said candidate, H.S.R. B.Kobbekaduwa, for the purpose of affecting the said Election.

The Petitioner states that the 2nd respondent committed similar acts of corrupt practice by repeating the aforesaid statements at Matugama, Bulathsinhala and Kalutara on 18th September 1982. These are the subject matter of the 2nd, 3rd and 4th charges.

It is to be noted that the aforesaid acts of corrupt practice are alleged to have been committed by the 2nd respondent as the agent of the 1st respondent and/or with his knowledge and consent all on 18th September 1982, the day following the nominations day and not thereafter.

The 5th ground of challenge is that the 3rd respondent who is the General Secretary of the United National Party and the United National Party, acting as agents of the 1st respondent, in the Presidential Elections "caused to be printed,

published and/or distributed hand bills or advertisements, placards or prospectus representing a Ration Book and containing inter alia a photograph of the candidate H.S.R.B. Kobbekaduwa and a statement alleged to have been made by the said H.S.R.B. Kobbekaduwa. The said publication was printed, published and/or distributed by the 3rd Respondent and the United National Party as the agent of the 1st Respondent and the United National Party as the agents of the 1st respondent all over the country in the said election campaign between 17th September 1982 and 20th October 1982. The said publication does not bear upon its face the names and addresses of its Printer and Publisher, which is an illegal practice under section 85 of the Presidential Elections Act. One copy of the said publication is annexed hereto marked 'X'. Thus the 3rd respondent and the said United National Party as agents of the 1st respondent had committed the illegal practice of causing to be printed, published or distributed the said publication, marked 'X' which does not bear upon its face the names and addresses of its Printer and Publisher."

The relief claimed by the Petitioner are that this Court determines that the 1st Respondent was not duly elected or returned as the President of the Democratic Socialist Republic of Sri Lanka at the election held on 20th October 1982 and that the election is void.

The Respondents to the petition are Mr. J.R. Jayewardene, the 1st Respondent, whose election as President is sought to be avoided, Mr. Lalith Athulathmudali, the 2nd Respondent, who as the agent of the 1st Respondent is alleged to have committed the corrupt practice of publishing the false statements of fact referred to above in breach of section 80(c) of the Act and Mr. Harsha Abeywardena, the 3rd Respondent, who as the agent of the 1st Respondent is alleged to have caused to be

printed published and/or distributed the hand bills representing a Ration Book (copy marked 'X') containing inter alia a photograph of the petitioner and a statement alleged to have been made by him which did not bear upon its face the name and address of its Printer and Publisher, in breach of section 85 of the Act.

Preliminary Objections.

The Respondents have taken several preliminary objections to the petition and have moved that the petition be rejected or dismissed.

The main objections of the Respondents are that:-

1. The petition does not disclose any corrupt practice within the meaning of section 80(c) of the Act and the 1st and 2nd Respondents submit that, assuming that the 2nd Respondent made the alleged false statements referred to in paragraphs 3,4,5 & 6 of the petition, the said statements do not constitute false statements of fact in relation to the personal character or conduct of the candidate H.S.R.B.Kobbekaduwa.

2. The petition does not disclose any illegal practice within the meaning of section 85 of the Act.

The 1st and 3rd Respondents further submit that the said publication 'X' does not contravene section 85 of the Act. The petition does not aver or allege that the document 'X' refers to the Presidential Election and hence, there was no breach of section 85 of the Act.

3. The petition has not complied with the mandatory provisions of section 95(1)(b) of the Act, in that the petitioner has failed to join

as Respondent to the petition the United National Party, who is alleged to have committed the illegal practice under section 85 of the Act.

4(a) The supporters of the United National Party, referred to in paragraph 3 of the affidavit of Randeni Arachchige Sarath Wijesekera (filed in support of the petition) as having distributed on behalf of the 1st Respondent, the United National Party candidate, the document 'X' have not been named either in the said affidavit or in the petition and that accordingly the petition does not comply with the requirements of section 96(c) and (d) of the Act.

(b) The petitioner has failed to join as respondents to the petition as required by section 95(1)(b) of the Act the said supporters who according to the affidavit would appear to have committed an illegal practice under section 85.

5. The petitioner has not filed affidavits in support of his allegation of the illegal practice set out in paragraph 7 of the petition and that the petition accordingly does not comply with the requirements of section 96(d) of the Act.

FIRST OBJECTION

Corrupt Practice.

The statement of fact which the petitioner asserts is false and which constitutes an infraction of section 80(c) of the Act is that "Mr. Hector Kobbekaduwa without going to the Election Commissioner to hand over the nomination papers sent Mr. Ratnasiri Wickramanayake, the Secretary,

instead." Counsel for the petitioner rightly conceded that the observations, namely "It was seen over the television at the handing over of the nomination, who is the suitable person to be the President of this Country" and "yet it was possible for everyone to view how modestly our President behaved on that occasion" were expressions of opinion by the speaker and were not prohibited by section 80(c) of the Act.

Section 12(1) of the Act provides that "no candidate shall be nominated by means of more than three separate nomination papers." And section 13(1) provides that each nomination paper shall be delivered to the Commissioner at the place of nomination... by the candidate or the person who has signed his nomination paper.

Counsel for the petitioner specified that the falsity in the 2nd Respondent's aforesaid statement lay in the assertion that Mr. Kobbekaduwa had all the nomination papers delivered to the Commissioner by Mr. Ratnasiri Wickremanayake, the Secretary of the Sri Lanka Freedom Party.

The question then arises whether the statement namely that Mr. Hector Kobbekaduwa had sent Mr. Ratnasiri Wickremanayake, the Party Secretary, to hand over the nomination papers, to the Commissioner is a false statement that is struck by section 80(c) of the Act. For the purpose of the present preliminary proceeding, it has to be assumed that that statement is untrue. But it is not every incorrect statement that is penalised by section 80(c).

Section 80(c) provides as follows -

"Every person who makes or publishes before or during the election for the purpose of affecting the result of that election *any false*

statement of fact in relation to the personal character or conduct of any candidate, shall be guilty of corrupt practice."

In order to bring the case within the ambit of section 80(c) read with section 91(c) of the Act, the petitioner must prove -

Firstly- that there had been a publication by the candidate or with his knowledge or consent or by his agent.

Secondly-the statement is a false statement of fact.

Thirdly- the statement is in relation to the personal character or conduct of the opposing candidate and not to his public or political character or conduct.

Fourthly-the statement is made for the purpose of affecting the result of the election. It must be reasonably calculated to prejudice the prospects of the candidate's election.

Thus what is open to objection is a false statement of facts with reference to the personal character or conduct of the candidate. In what has come to be known as the *North Louth case* reported in (1910) 6 O.M & H 103,(1) it was observed by Gibson, J., at page 163 that :-

"a politician for his public conduct may be criticised, held up to obloquy; for that the statute gives no redress; but when the man beneath the politician has his honour, veracity and purity assailed, he is entitled to

demand that his constituents shall not be poisoned against him by false statements containing such unfounded imputations."

In the *Sunderland* case, reported in (1896) 5 O.M & H 53, (2) a similar view was taken by Baron Pollock, who observed at page 62 that the principal words here are 'any false statement of fact', but if it be a false statement of fact and if it be in relation to the election and to the personal character and conduct of the candidate, the Court has nothing whatever to do with the question which arises in cases of libel as to whether there was malice. Any false statement, whether charging dishonesty or merely bringing a man into contempt if it affects or is calculated to affect, the election, comes within this Act.... Thus some perfectly innocent acts which may be ascribed to a candidate at the time of election may come within the mischief of the election statute.

The false statement of fact need not be defamatory at common law, so long as it is a statement which is calculated to influence electors, as for instance, a statement made in a hunting county that the candidate shot a fox or a statement made to promoters of total abstinence that the candidate has taken a glass of wine; but it is essential that it should relate to the personal rather than the political character or conduct of the candidate. The words of the statement will be interpreted according to their real and true meaning and not necessarily according to their literal sense. The question to be determined is what in the circumstances is the true meaning which the reader would place upon a statement. The true meaning will depend on the occasion of the publication, the persons published, the person attacked and the readers intended to be addressed. Vide Halsbury's Laws of England, 4th Edition, Vol.15; paragraph 790, pages 431 - 432.

In the oft quoted case, known as *Cockermouth Division case*, reported in (1901) 5 O.M & H 155 at page 159, 160 (3) Darling J., stated the law thus -

" What the act forbids is this - you shall not make or publish any false statement of fact in relation to the personal character or conduct of the candidate. If you do, it is an illegal practice. It is not an offence to say something which may be severe about another person, nor which may be unjustifiable, nor which may be derogatory, unless it amounts to a false statement of fact in relation to the personal character or conduct of such candidate, and I think the Act says that there is a great distinction to be drawn between a false statement of fact, which affects the personal character or conduct of a candidate and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind, this statute would simply have prohibited all sorts of criticism which was not strictly true relating to the political behaviour and opinion of the candidate. That is why it carefully provides that a false statement, in order to be an illegal practice, must relate to the personal character and personal conduct."

It could be noticed that in prescribing the requirement that the false statement should be in relation to the personal character of the candidate, a distinction is intended to be drawn between the personal character of the candidate and his public or political character. The provision postulates that if a false statement is made in regard to the public or political character of the candidate it would not constitute corrupt practice, even if it is likely to prejudice the prospects of the candidate's election. This inhibition is

probably based on the theory that the electors would not be deceived by a false statement or criticism of the public character or conduct of a candidate. The public and political character or conduct of a candidate is open to public view. Even if any false statement is made about his public conduct or character, the electorate would be able to judge the allegations on the merits and may not be misled by any false allegation on that behalf. But the position with regard to private or personal character or conduct of the candidate is very different. Circulation of false statements about the private or personal character of the candidate during the period preceding the election is likely to work against the freedom of election itself, inasmuch as the effect created by false statements cannot be countered by a denial at proper time and so the constituency has to be protected against the circulation of such false statements which are likely to affect the voting of the electorate. That is why dissemination of false statements about the personal character or conduct of a candidate is made a corrupt practice. The words "personal character or conduct" are clear and do not require further elucidation or definition. The character of a person may ordinarily be equated with his mental or moral nature. Conduct connotes a person's action or behaviour. Hence, for the false statement, to constitute a corrupt practice under section 80 (c) of the Act, it must be in the nature of the disclosure of some private scandal in what one might call the secret life of the candidate and the reference to the personal character or conduct of the candidate attacked must be explicit and derivable from the plain meaning of the words in the document. The reference must not be inferential; an indirect implication does not infringe section 80 (c).

In *Ram Singh vs. Inder Singh* (The Indian Election Cases 1935 - 1950) by H.S.Dhobia, Vol.1,

page 341 (4) the Court observed at page 347:-

" We are not at all impressed by the argument that the statement contains an innuendo to the effect that S. Bhat Singh had been deceiving the electorate. We feel no doubt that if a charge of this kind is made, it must be sustained by a false statement directly relating to the personal character or conduct of the candidate and not one which by indirect implication may be understood as satisfying that mandatory provision of law. The reference to the personal character or conduct of the candidate must be explicit and derivable from the plain meaning of the words used. To hold otherwise would, in our opinion, be to nullify the effect of the qualifying clause "in relation to the personal character or conduct of any candidate" for there is hardly a false statement of fact that can be made, referring to a person, which cannot by a more or less elaborate process of reasoning be shown to contain an indirect reference to the personal character or conduct of that person. The principle underlying this provision of the law appears to us to be that the public character or conduct of a public man or politician is public property and the risk of persons being misled regarding a candidate by a false statement relating to his public or political character and conduct is therefore slight, and is out-weighed by the paramount necessity of allowing free and unfettered public criticism of the public or political acts of public men and politicians. Whilst on the other hand facts relating to the personal character or conduct of such men are, in the nature of things, not generally known and a false statement relating to the personal character or conduct of a candidate may be calculated

seriously to mislead the electors to the prejudice of such candidate."

Though it is clear that the statute wants to make a broad distinction between public character or conduct on the one hand and private or personal character or conduct on the other, a sharp and clear-cut dividing line cannot be drawn distinguishing one from the other. In discussing the distinction between private or personal character or conduct and public character or conduct, sometimes reference is made to the "man beneath the politician" and it is said that if a statement of fact affects the man beneath the politician, it touches his private character and if it affects the politician, it does not touch his private character. There may be some false statement of fact which clearly affect the private character of the candidate; if, for instance it is said that the candidate is a bribe taker, there can be no doubt that the statement is in regard to private character and conduct, and so if the statement is shown to be false it would undoubtedly be a corrupt practice. Vide *Illangaratne vs. G.E. de Silva*, 49 N.L.R. 169 at 172-173 and 179 (5); and *Don Philip vs. Illagaratne*, 51 N.L.R. 561 (6). If the socio-economic policy of the Party to which the candidate belongs is falsely criticised and it is suggested in strong words that the said policy would cause the ruin of the country, that clearly would be criticism, though false, against the public character of the candidate and as such would be outside the purview of the statute. But if a statement alleges that a candidate is buying votes by offering bribes that clearly and unequivocally affects his private character, even though in a sense it is his public character which is falsely criticised. It is idle to contend that it is a false statement only against the public character of the candidate. Having regard to the moral turpitude or personal delinquency involved in the allegation that state-

ment in question certainly affects his private character as well.

Having regard to the propositions enunciated above, can it be said that the impugned statement infringes section 80(c)? There is nothing expressly derogatory of the personal character or conduct of the petitioner. In fact the burden of Mr. Shanmugalingam's submission was that the sting lies in the inference from the statement. Further the reference is to his conduct qua candidate for Presidency, on the occasion of his submitting his nomination papers to the Commissioner in terms of section 13(1) of the Act. The statement does not cast any reflection or aspersion on the honour, veracity or purity of the man beneath the public man; at the worst, it is merely a criticism of the petitioner's public conduct. Such criticism does not come within the mischief envisaged by the law.

Counsel for the petitioner submitted that the impugned statement which is sandwiched between two expressions of opinion, should be considered in its context. He contended that it would have conveyed to the audience the inference that while the President (1st Respondent) was modest, Mr. Kobbekaduwa was arrogant. From the fact that the speaker had described the President's conduct as modest, it does not follow from his omission to comment on Mr. Kobbekaduwa's behaviour that he intended the audience to draw the inference that Mr. Kobbekaduwa was arrogant. No imputation or aspersion is cast when one candidate is praised and nothing is stated about the other. There is no express reference to the personal character or conduct of Mr. Kobbekaduwa. Counsel's submission involves reading an indirect implication in order to bring the statement within the ambit of section 80(c).

In my view the averments relating to the 1st, 2nd, 3rd and 4th charges of corrupt practice under

section 80(c) do not disclose any offence under that section.

SECOND OBJECTION

Illegal Practice

The fifth charge contained in the petition of the petitioner is that of "printing, publishing and distributing the publication 'X' by the third respondent and the United National Party as agents of the first respondent, *without the said publication bearing upon its face the names and addresses of its printer and publisher*" - an illegal practice under section 85 of the Act. This section provides that "a candidate or his agent who prints, publishes, distributes or causes to be printed, published or distributed any handbills etc., which refers to an election under the Act and which does not bear upon its face the names and addresses of its printer and publisher shall be guilty of an illegal practice." The basis of the petitioner's charge is the allegation that the document 'X' does not bear upon its face the name and address of its printer and publisher. This allegation lacks any foundation. For, the document 'X' instead of substantiating this charge negates it. The document 'X' exhibits the statement "Printed at the State Printing Corporation and Published by Pathmasiri of Gothatuwa, Angoda." When confronted with this patent contradiction between the petitioner's averments and the document 'X' Counsel for the petitioner submitted that what was meant was that the document 'X' does not bear the name and address of its true printer and publisher. This ingenious clarification cannot be accepted. The petitioner's averment in his petition and affidavit, that the publication 'X' does not bear upon its face the names and addresses of its Printer and Publisher" does not lend support to this far fetched construction. Petitioner has neither in his petition nor in

his affidavit suggested that the name and address of the Printer and Publisher appearing in document 'X' are false and not the name and address of the true printer and publisher of 'X'. Section 96 of the Act requires the petitioner to state concisely the material facts on which he relies and to set forth full particulars of the illegal practices that he alleges. The petitioner cannot be allowed to depart from his statement of material facts and the particulars of illegal practice set out by him in his petition and amend his petition after the time prescribed by section 102(2). Counsel's explanation involves setting up a new case, diverging from that adumbrated in the petition. Such a course is not permissible. Since there is a sufficient identification of the Printer and Publisher on the publication 'X', the 3rd respondent and the United National Party could, have had it distributed without rendering themselves guilty of illegal practice under section 85 of the Act. The petitioner's charge of illegal practice under section 85 of the Act, does not rest on any basis of fact; the charge, therefore, fails.

Further, neither in the petition nor in his affidavit does the petitioner suggest that the document 'X' refers to the Presidential Election. An ingredient of the offence of illegal practice under section 85 of the Act is that the impugned document must refer to an election under the Act. Ex facie the document 'X' does not refer to the Presidential Election held on 20th October 1982. As stated by Nagalingam, J., in *Don Philip vs. Illangaratne*, 51 N.L.R. 561 at 573 (6).

"Before a document could be said to be one which falls within the class of publication referred to in section 58 (1) (c) of the Parliamentary Elections (Order in Council) 1946 (which corresponds to section 85 of the Act). It must be shown that it either express-

ly or at any rate by implication refers to the election and any document, however mischievous it may be in its effect on the election itself, if it has no reference to the election, though made use of for false propaganda against the candidate at the election, is outside the scope of this section."

Counsel for the petitioner submitted that though the document 'X' does not expressly refer to the Presidential Election, yet by implication it refers to it. In my view to imply such reference one cannot look outside the document. The document must contain the indicia pointing to the Presidential Election. The impugned statement does not satisfy the test. Hence the charge of illegal practice under section 85 fails on this ground also.

Further the agent referred to in the body of section 85 is the election agent or authorised agent of the candidate and not every body who comes within the wide concept of "agent" in election law. It is to be noted that only "the candidate or his agent" who can be found guilty of an illegal practice as referred to in section 85 and not any agent in election law. It is significant that in contrast to section 80 (1) which makes every person who commits any one of those offences referred to there guilty of corrupt practice, section 85 of the Act restricts the persons who can be guilty of illegal practice under it to the candidate or his agent only. The rationale of this limitation is that the election agent acts for the candidate and may be described as his alter ego for the purpose of his election.

Section 58(1)(c) of the unamended Parliamentary Order in Council 1946 made it a corrupt practice for any person to print or publish etc., any handbill which does not bear upon its face the

name and address of it. This section 58(c) was repealed by Act No.6 of 1956. It would appear that at the present stage of the development of Election Law, both under the Parliamentary Elections Act No.1 of 1981 (Section 86) and Presidential Elections Law No.2 of 1981, the candidate or his election or authorised agent alone is now penalised for such printing etc., without the name and address of the printer and publisher. The marginal note to section 85 also supports the restrictive interpretation that the word 'his agent' in the body of the section is confined to election agent and authorised agent of the candidate. It is not the petitioner's case that either the third respondent or the United National Party is the election agent or authorised agent of the 1st respondent. On this ground too the charge is not tenable.

In my view the averments in the petition do not disclose the commission of the offence of illegal practice by the 1st and /or 3rd respondent.

THIRD OBJECTION

Failure to join the U.N.P. as a Respondent

Counsel for the petitioner contended that the word 'person' occurring in the Act referred only to a natural person. Counsel for the respondents on the other hand argued that the word included also an artificial or legal person and an unincorporated body of persons, such as an organisation as the United National Party or the Sri Lanka Freedom Party. Section 2 (c) of the Interpretation Ordinance (Cap. 2) provides that the expression 'person', unless there be something repugnant in the subject or context, "includes a body of persons corporate or unincorporate."

Section 95 (1)(b) makes it mandatory that the petitioner shall join as respondent to his election

petition "any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition."

'Corrupt practice' under the Act, consists of personation, treating, undue influence, bribery and publishing of false statements (vide sections 76-80 of the Act).

Section 80 provides that any person convicted of corrupt practice by the High Court shall, in the case of personation be liable to rigorous imprisonment and in any other case to a fine not exceeding five hundred rupees or to imprisonment and every person so convicted, would become incapable for a period of seven years of being registered as an elector or of voting under the Act.

"Illegal practice" under the Act consists of making certain payments, publication of false statements in any newspaper, certain employment of persons for payment for the purpose of promoting the election of a candidate, and printing or publishing of election publications by the candidate or his agent which do not bear the names and addresses of the printer and publisher (Vide sections 82,85 of the Act).

Section 86 prescribes the punishment for the commission of the offences of illegal practice. It provides :-

"Every person who commits an illegal practice shall on conviction by the High Court be liable to a fine not exceeding three hundred rupees and shall by conviction become incapable for a period of three years from the date of his conviction of being registered as an elector or of voting at an election under this Act."

Counsel for the petitioner opened his case by submitting that only a natural person can commit the offence of corrupt or illegal practice but confronted with the question whether an incorporated company could not commit the corrupt practice of bribery or, being the proprietor of a newspaper, could not commit the illegal practice of publishing false reports in its newspaper he conceded that a juristic person like an unincorporated company can commit such offences. But he persisted in his contention that an unincorporate body like a firm or an organised political party is not a "person" in the eye of the law and cannot be convicted of such offence; as by its very nature, it cannot be registered as an elector or cannot vote and hence cannot suffer the penalty consequent on a conviction for such offence. The argument finds its refutation in the concession that an incorporated company can commit a corrupt or illegal practice. The physical impossibility of making the company suffer the consequent punishment of being deprived of civic rights does not ensure to the benefit of the company and immunise it from liability for corrupt or illegal practice when the punishment theretofor includes a fine. Since fine is the only type of punishment appropriate to an incorporated or unincorporated body, the company or body can be fined for the commission of the offence of corrupt or illegal practice. Where the only punishment for an offence that the Court can impose is corporal, the Court will not stultify itself by embarking on a trial in which if a verdict of guilty is found, no effective order by way of sentence can be made (*R.V.I.C.R. Haulage. (1944) 1 A.E.R. 691 at 693. (7)*). Since a fine can be imposed and recovered from an incorporated or unincorporate body, an allegation of any corrupt or illegal practice can be made against such a body as an organised political party. It is a matter of significance that the punishment for the corrupt prac-

tice of personation is rigorous imprisonment (vide section 80(1)(a)). Neither a corporate nor an incorporate body can commit the offence of personation.

In the instant case, the petitioner, though he has alleged in paragraph 7 of his petition that the third respondent and the United National Party acted as agents of the 1st respondent in the Presidential Election and that they had committed the illegal practice of causing to be printed, published or distributed the publication, 'X' which does not bear upon its face the names and addresses of its Printer and Publisher, had omitted to join the United National Party as respondent.

In view of the peremptory requirement of section 95(1) (b), when an allegation of illegal practice has been made in the petition against the United National Party, the United National Party should have been made a party. It is to be noted that section 96(d) requires that the election petition should set forth the names of the parties alleged to have committed the illegal practice complained of and the petitioner had in compliance with that requirement, stated that the third respondent and the United National Party committed the illegal practice alleged by him.

It is a principle of substantive law that for the preservation of the purity and freedom of elections, the member returned shall be answerable not only for his own acts, but for the acts of his agents whom he puts in his place to represent him in the conduct of the election. Section 91 provides for an election to be avoided on the ground that a corrupt or illegal practice was committed in connection with the election by the candidate or by any agent of the candidate.

An unincorporated body like a political party

can be the agent of a candidate for election purposes. *Don Philip vs. Illangaratne*, 51 N.L.R. 561 at 571 (6).

An association of persons or a society or a Political Party and /or its prominent members, who set up the candidate, sponsor his cause and work to promote his election may be aptly called the "agent" of the candidate for election purposes, A.I.R. 1959 Assam p. 200 at 203, followed in A.I.R. 1961 Rajasthan, 122 at 127

The Presidential Elections Act No.15 of 1981, like the Interpretation Ordinance section 2(c) recognises that a body unincorporate may have a juridical personality. We have reached the point foreseen by Professor Dicey long ago.

"When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted."

Vide Lord Denning in *Willis vs. Association of Universities* (1964) 2 A.E.R. 39 at 42 (8).

A recognised political party though it is a body unincorporate is endowed with a quasi-legal personality and status by the Presidential Elections Act read with the Parliamentary Elections Act No. 1 of 1981. It is identified by the Act as a separate legal entity, apart from its members. It has been enabled to nominate candidates for the Presidential election. Similarly a political party other than a recognised political party is recognised by the Presidential Election Act - vide section 12 and Form 'A' in the First Schedule to the Act. Section 20(1) directs the Commissioner to

allot to the candidate nominated by a recognised political party the approved symbol allotted to that party under the Parliamentary Elections Act, 1981.

Counsel for the petitioner pointed out the procedural difficulty of enabling the United National Party to be joined as respondent to his petition. In our law no action can be brought by or against any party other than a natural person unless such party has been given by statute, expressly or impliedly either a legal person under the name by which it sues or is sued or a right to sue or be sued by that name. A trade union though it is a body unincorporate has thus been enabled to sue or be sued in its registered name. *Bonser vs. Musicians Union*, 1956, A.C. 104 (9). He submitted that a political party cannot, according to rules governing civil procedure, be made a party respondent under its name. The difficulty envisaged by Counsel cannot be allowed to defeat the salutary object of making the party against whom an allegation of corrupt or illegal practice is made a respondent to the petition. Substantive law cannot be jettisoned because of procedural problems. The law is however not so powerless. Presidential election-petition proceedings are sui generis. The rules governing such proceedings are set out in the Fourth Schedule to the Act. Section 105(2) provides for casus omissus; it states that matters not provided for by the Act or by the rules contained in the Fourth Schedule to the Act, shall be dealt with in such manner as the Chief Justice shall direct. In the circumstances, as Counsel for the Respondents rightly pointed out the petitioner could have cited the United National Party as a Respondent and applied for directions from the Chief Justice for the further steps to have the party represented in the proceedings. The provisions of section 96 are mandatory and failure to duly comply with same renders the petition invalid

and a nullity. *Nair vs. Teck* (1967) 2 A.E.R. 34, P.C. (10). *Wijewardena vs. Senanayake* 80 C.L.W. 1 (11) affirmed in appeal in 74 N.L.R. 97.

In this case the petitioner has filed one petition challenging the 1st respondent's election on the grounds that the respondents had committed corrupt and illegal practices and has furnished security on the basis of one petition. The petition has to stand or fall as a single petition and not as an aggregate of petitions depending on the number of grounds of challenge. In the circumstances it is not open to the petitioner to seek to salvage his petition by stating that the failure to join the United National Party as a Respondent against whom the allegation of illegal practice was made avoids only that charge but that the petition is good for the purpose of maintaining the other charges preferred in it. In my view, this course of action is not available to the petitioner; for the vice of the omission to join the United National Party to his election petition which included an allegation of illegal practice against the Party affects the entire petition and renders the entire petition a nullity. Had there been two petitions, one incorporating the charges of corrupt practice and the other the charge of illegal practice the position would have been different; the petition relating to the corrupt practice would have been saved. But, we have only one petition and that petition has not complied with the imperative requirements of section 95.

Counsel then submitted that if the petition does not disclose an offence of illegal practice under section 85 of the Act, then that charge is not a valid charge in law and has to be disregarded and that in that event, the failure to join the United National Party would not, in the circumstances be of any relevance. I cannot agree with this contention. For what section 95 postulates is

an allegation of corrupt or illegal practice and not the establishment thereof. Having made the allegation in his petition, the petitioner cannot make default in complying with the law relating to the allegation whether it is tenable in law or not. I uphold this objection and dismiss the petition on this ground too.

FOURTH OBJECTION

In the affidavit of Randeni Arachchige Sarath Wijesekera, that was attached to the petition, he states in paragraph 3 that on the 17th October 1982 "supporters of the United National Party went about in our area distributing leaflets, handbills and advertisements on behalf of the United National Party candidate Mr. J.R. Jayewardene and gave me a copy of a Ration Book marked 'X'". It was in relation to the publication 'X' that the illegal practice under section 85 is said to have been committed.

Objection is taken that the names of the said supporters of the United National Party, referred to in the affidavit have not been given.

According to paragraph 7 of the petition the illegal practice alleged to have been committed by the 3rd respondent and the United National Party, as agents of the 1st respondent is that "they had committed an illegal practice of causing to be printed, published or distributed the said publication marked 'X', which does not bear upon its face the name and address of its Printer and Publisher." No complaint has been made against the supporters of the United National Party that they had committed any illegal practice.

Section 95 (1)(b) requires only the person against whom an allegation of any illegal practice is made in the petition to be made respondent. Since the petitioner has not made any allegation in

his petition that the said United National Party supporters, had committed any corrupt or illegal practice, they need not have been joined as respondents to the petition. The above averment in Mr. Wijesekera's affidavit was intended to support the allegation in the petition that the United National Party had committed the illegal practice of causing to be distributed the impugned publication 'X'. Though it does not expressly state that the United National Party had caused the said document 'X' to be distributed through its supporters, it is only on that footing that the affidavit can be said to have any relevancy. Section 96 makes a distinction between 'material facts' and 'particulars'. Material facts are those which go to make out the petitioner's case against the respondent. The word 'material' means necessary for the purpose of formulating the charge and if any one material fact is omitted the statement of claim is bad and liable to be struck out. In this case, it cannot be seriously stated that the petition is flawed for want of concise statement of the material facts on which the petitioner relies. The function of particulars is quite different. It is to fill the picture of the petitioner's charge against the respondent with information sufficiently detailed to enable the respondent to become aware of the case he has to meet and to prepare for the trial. An election petition is not liable to be dismissed in limine merely because full particulars of the corrupt practice alleged in the petition are not set out.

Section 97(1) enables the Court to allow the particulars specified in the petition to be amended or amplified in such manner as may in the opinion of the Court be necessary for ensuring a fair and effective trial.

In my view there is no substance in this objection and I reject this objection.

FIFTH OBJECTION

As stated earlier the burden of the petitioner's allegation of illegal practice under section 85 of the Act is that the 3rd Respondent and the United National Party as agents of the 1st Respondent had committed the illegal practice of causing to be printed, published or distributed the impugned publication marked 'X'.

Section 96(d) requires that the petition "shall be accompanied by an *affidavit in support of the allegation of such corrupt or illegal practice* and the date and place of the commission of such practice.

The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. Section 13 of the Oaths and Affirmation Ordinance (Cap.17) furnishes the sanction against a false affidavit by making the deponent guilty of the offence of giving false evidence. In an affidavit a person can depose only to facts which he is able of his own knowledge and observation to testify. It is apparent from a reading of the petitioner's affidavit, that the statement of facts relating to the printing, publication and distribution of the publication 'X' is not testified to by the petitioner from his own knowledge and observation. That is why he has filed the affidavit of Mr. Wijesekera in support of the alleged illegal practice. The illegal practice alleged in paragraph 7 of the petition is that "the 3rd respondent and the United National Party caused to be printed, published or distributed the said publication 'X'. Wijesekera's affidavit does not testify to any of these matters and does not support this allegation. On this view of the matter, there is substance in the objection of respondents

that the petition is not accompanied by the necessary affidavit.

Since the petition does not show that the respondents have committed any corrupt or illegal practice, in connection with the Presidential election, the petition challenging the election of the 1st respondent as President is not warranted in law and is untenable. The petition is, also, not properly constituted in terms of section 95(1) (b) of the Act. I therefore dismiss the election petition of the petitioner and direct the petitioner to pay the 1st respondent Rs. 4500/- and the 2nd and 3rd respondents Rs. 3000/- each as costs of this proceeding.

WANASUNDERA, J., - I agree.

SOZA, J., - I agree.

RANASINGHE, J., - I agree.

Petition dismissed.