

MOHAMED
v.
JAYARATNE AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.,
EDIRISURIYA, J. AND
BALAPTABENDI, J.
CA (EXPULSION) NO. 2003/2001
APRIL 04, 2002

Provincial Council Elections Act, No. 2 of 1988, section 61A (2) – Elected a Councillor as a nominee of PA but remained a member of the SLMC – Expulsion from PA by Secretary of PA – Validity – Deeming member status – Affidavit – Requirements – Is the time limit of two months under section 63 (1) mandatory? – Constitution, Article 126 (5).

The petitioner who is a member of the Sri Lanka Muslim Congress (SLMC) was elected as a Member of the Provincial Council as a nominee of the People's Alliance (PA). The SLMC was a constituent member organisation of the PA. The Secretary of the PA informed the Commissioner of Elections of the expulsion of the petitioner from the PA. The petitioner challenged this decision on the ground that, the Secretary of the PA had no power to expel the petitioner as he is not a member of the PA, but a member of a constituent member organisation (SLMC) of the PA.

A preliminary objection was raised that the affidavit of the petitioner is not a proper affidavit as the petitioner having commenced the affidavit with an affirmation, cannot swear to the contents of the affidavit at the time he set his signature to it (*jurat*).

Held:

- (1) The words used by the petitioner in the opening part of his affidavit manifest his intention to make a solemn and formal declaration. The words used show his consciousness of his fundamental obligation to tell the truth. The use of the word "affirm" in the opening part of the affidavit and the word swear in the "jurat" cannot militate against the manifested intention of the petitioner to make a formal declaration in the discharge of his fundamental obligation to tell the truth.

Held, further –

- (2) The petitioner has the right to challenge the 1st respondent to show the provisions of the Constitution of the PA which conferred power on her to expel

the petitioner. The burden is on the 1st respondent to prove that he or the PA had power to expel the petitioner.

- (3) The 1st respondent has failed to point out the source of his power to expel the petitioner.
- (4) Apart from the fictional deeming membership conferred on the petitioner by the PA Constitution, the petitioner is not a member of the PA in the true sense of the word. The Constitution of the PA did not provide for his expulsion either by the PA or by the Central Executive Committee of the PA or by the leader of the PA or by the Secretary of the PA.
- (5) The time limit of two months set out in the proviso to section 63 (1) of the Provincial Councils Act is directory and not mandatory.

“This does not mean that the Judge will totally disregard the time limit of two months. They will continue to abide by the time limit unless they are prevented from doing so due to unforeseen and unavoidable circumstances.”

APPLICATION under section 63 of the Provincial Council Elections Act, No. 2 of 1988.

Cases referred to :

1. *Ratwatte v. Sumathipala* – (2001) 2 SRI LR 55.
2. CA Application No. 450/92 – CAM 25. 06. 92.
3. *Trico Freighters v. Yang Civil Engineering Lanka Ltd.* – (2000) 2 Sri LR 136.
4. *Sooriya Enterprises (International) Ltd. v. Michel White & Co., Ltd.* SC Spl No. LA 235/94 – SCM 27. 07. 94.
5. CA Application No. 663/92 – CA 17. 11. 1992.
6. *Segu Dawood v. Ms. Ferial Ashroff and Others* – (2002) – 1 Sri LR 26.
7. *Visuvalingam v. Liyanage* – (1985) 1 Sri LR 203.

Faiz Musthapa, PC with *Abdul Najeem* for petitioner.

Wijedasa Rajapakse, PC with *M. L. M .A. Farook*, *Tilaka Bandara Waduressa* and *Rasika Dissanayake* for 1st respondent.

M. M. Sahid for 2nd respondent.

Janak de Silva, State Counsel, for 3rd and 4th respondents.

May 02, 2002

GAMINI AMARATUNGA, J.

The 3rd respondent Commissioner of Elections, acting under section 01 61 A(2) of the Provincial Council Elections Act, No. 2 of 1988, by notification published in *Government Gazette Extraordinary* No. 1075/1 dated 12. 04. 1998 declared that the petitioner Abdul Kader Rawuthar Neina Mohamad has been elected as a Member of the North-Central Province Provincial Council as a nominee of the People's Alliance, a recognized political party.

The People's Alliance (PA) is a recognized political party in terms of the Parliamentary Elections Act, No. 1 of 1981. The PA is an alliance of several recognized political parties. The Sri Lanka Muslim Congress 10 (SLMC) which is a recognized political party was a constituent member organization of the PA. The petitioner is a member of the SLMC. The 1st respondent, secretary of the PA by his letter dated 12. 11. 2001 (P6) informed the petitioner that as it has become clear that the petitioner was acting contrary to the policies and the activities of the PA the petitioner is expelled from the membership of the PA with immediate effect. By letter of the same date the 1st respondent informed the Commissioner of Elections about the expulsion of the petitioner from the PA.

Section 63 (1) of the Provincial Council Elections Act, No. 2 of 20 1978 provides that where a Member of a Provincial Council ceases by . . . expulsion to be a member of a recognized political party. . . or whose nomination paper his name appeared at the time of his becoming such Member of a Provincial Council, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member.

The proviso to section 63 (1) provides as follows:

“Provided that in the case of the expulsion of a member of a Provincial Council his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Court of Appeal by petition in writing and the Court of Appeal upon such application determines such expulsion was invalid.”

Where the Court of Appeal determines that the expulsion was valid the vacancy shall occur from the date of such determination.

The petitioner, in terms of the proviso to section 63 (1) made an application to this court within the prescribed period for a determination that his expulsion was invalid.

When this application came up before us Mr. Wijedasa Rajapakse, PC for the 1st respondent raised a preliminary objection that since the affidavit filed by the petitioner in support of the averments of fact set out in the petition is not a proper affidavit prepared in accordance with the law, the facts set out in the petition are unsupported by evidence and as such the petitioner's application should be dismissed *in limine*. The learned President's Counsel for the 1st respondent made submissions in support of his preliminary objection and Mr. Musthapha, PC, counsel for the petitioner made submissions in reply. After the conclusion of submissions of both President's Counsel, we, having considered all submissions made to us, unanimously decided that the preliminary objection should be overruled. Accordingly, on 22. 02. 2002 we made order overruling the preliminary objection and fixed the application for inquiry on its merits. Having concluded the inquiry we in Part A of this judgment give our reasons for overruling the preliminary objection raised on behalf of the 1st respondent and in Part B we give our decision on the merits of the petitioner's application.

Part A

The submissions of the learned President's Counsel for the 1st respondent in support of his preliminary objection that the affidavit filed

by the petitioner is not a proper affidavit receivable in evidence was made on the following basis. The affidavit commences with the following sentence :

“I Abdul Carder Rawuthar Neina Mohamad of No. 46, Sekkupitiya⁶⁰ Road, Kekirawa, being a Muslim do hereby solemnly, sincerely and truly declare and affirm as follows.”

The jurat of the affidavit reads as follows:

The foregoing affidavit having been read over and explained to the deponent abovenamed and the deponent having understood the contents thereof sworn to and signed at Colombo on this 10th day of December, 2001.”

The learned President's Counsel submitted that the petitioner as a Muslim has a perfect right to elect to affirm or to swear to the contents of the affidavit but having commenced the affidavit with an affirmation he cannot swear to the contents of the affidavit at the time he set his signature to it. The learned President's Counsel submitted that in view of this defect, the affidavit of the petitioner is not a proper affidavit receivable or admissible in legal proceedings. The submission of the learned President's Counsel was that in the absence of a proper affidavit the facts set out in the petition are unsupported by evidence and this unsupported affidavit cannot be the basis for an inquiry under the proviso to section 63 (1) of the Provincial Council Elections Act. In support of his submission about the defect of the affidavit the learned President's Counsel cited the decision of this court in *Ratwatte v. Sumathipala*⁶⁰ and moved that the petitioner's application be dismissed *in limine*.

In *Ratwatte v. Sumathipala (supra)* the deponent who has submitted the affidavit in question has commenced his affidavit by stating that he is a Christian. The jurat entered by the Justice of the Peace stated that the deponent has affirmed. However, Edussuriya, J. (P/CA) did

not reject the affidavit on the discrepancy between the opening sentence of the affidavit and the jurat. Having closely examined many features of the affidavit and different ink used to fill the blanks in the jurat and the ink used by the deponent to set his signature to the affidavit, 90 His Lordship came to the conclusion that the Justice of the Peace did not read and explain the contents of the affidavit to the deponent as he claims he did in the jurat clause nor did the deponent make oath and swear to the contents of the affidavit in the presence of the Justice of the Peace, but that the Justice of the Peace blindly signed an affidavit which had been already signed by the deponent in some other place at some other time without even entering the date. It was for that reason that the affidavit was rejected. Therefore, this case does not support the submission made by the learned President's Counsel for the 1st respondent. 100

The learned President's Counsel for the petitioner sought to meet the preliminary objection on two grounds. His first submission was that there is no requirement laid down in the proviso to section 63 (1) of the Provincial Council Elections Act that a petition under this proviso shall be accompanied or supported by an affidavit. In support of his argument that a petition alone is sufficient to invoke the jurisdiction of the Court of Appeal for a determination under the proviso to section 63 (1) the learned President's Counsel invited our attention to section 98 of the same Act where there is specific reference to petition supported by affidavit. It was the contention of the learned President's Counsel that once jurisdiction of the Court of Appeal under the proviso to section 63 (1) of the Provincial Council Elections Act is invoked by presenting a petition the petitioner is entitled to adduce oral evidence to substantiate the facts set out in the petition. This is an attractive argument but before we deal with it, we wish to consider the second ground urged by the learned President's Counsel to meet the preliminary objection.

The learned counsel submitted that the affidavit of the petitioner is not defective and that it has been prepared in accordance with the

law. The learned counsel submitted that even if there is a defect in ¹²⁰ the affidavit the defect is curable. In support of this contention he cited the decision of this Court in *CA Application No. 450/92*⁽²⁾ where it was so held.

In *Trico Freighters v. Yang Civil Engineering Lanka Ltd.*⁽³⁾ an objection to an affidavit was raised on the basis that the deponent has made an affirmation without stating whether he is Buddhist, Hindu or Muslim. Edussuriya, J. (P/CA) held that under section 5 of the Oaths and Affirmation Ordinance as it stands today it is open to even a Buddhist, a Hindu or a Muslim to make an oath. The Supreme Court in its judgment in *Sooriya Enterprises (International) Ltd v. Michel White and Co. Ltd*⁽⁴⁾ has stated that "the substitution of an oath for an affirmation (or vice versa) will not invalidate proceedings or shut out evidence. The fundamental obligation of a witness or the deponent is to tell the truth and the purpose of an oath or affirmation is to enforce that obligation". Having quoted the above passage Edussuriya, J. held that even though the deponent has made an affirmation without stating whether he is a Buddhist, a Hindu or a Muslim the affidavit is valid in law.

In *CA Application No. 663/92*⁽⁵⁾ the deponent in his affidavit has stated that he was declaring the matters contained in the affidavit ¹⁴⁰ "respectfully, honestly and faithfully". The word affirm had not been used either in the opening part of the affidavit or in the jurat. S. N. Silva, J. (as he then was) with Gunasekera, J. agreeing held that the dictionary meaning of the word affirmation is to make a "formal declaration" and that the words used in the opening paragraph of the affidavit in question satisfied the requirements of a formal declaration. Accordingly, the Court made order admitting the affidavit.

In the instant case the words used by the petitioner in the opening part of his affidavit manifest his intention to make a solemn and formal declaration. The words used show his consciousness of his fundamental ¹⁵⁰ obligation to tell the truth. It was our considered view that the use

of the word affirm in the opening part of the affidavit and the word swear in the jurat cannot militate against the manifested intention of the petitioner to make a formal declaration in the discharge of his fundamental obligation to tell the truth. We accordingly held that the petitioner's affidavit is a valid affidavit sufficient to substantiate the facts set out in the petition.

In view of our decision regarding the validity of the petitioner's affidavit it was not necessary for us to make a decision on the 1st submission of the learned President's Counsel that even in the absence ¹⁶⁰ of an affidavit presented with the petition the petitioner is entitled to adduce oral evidence to substantiate the facts set out in the petition.

For the reasons set out above we overruled the preliminary objection raised on behalf of the 1st respondent and proceeded to hear the main application.

Part B

As we have already set out in part A of our judgment the petitioner is a member of the SLMC which is a constituent member organization of the PA from its inception. The petitioner has produced a copy of the constitution of the PA marked P1. According to section iii Rule ¹⁷⁰ 1 of the constitution of the PA it is a coalition of recognized political parties and independent political organizations which subscribe to the objectives of the alliance and accept its constitution. According to section iii Rule 3 of the PA constitution every member of a constituent member organization shall be deemed to be an individual member of the alliance for the purpose of achieving the aspirations and fulfilling the aims and objectives stated in the PA constitution.

The petitioner was first elected to the North Central Province Provincial Council (hereinafter called NCPPC) at the Provincial Council Election held in 1993. At that election he contested as a candidate ¹⁸⁰ of the SLMC. At the Provincial Council Election held on 6th April, 1999,

he contested as a candidate of the PA and received 12,000 votes and secured the 14th placed in the PA list. However, since the PA was entitled only to 12 seats on the basis of the total number of votes polled by it, the petitioner, who was placed in the 14th position failed to get elected as a Member of the Provincial Council.

The late Mr. Ashraff, the leader of the SLMC by his letter dated 09. 04. 99 addressed to Her Excellency the President who is also the President of the PA requested her to nominate the petitioner to one of the bonus seats the PA was entitled to in the NCPPC to represent¹⁹⁰ the Muslim community of the North Central Province. A true copy of the said letter, certified by the registered Attorney for the petitioner, has been produced marked P3. The learned President's Counsel for the 1st respondent challenged the authenticity of P3 on the basis that it is a copy not signed by Mr. Ashraff. The 1st respondent, in his affidavit has denied the sending of the purported unsigned letter P3 to Her Excellency the President. It is observed that P3, on the face of it, is a communication directly addressed to Her Excellency the President by Mr. Ashraff. It has not been copied to the 1st respondent. In these circumstances we cannot see on what basis and on what²⁰⁰ material the 1st respondent could deny the sending of that letter by Mr. Ashraff to Her Excellency the President. P3 is dated 9. 4. 99. The Commissioner of Elections by notification published in the *Government Gazette* (P4) has declared the election of the petitioner as a Member of the NCPPC under section 61 A (2) of the Provincial Council Elections Act with effect from 12. 04. 99. Therefore, *prima facie* one can see a nexus between P3 and P4. The 1st respondent has not placed any material before this Court to show, if not for the request contained in: P3, on what basis the petitioner was nominated to one of the bonus seats the PA was entitled to in the North Central Provincial Council.²¹⁰ Whatever was the reason for the petitioner's appointment as a Member of the NCPPC, the fact remains that the petitioner has been appointed as a nominee not of the SLMC but of the PA.

The petitioner in paragraph 10 of his petition has stated that at the NCPPC he conducted himself as a Member of the SLMC. In order to substantiate this position he has produced, marked P5, extracts of the minutes of the NCPPC. The 4th respondent, the Secretary of the NCPPC, in his affidavit has admitted that the name of the petitioner appears in the minutes of the NCPPC as a Member of the SLMC but this was due to a mistake made by the reporters who took down the minutes and the correct recording of the minutes should have been a record citing the petitioner name as a member of the PA. 220

Having considered all relevant material, it is our considered view that the petitioner's contention that he functioned in the NCPPC not as a member of the PA but as a Member of the SLMC cannot be accepted as correct. He was declared **elected** to the NCPPC as a nominee of the PA. He has accepted his election to the NCPPC as a member of the PA. There is no doubt that within the PA group he has functioned as a representative of the SLMC. By virtue of paragraph (b) of section VIII of the constitution of the PA which says that "nothing in this constitution shall preclude any individual member of constituent party from functioning fully as a member of such party" the petitioner was entitled to function as a member of the SLMC but he still remained a member of the PA group of the NCPPC. 230

In paragraph 12 of his petition the petitioner has stated that upon the dissolution of Parliament the SLMC decided to become a stakeholder in the United National Front as a combined political force and to contest the Parliamentary Elections held in December, 2001. The petitioner was nominated by the SLMC to contest the Parliamentary elections held in December, 2001, in respect of the Electoral District of Anurādhapurā as a candidate of the United National Party under the banner of the United National Front. 240

The 1st respondent in his affidavit states that the petitioner was lawfully expelled from the membership of the People's Alliance and states further that the petitioner became disqualified to continue to

be a member of the PA or to represent the PA in any institution such as a Provincial Council in view of the fact that he contested in the last General Election from the United National Party which is the main opposition party. Paragraphs 14 and 15 of the 1st respondents affidavit are as follows:

- “14. I state that legal, moral or ethical rights to claim the membership ²⁵⁰ in the Provincial Council from the PA after he had committed a most disastrous damage to the PA by his betrayal conduct as alleged by himself in his petition.”
- “15. I further state that the petitioner’s conduct is amount to gross violation of the People’s Alliance.”

Both averments set out above are incomplete but we presume that what the 1st respondent means to say is that the conduct of the petitioner amounted to a gross violation of the PA constitution and that by his conduct the petitioner has forfeited all legal, moral and ethical rights to continue as a PA Member of the Provincial Council. ²⁶⁰

The contention of the learned President’s Counsel for the petitioner is that the 1st respondent had no power or lawful authority to expel the petitioner from the PA. The learned counsel submitted that the petitioner is not a Member of the PA but a member of a constituent member organization (SLMC) of the PA. He pointed out that according to section iii Rule (3) of the constitution of the PA every member of a constituent member organization shall be deemed to be an individual member of the alliance for the purpose of achieving the aspirations and fulfilling the aims and objectives stated therein. The learned President’s Counsel contended that the “deeming member” status ²⁷⁰ conferred on an individual member of a constituent member organization of the PA is limited to the purposes spelt out in section iii Rule (3) of the PA constitution and does extend to disciplinary control of such member by the PA. The learned counsel pointed out that by section ix Rule 5 disciplinary control of Members of Parliament or Members

of Provincial Councils elected on the nomination of the alliance shall rest with the member organization of which they were members. The counsel argued that in view of the above quoted rule 5 of section 1X disciplinary control of a Member of a Provincial Council elected on the nomination of the alliance is with the member organization of ²⁸⁰ which such person is a member and the secretary of the PA has no disciplinary control over individual members of constituent member organizations of the PA and as such the purported expulsion of the petitioner by the 1st respondent was without lawful authority or any power to expel him.

In order to support his argument that disciplinary control of a member of a Provincial Council can be exercised only by the constituent political organization of which he is a member the learned counsel drew our attention to certain other provisions of the constitution of the PA. Section ix Rule 5(b) states that a member of a constituent member organization ²⁹⁰ of the alliance ceases to be a member of the alliance on his being expelled by the member organization of which he or she is a member. Section ix Rule 5(c) provides that in the event of a Member of Parliament or of a Provincial Council or of a local authority elected on the nomination of the alliance is expelled from the member organization of which he was a member at the time of contesting for such elective office, it shall be the duty of the Secretary of the alliance to forthwith communicate to the Commissioner of Elections or the Secretary of the relevant Provincial Council as may be of the fact of such expulsion as soon as he is informed of such fact by the Secretary-General or ³⁰⁰ the Secretary, as the case may be, of the relevant member organization. Having quoted the above rules the learned President's Counsel submitted that there is no provision in the constitution of the PA which empowers the Secretary of the PA or its Central Executive Committee to expel an individual member of a constituent political organization. It was the contention of the learned President's Counsel that although there is provision in the PA constitution (section ix Rule 2) to expel member organizations of the PA there is no provision which empowers the PA or its Secretary to expel individual members of member organizations

and as such the purported expulsion of the petitioner was null and void and of no force or avail in law. 310

The submission of Mr. Rajapakse, PC on behalf of the 1st respondent was that the petitioner having acted contrary to the letter and spirit of the constitution of the PA has in fact jettisoned it and therefore he cannot now seek to utilise the provisions of the same constitution to argue that the PA has no power to expel him.

Before we deal with Mr. Rajapakse's argument we wish to deal with the question of burden of proof. The 1st respondent in his affidavit (paragraph 11) has admitted that the petitioner was expelled from the membership of the PA. The petitioner has filed this application on the basis that the purported expulsion was invalid. The petitioner in his petition (paragraph 16 (d)) has specifically stated that the 1st respondent had no lawful authority to expel a member of a constituent member organization of the PA. He presented his case on the basis that under the constitution of the PA the 1st respondent or the PA had no power or authority to expel him. In these circumstances the burden is on the 1st respondent to prove that he or the PA had power and authority to expel the petitioner. Apart from a mere admission that the petitioner was expelled from the PA, there is nothing in the 1st respondent's affidavit to show the power or authority he had to expel the petitioner from the PA. The 1st respondent has failed to reveal to this Court the source of his power to expel the petitioner. Even at the hearing before us Mr. Rajapakse, PC was unable to point out the source of the 1st respondent's power to expel the petitioner. Mr. Rajapakse's argument to justify the petitioner's expulsion was that the petitioner who has violated and jettisoned the constitution of the PA has no right to challenge his expulsion on the basis that the constitution of the PA does not provide for the expulsion of individual members of constituent political organizations by the PA. 320 330

We are unable to accept Mr. Rajapakse's argument. The petitioner ³⁴⁰ has the right to challenge the 1st respondent to show the provision of the constitution of the PA which conferred power on him to expel the petitioner.

In *Segu Dawood v. Mrs. Ferial Ashraff and Others*⁽⁶⁾ the petitioner Segu Dawood was a Member of Parliament declared elected as a Member of Parliament by the Commissioner of Elections under Article 99A of the Constitution. The Commissioner of Elections has declared the petitioner as an elected Member of Parliament upon a request made by the Secretary-General of the National Unity Alliance (NUA), a recognized political party within the meaning of section 7 of the Parliamentary Elections Act, No. 1 of 1981. NUA was a political alliance ³⁵⁰ of two political parties, namely The Sri Lanka Muslim Congress (SLMC) and The Sri Lanka Progressive Front (SLPF). The members or the constituent parts of NUA were political parties and it did not accommodate individuals as members. The petitioner at all times was a member of the SLMC.

On 3rd July, 2001, the 1st respondent as the leader of the NUA by letter informed the petitioner that he has been expelled from the membership of the NUA with immediate effect. The petitioner under Article 99 (13) (A) of the Constitution (similar to section 63 of the Provincial Council Elections Act) applied to the Supreme Court for a ³⁶⁰ determination that such expulsion was invalid.

Although NUA nominated the petitioner to be declared elected as a Member of Parliament under Article 99 (A) of the Constitution, he was not a member of the NUA at any time as the NUA did not accommodate individuals as members. At all times he was a member of the SLMC. The Supreme Court held that the petitioner not being a member of the NUA could not be expelled from it and therefore the purported expulsion of the petitioner was invalid since it was null and void and of no force or avail in law.

The facts of the present petitioner's case are similar to the facts of Segu Dawood's case. Like the NUA, the PA had no individuals as members. At all relevant times the petitioner was a member of the SLMC. Since the petitioner was a member of a constituent member organization (SLMC) by virtue of section iii Rule 3 of the PA constitution the petitioner was deemed to be an individual member of the PA for certain purposes specified in the said rule. This deeming member status of the petitioner did not confer on the PA the power to exercise disciplinary control over the petitioner and by virtue of section IX Rule 5 (a) the powers of disciplinary control was vested in the SLMC, the member organization of which he was a member. Apart from the fictional deeming membership conferred on the petitioner by the PA constitution he was not a member of the PA in the true sense of the word. Though he was declared elected as a Member of the North Central Province Provincial Council under section 61 A(2) of the Provincial Council Elections Act as a nominee of the PA, the constitution of the PA did not provide for his expulsion either by the PA or by the Central Executive Committee of the PA or by the leader of the PA or by the Secretary of the PA. Accordingly, the purported expulsion of the petitioner by the Secretary of the PA is invalid on two grounds: 380

- (1) The purported expulsion of the petitioner by the Secretary of the PA from the membership of the PA is invalid as the petitioner was not a member of the PA.
- (2) The purported expulsion of the petitioner by the Secretary of the PA is invalid as there is no provision in the constitution of the PA which empowers the Secretary of the PA or any other person or a body of persons in the PA to expel an individual member of a constituent member organization from the PA. 390

Accordingly, we hold that the purported expulsion of the petitioner was invalid since it was null and void and of no force or avail in law. The purported expulsion by the 1st respondent is of no value and it 400

shall be treated as non-existent for the purposes of section 63 (1) of the Provincial Council Elections Act.

It now remains for us to consider whether the time limit of two months set by the proviso to section 63 (1) of the Provincial Council Elections Act is mandatory or directory. The relevant portion of the proviso to section 63 reads : "Such petition shall be inquired into by three Judges of the Court of Appeal who shall make their determination ⁴¹⁰ within two months of the filing of such petition".

The petitioner presented his petition to this court on 11. 12. 2001. Notices were issued on the respondents on 13. 12. 2001. The 1st respondent did not appear till 14. 02. 2002 due to the non-receipt of notices consequent to the change of his address. Thereafter, arguments relating to the preliminary objection were heard and the order was pronounced on 22. 02. 2002. On three occasions the learned counsel for the petitioner sought postponements of the hearing and on one occasion the Court could not sit due to the non-availability of court staff who had gone for local government election duty. The application ⁴²⁰ was eventually heard on 4. 4. 2002 and we reserved our order for 30. 04. 2002. The journal entries set out what happened on each day.

In *Visuvalingam v. Liyanage*⁽⁷⁾ a Bench of nine Judges of the Supreme Court considered whether Article 126 (5) of the Constitution is mandatory or directory. Article 126 (5) of the Constitution provides that when an application to the Supreme Court for relief against violation of fundamental rights guaranteed by the Constitution has been made "the Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition. . .". The words used in Article 126 (5) to set the time limit ⁴³⁰ are similar to the words used in the proviso to section 63 (1) to set the time limit for the Court of Appeal to make its determination.

The Supreme Court by majority judgment (divided 7-2) held that the provisions of Article 126 (5) of the Constitution are directory and not mandatory. Dealing with the argument that Article 126 (5) is mandatory and that even a fault of the court is no excuse, Samarakoon, CJ. said that "If that right was intended to be lost because the court fails in its duty the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind it was only an injunction to be respected and obeyed but fell short of 440 punishment if disobeyed. I am of opinion that the provisions of Article 126 (5) are directory and not mandatory. Any other construction would deprive a citizen of his fundamental right for no fault of his. While I can read into the Constitution a duty on the Supreme Court to act in a particular way I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control" (pg. 226).

In our view similar observations are applicable in respect of the time limit set out in the proviso to section 63 (1) of the Provincial Council Elections Act for the Court of Appeal to make its determination on the petition presented by an expelled Member of a Provincial Council. 450 Accordingly, we hold that the time limit of two months set out in section 63 (1) proviso of the Provincial Council Elections Act is directory and not mandatory. This does not mean that the Judges will totally disregard the time limit of two months. They will continue to abide by the time limit unless they are prevented from doing so due to unforeseen and unavoidable circumstances.

The 1st respondent shall pay a sum of Rs. 15,000 to the petitioner as costs.

EDIRISURIYA, J. – I agree.

BALAPATABENDI, J. – I agree.

Expulsion held invalid.