SIRIMAVO BANDARANAIKE
v.
RANASINGHE PREMADASA AND CHANDANANDA DE SILVA

SUPREME COURT
G. P. S. DE SILVA, C.J.
P. RAMANATHAN, J.
S. B. GOONEWARDENE, J.
P. R. P. PERERA, J. AND
A. S. WIJETUNGA, J.

PRESIDENTIAL ELECTION
PETITION NO. 1 OF 1989
19 JUNE 1989 TO 30 JUNE 1992

Presidential Election Petition – General intimidation – Non-compliance with provisions of the Presidential Elections Act No. 15 of 1981 – Failure to conduct a free and fair election in accordance with the provisions of the Presidential Elections Act – Presidential Elections Act No. 15 of 1981 ss. 91 (a), 91 (b) – Interpretation of s. 91 (a) – Burden of proof – ss. 101, 102 Evidence Ordinance.

The election to the office of President of Sri Lanka was held on 19 December 1988. There were three candidates namely Sirimavo R. D. Bandaranaike (Petitioner) of the Sri Lanka Freedom Party (SLFP), Ranasinghe Premadasa (1st respondent) of the United National Party (UNP) and Oswin Abeygunasekera of the Sri Lanka Mahajana Party (SLMP). The petitioner received 2289860 or 44.95% of the votes, the 1st respondent 2569199 or 50.43% of the votes and Abeygunasekera 235719 or 4.63% of the votes. The first respondent won by a Majority of 279339 votes. Of the eligible voters 55.32% voted. The 2nd respondent as Commissioner of Elections declared the 1st respondent elected to the office of President of Sri Lanka.

The petitioner by petition filed on 09 January 1989 challenged the election of the 1st respondent on the following grounds.

1. By reason of general intimidation the majority of electors were or may have been prevented from electing the candidate whom they preferred under section 91 (a) of the Presidential Elections Act No. 15 of 1981 (hereinafter referred to as the Act).

2. By reason of non-compliance with the provisions of the Act relating to elections, the election was not conducted in accordance with the principles laid down in such provisions and such non-compliance affected the result of the election under s. 91 (b) of the Act.

3. By reason of "other circumstances" to wit, the failure of the Commissioner of Elections (2nd respondent) and/or certain members of his staff to conduct a free and fair election, in accordance with the provisions of the Act as set out more particularly in paragraph 9 read with paragraph 8 of the petition, the majority of the electors were or may have been prevented from electing the candidate whom they preferred under section 91 (a) of the Act.

The petitioner called 546 witnesses, the 1st respondent 399 witnesses and the 2nd respondent 32 witnesses.

The pivotal question in this case turns on the correct interpretation of section 91 (a) of the Presidential Elections Act which reads as follows:

"The election of a candidate to the office of President shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Supreme Court namely:-

> (a) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred".

This Court in its preliminary order (reported at (1989) 1 Sri LR 420, 261, 270) held that mere proof of the several instances or acts of general intimidation would not suffice to avoid an election. In addition, the petitioner has to prove that these several acts or instances had the result or consequence that the majority of electors were or may have been prevented from electing the candidate whom they preferred. On the basis of instances or acts of general intimidation established by evidence, the Court may draw a reasonable inference therefrom that the majority of electors may have been prevented from electing the candidate of their choice. In a case of general intimidation, the question that arises is – from the proved acts of intimidation of electors is it reasonable to suppose that the result of the election may have been affected? This is the true meaning of the words 'the majority of the electors may have been prevented from electing the

candidate they preferred. But it will be open to the returned candidate to show that the gross intimidation could not possibly have affected the result of the election. Proof of widespread violence directed towards preventing electors from voting was not enough. There was the requirement of proof of an additional and distinct ingredient of the charge that the majority of the electors may have been prevented from electing the candidate whom they preferred.

The petitioner's case was one of preventive intimidation and not coercive intimidation.

In the expression "were or may have been prevented" there is a significant difference between the words "were" and " may have been". The term may was designedly used because mathematical proof that the majority of electors were in fact prevented, in many a case is impossible of attainment. The burden to prove that the majority of electors were in fact prevented is difficult and it is almost impossible to produce the requisite proof.

Held :

(1) (a) The preliminary order made by the Court is binding on the Court. No gloss or deviation from the order is permissible. Further trial proceeded on the basis of the interpretation placed by Court on s. 91 (a) in the preliminary order.

(b) Proof of widespread violence directed towards preventing electors from voting is not enough. Proof is necessary also of the additional ingredient that the general intimidation had the effect that the majority of voters were or may have been prevented from electing the candidate whom they preferred.

(2) In so far as a charge under s. 91 (b) is concerned a Court must reach a finding as to whether the non-compliance affected the result of the election. The Court then must consider the question whether the petitioner would have succeeded but for the non-compliance.

Per G. P. S. de Silva, C.J. "for that purpose evidence of party affiliations would be relevant and admissible, notwithstanding the secrecy provisions would it then be reasonable to say that the secrecy provisions do not apply to sec. 91 (b) and they apply to sec. 91 (a). We think not."

(3) The evidence of group leaders regarding party affiliations is permissible as a mode of proof that the voters were prevented from electing the candidate of

their choice and will not offend the secrecy provisions. The Court may address its mind to the pattern of voter behaviour.

(4) On a careful consideration of the totality of the evidence relating to the charge of general intimidation, it appears that the thrust of the J.V.P. violence was directed against the U.N.P. Between the period 17.09.88 and 19.12.88 (16.09.88 being the date on which the Working Committee of the U.N.P. chose the 1st respondent as the candidate) as many as 413 organisers, office-bearers and supporters of the U.N.P. were killed, and 237 were attacked. The acts of violence against the U.N.P. were spread throughout 80 polling divisions in 15 electorate districts, whereas the anti-S.L.F.P. incidents occurred in 23 polling divisions in 13 electoral districts. Further the incidents against the U.N.P. were spread over a longer period of time. Numerous threats, killings and attacks on local party organisers and office-bearers of the U.N.P. branches at the village level resulted in a serious and irreparable setback to the organization and the campaign of the 1st respondent. In addition there were resignations from U.N.P. branches by office-bearers and even ordinary members consequent upon threats conveyed by letters. Besides, there were threats directed at office-bearers and members of the J.S.S. and large numbers were compelled to resign. The J.S.S. actively supported the U.N.P. at previous elections. It is natural that all this would have had a strong adverse effect on supporters of the 1st respondent at the Presidential election. The oral and documentary evidence establishes that the weight of the J.V.P. intimidation and violence was directed at the U.N.P. and its supporters and this has contributed in no small measure to the low voter turn-out on 19.12.88 (election day.)

(5) The burden of proof however slight it may be is on the petitioner that the acts or instances of intimidation had the requisite effect, namely, that the majority of electors were or may have been prevented from electing the candidate whom they preferred. The petitioner has not succeeded in establishing that the result of the election may have been affected.

Accordingly the charge of "General intimidation" relied on by the petitioner as a ground of avoidance of the election fails.

(6) Per Goonewardene J..."in terms of section 91 (a) of the Presidential Elections Act, an order to avoid an election it must be shown that it was not a free and fair one. It is proved not to be a free and fair election, when it is proved that the majority of the electors were or may have been prevented from electing the

candidate whom they preferred...It is therefore, in my view, vital to the success of the petitioner's case as based upon section 91 (a) of the Presidential Elections Act to prove as the primary requisite, that the majority of electors were or may have been prevented from electing the candidate whom they preferred".

Cases referred to :

1. *Sirimavo Bandaranaike v. Ranasinghe Premadasa and Another* [1989] 1 Sri LR, 240, 248, 249, 250, 258, 259, 261, 263, 264, 268, 269, 270, 281, 282.
2. *Illangaratne v. G. E. de Silva* 49 NLR 169.
3. *Abeywardene v. Ariya Bulegoda* [1985] Sri LR 86.
4. *Jayasinghe v. Jayakody* [1985] 2 Sri LR 77, 89.
5. *Ratnam v. Dingiri Banda* 45 NLR 145.
6. *Pelpola v. R. S. S. Gunawardene* 49 NLR 207.
7. *Tarnolis Appuhamy v. Wilmot Perera* 49 NLR 361, 367, 368.
8. *North Louth Case* (1911) 6 O' M & H 103, 124.
9. *South Meath Case* 40 O' M & H 130, 141.
10. *Woodword v. Sarsons* (1875) LR 10 C.P. 733, 743, 744.
11. *Wijewardene v. Senanayake* 74 NLR 97, 101.
12. *Shiv Charan Singh v. Chandra Bhan Singh and Others* 1988 2 S.C.C. 12.
13. *Hackney Case* (1872) 2 O' M & H 77.
14. Morgan v. Simpson (1974) 3 All ER 722, 725, 726.
15. Anthony v. Seger (1780) 1 Hag. Con 9, 13, (1775 – 1802) All ER 549, 550.
16. *Faulkner v. Elger* (1825) 4 B & C 440.
17. *Ashby v. White* (1704) 1 Bro Parl Cas. 62.
18. *The Drogheda Case* (1869) 1 O' M & H 252.
19. *The Bradford Case* (1869) 1 O' M & H 35.
20. *The Salford Case* (1869) 1 O' M & H 133.
21. *The Stafford Case* (1869) 1 O' M & H 228.
22. *The Nottingham Case* (1869) 1 O' M & H 245.
23. *The Borough of Dudley Case* (1874) 2 O' M & H 115.
24. *North Durham Case* (1874) 2 O' M & H 152.

25. *The Thornbury Division of the Country of Gloucester* (1886) 4 O' M & H 63.
26. *The Lichfield Case* (1869) 1 O' M & H 25.
27. *The Thornbury Case (1886)* 4 O' M & H 65.
28. *The Ipswich Case* (1886) 4 O' M & H 70.
29. *London Joint Stock Bank v. Simmons* (1892) AC 208.
30. *Rex v. Dolan* (1907) 2 Irish Reports 286.
31. *R. v. Chief Constable of the Merseyside Police Ex parte Calveley and others* (1986) 1 All ER 257, 259.
32. *The Dudley Case* (1874) 2 O' M & H 115, 121.
33. *The Bolton Case* (1874) 2 O' M & H 138, 142.
34. *The Norfolk Case* 9 Journ. 631.
35. *The Heyw* Co. 555 (n).
36. *The Morpeth Case* 1 Doug. El. C 1471.
37. *The Pontefract Case* 1 Doug El. C. 377.
38. *The Coventry Case* P & Kn 338, C & R 276.
39. *The New Ross Case* 2 PR & D 188.
40. *The Drogheda Case* W & D 206.
41. *Attorney-General v. Prince Ernest Augustin of Hanover* (1957) 1 All ER 49.
42. *Amoah Ababio v. Turkson* (1954) 1 WLR 509.
43. *Warburton v. Loveland* (1831) 2 D & CL. (HL) 489.
44. *Vashit Narain Sharma v. Dev. Chandra AIR* 1954 S. C. 513, 516.
45. *Paokai Haokip v. Rishang AIR* 1969 S. C. 663, 666, 667.

Election petition challenging election of President

H. L. de Silva, P.C. with *Ranjith Abeysuriya, P.C., R. K. W. Goonesekera, A. A. de Silva, Sidat Nandalochana, Anil Obeysekera, Percy Wickremasekera, S. L. Gunasekera, M. W. Amerasinghe, Nihal Jayamanna, Morris Rajapakse, I. Yoosuf, C. Padmasekera, Suranjith Hewamanna, Neil Rajakaruna, S. Madawalagama* and *Collin Senarath, Nandadeva* instructed by *Nimal Siripala de Silva* for petitioner.

K. N. Choksy, P.C. with *L. C. Seneviratne, P.C., P. Nagendra P.C.; Varuna Basnayake, P.C., Kosala Wijayatilake, P.C., S. C. Crosette Thambiah, Sunil K. Rodrigo, Jehan Cassim, Naufel Abdul Rahman, Daya Pelpola, S. I. Mohideen, Raja Dep, D. H. N. Jayamaha, S. Mahenthiran, Laksman Ranasinghe, Lakshman Perera, A.L.B. Brito Muthunayagam, Ronald Perera, A. A. M. Illiyas, Miss B. Y. Devasurendra, Miss Nilmi Yapa,* instructed *by S. Sunderalingam* for 1st respondent.

P. S. C. de Silva, P.C. Attorney-General, Tilak Marapona, P.C. Solicitor-General, S. Aziz Additional Solicitor-General, K. C. Kamalasabayson, Deputy Solicitor-General, F. N. Goonewardena, State Counsel and *Dhammika Dassanayake, State Counsel* instructed by *U. R. Wijetunge, State Attorney* for 2nd respondent.

Cur adv vult.

1st September, 1992.

G. P. S. DE SILVA, C.J.

On 09th January, 1989, the petitioner Sirimavo R. D. Bandaranaike filed this petition seeking to have the election of Ranasinghe Premadasa, the 1st respondent, to the office of President of Sri Lanka, declared null and void. The election was held on 19th December, 1988. There were 3 candidates, Sirimavo R. D. Bandaranaike of the Sri Lanka Freedom Party (SLFP), Ranasinghe Premadasa of the United National Party (UNP) and Oswin Abeygunasekera of the Sri Lanka Mahajana Party (SLMP). The Commissioner of Elections (2nd respondent) declared the results as follows:-

Oswin Abeygunasekera	235719	4.63%
Sirimavo Bandaranaike	2289860	44.95%
Ranasinghe Premadasa	2569199	50.43%
Valid votes	5094778	
Rejected votes	91445	
Total polled	5186223	
Majority	279339	
Total registered votes	9375742	
Total polled/registered votes		55.32%

By this petition, the petitioner is challenging the election of the 1st respondent on the following grounds:-

(1) that by reason of general intimidation, the majority of electors were or may have been prevented from electing the candidate whom they preferred under section 91 (a) of the Presidential Elections Act No. 15 of 1981 (hereinafter referred to as the Act);

(2) that by reason of non-compliance with the provisions of the Act relating to elections, the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election under s. 91 (b) of the Act;

(3) that by reason of "other circumstances", to wit, the failure of the Commissioner of Elections (the 2nd respondent) and/or certain members of his staff to conduct a fair and free election, in accordance with the provisions of the Act, more particularly set out in paragraph 9 read with paragraph 8 of the petition, the majority of the electors were or may have been prevented from electing the candidate whom they preferred, under section 91 (a) of the Act.

Mr. H. L. de Silva, Counsel for the petitioner, in his closing address abandoned charge (2) above. Therefore in these proceedings we are now concerned only with charges (1) and (3) above. The trial commenced on 19th June, 1989, and concluded on 30th June, 1992. The petitioner called 546 witnesses, the 1st respondent 399 witnesses, and the 2nd respondent 32 witnesses.

The charge of "general intimidation" as a ground or avoidance of the election in terms of section 91 (a) of the Presidential Elections Act No. 15 of 1981:-

Mr. H. L. de Silva for the petitioner commenced his closing address before us with the submission:- " There is in fact I venture to submit but one pivotal question in this case and that turns on the correct interpretation of section 91 (a) of the Presidential Elections Act". Section 91 (a) reads as follows:-

"The election of a candidate to the office of President shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Supreme Court, namely:-

(a) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred."

Mr. de Silva urged that section 91 (a) does no more than reflect the English Common Law and that this was the position right from the days of the Ceylon (State Council Elections Order in Council 1931. The section contained the basic and essential principles of the English Common Law relating to a free and fair election. This was precisely the submission made by Mr. de Silva at the hearing before this Court on the preliminary objections (hereinafter called the preliminary hearing) filed by the 1st and 2nd respondents, moving for a dismissal of the petition *in limine*. It was his submission then (as it was in his closing address) that the expression "general intimidation" is nowhere defined in the Act and that our Courts have hitherto looked to the English Common Law for its meaning. The section is intended to protect the right of the electorate to a free and fair election. The underlying principle is that it is in the public interest that the election should be free and fair. In the English Common Law "general intimidation" has a well-recognised meaning which goes back to the time of Edward III.

In the order made by this Court on the preliminary objection (hereinafter called the preliminary order) the submissions of Mr. de Silva are set out thus:-

"(1) The English Common Law of a 'free and fair election' is what is embodied in s. 91 (a). The expression 'majority of electors were or may have been prevented from electing the candidate whom they preferred' means a majority of persons entitled to vote free of intimidation and other pressures, were prevented or may have been prevented from electing a candidate according to their preferences. **The expression does not impose an additional**

burden on the petitioner. If general intimidation is established, the necessary consequence flows – that the majority were prevented from electing the candidate of their choice. All that the petitioner need establish is general intimidation. Once general intimidation is established, free choice goes." (The emphasis is ours)

"(2) In this view of the matter, it is not necessary to identify the candidate whom the majority of electors would or may have preferred. Moreover, how the voters would have voted under different circumstances is impossible of proof. Unlike in the case of the statutory offence of undue influence where there must be an identification of the individual affected by the intimidation in the case of general intimidation, the identification of victims is difficult and is not necessary. Furthermore, it would violate the principle of secrecy of the ballot which is enshrined in Article 93 of the Constitution which enacts that 'the voting for the election of the President of the Republic shall be free, equal and by secret ballot'. A voter cannot be asked for whom he would have voted, if there was no general intimidation." (1989 1 Sri L. R. 240 at 249 and 250) [1].

The Court then posed to itself the question, "what is the English Common Law regarding the avoidance of elections?" (at page 255) and having considered no less than seven cases dealing with the English Common Law, concluded as follows:-

"From the observations made in the said cases, it seems to us to be clear that at English Common Law, where it was proved that bribery, treating or intimidation were so general and so extensive in its operation that it prevented men of ordinary nerve and courage from going to the poll, whether or not the successful candidate or his agents were responsible for the corruption or violence, the election was set aside on the ground that it was not free". (at page 258).

Thereafter the Court considered the rival contentions of Mr. de Silva and Mr. Choksy:-

> "The question arises whether s. 91 (a) of the Act embodies what Mr. H. L. de Silva, P.C. described as the "pure and unadulterated English Common Law" prior to 1949, or as Mr. Choksy submitted, that in addition to general intimidation etc. something more has to be proved by a petitioner to have an election avoided under s. 91 (a)." (at page 259)

Having cited the cases of *Illangaratne v. G. E. de Silva* [2], *Abeywardene v. Ariya Bulegoda* [3] and *Jayasinghe v. Jayakody* [4] the court expressed its ruling in the following terms:-

> "We agree with Mr. Choksy that more proof of the several instances or acts of general intimidation would not suffice to avoid an election. In addition, the petitioner has to prove that these several acts or instances had the result or consequence that the majority of electors were or may have been prevented from electing the candidate whom they preferred'." (at page 261)

This is a very important finding in the preliminary order. The Court did not accept Mr. de Silva's submission that section 91 (a) reflects no more than the English Common Law. Mr. de Silva contended in his closing address that the Court was in error in reaching this conclusion. Said Mr. de Silva in his closing address "... the Supreme Court has misunderstood what the English Common Law on the subject was and wrongly assumed the requirement of the English Common Law was different. The language in section 91 (a) is in fact a reproduction of the English Common Law prior to 1949 and does not introduce an additional requirement ... What the earlier Bench in the preliminary order erroneously thought to be "additional" is also as much a part of the English Law" (written submissions of Mr. de Silva).

The other crucial question which the Court in its preliminary order posed to itself is, "What is the meaning of the expression 'the majority of electors were or may have been prevented from electing the candidate whom they preferred?" (at page 264). The Court proceeded to consider several decisions, viz. *Ratnam v. Dingiri Banda* [5], *Pelpola v. R. S. S. Gunawardene* [6] *Tarnolis Appuhamy v.*

Wilmot Perera [7], *North Louth* case [8], *South Meath case* [9] and answered the question in the following terms:-

> "So, it seems to us that on the basis of instances or acts of general intimidation established by evidence, the Court may draw a reasonable inference therefrom that the majority of electors may have been prevented from electing the candidate of their choice. In a case of general intimidation, the question that arises is – from the proved acts of intimidation of electors, is it reasonable to suppose that the result of the election may have been affected? This, it seems to us, to be the true meaning of the words" the majority of the electors may have been prevented from electing the candidate they preferred". But, it will be open to the returned candidate to show that the gross intimidation could not possibly have affected the result of the election." (at page 270)

This is a clear, categorical and unequivocal ruling on the key words in section 91 (a) of the Act. It is confined in terms to a "case of general intimidation". At the argument on the preliminary objection much time was spent in elucidating the meaning of these words of critical importance in section 91 (a). Almost all the cases cited by Mr. de Silva in his closing address were cited at the hearing on the preliminary objections. A full and comprehensive argument was presented by both Mr. de Silva and Mr. Choksy. The argument lasted for as long as 17 days in March and May 1989.

At the preliminary hearing Mr. de Silva strenuously contended that section 91 (a) has two constituent elements. First, there must be proof of certain forms of conduct or events of a specific description — general bribery, general treating or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not. The second limb of the section — "the majority of the electors were or may have been prevented from electing the candidate whom they preferred" — connotes the consequences of the conduct or the events specified in the first part of the section. The consequence is to impede or prevent the free exercise of the franchise. The specified forms of conduct or events, on account of their inherent nature, impede or prevent the free exercise of the

franchise. Once it is established that the general intimidation is of a widespread and of an all pervasive character (not of a local or isolated nature) then the inevitable consequence is that the voter's freedom to elect a candidate of his choice is seriously affected. The effect is in-built in the very nature of the forms of conduct or events specifically set out in the section. The Court will draw an inference as to the effect, having regard to the nature of the forms of conduct or events enumerated in the section. This is a matter of legal inference for the Court. In other words what Mr. de Silva stressed was that the effect or the consequence is **not** an independent factor or an additional element ("something more" as stated in the preliminary order). In short, it is not a requirement that has to be proved *aliunde.* These submissions, however, did not find acceptance with the Court in the preliminary order.

Apart from the passages in the preliminary order quoted earlier, the following passage in that order also shows that the interpretation placed on the section by Mr. de Silva did not find favour with the Court –

> "s.91(a) of the Act states that an election will be avoided if it is 'proved to the satisfaction of the Supreme Court that by reason of general intimidation, the majority of electors were or may have been prevented from electing the candidate whom they preferred'. It seems to us that it is for the petitioner to prove that there was widespread violence directed towards preventing electors from voting. But the relief which the petitioner has asked for under s.91(a) of the Act will be granted subject to a finding by the Supreme Court that the general intimidation had the effect, namely, that the 'majority were or may have been prevented from electing the candidate whom they preferred'. It is a conclusion which is placed in the hands of the Supreme Court upon a review of all the evidence." (at page 268)

This passage shows that the view of the Court was that proof of widespread violence directed towards preventing electors from voting was not enough. There was the requirement of proof of an additional and distinct ingredient of the charge. Relief which the petitioner has asked for under section 91(a) of the Act will be granted

subject to a finding by the Supreme Court that the general intimidation had the requisite effect. In the preliminary order the Court cited with approval the opinion of Sharvananda, C.J. in *Jayasinghe v. Jayakody* [4] — "In order to succeed in his petition the petitioner has got to prove a **further ingredient,** viz. that the majority of the electors may have been prevented from electing the candidate whom they preferred ..." (The emphasis is ours)

On the other hand, it was the submission of Mr. de Silva that the second limb of s.91(a) was not intended to impose an additional requirement but it indicates the effect flowing from the "general intimidation". At the preliminary hearing it was the contention of Mr. de Silva that the section postulates "a composite concept" and the latter part of the section sets out "the necessary effect of the unlawful pressures" (to use Counsel's own words). In his closing address Mr. de Silva urged that "by considering this last element to be an addition the Court has unwittingly fallen into error and thought that the Sri Lankan law on this question was in some way different from the English Common Law. That this is not so may be gathered from the unambiguous statement of Nagalingam, J. when he stated the law in *Tarnolis Appuhamy v. Wilmot Perera* [7] There is not even a hint there that our law is any different from the English Common Law — there is no such additional element." (Written submissions of Mr. de Silva).

We have already referred to the ruling in the preliminary order (1989 1 Sri L.R. at 270) as to the meaning of the key words "the majority of electors were or may have been prevented from electing the candidate whom they preferred". Mr. de Silva strongly urged before us that the word "result" when used "in the judicial exposition of s.91(a) means 'the effect' or 'the consequence' which the offensive acts have on the majority of voters' freedom to choose the candidate ... Courts have for convenience, in order to describe the requisite magnitude or the extent to which voters were prevented from voting used the expression 'that the result may have been affected' as a shorthand expression for describing the extent or magnitude of the affectation. But these words are not in fact to be found in the words enacted by Parliament in framing para (a) of s.91. That is only a judicial paraphrase of paragraph (a) ... These words prescribe the

index or the measure of the effect which the law requires the prohibited acts or disabling facts must have on the minds of the voters". (Written submissions of Mr. de Silva)

It appears to us, however, there is not even a hint in the preliminary order that the Court was resorting to what Mr. de Silva calls a "judicial paraphrase" of s.91(a) when the Court ruled that "in a case of general intimidation, the question that arises is — from the proved acts of intimidation of electors, is it reasonable to suppose that the **result of the election may have been affected".** It is not without significance that in the very next sentence the Court proceeded to say in clear, explicit and emphatic terms, "this it seems to us, to be the true meaning of the words 'the majority of electors may have been prevented from electing the candidate they preferred'." Undoubtedly the ruling is in terms that are cogent, precise and unambiguous. There is nothing whatever to suggest in this ruling that the words "prevented from electing the candidate whom they preferred" mean more than saying "prevented from freely exercising the franchise or the right to vote" as contended for by Mr. de Silva.

The expression "result of the election" which occurs in the above ruling of the Court has to be given its plain and literal meaning, for there is no other meaning which could be reasonably attributed, having regard to the rival contentions advanced and the context in which the words are used. Mr de Silva strongly relied on the fact that in the preliminary order the Court expressly held that the "result" contemplated in s.91(b) is "the success of one candidate over the other" citing *Woodword v. Sarsons* [10] but that the Court made no such ruling in respect of its analysis of s.91(a). This, however, does not mean that the Court used the words "result of the election" in a sense other than its natural and ordinary meaning, namely, the **outcome** of the election.

Mr. de Silva drew our attention to two submissions made by Mr. Choksy for the 1st respondent in support of the preliminary objections. These submissions are set out in the preliminary order (1989) 1 Sri L.R. 240 at 248, and read as follows:–

"(1) The petitioner must prove that by reason of general intimidation, a certain result or consequence followed, namely, that 'the majority of electors were or may have been prevented from electing the candidate whom they preferred'. This is an important ingredient of the ground of avoidance in s.91(a) of the Act. If so, the petitioner must identify the candidate whom the majority of electors preferred, but were or may have been prevented from electing by reason of general intimidation.

This is a material fact which the petitioner must prove and if it is a material fact to be proved, then it must be pleaded."

"(2) In addition, the petitioner must plead and prove how the majority of electors were or may have been prevented from electing the candidate whom they preferred. That is, the petitioner must plead and prove that the majority of electors who voted for the 1st respondent were or may have been compelled to vote for him by reason of general intimidation, or that the balance 45% of the electors abstained from voting because of general intimidation, and if they had voted, the reasonable probabilities are that they would have voted for her. This is a material fact which the petitioner must prove, and if so it must be pleaded".

It was the contention of Mr. de Silva that both submissions were rejected by the Court in the preliminary order. We do not agree. This is how the Court in its preliminary order dealt with (1) above – (1989) 1 Sri L.R. 240 at 263.

"s.96(c) of the Act requires that the petition 'shall contain a concise statement of the material facts on which the petitioner relies'. In *Wijewardena v. Senanayake*, [11] H. N. G. Fernando, C.J. observed that this requirement was 'intended to secure that a respondent will know from the petition itself what facts the petitioner proposes to prove in order to avoid the election and will thus have a proper opportunity to prepare for the trial ... The term 'material facts' has a plain meaning in the context of requirements relating to pleadings, namely, facts material to

establish a party's case'. The object of the requirement is clearly to enable the opposite party to prepare his case for the trial so that he may not be taken by surprise. When the petitioner pleaded in paragraph 6(a) of her petition that 'there was general intimidation in consequence of which the majority of the said electors were or may have been prevented from electing the candidate whom they preferred' is there sufficient information given in the petition to enable the 1st respondent to identify the candidate whom the electors were or may have been prevented from electing? In paragraph (1), the petitioner has stated that she was a candidate at the Presidential Election and 'claims to have had a right to be returned or elected at the said election'. The petitioner has set out in paragraph 5 the votes cast for each candidate and that she obtained the second largest number of votes. Could there be any doubt in the mind of the 1st respondent as to the identity of the candidate, who, the petitioner claims, would or may have been returned, but for the general intimidation?"

There is no finding here that it is not necessary for the petitioner to identify the candidate whom the majority of electors preferred but were or may have been prevented from electing by reason of general intimidation. All that the Court held was that on a fair reading of the relevant averments in the petition, the test formulated in *Wijewardena v. Senanayake* (*supra*) was satisfied. In other words the pleadings were sufficient to prevent the opposite party from being taken by surprise. There is certainly no finding by the Court, that the petitioner is relieved of the obligation to show that she was the candidate whom the majority of electors may have preferred but for the intimidation.

As regards (2) above, the Court having held that the petitioner's case is one of "preventive intimidation" (and not "coercive intimidation") and having considered *Rutnam's* case, *Pelpola's case, Wilmot Perera's case (supra)* and the observation of Gibson J. in the *North Louth Case* [8] and of O' Brien J. in *South Meath Case* (*supra*) reached the following finding:– "In Our opinion, how the majority were or may have been prevented from electing the candidate of their choice need not be **specially** pleaded" – at page 268. (The emphasis is ours) In other words the Court was of the view that a

specific or an express plea was not necessary and the plea in the petition in regard to the effect of the general intimidation was adequate. We cannot agree that this finding has any further implication in regard to the ingredients of the charge of general intimidation set out in s.91(a).

The preliminary order has dealt in fair detail with the two local cases relating to a charge of general intimidation, viz. *Ratnam v. Dingiri Banda* and *Pelpola v. R. S. S. Gunawardene* (*supra*). These two cases are important inasmuch as they indicate the approach of the Court to the facts in relation to the requirement of "affectation" of the result. In *Ratnam's* case the contention of the petitioner was that his supporters who were the Indian labourers on the estates were prevented from going to the poll by the supporters of the contesting candidate, M. D. Banda. Upon a review of the evidence Hearne J. expressed his finding in the following terms:– "I hold that there was gross intimidation, that it was widespread in the areas where **Mr. Ratnam had good reason, to count upon heavy voting in his favour,** and that it may well have prevented the majority of the electors from returning the candidate whom they preferred". The words underlined above show that upon the evidence the Court found that there were areas within the electorate where the majority of the electors were supporters of the petitioner, though of course they were prevented from going to the poll. In a narrow and unduly strict sense it could be said that this finding was reached on "opinion evidence". Nevertheless the ultimate conclusion in favour of Ratnam was reached on the basis that the intimidation was widespread "in the areas where Mr. Ratnam had good reason to count upon heavy voting in his favour ....." If Mr. de Silva is correct in his submission that such evidence is opinion evidence and inadmissible hearsay, then Hearne J. could not have found for the petitioner.

Pelpola's case was also a similar case where the Court specifically addressed its mind to the pattern of "voter behaviour". Apart from the fact that the majority of the winning candidate was only 387 votes, the unchallenged position of the petitioner was that over one quarter of the electorate were Indian estate labourers **against whom the intimidation was directed.** There was the evidence of the President of the Ceylon Indian Congress Labour Union Committee of Mosville

Estate that all the Indian labourers had decided to vote for the petitioner. Windham, J. goes on to state: "*It is not unreasonable to suppose that the Indian labourers on the neighbouring* estates ... *had likewise decided to vote for the petitioner* ... Only 514 out of 1427 recorded their votes at the Uduwela polling station ... *Had 400 more persons voted and cast their votes for the petitioner the latter would have won the election*". (The emphasis is ours) Thus it is seen that the decision turned not only on the size of the majority but also on (1) the direction of the intimidation (acts of intimidation against the Indian estate labourers), (2) the probability of the Indian estate labourers voting for the petitioner. In other words, the Court considered the evidence relating to the charge of general intimidation on the basis of how the electors may have voted had they the opportunity of voting – a view of the evidence which Mr. de Silva strongly urged a Court is precluded by law from taking by reason of the secrecy provisions. These provisions no doubt preclude an elector who has voted from being asked for whom he voted. But do they also preclude a witness who claims to be an organizer or an office-bearer of a party branch from stating that the campaign of a candidate was disrupted by certain incidents and that the supporters of that candidate were afraid to go to the poll? We think not. It is very relevant to note that in both *Ratnam's* case and *Pelpola's* case evidence of the party affiliation of the voters in relation to the petitioner was considered and acted upon by the Court. Similar secrecy provisions in regard to the ballot were in operation at that time also, but the evidence was admitted. What is relevant for present purposes is that evidence of party affiliation was allowed as a mode of proof that the voters were prevented from electing the candidate of their choice.

Mr. de Silva vigorously contended that the evidence led on behalf of the 1st respondent of adverse "affectation" of UNP supporters by reason of the JVP terror campaign was based on pure conjecture and speculation; that the Court is precluded from considering such evidence as it is founded on surmise and unpredictable factors. We find, however, that the case for the petitioner, **as presented before us,** was not free of evidence of this kind. A striking example was the evidence of the principal witness for the Anuradhapura electoral district, K. B. Ratnayake, M.P. He said he was the authorised agent of the petitioner for Anuradhapura (East) at the Presidential Election. In examination-in-chief he was questioned as follows:-

Q. Did you expect more votes than what you received at the Presidential election of 1987?
A. Yes.
Q. About how many votes did you expect?
A. I expected a minimum of another 20,000 more votes from my electorate alone.
Q. For what reasons did you expect more votes?
A. After the defeat in 1977 we organized branches and formed women's organizations, youth organizations and enrolled members. We had more than 120 branches in my division alone and there were 8000 registered members and one member from each household generally.
Q. Roughly, how many votes were there in support of the SLFP?
A. Two or three from each family.
Q. Were there any other reasons why you expected more votes to the SLFP?
A. In addition to the organizational strength there was unpopularity on the part of the government party because people could not get what they wanted; due to communal issues there were several killings near the Jayasrimaha Bodhi. This position was aggravated by the Indo-Sri Lanka Accord.
Q. Are there any other reasons?
A. No.
Q. How many more votes did you expect in the entire district?
A. We expected at least another two lakhs more in the Anuradhapura district.

Similarly Pradeep Hapangama, M.P. for the Gampaha district testified to the "enthusiasm among the people for the SLFP in the Mahara electorate"; that he enrolled 4000 members and established about 100 SLFP party branches; that after the attack on the meeting organized by the USA at Kadawata junction on 01.12.88 there was a change in the enthusiasm among the people to work for the SLFP. There was also the evidence of R. M. Jayasena, M.P. for the Kurunegala district who stated that he formed 184 SLFP branches and enrolled about 15300 members for the 1988 Presidential

election. There was the evidence of witness Pina of Yapahuwa who claimed that of the 182 voters in his village all except 2 were members of the local branch of the SLFP of which he was the president. There is also the evidence of Dr. Neville Fernando, M.P. for the Kalutara district. In examination-in-chief he stated as follows:-

Q. You said you expected a very high poll?
A. Yes, but they did not turn up.
Q. Is that the reason for the petitioner to get 28,000 votes?
A. Yes.
Q. Otherwise she would have got over 40,000 votes?
A. Yes.
Q. She received only 28,000 votes?
A. I expected that Mrs. Bandaranaike would get over 40,000 votes.
Q. That was the result of this intimidation caused by the shooting that took place?
A. Yes.

This kind of evidence was led to show that in certain electorates the SLFP had strong support but that the acts of intimidation prevented the party supporters from votng on 19.12.88. The inference to be drawn from the evidence is that but for the violence the SLFP would have received more votes.

There is a further aspect to Mr. de Silva's submission that the Court is precluded from acting upon the evidence led on behalf of the 1st respondent. When Mr. Choksy moved to lead evidence on behalf of the 1st respondent at the conclusion of the evidence led on behalf of the petitioner, Mr. de Silva vehemently opposed it. It was the submission of Mr. de Silva that evidence of incidents outside what is pleaded in the petition is totally irrelevant to the issues that arise in this case. Such evidence could, if at all, only strengthen the case for the petitioner on the charge of general intimidation. Mr. de Silva analysed the constituent elements of s.91 (a) and we find the submissions he made then were substantially the same as the submissions he made before us in his closing address. On the other hand, Mr. Choksy argued that he was entitled to lead evidence of intimidation directed against the supporters of the UNP and his case

was that such intimidation contributed to the low poll at the Presidential election. Upon a consideration of the submissions made by Mr. de Silva and Mr. Choksy, this Court made order on 18.12.90 overruling the objection taken on behalf of the petitioner. In allowing Mr. Choksy to lead evidence of incidents outside the petition this Court made specific reference to the "order we have already delivered in regard to the preliminary objection that was taken at the commencement of these proceedings".

The order made by this Court on the preliminary objections is clearly binding on us, although Mr. de Silva argued that some of the crucial findings therein are erroneous. Having regard to the nature of the preliminary objections that were raised, the Court was called upon to analyse the ingredients of the charge of general intimidation postulated in s. 91 (a). At the hearing on the preliminary objections the foundation of the submissions of Mr. de Silva was that s. 91 (a) embodied the essential principles of the English Common Law relating to a free and fair election. The Court did not accept this contention. The Court ruled on what it considered to be the true meaning of the words "... the majority of electors were or may have been prevented from electing the candidate whom they preferred". This ruling is undoubtedly a part of the *ratio decidendi* of the order and it is not open to us to place a gloss on it or to deviate from it. What is more, we cannot overlook the significant fact that the trial proceeded on the basis of the interpretation placed by the Court on s. 91 (a) in the preliminary order.

One of the important contentions of Mr. de Silva both at the stage when he objected to evidence being led on behalf of the 1st respondent and also in his closing address was that any evidence of an opinion expressed by a witness (be he an office-bearer of a local party branch, a political activist, a local organizer or even an ordinary member of a local branch) as to how others who are supporters of the party would vote is inadmissible for such opinion is based on pure conjecture, surmise and speculation. No one could predict how an elector who could not vote might have voted. In support of this proposition Mr. de Silva relied strongly on a passage from the judgment in *Shiv Charan Singh v. Chandra Bhan Singh and Others* [12] and on the observations of Grove, J. in the *Hackney Case* [13]

which were cited in the preliminary order (1989 1 Sri L.R. 240 at 269 and 270). The passage that was cited in the preliminary order from ***Shiv Charan Singh's*** *case* reads as follows:-

> "The burden to prove this material effect (on the result of the election) is difficult and many times it is almost impossible to produce the requisite proof. Electors exercise their right to vote on various unpredictable considerations, and the Courts are ill-equipped to speculate, guess or forecast by proceeding on probabilities or drawing inferences regarding the conduct of thousands of voters ...". (1989 1 Sri L.R. at 269)

The observation of Grove J. in the *Hackney Case* cited in the preliminary order reads thus:-

> "I cannot see how the Tribunal can by any possibility say, what would or might have taken place under different circumstances. It seems to me a problem which the human mind has not yet been able to solve, namely, if things had been different at a certain period, what would have been the result of the concatenation of events upon the supposed change of circumstances ... " (1989 1 Sri L.R. 270)

The point that is relevant and must be noted is that the Court in the preliminary order cited these two passages when considering the meeting of the expression "were or may have been prevented" in s.91 (a). The court was at pains to point out the significant difference between the words "were" and "may have been". This is manifest from the reasoning of the Court which appears just before the quotation from ***Shiv Charan Singh's*** *Case*. The Court reasoned thus:- "It seems to us that the term 'may' was designedly used because mathematical proof that the majority of electors were in fact prevented, in many a case, is impossible of attainment. The burden to prove that the majority of electors were in fact prevented is difficult and it is almost impossible to produce the requisite proof". (1989 1 Sri L.R. 269) (1). We cannot agree with Mr. de Silva that there is anything in the preliminary order which precludes us from considering the evidence led on behalf of the 1st respondent of acts

of intimidation against his supporters. Indeed the Court overruled this very objection and allowed the 1st respondent to lead such evidence. That order made in these very proceedings is clearly binding on us. As stated earlier, both in *Ratnam's case* and *Pelpola's case* the Supreme Court acted upon similar evidence. As submitted by Mr. Choksy, it was evidence of group leaders of voters that was adduced by the petitioners and acted upon by the Court. And it was on the basis of that kind of evidence that the Court set aside the election in these two cases.

Furthermore, in the preliminary order the Court held that one of the essential ingredients of the charge of "non-compliance" set out in s.91 (b) is that the "result of the election should be affected". At the preliminary hearing Mr. de Silva argued the contrary, but in view of the ruling of the Court Counsel very properly conceded that he cannot maintain the "non-compliance" charge and abandoned it. The resulting position is that in so far as a charge under s. 91 (b) is concerned a Court must reach a finding as to whether the "non-compliance" affected the result of the election. A Court then must consider the question whether the petitioner would have succeeded but for "the non-compliance". For that purpose evidence of party affiliations would be relevant and admissible, notwithstanding the secrecy provisions. Would it then be reasonable to say that the secrecy provisions do not apply to s. 91 (b) but that they apply to s.91 (a)? We think not.

Before we conclude the discussion of the interpretation of s.91 (a) we think it fit and proper to observe that the construction sought to be placed on s.91 (a) by Mr. de Silva is not without attraction. However, there is a definite ruling made by this Court in these same proceedings, after a full argument, a ruling which runs counter to the submissions of Mr. de Silva as we have endeavoured to show. It is scarcely necessary to repeat that this ruling is clearly binding on us.

The facts in relation to the charge of "general intimidation":-

We now turn to the facts as presented by the petitioner and the 1st respondent in respect of the charge of general intimidation. We will consider the averments in the petition, the evidence led in support

thereof by the petitioner, and the evidence adduced by the 1st respondent in respect of each electoral district as set out in the petition.

Electoral District No. 01 – Colombo

Eleven incidents have been pleaded in the petition. The petitioner led evidence in regard to all incidents except the one pleaded in paragraph 7 (i) (g). It is unnecessary to burden this order with details of the evidence given by the several witnesses since Mr. Choksy did not challenge these incidents. It is averred in paragraph (i) (a) that a large number of voters at two polling stations were forcibly prevented from voting but the evidence does not bear out this allegation. The other incidents related to bomb explosions at 4 polling stations; the chief SLFP organizer for Dehiwela was shot at on 17.12.88; explosion of bombs at the SLFP branch at Woodlands Mawatha in the Dehiwela polling division on 19.12.88; the disruption of the meeting at Belekkade junction in the Ratmalana polling division on 16.12.88 by the explosion of bombs when the petitioner was about to address the meeting; 3 persons were killed and 30 injured when bombs were flung at a meeting held on 17.11.88 at Grandpass in support of Mr. Ossie Abeygunasekera.

Mr. Choksy stressed that the evidence did not disclose the killing of any SLFP organizer or supporter. There are 574 polling stations in the Colombo electoral district but the evidence of incidents was confined to 7 polling stations.

As against this evidence, the 1st respondent led evidence of numerous killings, attacks, and threats of UNP organizers, office-bearers of party branches and of supporters in the following polling divisions:- Colombo Central, Colombo North, Homagama, Avissawella, Kolonnawa, Moratuwa, Kotte, Kesbewa, Kaduwela and Maharagama. A very large number of these incidents took place from about mid-September 1988. About 26 office-bearers of local party branches were killed and 87 were attacked. A large number received threatening letters and were compelled to put up banners announcing their resignation from the offices they held in the party branches. They had no alternative but to refrain from engaging in any

political work. Several witnesses produced the threatening letters they had received. Some of the documents, purporting to be from the JVP, stated that the UNP was a party that was banned. (*vide* 1 R 42 and 1 R 43) Some of the Jathika Sevaka Sangamaya (JSS) members who were active in the election campaign were killed and some were attacked. It is in evidence that JSS members actively supported the UNP in the election campaign. It is unnecessary to consider in detail these anti-UNP incidents because the incidents as such were not challenged in cross-examination.

Electoral District No. 02 – Gampaha

Paragraph (ii) (a) of the petition speaks of an attack on the Dharma Salawa polling station No. 27 in the Gampaha polling division on 19.12.88 by a gang of unknown persons. This incident was not disputed by Mr. Choksy.

Paragraph (ii) (b) alleges that unknown persons threw hand bombs at the Ganegoda polling station in the Mirigama polling division. There is no evidence to establish this incident. According to Police Sergeant Hettiarachchi no incident took place at the polling station on the polling day. All that happened was that on the night of 18.12.88 while he was on patrol duty he heard a "loud sound" about 50 yards away from the polling station and he fired in that direction. We accordingly hold that this incident has not been proved.

Paragraph (ii) (c) The incident averred is the throwing of bombs at a meeting held at Kadawata on 1st December 1988 in support of Mr. Ossie Abeygunasekera. Four persons were killed and some others were injured. The incident is admitted. As a result of this incident "a large number of people lost their enthusiasm to work for the SLFP".

There are 13 polling divisions in the Gampaha electoral district. Three incidents in 3 polling divisons are pleaded in the petition. While there are 717 polling stations in the electoral district, the petitioner complains of incidents only at 2 polling stations. There is no allegation of any incident directed against the SLFP. As far as the case for the petitioner is concerned, the evidence of general intimidation in this electoral district is weak.

The case for the 1st respondent, however, stands on a different footing. L. P. Julis, a strong UNP supporter in Dompe who was to have functioned as a polling agent on 19.12.88 was shot dead in his house on 18.12.88; Anthony Almeida, President JSS, Ja-Ela depot, was shot and killed on 14.11.88 at his residence; Hubert Silva, Chief Organizer, Ragama, and President UNP branch Ragama was shot dead on 18.11.88 at this house; S. M. Gunadasa, President JSS, Veyangoda Mills, was killed on 19.11.88. About 9 office-bearers of UNP branches were killed from about mid-September 1988. There were as many as 133 resignations of members of the UNP branches as well as from membership of the JSS on account of threats received from the JVP. Some of these persons were compelled to announce their resignations by inserting advertisements in the newspapers – *vide* 1 R 57A, 1 R 57B, 1 R 52A, 1 R 55A, and 1 R 54A.

Mathew Perera a member of the Western Provincial Council produced the letter 1 R 58. This letter reads thus: "Resignation from offices". "It is an act of treachery to serve the traitorous UNP – Thondaman Government that has betrayed the nation to the Indian imperialists ... Therefore you are hereby ordered to resign forthwith from all the offices you hold. Penalty for defying this order is death. No further notice will be given". There is a postscript which reads: "The UNP is a prohibited party. It is an act of treachery to carry on their propaganda activities ...".

Electoral District No. 03 – Kalutara

The petitioner has pleaded 10 instances of intimidation and has led evidence in respect of 9. The petitioner has also pleaded posters threatening voters in the Agalawatte polling division.

Paragraph (iii) (a) alleges that an SLMP supporter Rev. Premaloka was shot dead at Panadura on 19th December 1988. This incident is not challenged.

The averment in **paragraph (iii) (b)** that a female voter who was on her way to the polling station on 19.12.88 was shot dead is not challenged. Nor is the allegation in paragraph (iii) (c) that a voter at Agalawatte was shot and injured disputed.

The incident pleaded in **paragraph (iii) (d)** is of a very serious nature, and would undoubtedly have deterred many SLFP supporters from going to the poll. It refers to the shooting incident at the house of Dr. Neville Fernando on 18.12.88 at about 10.30 a.m. Eight persons were killed and several were injured consequent upon the shooting.

The item pleaded in **paragraph (iii) (e)** reads as follows:- "A bomb was exploded near the Kaluwamodera polling station No. 43 in Beruwala polling division on 18th December 1988. Roads around polling stations were blocked and Junior Presiding Officers and clerks did not report for duty". We find that there is no evidence of a bomb explosion near the Kaluwamodera polling station. Nor is there evidence that Junior Presiding Officers and clerks did not report for duty. We are satisfied that the incident has not been proved.

In regard to **paragraph (iii) (f)** there is evidence of a bomb explosion near the Andewela polling station No. 30 in the Matugama polling division on 19th December 1988 at about 2 p.m. Voting was suspended for about 15 minutes and went on till 4 p.m. There is, however, no evidence that the explosion caused roads to be blocked.

Paragraph (iii) (g) alleges that the Senior Presiding Officer at Gammana polling station No. 06 in the Agalawatte polling division was shot at and injured in the early hours of the day of the poll, and that several bombs were thrown near the polling station. The evidence of the two witnesses called by the petitioner, namely, Seneviratne and Amerasena does not establish this allegation.

As against this the 1st respondent has led evidence of the killing of about 15 office-bearers of party branches in the Kalutara electoral district from about mid-September 1988. There is the evidence of two strong UNP supporters being killed at Agalawatte on 09.12.88. On 28.11.88 G. Wijesena, Secretary JSS Tibbotuwa branch was killed at his house at night. D. Pathirage, a political activist in Bulathsinghala was shot dead on 10.12.88, as a bundle of UNP manifestos was discovered in his house. H. de Silva, a member of the UNP branch at Waskaduwa North was shot dead on 21.11.88. As a result of this

killing all members of the Waskaduwa North party branch resigned and put up banners. Martin Vithanage, an active JSS member was shot and stabbed to death on 08.11.88 in the Matugama polling division. After the killing a poster was found by the road stating that UNP traitors and stooges are punished with death. His widow and children left the village and did not vote. On 18.12.88 there was a bomb explosion outside the house of Upali Wijekoon, a brother of the President of the local party branch. There were at that time 15 - 20 UNP supporters inside the house. On 19.12.88 20 Tamil estate workers on Delkeith estate in the Agalawatte polling division were intimidated and they did not cast their votes. Anthony Cooray, Vice-President of the UNP Balamandalaya at Beruwela stated in evidence that there were 300 voters at St. Vincent's Home and 90% of them supported the UNP. At the Presidential election, however, only 6 votes were cast.

Electoral District No. 04 – Kandy

In the Kandy electoral district there are 13 polling divisions and 580 polling stations. The petitioner relies on one incident:- Shots were fired by unknown gunmen at voters who had gone to vote at Deliwalatenne polling station (No. 24) in the Kundasale polling division on 19th December 1988. The incident is admitted. Further it is not disputed that the voters were SLFP supporters and that they were unable to cast their votes.

The examination-in-chief of the witness P. Karunadasa called by the petitioner to speak to the incident is of relevance in view of Mr. de Silva's submission in regard to the provisions of law relating to the secrecy of the ballet. Karunadasa was injured by the shooting.

Q. Have you been a supporter of any political party?
A. No. I am a voter of the Sri Lanka Freedom Party.
Q. You said you gave support by voting?
A. Yes.
Q. For which party?
A. It was Sri Lanka party.
Q. What party, what was the symbol?
A. Hand, The leader is Mrs. Bandaranaike.

Q. From when were you a supporter?
A. From 1965 I am a supporter of that party.
Q. You said there were 6 persons who went along with you?
A. Yes, along with me.
Q. Did the others discuss with you where they were going?
A. We all were going to the polling booth.
Q. Did you know to which party they were supporting?
A. Yes, Sri Lanka Freedom Party.

In regard to the submission of Mr. de Silva that the party affiliation of voters is irrelevant, the evidence of witness Dambakotuwa (the SLFP organizer for Kundasale) was that this shooting incident affected voters at other polling stations as well.

Q. After you visited Karunadasa at the hospital did you again go round your electorate?
A. Yes.
Q. You visited the polling stations?
A. Yes.
Q. What did you observe at these polling stations?
A. After getting the information of shooting at Delivalatenna supporters of the SLFP were frightened to come to the polling stations to cast their vote.
Q. Was it only SLFP supporters who were frightened to come and vote because of this incident?
A. Mostly.

It is not without significance that the shooting was at SLFP supporters, and the evidence was that it affected mostly SLFP supporters at the other polling stations as well. The extent of the "affectation" is seen from this evidence.

As against this single incident pleaded in the petition the 1st respondent has led evidence of the killing of about 11 office-bearers and of about 26 other supporters from about mid-September 1988. On 16.12.88 Sarath and Sisira Subawickrema (brothers) were taken out of their house and shot and killed. Sisira was the Secretary of the local UNP branch and Sarath was a member of the branch. On

13.11.88 one Dhanapala a strong UNP supporter was killed. These incidents occurred at the Galegedera polling division. On 07.11.88 Nazeer Jamal, a UNP supporter was shot and killed at his boutique near the Kandy railway station. On 15.12.88 two organizers in two different local areas in the Kundasale polling division (E. N. Gunawardena and D. R. Jayawardene) were killed. On the same day a UNP supporter named Kingsley Jayawardene was killed. On the night of 18.12.88 3 persons named Najeem, Mani and Nisamdeen who were putting up posters and distributing pamphlets for the UNP were assaulted and had to be taken to hospital. On the same day R. W. Vidurusinghe, Secretary of the branch at Putuhapuwa was shot and killed. In the Nawalapitiya polling division on 16.11.88 there was an attempt to kill H. L. P. Tillakaratne, Chairman, Nawalapitiya Urban Council and a staunch UNP worker. Three other UNP supporters who had helped in constructing the stage for a public meeting on 15.11.88 at Nawalapitiya were shot and killed on 16.11.88.

It is in evidence that Tamil workers at Craighead and Monte Cristo estates (in the Nawalapitiya polling division) who were members of the CWC (and who were instructed by the Union to vote for the UNP) were assaulted between10 and 11 a.m. on 19.12.88 and thus prevented from voting. In the Senkadagala polling division 5 persons engaged in putting up posters for the UNP were cut with swords and killed on 18.12.88. H. E. Sumathipala, President of the UNP branch, Morayaya, in the Udu Dumbara polling division was shot and killed on 14.11.88. R. M. Gunathilleke, President of the UNP branch at Telagune in the same polling division was killed on 14.12.88. A UNP meeting at Wattappola in the polling division of Udunuwara was disrupted on 13.12.88 and on the following day Kuda Banda, the President of the UNP branch at Wattappola was killed.

Kamala Randeniya (Secretary of the Kantha Samithiya, Muruthalawa branch in the Yatinuwara polling division) and her husband received threatening letters directing them to resign from all posts held by them in the UNP. On 13.11.88 her brother was killed. Thereafter she and her husband put up posters in front of their house. One such poster dated 15.11.88 marked 1 R 71 was produced. It reads thus:- "We Chandrapala Randeniya and Kamala Randeniya of No. 86 A, Muruthalawa hereby inform the patriotic comrades under oath that effective from 01.11.88 both of us have resigned from

membership and other offices in the UNP and from offices in other organizations and that we will not participate in any political activity whatsoever hereafter".

G. R. Abeysundera, M.P. for the Kandy district stated that during the 1988 Presidential election campaign there were numerous killings of UNP supporters in the Yatinuwara polling division. Further there were threats against persons working for the UNP. A number of them resigned from the party and refrained from election work. It was his evidence that as a result of the threats the party activities in the electorate came to a complete standstill. It was not possible to go out canvassing and only a few supporters were willing to function as polling agents.

Electoral District No. 05 – Matale

Matale electoral district has 4 polling divisions – Matale, Dambulla, Laggala, and Rattota. The total number of polling stations is 170. The petitioner has pleaded 11 incidents and has led evidence on 10 incidents. The petitioner has pleaded threatening posters in all 4 polling divisions.

Paragraph (v) (a) This relates to the attack on the house of the SLFP organizer for Rattota on the night of the 18th of December 1988. This was an incident of a very grave nature. Six persons in the house were killed including the SLFP organizer Wegodapola. The incident was not challenged. It would undoubtedly have frightened voters, particularly the SLFP supporters whose organizer was killed on the eve of polling day.

Paragraph (v) (b) The Madawala Ulpotha polling station was attacked on 19.12.88 while voting was going on and 4 voters were killed. The SPO closed the poll by 12 noon owing to the shooting. The incident is admitted but evidence was led on behalf of the 1st respondent that the voters killed were UNP supporters.

Paragraph (v) (c) No evidence was led in support of the allegation that the Galewela polling station in Dambulla polling division was attacked.

Paragraph (v) (d) The allegation here in that the Kalundawe polling station (No. 40) in the Dambulla polling division was attacked on 19.12.88 while voting was going on and that 2 voters were injured. There is no evidence that the polling station was attacked – *vide* the evidence of V. G. Wijekoon Banda. No officer who functioned at the polling station was called. We hold that this incident has not been proved.

Paragraph (v) (e) It is alleged that the Elamalpotha polling station (No.18) in the Dambulla polling division was attacked on 19.12.88. The evidence does not support this allegation – *vide* the evidence of S. M. Imamdeen who admitted that the polling station was not attacked. We accordingly hold that this incident has not been established.

Paragraph (v) (f) The murder on 17.12.88 of the SLFP organizer for Dambulla, T. B. Kulatunga, was not challenged. Mr. Choksy submitted that Kulatunga's office was a very small one, consisting of only 2 rooms, one of which was used as a boutique. Counsel also stressed that the office was situated by a gravel road in Galahitiyagama which is a small village on the border of Dambulla polling division. These circumstances do not, however, detract from the important fact that Kulatunga was the SLFP organizer for Dambulla and his murder on the eve of the election would undoubtedly have driven fear into the minds of the voters, particularly the SLFP supporters. At one stage of the cross-examination, the fact that Kulatunga was the organizer was challenged but later this was not pursued.

Paragraph (v) (g) The burning of the office of the SLFP at Walawela on 13.12.88 was not disputed. This would have had an adverse effect on the SLFP campaign.

Paragraph (v) (h) The throwing of bombs at the SLFP main office in the Matale town on 16.12.88 at 5 a.m. was also not challenged. This too was an incident which would have affected SLFP supporters.

Paragraph (v) (i) The shooting on 09.12.88 of the President of the SLFP branch at Aluthgama, is not challenged. This incident would have had an adverse impact on the SLFP supporters.

Paragraph (v) (j) The averment here is that:- "posters appeared before the election day warning people not to vote for the SLFP". The evidence of C. W. Abeyratne shows that in Madipola in the Dambulla polling division posters appeared stating "death for supporters of the SLFP". The witness Chandawimala Thera said he saw posters which read "Refrain from voting for the SLFP" in 4 places in the Matale polling division. There is also the evidence of Haniffa Hadjiar to the same effect. We hold that the averment in paragraph (j) has been proved.

Paragraph (v) (k) It is averred here that gangs of unknown persons went from house to house warning persons not to vote. The evidence of O. W. Abeyratne, Upatissa Banda, D. D. Kannangara and Chandawimala Thera establishes this fact.

On a consideration of the above evidence we hold that there was considerable intimidation directed at the SLFP supporters in the Matale electoral district as a result of the killing of 2 SLFP organizers, the attacks on 2 SLFP offices, and the posters specifically warning people not to vote for the SLFP.

The 1st respondent led evidence of resignations of office-bearers in the local party branches and of a very large number of JSS members who were compelled to resign on account of death threats. District Secretary of the JSS (Central Province) Sydney de Soysa said in his evidence that there were about 2500 workers in the 6 C.T.B. depots that fall within the district and that 2150 are members of the JSS. Premasiri, the President of the JSS, Matale depot was shot at in November 1988 and the result was that the election work done by the JSS came to a standstill. Practically all the office-bearers of the 6 depots resigned from their posts. He was questioned as to the kind of political work done by the JSS members during elections. His answer was, "They assist in fixing posters, if there is to be a rally, they help to construct the stage; we organize big meetings. We do in short propaganda work". But at the Presidential election the JSS members were unable to engage in such activities.

The evidence further shows that about 10 office-bearers in party branches and about 15 other supporters were killed from about

mid-September 1988 in the Matale electoral district. On 18.11.88 K. G. Loku Banda a staunch party supporter in the Matale polling division was killed. The treasurer of the Kotuwegedera branch was killed on 22.11.88 and a member of the same branch was shot at in the course of the same incident. A prominent UNP worker M. J. Shahabdeen from Madipola was killed on 17.12.88. On the same day A. L. M. Sarada, chief organizer of Undugoda Palle Siyapattuwa was attacked.

There was evidence of a somewhat unusual incident that took place on 17.12.88 in the Laggala polling division. Biso Menika, a strong UNP supporter was threatened, her hair was cut and was ordered to carry a poster and cycle a distance of 15 miles up to Hettipola and back to her village, passing through 7 villages. She produced the posters (1 R 81 and 1 R 82) and also produced the cut hair in court. The poster reads, "This is the punishment for finding fault with the patriotic comrades". By the 15th of December most of the UNP chief organizers of the Laggala polling division had resigned owing to death threats.

It is unnecessary to enumerate the other incidents relating to the killings of, and attacks on office-bearers and party supporters. There is little doubt that the intimidation directed against the supporters of the 1st respondent was by no means insignificant.

Electoral District No. 06 – Nuwara Eliya

Paragraph (vi) (a) reads thus:- "A large number of voters of Thibbotugoda polling station (No. 21). Rupaha polling station (No.44) in the Walapone polling division were forcibly prevented from voting for the candidate of their choice by gangs of unknown persons who had blocked the access roads to the polling stations". There is the evidence of T. B. Wickremasinghe that a water channel had been diverted across the access road to Thibbotugoda polling station. There were 552 registered voters but only 2 votes had been cast. As regards Rupaha polling station there is no satisfactory evidence to establish that the access road was blocked.

Paragraph (vi) (b) Although the allegation here is that the houses of SLFP supporters were burnt in Beramana village on 04.12.88, the

evidence of the Police officer establishes that only one house of an SLFP supporter was burnt on 07.12.88. This is not challenged.

There are 272 polling stations in the electoral district but the petition refers to incidents in only 2 polling stations. There is no complaint in respect of threatening posters. The voter turn-out at the Presidential election was as high as 79.96%.

Electoral District No. 07 – Galle

Paragraph (ivA) (a) states that for 2 weeks prior to 19.12.88 unknown persons threatened A. M. Karunaratne, SLFP organizer for Ambalangoda and his wife at their house. This is clearly proved by the evidence of Karunaratne and his wife. In fact the incident is admitted.

Paragraph (ivA) (b) alleges that the house of Saman de Silva co-organizer for Ambalangoda was burnt. This incident too is not challenged.

There is evidence of threatening posters in the polling divisions of Ambalangoda, Balapitiya, Bentota-Elpitiya, Karandeniya and Ratgama.

On the other hand the evidence led on behalf of the 1st respondent shows that about 40 office-bearers of party branches were killed from mid-September 1988. B. G. Bandusena, Secretary, Doralla branch, Osmund Jayasooriya, Secretary Youth League, Mahawatte, S. Wimalasooriya, Treasurer, Patabendimulla branch, G. K. Y. Lokuge, Secretary Illukpitiya branch, P. V. Piyadasa, President JSS branch at the Plywood Corporation, Gintota, were all killed in the months of October, November and December 1988. In many instances a poster was found by the body of the deceased stating that the reason for the killing was working for the UNP. In the Balapitiya polling division 5 strong UNP supporters were tied together and killed on 19.11.88. M. M. Nandasena, Secretary UNP branch Nugaduwa in the Akmeemana polling division was killed on 09.11.88. In the Ambalangoda polling division alone 16 office-bearers and supporters were killed between 23.10.88 and 12.12.88. Consequent

upon these killings several local organizers and office-bearers resigned from their posts by displaying banners and putting up posters. The election campaign and the organisation suffered a serious setback. In addition there is evidence of posters specifically directed against the UNP and its supporters in the Ambalangoda, Bentara-Elpitiya, Habaraduwa, Galle, Baddegama, Karandeniya, Balapitiya and Hiniduma polling divisions.

Electoral District No. 08 – Matara

Paragraph (vii) (a) The petitioner relies on one incident, viz. a large number of voters of Buddha Jayanthi polling station (No. 08) of Hakmana polling division were prevented from voting for the candidate of their choice by gangs of unknown persons who had blocked the access roads to the polling station. The petitioner called 2 witnesses (Amaradasa and Sethupala) but their evidence is completely contrary to the allegation in the petition. According to the evidence of the Senior Presiding Officer Amaradasa, he reached the polling station and the road had been cleared. We acordingly hold that the allegation has not been proved.

The petitioner led evidence of intimidatory posters in the polling divisions of Hakmana, Akuressa, Deniyaya, Weligama, Devinuwara and Kamburupitiya. There is one witness, Sumanawathie Pahalage, of Akuressa called by the petitioner to give evidence on posters who admitted in re-examination that the killings affected mostly the UNP and its supporters.

The Matara electoral district consists of 7 polling divisions and there are 358 polling stations. The 1st respondent has led evidence of killings and attacks on his supporters in the polling divisions of Kamburupitiya, Akuressa, Deniyaya, Weligama, Devinuwara and Hakmana. The evidence shows that 53 office-bearers of UNP branches and other supporters were killed between September and December 1988. H. H. Sirisena, President of Ududamana party branch in the Kamburupitiya polling division was shot and killed on 27.09.88 and his head was severed from the body. K. Siyaneris, organizer for the UNP at Diganahena in Akuressa polling division was shot and killed on 15.10.88. M. L. Diyonis, the organizer for

Pahala Maliyaduwa was shot dead on 18.09.88. R. Vettasinghe, Secretary of the Malimbada Youth League was shot dead on 07.12.88. A poster put up after his death stated that he was killed by the JVP because he supported the UNP. On 12.12.88 K. G. W. Rajapaksa, Superintendent of Wilpita State Plantation and a staunch UNP supporter was killed in his office. A. R. Siriwardena, an active UNP worker and a member of the JSS who worked during the Presidential election campaign was stabbed to death on 17.12.88. After his death, posters appeared stating that he was killed because he was a staunch UNP supporter. On the same day another active UNP worker was killed and posters appeared later giving the reason for the killing – that he was a supporter of the UNP. Francis Weeraman, another strong UNP supporter was shot and killed on 18.12.88. After his death posters appeared stating "death is the punishment for traitors who worked for the UNP". It is in evidence that almost all the office-bearers of the JSS branch of Matara C.T.B. depot resigned in October 1988 consequent upon receiving threatening letters. On 09.12.88 R. P. Gamini, Secretary of the Urubokka Bala Mandalaya and an undergraduate of the University of Ruhuna was killed.

V. P. Abeywickrema, a member of the Provincial Council for the Southern Province stated in his evidence that the numerous threats and killings of UNP supporters seriously affected the election campaign and organisational work of the UNP. He further said "all this affected the voting of the UNP supporters at the election". D. A. Wickremasinghe, M.P. for the Matara District also testified to the effect the attacks and the killings had on the election campaign:-

Q. At the time of this Presidential election campaign of 1988 what was the state of the UNP organizations at village level?
A. Our organization had got paralysed at village level because some office-bearers had been killed and some had left the village.
Q. As a result what was the effect of this on the Presidential election campaign of 1988 of the UNP?
A. Our organisational capacity became very much weakened.
Q. Were you able to hold meetings at village level?
A. No ...

Q. Were you able to go house to house canvassing?
A. No.
Q. The normal election work could not be done?
A. That is so.
Q. Were you able to get polling agents?
A. No, we were unable to get.

Electoral District No. 09 – Hambantota

Paragraph (viii) (a) reads thus:- "SLFP organizer (R. Dharmasena) who was in charge of 27 polling stations in the Mulkirigala polling division was shot dead by unknown persons on 15.12.88". This incident has not been challenged. The widow Kusumawathie spoke to the circumstances in which her husband came by his death.

Paragraph (viii) (b) The incident pleaded here is that another SLFP organizer, Dissanayake, who was in charge of 15 polling stations in the Mulkirigala polling division was killed by unknown persons before the elections. This killing too is admitted. It would appear that he was killed on the night of 14th December 1988.

The killing of the SLFP organizers in the Mulkirigala polling division would undoubtedly have had a grave impact on the supporters of the SLFP. The petitioner has also led evidence of intimidatory posters in all the 4 polling divisions in the Hambantota electoral district.

The 1st respondent led evidence of threats, attacks, and a few killings of office-bearers and party supporters during the Presidential election campaign. Harry Abeydeera, M.P. for the Hambantota district testified to the effect of those incidents:-

Q. And for the Presidential election in 1988 could your party organization in Beliatte electorate function at all?
A. No.
Q. Was your UNP organization in the Tissa electorate also able to function for this Presidential election in 1988?
A. No.
Q. In Mulkirigala?
A. No.
Q. And in Tangalla too was the position the same?
A. Yes.

He also referred to the meetings held in support of the 1st respondent at Katuwana on 12.11.88, at Beliatte on 20.11.88 and at Tangalla on 27.11.88, all of which proved to be a failure owing to bomb explosions and shots being fired in the vicinity of the venue of the meetings. At the meeting at Tangalla posters appeared warning people not to attend the meeting. UNP polling agents too were afraid to function at the polling stations in the Hambantota electoral district.

Chamal Rajapakse, M.P. for the Hambantota district called by the petitioner admitted that persons from families who were known to be supporters of the UNP were killed in Walasmulle and Middeniya. This was between 10th November and 19th December 1988. When asked whether the UNP "suffered from the killings of its party supporters and workers", his answer was "that started with the signing of the Accord".

Electoral District No. 15 – Kurunegala

The Kurunegala electoral district has 14 polling divisions and 638 polling stations. At the 1988 Presidential election the voter turn-out for the Kurunegala electoral district was 50.05%. Apart from the incidents set out in the petition, intimidatory posters have been pleaded in 4 polling divisions.

Paragraph (xl) (a) The averment here is that the access roads to the Kudagalgamuwa polling station (No. 10) were blocked and voters were harassed by gangs of unknown persons.

The petitioner called 5 witnesses. Two of these witnesses (R. M. Tilakaratne and R. M. Punchi Banda) remained at Minhettiya which is about 3 miles away from Kudagalgamuwa and could not have known whether the access roads were blocked or not. Witness S. B. M. Ranasinghe had walked from Edandawela to Kudagalgamuwa and denies the existence of road blocks. The only witness who speaks to road blocks is T. M. Ranbanda. It is thus seen that the evidence is of a contradictory nature. We accordingly hold that the allegation has not been proved.

Paragraph (xl) (b) The petitioner led no evidence in regard to the alleged attack on polling station Mahakeliya (No. 06) in Wariyapola polling division.

Paragraph (xi) (c) Polling station Hewanpellessa (No. 25) in the Nikaweratiya polling division was attacked on 19.12.88. This incident has not been challenged.

Paragraph (xi) (d) The allegation is that persons who came to vote at polling station Yayawatte (No. 25) and Galpola (No. 30) were shot at and two voters were killed. The evidence establishes that one voter named Najibudeen was killed at polling station Yayawatte (No. 25). No evidence was led in regard to any incident at polling station Galpola (No. 30).

Paragraph (xi) (e) It is averred that persons who came to vote at polling station Ihala Gomugonuwa (No. 29) were shot at on 19.12.88 and one person died. This incident is admitted and the person who died is Tikiri Banda, a supporter of the SLFP. The incident occurred during polling hours.

Paragraph (xi) (f) On 18.12.88 two SLFP supporters of Nikeweratiya were killed by unknown persons. This incident was not challenged.

Paragraph (xi) (g) On 18.12.88 the house of A. Tennekoon, the SLFP organizer for Nikaweratiya was attacked in the night by unknown persons who threatened him and his family. This incident too was not disputed.

Paragraph (xi) (h) "Four members of the SLFP in the Galgamuwa polling division were brutally killed just prior to the elections". Two witnesses, S. H. Podiratne and Bandula Başnayake were called to speak to this incident. The evidence clearly proves that 4 persons were killed and 3 of them were SLFP supporters.

Paragraph (xi) (i) "A large number of voters in Galgamuwa polling division were threatened by gangs of persons by shooting and other forms of intimidation". There was only one witness, Bandula Basanayake SLFP organizer for Galgamuwa called to testify to this incident. He spoke of a gang of persons attacking his vehicle when passing through a jungle area on his way to a polling station on polling day. There is no evidence to prove the allegation as pleaded

in the petition. We accordingly hold that the incident has not been established.

Paragraph (xl) (j) "A large number of voters in the Hamangalla area in the Katugampola polling division were threatened by gangs of unknown persons coming to their homes and threatening them not to vote, firing shots in the air in the night as well as putting up posters threatening them not to vote". The petitioner called 3 witnesses who asserted that gangs of persons visited their homes and threatened them not to vote. Two of these witnesses however did function as polling agents. We hold that the evidence establishes that voters were threatened between the 15th and 17th of December 1988 not to exercise their vote.

On a consideration of the evidence led on behalf of the petitioner we hold that there was a fair degree of intimidation directed at the SLFP supporters in the Kurunegala electoral district.

As against this, Mr. Choksy for the 1st respondent led a substantial volume of evidence of killings and attacks on organizers, office-bearers and supporters of the UNP. The evidence reveals that there were 62 killings of UNP office-bearers and supporters in the months of September, October, November and December 1988. (up to 19.12.88) in the Kurunegala electoral district. These incidents were of a widespread nature covering 10 out of the 14 polling divisions of the Kurunegala electoral district. Lionel Jayatilaka, a Cabinet Minister, was killed on 26.9.88 and his death frightened office-bearers and members of party branches in Kuliyapitiya. J. S. Jane Nona, Chief organizer, UNP Women's League in Kuliyapitiya was shot at on 02.11.88 and thereafter she left the village. J. A. Nilangaratne, the treasurer of the local party branch and an active worker was killed on 05.12.88. A. W. M. Thaha, President of the local party branch and the leader of the Muslims in the village of Arakyala was killed on 18.12.88. D. M. Abeyratne Banda, the organizer of the Medagamdahaya Korale Bala Mandalaya was shot and killed on 08.12.88. This resulted in office-bearers giving up party work through fear. Three UNP supporters in the Dambadeniya polling division were killed in the same incident on 11.12.88 and the killers had left a poster which stated that they were killed because they worked for the

UNP in their village. In the Dambadeniya polling division several office-bearers who had resigned from their posts in their party branches had displayed banners announcing their resignation. The brother of M. H. B. Wanninayake, M.P. was killed on 12.11.88 in the Nikeweratiya polling division. H. M. A. Loku Banda, M.P. for the Kurunegala district stated that he saw posters in the Galgamuwa polling division saying that the UNP supporters are prohibited from voting. J. Balasuriya, President of the Koswatte party branch in the Panduwasnuwara polling division was killed on 25.11.88. There is evidence to show that there were posters specifically directed at the UNP in the polling divisions of Kuliyapitiya, Wariyapola, Nikaweratiya, Katugampola, Panduwasnuwara, Yapahuwa and Dodangaslanda.

Electoral District No. 16 – Puttalam

The petitioner has pleaded 4 incidents but no evidence was led in regard to two incidents, namely, paragraph (xii) (c) and (d). Evidence was led in respect of paragraphs (a) and (b).

Paragraph (xii) (a) "In the Anamaduwa polling division a Ven. Buddhist monk who is an SLFP supporter was dragged out of his temple in Wadigamangawa and mercilessly assaulted". Witness Karunaratne speaks to the assault on the priest but he says the assault appears to have been on account of his personal conduct and not due to any political activity. We hold that the incident as pleaded has not been proved.

Paragraph (xii) (b):- "Shooting at and intimidation of voters took place at the polling station No.13 (Thalgaswewa) by unknown persons". Wimalasuriya was the witness called to speak to this incident. He said that he heard gunshots around the polling station. No officer who functioned at the polling station was called by the petitioner. There is no record of the alleged shooting in the journal. The 1st respondent called a police officer who was on duty at the polling station and he denied that such an incident took place. The evidence is unsatisfactory and we hold that the alleged incident has not been established.

On the other hand, the 1st respondent led evidence of the killing of 3 office-bearers of party branches in the Puttalam electoral district, in

the month of December 1988. Keerthi Sovis, President of the UNP Youth League, Mahuswewa, was shot dead on 16.12.88. There was a poster beside his body which stated: "This is the punishment for treacherous UNP supporters". Sunil Ananda, Secretary of the local party branch was shot and killed on 17.12.88. A poster was put up stating "Sunil Ananda was killed because he was a stooge of the UNP"; I. B. Fernando, President of the UNP Youth League at Wennappuwa and President of the party branch at Waikkal was killed on 02.12.88.

Electoral District No. 17 – Anuradhapura

Paragraph (xiii) (a) "On 19.12.88 two voters H. F. Mohammed and Carim of Mookiriyawa in the Horawapathana polling division were shot dead by unknown persons". Three witnesses namely, Shahabdeen, Piyadasa and Inspector of Police Ratnayake were called to testify to this incident. The incident is admitted. However, the 1st respondent called a witness named N. Cader who claimed that the two deceased persons were UNP polling agents, killed on their way to the polling station. This belated claim is not acceptable as it was never put to the witnesses called by the petitioner.

Paragraph (xiii) (b) "On 19.12.88 election staff travelling to the polling station at Parangiya Wadiya Ranpathwila in a vehicle were shot at by unknown persons and one Piyadasa was injured in the Horawapathana polling division". The incident is not disputed. Mr. Choksy pointed out that there is no complaint that the polling station did not function on account of this attack.

Paragraph (xiii) (c) "On 19.12.88 election staff travelling in vehicle No. 29 Sri 247 was shot at by unknown persons". The incident is admitted. There is evidence to show that the poll was in fact conducted at the polling station. No one was injured.

Paragraph (xiii) (d) "On 19.12.88 police mobile patrol of S. I. Wijekoon was shot at and attacked. S. I. Wijekoon, the driver and a Home Guard were injured and one Army Private died. This happened in the Medawachchiya polling division". This incident is admitted. It occurred when the vehicle was proceeding in a jungle area.

Paragraph (xiii) (e) "In Kalawewa polling division in the polling station area No. 24 (Katiyaya Yaya) 5 SLFP supporters were killed about 15 days prior to the election day by unknown persons. Twelve days prior to the election day another SLFP supporter was killed and on the day before the election another supporter of the SLFP was killed by unknown persons". The killings are admitted. The allegation that those killed were SLFP supporters is disputed. The evidence of Muthukumarena is sufficient to prove that the 5 persons killed about 15 days prior to the election were SLFP supporters. However, the identity of the other 2 persons killed has not been established.

Paragraph (xiii) (f) "In the polling division of Mihintale unknown persons armed with guns prevented voters from voting at polling station Manewa (No. 22)". The evidence led on behalf of the petitioner does not prove the incident as pleaded. The chief witness was M. Ariyadasa. All that the evidence establishes is that Ariyadasa alone was prevented from proceeding to the polling station by an armed gang of persons who assaulted him. Ariyadasa was an SLFP polling agent.

Paragraph (xiii) (g) "On 19.12.88 polling station No.26 (Kongahawewa) was attacked by unknown persons". No evidence was led to prove this allegation.

The petitioner also led evidence of threatening posters in the polling divisions of Horawapathana, Kekirawa and Mihintale.

The 1st respondent called evidence to establish killings of, and attacks on, organizers, office-bearers and supporters of the UNP in all 7 polling divisions of the Anuradhapura electoral district. The evidence shows that about 39 office-bearers and supporters of the UNP were killed during the period September to December 1988. In the Anuradhapura district there were 7 C.T.B. depots and each had its own JSS branch. On account of threats by the JVP almost all the office-bearers in the JSS resigned. As ordered by the JVP they put up banners stating that they have resigned from the UNP and the JSS. Witness A. Jayatilake, a UNP supporter in Kekirawa polling division said that on 15.12.88 he saw posters put up opposite his house stating "UNP voters will be killed". A. B. Ariyadasa, President of the

UNP Bala Mandalaya, Kalawewa, was killed on 24.11.88. There was a writing near his body which stated that he was killed for working for the UNP. T. M. Abeyratne, an active UNP supporter who addresed several meetings in Anuradhapura East and the adjoining electorates was shot at and injured on 21.11.88. Earlier he had received threatening letters from the JVP. D. Kithsiri, President of the UNP branch, Turuwila, was shot dead in his house on 03.12.88. His family were supporters of the UNP but after his death they refrained from political work. M. B. Basnayake, President of the UNP branch Ottappuwa was killed on 07.12.88. A poster was found near his body stating that death is the punishment for working for the UNP. The evidence also shows that a very large number of office-bearers in the UNP branches resigned and kept away from political work owing to threats from the JVP.

Electoral District No.18 – Polonnaruwa

Paragraph (xiv) (a) "In the polling division of Medirigiriya at polling booth No. 09, Thelawewa, unknown persons opened fire and injured 5 persons on 19.12.88". This incident is admitted but the number of persons injured is 3 and not 5, as is seen from the evidence of the police officers called by the petitioner. Moreover, the 1st respondent called B.K. Guneratne who asserted that the 3 injured persons were UNP supporters. No evidence to the contrary was led by the petitioner.

Paragraph (xiv) (b) "In the polling division of Polonnaruwa a person by the name of J.M. Jayawardena was shot dead by unknown persons on 19.12.88". This incident is not disputed. However, the evidence of Police Inspector Gunasekera called by the petitioner and the evidence of B.K. Gunaratne called by the 1st respondent show that the deceased was a UNP supporter.

Paragraph (xiv) (c) "In the polling division of Polonnaruwa a person by the name of Ariyasena was shot dead on 19.12.88." The incident is admitted. The victim was a supporter of the UNP according to the evidence of Police Inspector de Silva called by the petitioner and also the evidence of B. K. Guneratne called by the 1st respondent.

It would thus appear that on the evidence all 5 victims in the Polonnaruwa electoral district were supporters of the UNP. Even in the pleadings the petitioner did not claim that they were supporters of the SLFP.

As against this, the evidence led on behalf of the 1st respondent reveals that 13 UNP office-bearers and supporters were killed between September and December 1988. W. C. Boyagoda, Secretary UNP branch at Hathamune was shot dead on 23.09.88. Quintus Fernando, President of the UNP branch of Henyaya and member of the Bala Mandalaya was shot and killed in his house on 05.12.88. S. A. Maithripala, Secretary of the UNP branch at Yatigalpatana was killed on 17.12.88.

Electoral District No.19 – Badulla

Paragraph (xv) (a) "In the polling division of Welimada at Weegolla a Senior Presiding Officer was shot dead and a civilian and a police constable were injured on 19.12.88". The incident is admitted. It took place at about 5.10 p.m. after the close of the poll when the vehicle was returning to the Badulla Kachcheri. The ballot boxes were not damaged and were taken to the Badulla Kachcheri for the count. This incident which took place after the poll had no adverse effect on voters.

Paragraph (xv) (b) "In the polling division of Welimada booth No. 30 (Alugolla) and No. 40 (Ohiya) were attacked by unknown persons". The attack on booth No. 30 (Alugolla) is admitted, but there is no evidence of an attack on booth No. 40 (Ohiya). The attack took place at 12.45 p.m. and at that time there were only 3 voters in the queue and they had run away.

Paragraph (xv) (c) "In the polling division of Bandarawela police found 8 persons murdered at Ellethota near the railway bridge on 19.12.88". This incident is not challenged. It was elicited in cross-examination from Police Inspector Jayatissa that all the deceased persons were supporters of the UNP. However, the incident occurred well after the close of the poll and it could not have had any adverse effect on voters.

Paragraph (xv) (d) "Between 3rd and 5th December 1988 in the polling division of Viyaluwa unknown persons in police uniform at Meegahakivula threatened SLFP supporters not to vote on 19.12.88". This incident is not challenged. The evidence indicates that there were houses of UNP supporters also in this village.

Paragraph (xv) (e) In the Bandarawela polling division a bomb was thrown at W. Ratnayake, Chief organizer's (SLFP) residence No. 20, Badulla Road, Bandarawela on 18.12.88". This incident is not challenged.

Paragraph (xv) (f) "The SLFP chief organizer for Passara polling division, D. G. M. Landawela was shot dead on 17.12.88 by unknown persons". This incident is admitted. It would have definitely affected the SLFP supporters adversely in the Passara polling division.

The evidence led on behalf of the 1st respondent shows that during the period September to December 1988 as many as 18 office-bearers of the party branches were killed in the Badulla electoral district. W. M. Amerasekera, President of the UNP branch at Boralanda and a member of the UNP Youth League was killed on 26.09.88. In the same incident a supporter of the UNP called R. M. Jayasena was also killed. R. M. Razak, the UNP organizer for Welimada and Uva Paranagama received a number of threatening letters. He thereafter stopped working for the UNP and left his village ten days prior to 19.12.88. L. M. Muthu Banda, President of the Rilpola Korale UNP branch who had earlier received threatening letters was shot dead on 27.11.88. David Appuhamy, Secretary Bogoda North Bala Mandalaya was killed on 11.12.88. R. M. B. Ratnayake, President of the UNP Youth League, Katugaha branch and President of Deluwina Korale Balamandalaya resigned from the offices he held in November 1988 by publishing a notice and distributing it in the village – *vide* 1R 67. A. J. M. Upasena, President of the Dowa UNP branch and JSS member, Bandarawela, stated that in October and November 1988 three active JSS members were killed. It is in evidence that the JSS worked actively for the UNP at every previous election.

Electoral District No. 20 – Moneragala

Paragraph (xvi) (a) "On 18th December 1988 (unknown persons in uniform) removed SLFP posters and the SLFP office board in Moneragala". This incident is not admitted by Mr. Choksy. The petitioner called H. M. Wijeratne to speak to the incident. He was present on the occasion the board was removed. He admitted that he made no complaint to the police and the reason was that he was afraid to do so. We accept his evidence and we hold that the incident has been proved.

Paragraph (xvi) (b) "Trees were cut down and the road obstructed from Badalkumbura to Passara. Four culverts were damaged and the road from Hingurukaduwa to Badalkumbura was made impassable on 19.12.88". Two witnesses were called by the petitioner, namely, Sugathadasa and Wijekoon. Admittedly Sugathadasa did not go out of his house on 17th, 18th and 19th December and he could not have known anything about the state of the road. Wijekoon claimed that he saw the obstructions on the road but he further stated that he had a suspicion that the posters appearing at the time of the Presidential election were put up by the UNP and that the UNP may have killed their own supporters. His evidence when considered as a whole is unacceptable. We hold that the allegation is not proved.

Paragraph (xvi) (c) "In the Wellawaya polling division when Senior Presiding Officer S. Abeysundera and his staff were proceeding to the polling station (No. 22) Tanamalwila his vehicle was stopped at Baddandiyaya and fired at, Two police officers sustained injuries". The incident is admitted. It occurred on 18th December 1988 at about 8 p.m. There is no evidence that the polling station did not function on 19.12.88.

Paragraph (xvi) (d) "In the polling division of Wellawaya mobile police patrol was attacked on 19.12.88 by unknown persons and 3 police constables were injured". No evidence was led in support of this allegation.

Paragraph (xvi) (e) "In the Moneragala polling division 2 Army soldiers were shot at and injured by unknown persons on 19.12.88".

The incident is admitted. The evidence shows that the election staff travelled in another vehicle and they proceeded to the polling station. The conduct of the poll was not affected by this incident.

Paragraph (xvi) (f) "In the Moneragala polling division, S. I. Silva and party while on mobile patrol were attacked by unknown persons on 19.12.88 and 3 police constables and the driver were injured". The incident is admitted. However, it had no adverse effect on the conduct of the poll because the incident took place on the return journey after the ballot boxes had been taken to the polling station.

Paragraph (xvi) (g) "In the Wellawaya polling division at Buttala, police mobile patrol party was attacked by unknown persons and police sergeant 5060 and a reserve police constable were injured on 19.12.88". This incident is admitted. The evidence establishes that the Senior Presiding Officer and the election staff refused to proceed any further. Neither the ballot box nor the election staff reached the polling station.

Paragraph (xvi) (h) "In the Moneragala polling division

(i) Notices were put up at Moneragala warning people not to vote.
(ii) an unofficial curfew was enforced from 17th December 1988.
(iii) bombs were exploded and guns were fired in the Moneragala town on 19.12.88 morning".

The averments in (i) and (ii) are admitted. As regards (iii) the evidence does not show that the explosion of the bombs and the firing took place in the Moneragala town.

Paragraph (xvi) (i) "In the Wellawaya polling division, the SLFP divisional agent was forcibly prevented from entering the polling station at Weliyara". The incident is admitted. There is no evidence to show that this incident adversely affected voters or the conduct of the poll.

Paragraph (xvi) (j) "In the Wellawaya polling division on 19.12.88 at about 1.30 p.m. P.C. 24217 Abeyratne Banda was on duty at the

polling booth at Yudagamsuwa Junior School, when about 25 armed unknown persons in uniform had entered the polling booth and had robbed the guns of P.C. 24217 and R. P. C. Premeratne having tied the police officers and dashed the ballot box on the floor". The incident is admitted. It is referred to in the petition in respect of the charge of non-compliance".

The evidence adduced by the 1st respondent shows that as many as 35 office-bearers and supporters of the UNP were killed during the months of September, October, November and December 1988, in the Moneragala electoral district. It is in evidence that families of well-known UNP supporters were done to death. D. M. Piyadasa, President of the UNP branch at Weliyaya was killed on 29.10.88. A poster was found near his body stating "death for those who stooge for the UNP". M. M. Loku Bandara, President of the Hulandawa UNP branch was killed on 31.10.88. A poster lying by his body stated "death for those who stooge for the UNP. H. M. Sirisena of the Wellawaya polling division who had served as a UNP polling agent since 1965 was killed on 14.10.88. At the scene of the killing a poster appeared stating "punishment is death for those who support the treacherous UNP". K. D. Keerthiratne, Committee Member of the UNP Youth League at Badalkumbura was shot and killed on 01.12.88. He had earlier received threatening letters asking him to stop working for the UNP, but he had not complied with those orders. A poster appeared later saying that he was punished for working for the UNP.

Electoral District No. 22 – Kegalle

Paragraph (xvii) (a) "In the polling division of Yatiyantota SLFP branch office at Ambanwela was set on fire on 18.12.88". The witness who testified to this incident is Kodikara, the SLFP organizer for Yatiyantota. He stated that he made a complaint to the police but at the inquiry before the A.S.P. he withdrew the complaint. We are of the view that the evidence on record is not sufficient to prove the incident.

Paragraph (xvii) (b) "In the polling division of Rambukkana unknown persons threatened voters and set up explosives around the polling booth at Parape (No. 26) on 19.12.88". It is admitted that sounds of explosions were heard around the polling station, but there

is no acceptable evidence to prove the allegation that voters were threatened.

Paragraph (xvii) (c) "In the polling divisions of Yatiyantota – Deraniyagala on 18.12.88 the SLFP branch offices at Teligama and Kitulgala were destroyed. In Yatiyantota polling booth at Siriwardena Balika Vidyalaya (No. 01) SLFP polling agents were not allowed to attend to their duties". It is admitted that the SLFP branch office at Teligama was destroyed. The evidence of witness Kodikara is sufficient to prove the attack on the SLFP branch office at Kitulgala. There is no satisfactory evidence to prove the allegation that the SLFP polling agents were not allowed to attend to their duties at the Siriwardena Balika Vidyalaya (No. 01).

Paragraph (xvii) (d) It is alleged that in the polling division of Aranayaka, (i) on 05.12.88 the SLFP electoral office at 369, Dippitiya Bazaar at Aranayake was set on fire, (ii) on 08.12.88 the stage constructed for the SLFP mass meeting was set on fire and M. Dayananda of Podapa who was guarding the stage was shot and killed, (iii) the polling station at Wakirigala Raja Maha Viharaya (No.04) was damaged by bombs being thrown at it on 19.12.88 before polling started. All three incidents set out above are admitted.

The evidence discloses that there was a fair amount of intimidation directed against the SLFP in the Kegalla electoral district. No evidence was adduced by the 1st respondent in respect of the Kegalle electoral district.

We have outlined above the facts and circumstances relied upon by the petitioner and the 1st respondent in relation to the charge of general intimidation which is the charge that was pressed before us by Mr. de Silva in his closing address. However, it is right to state here that neither Mr. de Silva nor Mr. R. K. W. Gunesekera made any submissions on the several acts or instances of violence and threats which the 1st respondent claimed were directed at his party and his supporters. Indeed the cross-examination of the witnesses called on behalf of the 1st respondent shows that by and large the incidents as such were not denied. What was suggested was that those incidents had no connection whatever with the Presidential election; the

killings, attacks and threats were not politically motivated. The suggestions however were flatly denied by the witnesses themselves. They remained as mere suggestions wholly unsupported by evidence.

On a careful consideration of the totality of the evidence placed before us relating to the charge of general intimidation, it appears to us that the thrust of the JVP violence was directed against the UNP. Between the period 17.09.88 and 19.12.88 (16.09.88 being the date on which the Working Committee of the UNP chose the 1st respondent as the candidate, according to the evidence on record) as many as 413 organizers, office-bearers and supporters of the UNP were killed, and 237 were attacked. For the same period 32 SLFP organizers, office-bearers were killed and 23 of them were attacked. The acts of violence against the UNP were spread throughout 80 polling divisions in 15 electoral districts, whereas the anti-SLFP incidents occurred in 23 polling divisions in 13 electoral districts. Further, the incidents against the UNP were spread over a longer period of time, having regard to the evidence on record. The evidence reveals that the numerous threats, killings and attacks on local party organizers and office-bearers of the UNP branches at the village level resulted in a serious and irreparable setback to the organisation and the campaign of the 1st respondent. In addition there was considerable evidence of resignations from UNP branches by office-bearers and even ordinary members.

These resignations were consequent upon threats conveyed by letters. Several of these threatening letters were marked in evidence; letters which called upon the people not to work for and support the UNP – *vide* 1R 41. The document 1R 42 refers to the UNP as a "banned party", "orders" office-bearers and members to resign from "this traitorous organisation". and upon failure to do so "sentence of death would be carried out". 1R 43 is another significant document which bears the heading "Banning of the United National Party". It reads thus:- "The United National Party which has been traitorous to the motherland is banned with immediate effect. All members are required to resign from membership and from all the offices they hold. All persons should cease to lend any kind of support to the

banned UNP. Death for those who violate the above conditions – Joint Commanding Headquarters of the Patriotic Peoples' Armed Troops". These documents single out the UNP as the target of attack. Besides, there were threats directed at office-bearers and members of the JSS and large numbers were compelled to resign. It is in evidence that the JSS actively supported the UNP at previous elections. Many of those who were ordered to resign from the party or the JSS were also directed to put up "banners" and notices in public places announcing their resignations – *vide* 1R 95, 1R 109, 1R 129, 1R 138, 1R 147, 1R 148, 1R 150, 1R 151, 1R 155, 1R 160, 1R 162, 1R 163, 1R 164 and 1R 167. It is natural that all this would have had a strong adverse effect on supporters of the 1st respondent at the Presidential elections. We are satisfied that the oral and documentary evidence on record establishes that the weight of the JVP intimidation and violence was directed at the UNP and its supporters and this has contributed in no small measure to the low voter turn-out on 19.12.88.

There is another relevant matter to which we must refer. Mr. Choksy drew our attention to paragraph 05 of the petition wherein it is averred that according to the results declared by the Commissioner of Elections, the majority by which the 1st respondent won is 279339 votes. It was the submission of Counsel that even if the petitioner got one more vote than the majority obtained by the 1st respondent she could still not have been declared elected. Mr. Choksy contended that the petitioner in order to win had to get the total votes received jointly by the UNP and the SLMP plus one more vote. Thus she would have had to get 515059 more votes than she polled in order to have succeeded at the election. It appears to us that this submission is well-founded.

The question then is, upon a review of all the evidence, whether the acts or instances of intimidation had the requisite effect, namely, that the "majority of electors were or many have been prevented from electing the candidate whom they preferred". In the preliminary order this Court has already ruled on the "true meaning" of these words in s.91 (a). The burden of proof is clearly on the petitioner in terms of s.91 (a). However slight that burden may be, (having regard to the

use of the words "were or may have been prevented") yet the burden of proof remains on the petitioner. We do not agree with Mr. de Silva's contention that the word "may" also envisages the existence of "may not" and is not inconsistent with it. The petitioner cannot leave this important ingredient of the charge in doubt and yet claim that the burden has been discharged. Considering all the evidence in the case, we hold that the petitioner has not succeeded in establishing that the "result of the election may have been affected (1989 1 Sri L.R. 240 at 270)[1]. Accordingly, the charge of "general intimidation" relied on by the petitioner as a ground of avoidance of the election fails.

We wish to make it clear that in arriving at the above conclusion we have not taken into consideration the results of the Parliamentary election held in February 1989, although this was an item of evidence very strongly relied on by Mr. Choksy. It was the contention of Mr. Choksy (i) that the evidence shows that there was less violence at the Parliamentary election in February 1989 than at the Presidential election of 1988, (ii) consequently there was a larger voter turn-out at the Parliamentary election, (iii) a comparison of the results of the December 1988 Presidential election and the Parliamentary election of February 1989 shows that the bulk of the "extra votes" cast in February 1989 were in favour of the UNP; this proves that it was the UNP that stood to gain when there was a decline in the violence. However, as pointed out by Mr. R. K. W. Gunasekera, the evidence to establish that there was less violence in February 1989 is of a tenuous nature. At the Parliamentary election there were a fair number of parties and a large number of candidates. Some of the parties and "independent groups" did not "field" candidates on an islandwide basis. And more importantly, this was an election held **subsequent** to the Presidential election where the 1st respondent had already been declared elected. Having regard to all the circumstances, we agree with the submission of Mr. Gunasekera that it is quite unsafe to draw any conclusions from the results of the Parliamentary election of February 1989, notwithstanding its proximity in time to the Presidential election.

The charge relating to "other circumstances" as a ground of avoidance of the election under Section 91 (a) of the Act:-

We now turn to the only other ground of avoidance relied on by the petitioner. It is founded on s.91 (a) and is set out in the petition in the following terms:-

> "that by reason of **other circumstances** to wit, the failure of the Commissioner of Elections (the second respondent) and/or certain members of his staff to conduct a fair and free election, in accordance with the provisions of the Presidential Election Act No. 15 of 1981, more particularly set out in paragraph 9 read with paragraph 8 hereof, the majority of the said electors were or may have been prevented from electing the candidate whom they preferred".

At the preliminary hearing the respondents filed objection to this ground of avoidance and contended that matters relied upon as consisting non-compliance with the provisions of the Presidential Election Act and as grounds for avoiding the election under s. 91 (b) cannot, as a matter of law, be included as a ground for avoiding the election under s.91 (a). The Court considered this contention in the preliminary order and overruled the objection. The Court reasoned thus:- "In paragraphs 9 and 10 of the petition the petitioner seeks to rely on the instances enumerated under the head of non-compliance with the provisions of the Election Law as "other circumstances" and pleads that by reason of their occurrence, the "majority of electors were or may have been prevented from electing the candidate whom they preferred". In other words, the petitioner is also seeking to avoid the election on the ground of avoidance set out in s.91 (a) of the Act, relying on non-compliance with the provisions of the Election Law... The words 'other circumstances' are wide enough to include instances of non-compliance with the law relating to the conduct of elections. The petitioner was therefore entitled to plead instances of non-compliance to sustain a charge under s.91 (a) of the Act". (1989 1 Sri L.R. 240 at 281 and 282)[1]. This ruling is very clear and is binding on us. The trial proceeded on the basis of this ruling.

Mr. de Silva, however, in his closing address deviated from this ruling and submitted that the "other circumstances" on which he relies consists not only of the instances of "non-compliance" but also of acts of general intimidation. In his written submissions counsel stated:- "The 2nd ground on which avoidance of the election is also sought to be founded on the same legal provisions, viz. s. 91 (a) but rests on a somewhat different factual basis. The factual basis here is composed of a combination of the acts of "general intimidation" referred to in paragraph 7 of the petition and the 'other facts and circumstances' referred to in paragraph 9 read with paragraph 8. The contention is that when the acts of general intimidation are taken in conjunction with the evidence of the breakdown of electoral machinery in various parts of the Island ... they together constitute the cause for the majority of voters being prevented from electing the candidate of their choice. In a sense therefore there has been an interaction of causes...". This ground of avoidance was not formulated on the above basis in the petition and this clearly is not the way in which it could have been understood by the respondents having regard to the ruling in the preliminary order. We are therefore of the view that the petitioner cannot be permitted to present a case (at the stage of the closing address) which was not pleaded in the petition and which is clearly contrary to the ruling given by this Court. The "other circumstances" must necessarily be confined to the instances of "non-compliance" pleaded in the petition.

Mr. Marapana, counsel for the 2nd respondent submitted that there are 253 instances of "non-compliance" upon which evidence has been led by the petitioner and these relate to 253 polling stations in different parts of the Island; this includes the 49 polling stations in the Moneragala electoral district where the poll was declared null and void by the 2nd respondent. There were altogether 8025 polling stations in the Island at the Presidential election. Therefore there is no complaint in respect of 7772 polling stations. Evidence was led in respect of only 3.1% of the total number of polling stations.

The complaints in respect of "non-compliance" may be very broadly categorized as follows:-

(a) 96 polling stations which were either opened late or closed early and some were opened late or closed early. It was the

submission of Mr. Marapana that these acts of "non-compliance" resulted in the loss of 288.75 polling hours which works out on an average to the loss of 2 minutes per polling station island-wide. The evidence led on behalf of the petitioner suggestive of the effect of this "late opening" or "early closure" was the number of persons remaining in the queue at the close of the poll (and thus unable to vote). Having regard to the number of such voters left in the queue at the close of the poll Mr. Marapana submitted that the total number who were unable to vote was 4450 which constitutes .047% of the total number of registered voters. No submissions to the contrary were made on behalf of the petitioner.

(b) There were allegations of inadequate staff in 38 polling stations which constitute .47% of the total number of polling stations. Mr. Marapana submitted that having regard to the number of persons left in the queue of voters at the close of the poll, 2915 voters were unable to cast their votes, i.e. .031% of the total registered voters. Counsel for the petitioner made no endeavour to challenge these figures.

(c) In 49 polling stations in the Moneragala electoral district no poll was held at all and there were 44850 registered voters at these polling stations. These 49 polling stations fall within the polling divisions of Bibile (8 polling stations), Moneragala (22 polling stations) and Wellawaya (19 polling stations). Having regard to the total number of registered voters at these polling stations and the average poll in each of the polling divisions it was the submission of Mr. Marapana that the total number of voters "affected" is 8014. Again, there were allegations of "non-compliance" in 5 polling stations in the Moneragala polling division and 4 polling stations in the Bibile polling division. Mr. Marapana submitted that the number of voters "affected" in those polling stations would be 3210. Thus the total "affectation" in respect of voters (those unable to vote) in the Moneragala electoral district is 11224. No submissions were made on behalf of the petitioner in this regard.

(d) There were 63 polling stations which were 'shifted', that is the location was altered. Section 4 (4) which permits such 'shifting' reads thus:- "Where due to any emergency it is necessary that the situation of any polling station should be different from that specified in a notice published under sub-section (1), the Commissioner may cause the situation of that polling station to be altered in such manner as he may, in his absolute discretion, determine". While the "shifting" is not denied by the 2nd respondent, the fact that an "emergency" had arisen was not seriously contested by the petitioner. The real dispute relates as to whether notice was given or adequate notice was given to the voters. In this regard Mr. Marapana led evidence of "announcements" being made by police officers and Army personnel on mobile duty and also of notices put up at places notified in the Gazette in terms of s.4(1). It was the submission of Mr. Marapana that in a fair number of these 'shifted' polling stations the voting figures themselves indicate that the voters have been given adequate notice of the change of location. In others, the poll was very low but this may be due to the change of location or to other factors. The burden lies on the petitioner to establish the nexus between the alteration of the location and the low voter turn-out. The evidence does not show that the petitioner has discharged this burden. It was the submission of Mr. Marapana that the "affectation" of voters consequent upon the "shifting" of polling stations does not exceed 14495. No submissions to the contrary were made on behalf of the petitioner.

Apart from the above instances of "non-compliance" there were other "incidents" at 7 polling stations:- (i) The Senior Presiding Officer at the Ekala Maha Vidyalaya polling station (No.40) in the Ja-Ela polling division had torn off about 25 ballot papers from 25 different books and placed them in a bag without issuing them (Paragraph vii at page 21 of the petition). There is no evidence as to what was done with those 25 ballot papers after they were put into the bag. The witness who speaks to this incident says that he does not know "for whose benefit the S.P.O. did this". The maximum effect of this incident is that 25 votes which should not have been included in the count may have been included.

(ii) The Elamalpotha polling station No.18 in the Dambulla polling division was attacked and consequently a large number of voters were unable to vote. (Paragraph ix (a) at page 21 of the petition) This same incident has been pleaded under the "general intimidation" charge. There is no evidence to establish this incident. We accordingly hold that it is not proved.

(iii) At the polling station Ganhela (No. 16) in the Akuressa polling division at about 11 a.m. a number of persons came in 3 jeeps and forcibly obtained from the Senior Presiding Officer 25 ballot books containing 1250 ballot papers and the marked ballot papers were put into the ballot box. (Paragraph x (b) at page 22 of the petition) This incident was not challenged. There is no evidence to show in whose favour the ballot papers were marked. Nor is there evidence to indicate compliance with s. 35 (2) (c) of the Act. If there was no such compliance the probabilities are that the ballot papers would have been rejected by the counting officer – *vide* s. 51 (1) (a). It is doubtful whether this incident would constitute an instance of non-compliance. Here again no submissions were made by counsel for the petitioner. The evidence does not establish that the "result" may have been affected.

(iv) At the polling station at the Minhath Maha Vidyalaya, Dickwella (No.38) in the Devinuwara polling division around 12 noon about 10 unauthorised persons entered the polling booth and forcibly obtained 12 ballot books, containing 600 ballot papers, each of which was then marked with a cross and put into the ballot box. (Paragraph x (c) at page 22 of the petition) The evidence here was that the ballot papers were marked in favour of the UNP. There is no record of this incident in the journal P31. However, there is sufficient evidence to establish this incident and we accordingly hold that the incident has been proved. The "affectation" here would amount to 600 votes.

(v) At the Bambarawewa polling station (No.16) in the Ampara polling division 50 ballot papers in excess of the number of voters who came to cast their vote were found in the ballot boxes. (Paragraph xiv, page 24 of the petition) One witness was called to testify to this incident but his evidence does not show that there were

50 ballot papers in excess. We are of the view that this incident has not been proved.

(vi) No ballot boxes reached the Dikwewa polling station in the Kalawewa polling division. (Paragraph d (ii) at page 34 of the petition) This allegation is not proved in view of the evidence of Dassanayake, the Government Agent, Anuradhapura, who stated that on the morning of 19th December this polling station was shifted to Maha Illuppalama for security reasons.

(vii) At the S. Thomas' College polling station (No.17) in the Bandarawela polling division around 2.30 p.m. a number of unauthorised persons forcibly entered the polling booth and forcibly obtained the petitioner's polling agent's list of voters and shouted at the voters to vote for another party. (Paragraph xviii (b) at page 35 of the petition) Witness Somawathie the SLFP polling agent stated in cross-examination that as a result of this incident no voters were prevented from voting and that everyone present was able to vote. By reason of the incident no adverse consequences were thus established.

We pass on to the more general allegation of "non-compliance" set out at paragraphs 8 (i), (iii), (iv) and (v) of the petition. (No evidence was led in respect of paragraph (ii).

Paragraph 8 (i) avers that the 2nd respondent failed to comply with the provisions of s. 21 (2) of the Act and in accordance therewith appoint another date for the taking of the poll in the electoral districts of Matale, Matara, Hambantota, Kurunegala, Polonnaruwa, and Moneragala notwithstanding the outbreak of widespread violence for many days prior to the election and on election day. In considering this allegation, it has to be borne in mind that the Constitution and the Presidential Elections Act stipulate a period of time within which the election has to be held. In accordance with the provisions of Article 31 (3) of the Constitution the last date for the poll would have been 3rd January 1989. Thus the 2nd respondent could not have postponed the holding of the poll in any electoral district beyond 03.01.89, that is, for a period of not more than 15 days. See also s.21 (2) of the Act. What is of relevance for present purposes is that there

is no evidence to show that the climate of terror alleged in these electoral districts would have declined and the situation would have improved between 19.12.88 and 03.01.89. Nor is there any evidence to indicate that the 2nd respondent had reasonable grounds to believe that the violence would be less within a period of 15 days. In view of the time limit within which the poll had to be held, the petitioner must show that the 2nd respondent had reason to believe that had he postponed the poll for any date before 04.01.89 there was a reasonable prospect of the situation improving. We find no such evidence on record. Nor is there evidence that an application was made for the postponement of the poll. On the other hand, Mr. Marapana submitted that the voter turn-out in the electoral districts of Matara and Hambantota decreased by February 1989, indicating an escalation of violence. We accordingly hold that there is no basis for the alleged "non-compliance".

Paragraph 8 (iii) avers that the 2nd respondent declared null and void the polling in 49 polling stations in the Moneragala electoral district without naming them and that he failed to comply with s.46A of the Act. The fact that the poll was cancelled in 49 polling stations is not contested. Mr. Marapana contests the allegation that the 2nd respondent failed to comply with s.46A of the Act. The document 2R 27 marked without objection at the trial clearly establishes that the 2nd respondent consulted the election agent of the petitioner as provided for in s.46A(8) of the Act. Paragraph 1 of 2R 27 states, *inter alia*, that "This meeting is specially convened in conformity with s.46A of the Elections (Special Provisions) Act No. 35 of 1988". Paragraph 8 of 2R 27 reads thus:– "Both Mr. Ranjan Wijeratne and Dr. Mackie Ratwatte agreed with the views expressed by the Commissioner of Elections, that what would have polled, could not make a difference to the result". The election agent of the petitioner having thus agreed, it is not open to the petitioner to complain now. We accordingly hold that there is no basis for this alleged instance of "non-compliance."

Paragraph 8(iv) deals with postal votes. The allegation is that the 2nd respondent failed to act in accordance with the provisions of s.23 and in consequence "a number of persons who had the right to vote by post were unable to vote at this election, and the votes of a large number of persons who voted by post were not counted at the

counting centres". No evidence was led in respect of "postal voting" in the Colombo, Gampaha, Nuwara Eliya and Ratnapura electoral districts. The evidence adduced in the Kandy, Matale, Galle, Matara, Hambantota, Wanni, Batticaloa, Digamadulla, Puttalam, Anuradhapura, Polonnaruwa, Badulla, Moneragala and Kegalle electoral districts does not prove the allegation contained in the petition. The evidence led in regard to the Kurunegala and Badulla Electoral districts shows that no postal ballot papers were issued at all. The evidence does not indicate how the "non-compliance" may have affected the result of the election. No submissions whatever were made by counsel for the petitioner in respect of "postal voting". We accordingly hold that the allegation as pleaded has not been proved.

Paragraph 8(v) refers to the failure to ensure that official poll cards were sent to all registered voters as required by s.24 of the Act. The allegation is that "as a result a large number of voters were prevented from voting". The evidence is that in many polling divisions poll cards could not be issued owing to the prevailing situation. It is also in evidence that the absence of a poll card does not mean that a voter is denied the right to vote. The Government Agent, Kandy, in his evidence stated as follows:–

Q. It is not a requirement that a voter should be in possession of a ballot (sic) card in order to cast his vote at the polling station?

A. That is so.

Q. Apart from the date of the poll the other particulars stated in the poll card are also available in the voters' electoral lists?

A. Yes.

Q. And these electoral lists are available to the candidates and their agents?

A. Yes.

Q. It is the practice as far as possible or convenient to continue using the same location for a polling station . . .?

A. Yes.

Q. By which (sic) the voters know their polling stations quite independently of receiving polling cards?

A. It is generally known.

Q. Are you aware that the Commissioner of Elections caused radio announcements to be made of the fact that a voter was entitled to vote although he was not in possession of a polling card?

A. Yes.

Q. The message was announced or telecast on the Rupavahani also?

A. Yes.

There is no evidence to show that any voter was unable to cast his vote because he had no poll card. Nor is there evidence to indicate that a voter did not know the situation of the polling station because he did not get a poll card. In short, there is no evidence to suggest that the result may have been affected on account of the failure to issue poll cards. The allegation as pleaded has not been established.

We have set out above the main instances of "non-compliance" relied on by the petitioner as "other circumstances" in terms of s.91(a) of the Act. We have already held, in accordance with the ruling of this Court in the preliminary order, that the burden is on the petitioner to prove that by reason of the "other circumstances" the result of the election may have been affected. This, the petitioner has failed to do; the evidence falls short of the required proof. In the result the second ground of avoidance relied on also fails. The petition is accordingly dismissed with costs.

In terms of s.98 of the Presidential Elections Act No.15 of 1981, we determine that the 1st respondent was duly elected.

This is perhaps the longest trial held in this country. It continued for no less than 3 years. In this, not altogether easy case, we received the full and complete assistance from all the counsel appearing for

the petitioner and the two respondents. We wish to place on record our deep appreciation of the comprehensive and cogent written submissions on the law given by Mr. H. L. de Silva and the carefully prepared, well-documented, and meticulously-arranged summary of the evidence handed over by Mr. Choksy as well as Mr. Marapana. These, considerably lightened the burden that lay on us.

RAMANATHAN, J. – I agree.

P. R. P. PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

S. B. GOONEWARDENE, J.

The Constitution of the Democratic Socialist Republic of Sri Lanka provides for the office of The President of the Republic who is described in Article 30 (1) as the Head of State, the Head of the Executive and of the Government and the Commander-in-Chief of the Armed Forces. As the term of office of the then President was due to expire on the 4th day of February 1989, the poll for the election of a President had, as required by Article 31(8) of the Constitution, to be conducted not less than one month and not more than two months before that date. The poll was fixed for and the election conducted on the 19th day of December 1988, a date which fell within the limits prescribed, and the three candidates who contested were, Mrs. Sirimavo Bandaranaike of the Sri Lanka Freedom Party the petitioner, Mr. Ranasinghe Premadasa of the United National Party the 1st Respondent, and Mr. Oswin Abeygunasekera of the Sri Lanka Mahajana Party, no party in these proceedings.

The electorate for the purposes of the election was the whole country and, as required by section 3 (2) of the Presidential Elections Act No. 15 of 1981 (which is the principal statute governing the holding of an election of the President), divided into electoral districts and further subdivided into polling divisions and polling districts. As we were made to understand, the area of each such polling district broadly corresponded to the area served by a polling booth or to use another term, a polling station. There were 22 electoral districts, 159 polling divisions and 8025 polling districts.

The result of the election was declared by the 2nd Respondent the Commissioner of Elections in terms of section 56(2) of the Presidential Elections Act, that the 1st respondent was the candidate elected to the office of President and such result was duly published in the Government Gazette (Extraordinary) bearing No. 537/3 dated 21.12.1988 thus:–

Oswin Abeygunasekera	235719	4.63%
Sirimavo Bandaranaike	2289860	44.95%
R. Premadasa	2569199	50.43%
Valid Votes	5094778	
Rejected Votes	91445	
Total Polled	5186223	
Majority	279339	
Total Registered Votes	9375742	
Total polled/Registered Votes		55.32%

On the 9th day of January 1989, the petitioner Mrs. Sirimavo Bandaranaike, an unsuccessful candidate at this election, filed this petition seeking a declaration by this Court that the election of the 1st respondent is void and/or undue. The broad grounds on which she has sought this relief, and particularised in detail thereafter in her petition in paragraphs 7,8 and 9 respectively, are contained in paragraphs 6A, 6B and 6C. They read thus:–

> 6 (A) That by reason of the occurrence of the incidents, hereinafter mentioned and the commission of the acts hereinafter specified in paragraph 7 hereof, there was general intimidation of the electors at the aforesaid election in consequence of which the majority of the said electors were or may have been prevented from electing the candidate whom they preferred.
>
> 6 (B) That by reason of non-compliance with the provisions of the Presidential Elections Act No. 15 of 1981 (as amended) the aforesaid election was not conducted in accordance with the principles laid down in the said provisions and as hereinafter specified and as particularised in paragraph 8 hereof, which acts of non-compliance affected the result of the election and the said election is in consequence null and void.

6 (C) That by reason of other circumstances to wit, the failure of the Commissioner of Elections (the 2nd respondent) and/or certain members of his staff to conduct a fair and free election, in accordance with the provisions of the Presidential Elections Act No. 15 of 1981 more particularly set out in paragraph 9 read with section 8 hereof, the majority of the said electors were or may have been prevented from electing the candidate whom they preferred.

Section 91 of the Presidential Elections Act, *inter alia* in sub-sections (a) and (b) provides that, on an election petition, the election of a candidate to the office of President shall be declared to be void by the Supreme Court, if the following grounds are proved to Court's satisfaction

(a) that by reason of general bribery, general treating or general intimidation or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred.

(b) non-compliance with the provisions of this Act relating to elections if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election.

The allegations contained in any of the paragraphs 6A, 6B or 6C of the petition, if successfully established according to law, would affect the 1st respondent and no doubt therefore they are all of concern to him, but the case he was called upon to meet upon the petition is contained in the said paragraph 6A.

The case the 2nd respondent the Commissioner of Elections was called upon to meet upon the petition however is contained in the other two paragraphs 6B and 6C of the petition.

The petitioner's case in this petition as contained in paragraph 6A of her petition, being that founded upon general intimidation as particularised in paragraph 7 of such petition, falls to be decided by

reference to the provisions of section 91(a) of the Presidential Elections Act.

The petitioner's case as contained in paragraph 6B of her petition is based upon the provisions of section 91(b), of the Presidential Elections Act and relates to complaints of non-compliance with the provisions of the elections law as particularised in paragraph 8 of her petition, the general heading of which reads "Non-Compliance with Provisions of Elections Law".

The petitioner's case as contained in paragraph 6 C of her petition is that the cumulative effect of all or a substantial number of the instances and transactions enumerated in paragraph 8 was to prevent, in the manner set out in paragraph 9 of the petition, a free and fair election being held and that by reason of their occurrence, there was another "circumstance" whereby the majority of electors were or may have been prevented from electing the candidate whom they preferred, thus constituting a ground of avoidance of the election also under the provisions of section 91(a) of the Presidential Elections Act.

Before the evidence at the trial commenced, certain preliminary objections as to the maintainability of the petition as constituted, founded upon a claim of inadequacy of pleadings, had been raised on behalf of both respondents, and in holding that the petition was maintainable in the form constituted, this Court examined the provisions of sections 91(a) and (b) of the said Act. The order with respect to those objections is to be found reported *sub.nom. Bandaranaike v. Premadasa in* (1989) *1 Sri Lanka Law Reports page* 240. I will at this stage proceed to mention in outline, the questions around which these objections had been examined, in particular the submissions of Mr. H. L. de Silva, learned Counsel appearing for the petitioner, so that the general nature of such objections as well, insofar as that is necessary to be done, will also become apparent.

As regards the allegation of general intimidation relied on by the petitioner as contained in paragraph 6A of her petition, the contention on her behalf, as far as I can gather from the order on the preliminary objections, had been that the inclusion of section 91(a) in the

Presidential Elections Act was the way in which the concept of the English common law, of a free and fair election had been introduced into the statute. The argument put forward appears to have taken the form (though learned Counsel for the petitioner did submit that certain important aspects of his submissions are not reflected in the Court's order) that if proof could be adduced of general intimidation, which by reason of its magnitude deprived the electors of a free and fair election, it is possible to say then, that the majority of electors may have been prevented from electing the candidate whom they preferred, and consequently that the Court is not called upon to enter upon the independent exercise of determining whether there is proof before it that the majority of electors may have been prevented from electing the candidate whom they preferred (implying the success of some other candidate), and that this is a matter not capable of proof in any accurate sense. The argument adopted, as one can gather from the Court's order, appears to have been on these lines, that if general intimidation is established and as a consequence a large number of voters are shown to have refrained from voting, the necessary inference is that the majority of electors may have been prevented from electing the candidate whom they preferred and therefore what the petitioner had to prove was the existence of that degree of general intimidation which made a substantial number of voters keep away from the polls, thus eliminating free choice.

In its order on the preliminary objections, the Court, in examining the English common law concept of a free and fair election in the context of general intimidation, posed to itself (at p. 259) a question thus:– "The question arises whether s. 91(a) of the Act embodies what Mr. H. L. de Silva P.C. described as 'the pure and unadulterated English Common Law prior to 1949' or as Mr. Choksy submitted 'that in addition to general intimidation etc., something more has to be proved' by the petitioner to have an election avoided under section 91(a)". The Court answered this question (at page 262) so far as I see, in the following terms:– "The case of the petitioner based on the ground of avoidance under section 91(a) falls to be determined solely by a consideration and application of the provisions contained in section 91(a)". The Court also said (at page 261) "We agree with Mr. Choksy that mere proof of several instances or acts of general

intimidation would not suffice to avoid an election. In addition the petitioner has to prove that these several acts or instances had the result or consequence that the majority of electors were or may have been prevented from electing the candidate whom they preferred." The Court also posed to itself (at page 264) the following question "What is the meaning of the expression 'the majority of electors were or may have been prevented from electing the candidate whom they preferred' ". It answered such question (at page 270) in this form: "In a case of general intimidation, the question that arises is, from the proved acts of intimidation of electors, is it reasonable to suppose that the result of the election may have been affected? This it seems to us to be the true meaning of the words, 'the majority of electors may have been prevented from electing the candidate they preferred' ". The following words the Court then immediately proceeded to add "But it will be open to the returned candidate to show that the gross intimidation could not possibly have affected the result of the election".

With respect to the case of the petitioner as directed against the 2nd respondent on the ground of non-compliance with the provisions of the elections law, the submission made on her behalf at the inquiry into the preliminary objections had been that upon a reading of section 91(b), it is apparent that there is no burden cast on her to establish that the result of the election had been affected and that therefore proof of such affectation is not an essential ingredient of the ground of avoidance contained in such section. The tenor of this contention had been that when section 91(b) refers to "the result of the election"' such reference can only be to a valid election and that when the magnitude and extent of the non-compliance is to such a degree as to render the election a sham, the result goes with it. The key to the interpretation of section 91(b), it had been argued, is to be found in section 115 of the Act which is a provision guaranteeing protection to the returned candidate and therefore that both provisions had to be read together and interpreted in a manner consistent with each other. The resultant submission therefore had been that the words in section 91(b) which read "if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election," had to be read to mean, " if it appears that the

election was not conducted in accordance with the principles laid down in such provisions or that such non-compliance affected the result of the election". The Court upon an examination of earlier legislation on similar lines and a consideration of the relevant authorities concluded that it was not permissible to substitute the word "or" for the word "and" in that manner, and held that proof of affectation of the result was indeed an essential ingredient of the ground set out in section 91(b) of the Presidential Elections Act.

At the stage of the final addresses in the case, learned Counsel for the petitioner Mr. H. L. de Silva contended that, as regards the case of the petitioner based upon section 91(a) where reliance was placed on general intimidation, while not challenging the Court's earlier order or seeking its review, certain portions of such order required clarification and that he would endeavour to demonstrate how they should properly be understood and that if so done, it would support his position. On the other hand learned Counsel for the 1st respondent, Mr. Choksy objected to any endeavour to reagitate the questions decided upon by the Court's earlier order, particularly that portion of it which, in his submission, said that there was cast upon the petitioner the burden of proving that the majority of electors were or may have been prevented from electing the candidate whom they preferred, which in essence he claimed, suggested an affectation of the result of the election, meaning a return of the wrong candidate. In point of fact, as if in anticipation of such a possibility, Mr. Choksy, at the stage at which he was addressing the Court, submitted that such a course should not be permitted.

With respect to the ground of avoidance based upon section 91(b) of the Presidential Elections Act and founded upon a claim of non-compliance with the elections law, Mr. H. L. de Silva's position was that he was "abandoning his case". He submitted that he was adopting that course by reason of the Court's decision with respect to the preliminary objections, that when this ground of avoidance is invoked, it must be proved affirmatively that the result of the election was affected, a virtually impossible burden as he suggested, and to discharge which there was no evidence in the case, as he impliedly conceded.

Mr. H. L. de Silva adopted a new approach to the case of the petitioner directed against the 2nd respondent, the Commissioner of Elections, on the basis of a failure to conduct a fair and free election in accordance with the elections law as a ground of avoidance under section 91(a) of the Presidential Elections Act, an approach new in the sense that it was not the position taken up in the petition, as he indeed had to concede. He argued that non-compliance with the elections law was broadly, and subject to one exception (there was however no clear statement as to what this exception was based on, nor any submissions made connected therewith), not something for which the 2nd respondent was accountable or responsible but that the acts of general intimidation complained of, resulted in a breakdown of the machinery of election on a large scale so that the instances of such breakdown as pleaded, taken in conjunction with the general intimidation which led to such breakdown, was another "circumstance", as that word is used in section 91(a) of the Presidential Elections Act and constituting a basis of avoidance thereunder. I will deal with this aspect of his submissions at an appropriate stage later on.

The contention of Mr. H. L. de Silva as to the question of general intimidation relied on as a basis of avoidance of the election, standing by itself and without link to the pleaded items of non-compliance with the elections law is, as I see it, much the most important aspect of the petitioner's case. Whether as claimed, what was done by him can be described as an exercise calculated to achieve a true understanding of the Court's order on the preliminary objections or whether, as was suggested by the reaction of opposing counsel, it was in reality an attempt at reagitating some of the legal questions upon which the Court had already ruled, I am of the view that the situation is one that can be dealt with, without embarking upon a separate examination directed at resolving that initial question. The approach that commends itself to me as a satisfactory one and one appropriate in the circumstances of this case is thus: The foundation upon which Mr. H. L. de Silva sought to rest the case of the petitioner on this aspect is, that the expression in section 91(a), "the majority of electors were or may have been prevented from electing the candidate whom they preferred", does not mean what Mr. Choksy contended to be its meaning, which is that the result of

the election was affected implying thereby the return of the wrong candidate. I will hence first deal with the petitioner's case as if these words connote that which has been contended on her behalf to mean. Thereafter I will endeavour to ascertain what this expression means, as I read and understand it, and in doing so attempt to interpret what the Court intended these words to mean in its order on the preliminary objections. Adopting such a course would have the advantage of producing a final judgment arrived at, at the end of the case, clarifying the issues upon the decisions of which the result of the case must be made to rest and which are seen at that concluding stage to arise with respect to all material propositions upon which the parties may be seen to be at variance, not forgetting that this is the Court both of first and last instance, disposing of a matter which, notwithstanding its public interest dimension, has a good many of the attributes of a *lis inter partes*. Additionally I feel that these submissions involve questions of a serious and important nature which deserve consideration.

Mr. H. L. de Silva, as I understood him, asserted what I will now proceed to outline, but before doing so, in order to avoid confusion as to whether there is an intermix therewith of my own observations, I would make clear here that this paragraph will be confined entirely to what he has said. He submitted thus:- The concept of a free and fair election as known to the English common law before The Representation of The People Act 1949 introduced certain significant changes, is what is embodied in section 91 (a) of The Presidential ELections Act. The pivotal question (Mr. H. L. de Silva's words) is therefore as to the correct interpretation of section 91 (a). The concept embodies the right to choose freely and that presupposes a choice to be exercised without, duress, coercion or intimidation. The case of the petitioner is rested on a twofold basis of fact (as Mr. H. L. de Silva described it), but on a single legal ground. Therefore, to ensure the petitioner's success upon a proper discharge of the burden placed on her by section 91 (a), the following have to be established, namely, (a) the existence of a situation where a significant number of voters were prevented from voting at the election, which number should necessarily be numerically greater than the majority of votes secured by the 1st repondent, the returned candidate, which implies therefore that if this number is numerically

less, the election cannot be avoided, (b) that these persons who were prevented from exercising their right to vote were so prevented, irrespective of the question of which candidate they would have voted for, had they not been so prevented, and (c) that they were so prevented from voting by acts of general intimidation (that is undue influence, coercion, duress etc) of such a nature as would have been sufficient to deter persons of ordinary courage from voting and that they were thereby prevented from electing the candidate whom they preferred. If these elements are established, then, irrespective of the question as to whom such acts of intimidation were directed at, irrespective of the question as to who the voters were, who were so prevented, that is whether they happened to be supporters of the returned candidate or on the other hand supporters of either of the other two candidates, irrespective of the question for whom they would have cast their votes, had they been free to vote, such proof constitutes a sufficient basis for avoidance of the election under section 91 (a) of the Act. Once these constituent elements are established the inevitable consequence is that the majority of the electors are shown to have, as a matter of possibility, been prevented from electing the candidate whom they preferred, whoever that candidate might be. The other basis of avoidance relied on is the large-scale breakdown of the electoral machinery which, when taken in conjunction with the acts of intimidation established, together constitute another cause for the majority of voters being prevented from electing the candidate of their choice, once again constituting a ground of avoidance under section 91 (a) of the Act. It is reasonable to suppose that had it not been for these causes the voter turn-out would have been around 80% of the total number of registered voters so that there was a consequent shortfall of about two and a half million votes. The evidence establishes that the 1st respondent had a majority of about 280,000 votes over those of the petitioner, and taking account of the amounts of these two figures it is clearly seen that those deprived of voting numbered six or seven times the majority secured by the 1st respondent over the petitioner, the runner-up. In that situation it is reasonable to conclude that the result "may have been different" in the sense that the majority of electors may have been prevented from electing the candidate of their choice, whoever that might have been. The point of divergence between the respective positions of the parties is as to whether there is, or there is

not, another requirement that it was incumbent upon the petitioner to establish apart from the factors already mentioned, (which factors are the acts of general intimidation committed together with the demonstrated instances of the malfunctioning or breakdown of the electoral machinery and the natural consequence flowing therefrom which brought about the result that voters were unable to vote, and the extent or magnitude of the resultant loss of votes being so considerable that the result may well have been affected had all the non-voters cast their votes), yet another factor, which is that the result of the election may have been affected, in the sense that but for these acts another candidate other than the one declared returned would have been successful. Such an exercise to determine whether such an additional element exists would involve a computation of numbers which necessarily must be based upon conjecture and surmise, being depended upon circumstance totally different and unpredictable, and therefore not something that the section could reasonably be thought to demand. The Court in any event would be precluded from entering upon any such exercise by reason of the right to secrecy of voting which is ensured to all, not only by virtue of the relevant constitutional provisions and many provisions in the Presidential Elections Act, but also because any such exercise by violating one of its essential components would erode the common law concept of a free and fair election, which has found expression in section 91 (a) of the Presidential Elections Act. In these circumstances the petitioner's contention is that there is no burden cast upon her to show that, but for the acts complained of, either that she would have been the successful candidate or that someone other than the 1st respondent would have been the successful one.

I have here in broad outline endeavoured to set out what I have been able to understand to be the position taken by learned Counsel for the petitioner.

Before considering what Mr. H. L. de Silva said as to the case the petitioner has presented with respect to general intimidation, I find it convenient to make reference to what he relied on as a finding in his favour contained in the order on the preliminary objections which he claimed had the consequence that there was no requirement under

section 91 (a) of the Presidential Elections Act that calls upon the petitioner to establish that the result of the election was affected, in the sense of the success of another candidate other than the one declared elected.

Mr. H. L. de Silva's submissions thereon were thus. Each of the respondents contended that the petition was defective, in that it contained no plea as to what the petitoner's position was as regards the 45% of voters who did not vote at this election (55% having actually voted), that is whether such contention was that if they had in fact voted, they would have voted for her. The Court, he contended, held that there was no need to so plead, and since section 96 (c) of the Act demands that all material facts be pleaded, what is implicit in that ruling is that it was not a material fact that had to be proved as to how that 45%, if they could have voted, would in fact have voted. Since the Court, he argued, therefore considered that it was not a material fact, it could not be a requirement of the section, and therefore it was not a part of the burden cast upon the petitioner to show for which candidate the voters who did not vote would have voted, had they the opportunity of doing so, and hence the section in no way demands that the petitioner has to establish that the result of the election was affected, in the sense that some other candidate other than the one declared elected would have been successful. This process of reasoning which learned Counsel adopted is something, I find I am unable to go along with. The Court said (at page 268) "In our opinion, how the majority were or may have been prevented from electing the candidate of their choice need not be specially pleaded". The inclusion here of the word "specially" must have the usual significance it would convey when used in a context such as this and would suggest no sense different from "expressly" (as opposed to "impliedly"). Other passages in the order militate against the view that this passage was intended to do more than state that as a **matter of pleadings,** there need be no express averment of this. Examples of such passages are thus:- "(The requirement that the petition) shall contain a concise statement of the material facts on which the petitioner relies" was "intended to secure that a respondent will know from the petition itself what facts the petitioner proposes to prove in order to avoid the election and will thus have a proper opportunity to prepare for the trial... The term *material facts* has a plain meaning in the context of requirements

relating to pleadings, namely facts material to establish a party's case". (at page 263 of the order on the preliminary objections); "The object of the requirement (as to what should be pleaded) is clearly to enable the opposite party to prepare his case for the trial so that he may not be taken by surprise." (p. 263). The passage then (at page 268) that reads "The petitioner has, in her petition pleaded that the general intimidation had this effect (that is that the majority were or may have been prevented from electing the candidate whom they preferred). In our opinion, how the majority were or may have been prevented from electing the candidate of their choice, need not be specially pleaded", must be understood, as I read these words, to limit the question that the Court was concerned with at that stage, to the adequacy or inadequacy of the pleadings.

As can be gathered from these passages, and in the circumstances of this case I do not see it as a necessary conclusion derived from any process of legal reasoning to say that the petitioner was not required to establish this requirement by reason only of the Court having said that there was no need for a special plea in the way contended for the respondents, although generally as a matter of pleadings, what has to be proved may well have to be pleaded. The Court exempted the petitioner only from pleading the requirement, specially, or expressly, as a prerequisite to proving it, and that too in the circumstances of the case, having regard to what the petition already contained. When the Court ruled that the petitioner did not have to aver how the majority were or may have been prevented from electing the candidate of their choice, it does not mean as claimed, that the Court thereby rejected a submission that there was an obligation to prove, either as a certainty or as a probability, how the voters who were prevented from voting would have voted at this election had they the opportunity of doing so. I do not think that such was the conclusion which the Court reached as that contended by Mr. H. L. de Silva and I therefore cannot, for myself, conclude that what is stated merely as a matter pertaining to pleadings, can be extended in this way so as to say that what is implied is as to what does not require to be proved. I therefore see no warrant for arriving at a conclusion that this passage relied on by Mr. H. L. de Silva can be read to mean that the Court ruled that there was no burden cast upon the petitioner in that regard. Indeed the Court has not said so and I do not imagine that the Court would have intended to say so.

Furthermore, in the course of his submissions regarding what he termed a clarification of certain aspects of the Court's order on the preliminary objections, Mr. H. L. de Silva was heard to say something to the effect that the *ratio decidendi* of the order which is what is of binding force, had to be arrived at by reference to the questions in issue at that stage before the Court, in the sense of those upon which the Court had to rule, and that was as to the adequacy or inadequacy of the matters pleaded, that is whether in the state of the pleadings as they were to be found, further proceedings upon the petition could or could not be continued. How therefore, it is possible to reconcile the statement that the *ratio decidendi* had to be construed in the way so argued, with this further submission that the Court held that there was no burden cast upon the petitioner as respects proof of this matter, which is that the majority of electors were or may have been prevented from electing the candidate they preferred as meaning that the result of the election was affected, is something I do not clearly understand. Indeed having regard to the approach I have adopted, it is not possible for me to draw the inference we were called upon to draw, there being not a single statement in the Court's order that there is no such legal requirement under section 91 (a) of the Presidential Elections Act.

It is convenient to get out of the way one other matter. In the course of his submissions Mr. H. L. de Silva emphasized that an integral aspect of the right to a free and fair election is the right to voting by secret ballot. Learned counsel used the word "precluded", with reference to any possible exercise the Court might indulge in, directed towards ascertaining, if I mistake not, whether any other candidate would have been the successful one had the acts complained of not been present, and in that context asserted that the principal obstruction to such a course would be the barrier erected by the voters' right to the secrecy of the ballot. It is therefore useful to see whether the common law concept of a free and fair election as understood in England before The Representation of the People Act 1949, demanded as an essential requisite or component thereof, the right to vote secretly. I do certainly understand that the constitutional and other statutory provisions of our law, assure such a right to voters. But the question my inquiry is directed to is as to whether this right of voting by secret ballot, if taken away, would result in an

erosion of the common law concept of a free and fair election, which, of course, is the same as asking whether such a right is demanded as an integral part of that concept, which if I mistake not, is the effect of what Mr. H. L. de Silva claimed. Having regard to the submission that section 91 (a) is a statutory embodiment of the common law concept of a free and fair election, if the right to secrecy of voting is not part to that common law concept, apart from such assurances of a right to secrecy of voting granted by other provisions, it could not be considered a requirement implicit in the section itself. The best approach I think to such a question is by reference to the judgment of Lord Denning M. R. in the case of *Morgan v. Simpson* [14]. A quotation from that judgment (at pp. 725 and 726), other than as a matter of interest, bears repetition here because it helps to understand the background against which the early cases particularly those decided before the Ballot Act 1872, some of which I will refer to subsequently, had been decided. Lord Denning said:-

> "The common law method of election was by show of hands. But if a poll was demanded the election was by poll: see *Anthony v. Seger* [15]. A poll was taken in this way. The returning officer or his clerk had a book in which he kept a record of the votes cast. Each voter went up to the clerk, gave his name and stated his qualification. The clerk wrote down his name. The voter stated the candidate for whom he voted. The poll clerk recorded his vote. (Sometimes the voter went up with a card on which the particulars were written, and these were written down by the poll clerk). After the poll was concluded, the votes were counted and the result announced. But the poll book was open to inspection. Then, if required, there was a scrutiny at which the vote could be challenged, for example by showing a voter was not qualified to vote. In that event his vote was not counted. So the result was decided according to the number of votes cast which were valid votes. Sometimes the returning officer or his clerk might refuse to record some of the votes without good cause. If it were found that the rejected votes would have given a different result the election would be vitiated: see *Faulkner v. Elger* [16]. If they would not have affected the

result, the election was good, but the rejected voter could have an action for damages against the returning officer: see *Ashby v. White* [17].

Such was the method of election at common law. It was open. Not by secret ballot. Being open, it was disgraced by abuses of several kind, especially at Parliamentary Elections. Bribery, corruption, treating, personation, were rampant. These were not investigated by the Courts of law. They were the subjects of petition to Parliament itself. Often members were unseated and elections declared invalid. If you should wish to know what happened, you will find it in *Power, Rodwell II & Drew's reports of controverted elections (Power Rodwell & Drews Election Cases 1848–1858 Vols.1 & 2) and in Charles Dicken's Account of the Election on Eatanswill (The Pickwick Papers ch.13).*

In 1868 the judges were brought in for the first time. By the Parliamentary Elections Act 1868 a petition to unseat a member was to be tried by a judge of one of the superior Courts. He was to make a report to the Speaker: and his report had the same effect as that of an election committee previously. After that Act, the judges tried many election petitions. Nearly all of them were for bribery and corruption, and treating. Most of them will be found in *O'Malley & Hardcastle's Reports (O' Malley & Hardcastle Election cases 1869 -1934)...*

Then in 1872 Parliament passed the *Ballot Act 1872.* It revolutionized the system of voting at elections. It provided for voting by secret ballot".

A major objective of the change which was to introduce voting by secret ballot had apparently been to eliminate the unsatisfactory features of the earlier common law system of voting by show of hands. I do not understand that the object of that change was to supply a missing component in the common law concept of a free

and fair election, so as to complete and perfect an otherwise perfect concept, incomplete by reason of the absence of this right of voting by secret ballot. Indeed even the Ballot Act 1972 which for the first time introduced in England the system of voting by secret ballot, did not ensure total secrecy to the degree that appeared to be contended for it of being the basis of the freedom of franchise. That Act itself contained a provision to enable a voter to be asked how he voted, upon a scrutiny after a vote had been declared invalid. (*Vide* the observations of Grove J. in the *Hackney Case* 2 O' M & H 77 at page 81).

Against a background of what I have said as to the position regarding the method of voting under the common law which was as pointed out by show of hands, I will now make reference to some of the early cases which will show that the concept of a free and fair election was much in the minds of the judges and recognised and given effect to as a concept full in all important respects, even when there was no secrecy of voting. A reproduction of excerpts from the judgments in such cases will also help to understand the true and full meaning of the concept as the judges who decided these cases understood it, and here it must be pointed out that learned Counsel for the petitioner on many an occasion cited passages from such cases as embodying the concept in all its dimensions.

The *Drogheda Case* [18] was decided in 1869 before the **Ballot Act 1872** became law. The allegation in that case pertaining to general intimidation as contained in the petition was that its object was to secure the success of the candidate who was declared elected. The contention of Counsel for the respondent had been that if an organised and general system of intimidation was proved, still before setting the election aside on such a ground, that it was necessary to establish that such intimidation, however excessive it might have been, had a substantial influence on the fate of the election. In elaboration of that argument it had been the submission of Counsel that provided the respondent had an actual majority of registered electors, however small it was, then no matter what happened outside, no matter how many voters were assaulted and driven from the polling booth, no matter how many voters were compelled to go by devious ways in order to get back to their homes,

no matter how much blood was shed, no matter how much spiritual intimidation had been brought to bear upon the electors, still if the candidate who was returned could say that there were 1000 electors in the Borough and no matter how, he had polled 501 of them, his election cannot be declared void on the ground of general intimidation, although the unsuccessful candidate may, upon a scrutiny, by striking off individual votes on this ground show that, but for the general intimidation he would have had a majority. Mr. Justice Keogh in his judgment responded to that argument thus:–

> "I must say at once that the argument put forward by the Respondent is one from which I wholly and entirely dissent. It is subversive, in my mind, of the whole principle of freedom of election. It is said by the Counsel for the Respondents, that freedom of election is secured provided the majority are shown to have had the power of recording their votes, I deny that altogether. This was not solely a contest between the Respondent and the Petitioner. There is another and greater interest than belongs to either of them; there is the public interest. The humblest individual in the whole of the constituency has as good a right without fear or intimidation to come into the Court-house upon the day of the election as the richest man upon the register, and as good a right as the great majority of the constituency. Take it that a candidate has by the most legitimate means obtained the votes of nine-tenths of the constituency in his favour, yet it is of vital importance to the public weal that the remaining tenth should be able to record their votes and to express their opinions. If the majority are not only to send their own representative to Parliament, as of course the majority must do, but if they are to drive by terror and with ignominy and with scorn and with denunciation the minority from the poll, what becomes of freedom to this country? . . .
>
> But I take it to be well settled law . . . that an organised system either of bribery or of treating will invalidate an election.
>
> . . . to put general intimidation upon a parallel with general bribery or general treating, it must be shown to spread over such an extent of ground, and to permeate through the community to such an extent that the tribunal considering the

case is satisfied, if it be so, that freedom of election has ceased to exist in consequence. If that be the case, I for my part see no distinction between an organised system of bribery, an organised system of treating, and an organised system of intimidation."

It is well not to overlook here, firstly, that the method of voting by secret ballot had not yet become law and secondly, that the allegation in the case was that general intimidation of a widespread nature was calculated to benefit a particular candidate.

The *Bradford Case* [19] decided in 1869, again emphasized that by the common law, that is law not created by the enactments of Acts of Parliament, undue influence vitiates an election. Mr. Baron Martin said in that case thus:–

"There are some influences which are called due influences, and other influences which are called undue influences, and the law has endeavoured to punish the use of undue influences. Amongst these influences there are what are called bribery, treating, and oppression, that is, an improper and undue pressure put upon a man. But if pressure is put upon a man, or a bribe is administered to him, no matter by whom, or refreshments are given to a man, no matter by whom, for the purpose of affecting his vote, the effect is to annihilate the man's vote, because he gives his vote upon an influence which the law says deprives him of free action; he becomes a man incompetent to give a vote, because he has not that freedom of will and of mind which the law contemplates he ought to have for the purpose of voting. But that affects the man alone, it does not affect the candidate; it has merely the effect of extinguishing the vote, and if there was a scrutiny for the purpose of ascertaining who had the majority of lawful votes, that man's vote ought to be struck off the poll, but that is all. But it has been long held, before these Acts of Parliament passed at all, that by the common law of the land, that is, law not created by the enactments of Acts of Parliament, bribery, undue influence, and undue pressure vitiate an election. So that if it had been proved that there existed in this town generally, bribery to a large extent, and that it came from unknown quarters, that no

> one could tell where it had come from, but that people were bribed generally and indiscriminately; or if it could be proved that there was treating in all directions on purpose to influence voters, that houses were thrown open where people could get drink without paying for it, – by the common law such election would be void, because it would be carried on contrary to the principle of the law."

in the *Salford Case* [20] decided in 1869 Mr. Baron Martin said as follows:–

> "Before an election can be vitiated by reason of general riot and violence, it must be shown to be such as to affect the freedom of election, which is that every person who has the franchise ought to be at liberty to go and have the means of going to the poll and giving his vote without obstruction, and without fear or intimidation. To set aside an election on the ground of general riot and violence, it must be established that persons possessing the ordinary nerve and courage of men have been prevented from going to the poll to record their votes."

The *Stafford Case* [21] was decided in 1869, and it had been submitted by Counsel for the petitioner there, that sufficient had been proved to show that the election ought to be declared void at common law on the ground of general intimidation. In response, Blackburn, J. said that he would admit that, if it was proved that there was so much intimidation that the result of the election may have been affected, it was not necessary to prove that it actually was affected and that it is a question of fact whether the intimidation had been so great that it could fairly be said that it was not a free election, that is, that if there had not been so much intimidation, such a number of persons would have voted who did not vote, that the result of the election would have been different.

In the *Nottingham Case* [22] decided in 1869 once again it was emphasized that "if rioting takes place to such an extent that ordinary men, having the ordinary nerve and courage of men, are thereby prevented from recording their votes, the election is void by the Common Law, for the Common Law provides that an election should be free in a sense that all persons shall have an opportunity of

coming to the poll and voting without fear or molestation. But for the purpose it must be rioting to an extent certainly to deter a man of ordinary reasonable nerve from going to the poll".

The foregoing cases contained in the O'Malley & Hardcastle series of reports had all been decided before the Ballot Act of 1872 when the common law method of election by show of hand prevailed and there was no voting by secret ballot. Secrecy of voting, as being a kind of foundation upon which the concept of a free and fair election stood, if that was the contention, was not thought by the judges to be an essential concomitant of a free and fair election, as these cases show.

The case of *The Borough of Dudley*[23] decided after the Ballot Act of 1872 introduced voting by secret ballot, was one where the substantial allegation in the petition was that there was so much riot and intimidation by mobs that there was no free election. Mr. Justice Grove set aside the election, in the view that he took on the evidence, that although the rioting and assaults were not committed by mobs acting for one side only, the more formidable violence was on the part of the mob which espoused the respondent's side and that the result was that a large number of voters were deterred and prevented from exercising the franchise and that the election therefore was not a free one and the constituency had not a fair opportunity of freely exercising the franchise. He went on to add however:

> "I by no means say that if a case had been made out of the violence being wholly or substantially on the side of the defeated candidate, and if I was satisfied that the result of the poll was a fair expression of the opinion of the constituency, I should have come to this conclusion, but the case, taking it in the most favourable view for the Respondent, stops far short of this."

In the *North Durham case*[24] once again decided after voting by secret ballot had been introduced into the law, the allegation in the petition was that the election was void on account of general riot and intimidation. In declaring the election void, there being a concession

by the successful candidate that the evidence was adequate to establish general intimidation, Mr. Baron Bramwell commented thus:

> "I take it that the law is this; first of all, there is the statutory intimidation, that contemplated by the statute, if one may use such an expression, that is, an intimidation contemplated by the statute which avoids the seat, where a candidate or his agent is guilty of it. But besides that there is another intimidation that has been called a common law intimidation, and it applies to a case where the intimidation is of such a character, so general and extensive in its operation that it cannot be said that the polling was a fair representation of the opinion of the constituency. If the intimidation was local or partial, for instance, if in this case it had been limited to one district, . . . I have no doubt that in that case it would have been wrong to have set aside this election, because one could have seen to demonstration that the result could not possibly have been brought about by that intimidation, and that the result would not have been different if it had not existed. I do not mean the result of the polling in that particular district, but the general result of the majority for the Respondents. But where it is of such a general character that the result may have been affected, in my judgment, it is no part of the duty of a judge to enter into a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence, if that intimidation had not existed the result would have been different. What the judge has to do in that case is to say that the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shown that the gross amount of intimidation could not possibly have affected the result of the election it ought to be declared void. Now in questions of this sort one must look not only to the amount of intimidation, but to the absolute majority which has been obtained. It was the opinion of Mr. Justice Willes, and I believe it is not inconsistent with the opinion of Mr. Justice Keogh, as expressed in that celebrated and most useful judgment which he gave in the Galway case, that you are to look at the probable effect of intimidation, which consists of two things, the extent and operation of the intimidation, and the majority which the sitting members got..

Now, I think if it were otherwise, and if one were told that partial intimidation would avoid an election, although it was certain that it had not affected the result of the election, the consequence would be that a few mischievous persons might upset every election."

The case of *The Thornbury Division of The Country of Gloucester* [25] once again decided after the Ballot Act of 1872, was one where an allegation in the petition was *inter alia* of intimidation. Mr. Justice Field in delivering judgment said as follows:

"But besides this statutory prohibition there is what is known as common law intimidation and riot. Now there are two leading cases upon this subject, one the *North Durham Case* [24] and the other the *Drogheda Case* [18] and I propose here to adopt the language of Lord Bramwell in the former, which confirms the view of Mr. Justice Willes in the *Lichfield Case* [26], as supplying the legal test which we must apply to these facts. Now in this constituency, out of twenty-three polling districts only three are affected by this crime, and that out of 11333, the total number of electors, 9529 went to the poll. The number of voters in the three districts in question is 789, and all but 87 voted. It is therefore difficult to come to the conclusion that any such intimidation or violence was used as practically prevented any considerable number of persons from voting. Again, we must consider not whether any particular person or particularly nervous person was affected by it. We must take the electors as an average of ordinary men who may be disinclined to go to the poll, but who were not necessarily intimidated. A man of ordinary courage would not necessarily be intimidated by what happened, and it is a very strong feature in the case that, speaking generally, the violence did not occur until after 6 o'clock in the evening, and the petitioner has not attempted to prove that during the interval between 6 and 8 o'clock, persons who wanted to go to the poll were prevented from doing so, or that practically there was no polling between these hours. I say that if that had been proved it would have gone strongly to show that this rioting had the effect of intimidating voters . . . It seems to me that the question which I have to decide is whether all the

electors of the other divisions of the constituency are to be disfranchised for what was done in the three divisions, and a fresh election held with all its turmoil and excitement. That will have to be done if I am satisfied that there has not been that free exercise of the franchise which everybody is entitled to have, and that the absence of that has been caused by intimidation and riot. But after the most careful consideration, I am unable to come to the conclusion that this case falls within the principle of the *Durham Case*, and upon this part of the case my judgment must be for the Respondent."

The *North Louth Case*[8] was heard in 1911. It came up before a bench consisting of Gibson, J. and Madden, J. In the course of his judgment Gibson, J. observed that the election under consideration held in the month of December 1910 was fought on the same register as the one in the month of January previous, the total number of registered electors being 5761 at both such elections: that at the January election the unsuccessful candidate in the December election won by a majority of 99, the total polled being 4786 leaving 975 unpolled: that at the December election the poll was 4556 leaving 1205 unpolled: that the decrease in number of actual electors was 230, a figure which might represent natural wastage on the register from lapse of time, and that the successful candidate at the December election was returned by a majority of 488. In his judgment Mr. Justice Gibson at pages 136 and 137 stated thus:–

"To upset an election for general intimidation it is necessary to show that there was such general intimidation as might have affected the result of the election (the *Stafford Case*[21] *the Thornbury Case*[27] *The Ipswich Case*[28]).

Where there is such general intimidation, the onus of proving that the gross amount of intimidation could not have affected the election is cast upon the constituency. The *North Durham Case*[24].

The amount of the majority is held to be important. Looking at the figures in the various polling districts at the two elections on

the same register, a circumstance that has perhaps never occurred before, the restricted character of the intimidation proved as regards area and number of cases, the majority of 488 on the same register as in January, I find it difficult to bring the class of intimidation here relied upon, which I may term preventive intimidation, keeping voters from the poll, within the authorities as to general intimidation at common law.

Dealing with what is to me a new field of law, I am unwilling to extend the principle of common law intimidation by prevention beyond what the authorities cited seem to cover . . .

The petitioners' case was rested on preventive intimidation of the type dealt with in the reported cases relied upon by the Respondent's counsel. The difficulty in those cases was that so many of them depended on facts, and one case on facts could not bind another, as Lord Halsbury has so emphatically explained in *London Joint Stock Bank v. Simmons*[29] and Lord Chief Baron Palles in *Rex v. Dolan*[30] and the difficulty is increased when, as frequently happens the facts do not appear in the report but must be inferred from the judgments.

To avoid misconception I wish to point out that this point of numbers polled, districts, and majority, always difficult of application, has, in my opinion, little, if any operation when the intimidation is not preventive, to exclude voters, but persuasive, to win votes by a process of forcible conversion addressed to fear."

In the same case Mr. Justice Madden (at pages 172 & 173) said thus:–

"Intimidation operates on the mind of the intimidated, and when this influence pervades the electors to such an extent as to render the action of the constituency other than free, the election held under such circumstances is void and of no effect at common law, irrespective of any question of agency between the authors of the intimidation and the candidate in whose interest it has been exercised. From its very nature it is

incapable of the exact proof which can be adduced with regard to particular instances of intimidation, or other undue influence. But its existence is a conclusion to be inferred from the evidence given in the case as well of general conduct as of specific acts, and from a consideration of the nature of the undue influence alleged to have been brought to bear upon the electors and of the action of the constituency; a matter in regard to which the amount of the majority by which a seat was won and the number of electors polled, relatively to the entire constituency and also to other elections, are proper to be considered".

One of the objects of the exercise of examining these old English cases has been to ascertain the extent to which secrecy of voting was considered an essential element of the English common law concept of a free and fair election, and taking into account what I gather from them and also keeping in mind the secrecy of voting provisions contained in the Constitution and in the Presidential Elections Act, I find that I cannot read such provisions so as to impose a prohibition upon the Court from examining any material that might be considered relevant, as to how or in what manner voters would or might have voted, so long as there is not involved an exercise at asking a voter how he did in fact vote, although there too, I see nothing to prevent a voter volunteering that information.

I have excerpted such material from the judgments in the cases reported by O'Malley & Hardcastle from their compilation of decisions in trials of Election Petitions, as I thought would be of use for a proper understanding of the principles of the common law as to general intimidation and their application to the facts of any given case. Some of them as pointed out were cases decided at a time when voting was not by secret ballot. In some of them, if not in a good many of them, the general intimidation complained of appears to have been calculated either to achieve the success of one candidate or the defeat of another, a feature which perhaps could be distinguished from the present case.

It is perhaps well to keep in mind that in the case we are concerned with, the intimidation was not calculated to advance the interest of the 1st respondent. For the sake of completeness therefore

it may be mentioned here that there is to be found the following passage in *Rogers on Election 20th Edition Volume 2 at page 347* which gives the effect of the authorities as to the position in England under the common law thus:–

> "Whatever the form taken by the violence, it would be a sufficient answer to prove that it was practised not by persons acting in the interest of the respondent, but against him, and in the interest of the other candidate. . ."

Although in the instant case the intimidation was not practised in the interest of the petitioner, yet such intimidation was not practised by persons acting in the interest of the 1st respondent either, and therefore to that extent shares this common feature with the situation contemplated by this passage, the implication of which is something that the Court should not be altogether unmindful of.

It is possible now to embark upon an examination of the essential submissions relied on by Mr. H. L. de Silva as constituting the basis of the petitioner's case. The most important aspect of those submissions is on the question of general intimidation in respect of which, in the context of section 91(a) of the Presidential Elections Act is to be found the following passage (at page 270) in the order of the Court on the preliminary objections, which I have set out in part earlier but which for ease of understanding is reproduced here once again.

> "So it seems to us that on the basis of instances or acts of general intimidation established by evidence, the Court may draw a reasonable inference therefrom that the majority of voters may have been prevented from electing the candidate of their choice. In a case of general intimidation the question that arises is – from the proved acts of intimidation of electors, is it reasonable to suppose that the result of the election may have been affected? This, it seems to us to be the true meaning of the words 'majority of electors may have been prevented from electing the candidate whom they preferred'. But, it will be open to the returned candidate to show that the gross intimidation could not possibly have affected the result of the election".

The effect of what Mr. H. L. de Silva suggested with respect to this passage was tantamount to saying that the inappropriate use of the word "result" there, has led to a good part of the confusion which needs clarification. He submitted that nowhere has the Court in its order equated the expression appearing in section 91(a) "the majority of electors were or may have been prevented from electing the candidate whom they preferred" with the words, "the result of the election was affected", as used in section 91(b), such that the former expression must be taken to convey the same notion as the latter. Indeed his contention was that the Court could not, upon a correct understanding of the law have done so. The word "result" occurs in two places in this passage and if I understood Mr. H. L. de Silva correctly, his complaint was that its use the first time is misleading. Once again, if I understood him correctly, the use of this word a second time is appropriate and denotes that there is a burden cast on the 1st respondent, the manner in which that burden was to be discharged being what was indicated by the way the word "result" was used the second time. This latter part of his submission however is something I will reserve for consideration later. The use of the word "result" as appearing the first time in that passage was, he contended, an "imprecise judicial paraphrase" of the true words in section 91(a). He submitted that the word "result" as used the first time in this passage by the Court, was intended to mean, "the effect or consequence on the voters' freedom of choice of candidate" and that the upshot of this at this election was of such a magnitude as to lead to the conclusion that the majority of electors may have been prevented from electing the candidate of their choice, regardless of whom they would have voted for, if they had had the opportunity to do so. It will become necessary therefore at some stage, to examine whether the Court's expression complained of, was intended to convey what Mr. H. L. de Silva contended was the true meaning of the section or whether on the other hand it was truly intended to convey the other meaning suggested by the "imprecise judicial paraphrase". Mr. H. L. de Silva's position was that he was not contending that it was no part of the petitioner's case upon the petition to show that the majority of electors were or may have been prevented from electing the candidate whom they preferred. His argument rather was that the expression did not mean the same as, "the result of the election was affected", as these words appear in

section 91(b) of The Presidential Elections Act and as interpreted by the Court in its order on the preliminary objections. These words, in his submission, were intended to suggest the notion that a significant number of voters were prevented from exercising the franchise, that is to say, that a greater number than those who voted would otherwise have voted freely but were prevented from doing so. He contended that when the Court in its order on the preliminary objections used words which might on their face suggest that they mean an affectation of the result, that was a judicial paraphrase of convenience and hence as I understood him, this inexactitude was one of the matters in that order that require clarification. The interpretation sought to be placed on section 91 (a) of the Presidential Elections Act on behalf of the petitioner, Mr. H. L. de Silva said, calls for proof of the facts and circumstances of the general intimidation and their intensity of virulence and perversive character, and the magnitude of the effect brought about, or, in other words the number of voters affected by being unable to vote, without the Court having to delve into their political loyalties or choice of candidate. The evidence while demonstrating the existence of general intimidation of that quality and kind had the result, he claimed, of preventing about 25% of the total of registered voters numbering around two and a half million from exercising their franchise, that figure being six or seven times the size of the majority which the 1st respondent secured over the petitioner. In these circumstances he contended that there is by way of evidence in the case, sufficient material in discharge of the burden which the section cast upon her. Something that strikes me here is, that the mere existence of a situation where the number of votes not cast is many times the difference between the votes secured by the winning candidate and the runner-up, should not, of itself, be allowed to assume an unduly important significance. It seems to me that the larger the electorate, as for instance when the whole Island is taken into reckoning as at a Presidential Election where therefore the total number of registered voters would run into millions, conceivably at any election (regarding which there is no complaint) the difference between the actual voter turn-out and a theoretically possible 100% voter turn-out could well be many time the difference in votes between those of the successful candidate and of the runner-up. At the same time it must not be overlooked that the smaller the majority of the winning candidate over

the runner-up at any such election, the greater the chance there is of that number as a fraction of the shortfall in votes becoming widened.

It is now necessary to consider what implications arise from Mr. de Silva's claim that these factors have been established. For a start there is the claim that reasonably, 80% of the total number of registered voters (i.e. the total of the 55% that voted and the 25% who were said to have been prevented from voting) could have been expected to have voted at this election, had it not been for such general intimidation. That percentage has been arrived at on the basis that it represents what he termed the national average of voters who have voted during the post-independence period.

In this connection before looking at what the evidence in the case taken as a whole suggests as to general intimidation, there are however one or two prefatory matters that need to be mentioned. Section 91 (a) of the Presidential Elections Act requires that it must be demonstrated that by reason of general intimidation, the majority of electors were or may have been prevented from electing the candidate whom they preferred. What does the expression "by reason of general intimidation" mean? The meaning as I have understood it suggests, that as a consequence of general intimidation there was this effect, that the majority of electors were or may have been prevented from electing the candidate whom they preferred, which to my mind connotes once again the notion that the general intimidation must be calculated to bring about this effect. The meaning adopted by the petitioner I find not inconsistent with this position and in her petition she has chosen to use the words, "In consequence". Mr. H. L. de Silva's submissions also suggested this, that it was the objective of this intimidation to bring about this effect. In the case of *Piyadasa v. Gunasinghe* 43 N.L.R. 36 Hearne J. (at page 39) used the same word,"calculated" that I have used as the following passage shows "I have mentioned in bare outline the incidents prior to December 14 which were **calculated** to prevent and did, in my opinion prevent a free and fair exercise of the franchise."

General intimidation, as opposed to statutory intimidation can consist of two broad types. Nagalingam, J. referred to them in *Tarnolis Appuhamy v. Wilmot Perera*[7] in the following passage:

"No evidence was given of what may be termed coercive intimidation, that is to say, intimidation having for its object the use of force or threat to compel a voter to vote for a particular candidate, but what evidence was led was led to show that the electorate was subjected to preventive intimidation, that is to say, intimidation which had for its object the prevention of electors from going to the polls lest the rival candidate gets their votes".

Nagalingam, J. refers to these two types of intimidation as being "coercive" and "preventive" in this passage somewhat on the lines that Mr. Justice Gibson did in the *North Louth case* I have already referred to. In the context of the case before him, he has described the object of preventive intimidation to be to deter voters from voting for the rival candidate, which suggests that such intimidation had been practised for the benefit of his opponent. Apart from that kind of preventive intimidation, there can perhaps be another type, which is general intimidation calculated to prevent all voters from going to the poll, regardless of their voting preferences. It is that type of general intimidation that is of relevance in this case and therefore it becomes necessary to see what the evidence suggests in this regard. Mr. H. L. de Silva in the course of his submissions contended that there were admissions by Mr. Choksy to the effect that there was such general intimidation as had the effect he contended for. Irrespective of whether or not there be any such admission, it is essentially a part of the Court's function and indeed its duty to reach the appropriate conclusions and draw the necessary inferences arising from the evidence before it. In addition in a matter pertaining to an election petition, there is the public interest element involved and the Court cannot by reason of admissions or anything to that effect be totally relieved of its duty in this regard. (*vide* for example the approach the Court adopted in the *North Louth Case* [8]. Even if it means that any important questions that may arise, not only as respects general intimidation but also as to certain other aspects of the case have to be decided upon a basis that has not been contended for by any of the parties, that is something that cannot be helped. In saying so I also have in mind what I consider to be the somewhat unexpected turn the case took at the end. As a statement of general application, it is correct in any event to say that a Court is

called upon to arrive at a just decision in the case, and that sometimes may have to be done regardless of what the parties may or may not contend. Indeed a Court is fully empowered to act in such a fashion as was pointed out by Sir John Donaldson M. R. in the case of *R v. Chief Constable of the Merseyside Police Ex parte Calveley and others*[31].

> "In reaching this conclusion, the Court, as it was entitled to do, was proceeding of its own motion in the sense that this was not a contention advanced on behalf of either party".

Mr. R. K. W. Gunasekera who continued the submissions commenced by Mr. H. L. de Silva for the petitioner, made two statements, one as his own assertion, and the other in response to a question put by me. His assertion was that the contention of Mr. Choksy that the situation during the 1989 general election had undergone an improvement from the standpoint of general intimidation, as compared with what it was at the time of the Presidential Election in December 1988, was incorrect. My question to him that resulted in the other statement was as to what inference, in the state of the evidence before the Court, one could draw from the increase in the percentage of those who voted in the 1989 general election, as compared with the percentage that voted at the Presidential Election in 1988 and his reply was that there was no inference which such evidence suggested. The effect of the two statements together, to my mind, is to suggest that there was no change in the atmosphere of intimidation at the different times at which these two elections were held, but that there was nonetheless an increase in the percentage of voter turn-out, a phenomenon which according to what Mr. Gunasekera said, the evidence did not explain. One would not then be too far wrong in saying that if such could be the position as to the increased percentage of voting in 1989 by reference to 1988, similar unknown and unascertained causes could well have also contributed in some measure to a decline in the percentage of those who voted at the Presidential Election of 1988 as compared with the so-called national average of 80%. I most certainly must not be understood to say here that there is no evidence to show that general intimidation did have an effect on the voter turn-out in 1988. What I do say is that to state a percentage

such as 80 points on the basis of a national average, and then to attribute the whole of the claimed shortfall to general intimidation, could well be inaccurate. The petitioner's own contention is that there was this climate of intimidation which was prevalent before and during the Presidential Election in 1988 and continued thereafter, even beyond the time of the general election in 1989. What is it then that the evidence suggests? If one takes account of some items of evidence, it could be said that there were calculated attempts at intimidating voters in order to prevent them from voting. Examples of such evidence were of posters displayed warning against voting at the election, disruption of political meetings, attempts to sabotage the holding of the poll at some polling stations, preventing the poll from being conducted at certain polling stations etc. But apart from these items of evidence which suggest the adoption of tactics of general intimidation calculated to prevent the holding of the election, the remaining mass of evidence demonstrates something somewhat different. Mr. H. L. de Silva's description of that at different places was thus:–

> "An election held amidst a massive compaign of terror, held under an all-pervasive climate of fear".

> "All these acts have been commonly attributed to the Janatha Vimukthi Peramuna which long before 1988 had given up any hope of coming to power through the parliamentary process when the leader of the J.V.P. who was a candidate at the 1982 Presidential Election had only succeeded in obtaining less than 6% of the votes polled. The violence that began with the protest against the 1987 Indo-Sri Lanka Accord increased in intensity and continued throughout 1988. It is beyond dispute that the J.V.P. was opposed to the holding of the Presidential Election in 1988 not because it was opposed to any particular candidate but because the entire objective was to bring about a revolutionary change in the legal order and overturn the entire constitutional structure which provided the legal machinery for the establishment of a governmental regime. The J.V.P. opposition and attacks were directed at the very holding of the election because the objective was to destroy the entire system of democratic government. It was an anti-systemic movement

calculated to destroy any claim to legitimacy through a process of democratic elections. Hence the carefully planned attempts to disrupt the civil administration, paralyse the transport and communications systems, impose unauthorised curfews, the compulsory closure of shops, business houses, schools, hospitals and bring about a general breakdown in essential services. In short, the object was to bring about a situation of wholesale chaos and disorder that would have enabled a revolutionary take-over of the administration".

"As I said before it was an anti-systemic agitation to dismantle democracy and usher in a reign of chaos and confusion before the final push for a revolutionary take-over of the administration. I think all of us here can vividly recall the tense atmosphere that prevailed at the time. We remember the anxiety, fear and apprehension which afflicted everyone and filled our nights and days. The whole nation was in the grip of fear and traumatised by the J.V.P. terror. A great many of those incidents have been unfolded in the evidence and portrays in graphic detail what one English Judge in a like context has called a 'communism of terror'. The whole nation was enveloped by a cloud of anxiety and fear".

"It was anti-systemic i.e. violence directed to bring about the destruction of the whole democratic structure of government and the collapse of all government institutions. It was a movement whose first aim was to annihilate the existing power structure and then attempt a revolutionary take-over of the apparatus of the State by armed force."

If these passages are truly descriptive of what the evidence shows, then it is reasonable to say that this climate of intimidation that commenced in 1987, continued from then on till the time of the general election and beyond. I repeat that certain specific acts brought out in the evidence do certainly fall within the description of those calculated to prevent the holding of the election. The evidence of these acts apart, the rest of the evidence suggests not general intimidation calculated to achieve the specific objective of preventing

the Presidential Election of 1988 from being held, but rather that the true picture is that this election was conducted while there was present throughout the country a climate of intimidation the object of creating which was to instil fear into the minds of the general public, voters and non-voters alike, so as to secure their submission and obedience to the demands and directions of this external force. If this movement was "anti-systemic", then the intimidation was calculated to be against the system and all components of the system and the holding of an election being such a component was a target; but it was not the sole target in the sense of a calculated effort to prevent the holding of the election isolated from the system. Indeed it must be remembered that 55% of the total number of registered voters, people of ordinary courage, men and women, young and old, went to the polls openly and visibly and that to my mind suggests that they were appreciative of the point made, that by and large an atmosphere of terror and tension had been created in the country for the larger purpose of overturning the entire established system. A statement to the effect then that this election was held during the prevalence of such a climate of intimidation does not necessarily mean that there was general intimidation as was altogether calculated to prevent electors from voting or the majority of electors from electing the candidate whom they preferred. The conclusion that I draw then from the evidence taken as a whole is, that although certain aspects of such intimidation had an effect on the Presidential Election of 1988, particularly such acts as were directed specifically to discourage voters from voting, nonetheless one cannot say with any degree of certainty or reasonable probability that such election did not show a voter turn-out of 80% or indeed any other ascertainable percentage, as a consequence of general intimidation calculated to prevent the holding of this election. When one is unable to draw a line of separation between the continued atmosphere of intimidation and tension that prevailed in the country during this entire period and the acts of general intimidation committed which were calculated to prevent the holding of the Presidential Election, one is in an uncertain area of speculation as to what percentage of loss of voter turn-out at such election, whether 25% as claimed or any other quantifiable percentage, could be attributed to general intimidation calculated to prevent electors from voting or the majority of electors from electing the candidate whom they preferred. In this regard it is

also possible to say that though over 50% of ordinary persons of average courage voted, others who might well have fallen within that description though not intimidated, could nonetheless have desisted from voting considering it sensible to keep away from the poll, guided by a counsel of prudence that discretion is the better part of valour, much in the same way that they might have been inclined to do, had they decided to remain in their homes without going about as freely as they might have done under conditions of normalcy. The point sought to be emphasized here is that quite a number of voters who may have refrained from voting could well have done so as an act of prudence and not because they were intimidated and thus it cannot be said that they were prevented from voting, but rather that they exercised a choice not to vote. Some sense of what I have in mind can be got from the following words used by Mr. Justice Field in the case of *The Thornbury Division of the County of Gloucester*[27] which I have already referred to "We must take the electors as an average of ordinary men who may be disinclined to go to the poll, but were not necessarily intimidated". How then can one apportion any precise percentage of the drop in voter turn-out in December 1988 to general intimidation as that expression is used in a context relevant to an election, whether such percentage be 25 points or any other, as a matter of reasonable conclusion from the evidence in the case, without running the risk of committing a serious error? For myself, I find that I am unable to draw any reasonable conclusion, which the evidence would warrant as to what fraction of the percentage that did not vote at the Presidential Election, as compared to the percentage that might ordinarily have been expected in a normal situation to have voted, was attributable to the practice of general intimidation calculated to prevent voters from voting, which is what matters in the case.

The next question that requires consideration is as to the majority the 1st respondent secured over the petitioner, which it was claimed was a fraction of the order of 1/6th or 1/7th of the number of additional votes that would have come in, if 80% of the registered voters had voted. The following figures were submitted in support of the petitioner's position that if this 80% did vote she could have overtaken the 1st respondent by one vote and achieved victory if she had obtained 279339 out of the additional votes numbering 2314371.

Total of Registered voters	9375742
Total Polled (55.32%)	5186223
If 80% voted the No. of votes that would have been polled	7500594
The No. of additional votes if 80% polled 7500594 – 5186223	2314371
For the 1st Respondent to be declared the winner if 80% polled	
He would have had to get 50% + 1 of the 80% i.e. he must get	3750298
He received	2569199
The additional votes he would have had to get 3750298 – 2569199	1181099
For the Petitioner to win if 80% polled	
She too had to get 50% + 1 of the 80% i.e.	3750298
She received	2289860
The additional No. of votes would be 3750298 – 2289860	1460438
The difference between 1460438 and 1181099 =	279339

The number 279339 can be arrived at by deducting the total number of votes the petitioner obtained from those that the 1st respondent did, but a close look will show that the calculation relied on is itself made in such a way as to arithmetically achieve this result. At first glance, these figures have no doubt the appearance of plausibility, but I will endeavour to demonstrate the erroneous basis upon which this result is reached. Section 56(2) of the Presidential Elections Act directs The Commissioner of Elections, if he finds that any particular candidate has received more than one half of the total number of valid votes cast, to forthwith declare such candidate elected. If however no candidate receives more than one half of the total valid

votes cast, then there is a procedure laid down which involves the counting of preference votes. To achieve an 80% voter turn-out, an additional 2314371 votes would have had to be cast. Upon the figures presented for the petitioner, it was claimed that if 80% of all registered voters did vote, the petitioner would have received one vote in excess of one half of the total number of votes cast and achieved victory, had she obtained an extra 1460438 votes in addition to those she actually received at the election numbering 2289860. Giving her that number of 1460438 votes out of the additional 2314371 votes cast, would leave a balance of 853933 votes. Now what happens to this remaining number of 853933 votes? They cannot be disregarded and must enter into the calculation. Let me assume that the entirety of that number is allotted to the 1st respondent. Then his total moves up to 3423132 which is a sum of that number plus 2569199, being the number of votes he actually received. It will be noted that this number 3423132 is less (by a figure of 327166) than the number 3750298 which is the total shown as necessary for the petitioner to obtain one vote in excess of one half of the total of the votes cast and achieve victory. Why is that so? It is so, because out of the additional 2314371 votes taken into reckoning in this exercise, to achieve her victory a percentage which works out to approximately 63.10 has been allotted to the petitioner leaving a balance of only 36.90% available to be allotted to the 1st respondent, assuming that is, that the whole of it were to be allotted to him. If on the other hand on the figures presented, the 1st respondent was to achieve victory having received one half of the total of the votes polled plus one out of the total number of 80% votes polled, a calculation on a like basis will demonstrate that he would have to be allotted approximately 51.03% of the extra 2314371 votes polled with 48.97% available to be allotted to the petitioner. The result of this exercise done in the manner claimed then, is to show that with an 80% voter turn-out, to ensure the petitioner's success she would have had to obtain 63.10% out of the additional votes, being a percentage much in excess of the 44.95% that she actually received at the election; while the 1st respondent's share of the additional votes would be reduced to 39.90% being much less than the 50.43% he actually received at the election. Similarly with a 80% voter turn-out, to achieve victory the 1st respondent would have had to obtain 51.03% of the additional votes cast, being an increase marginally

over the 50.43% he actually received at the election, with 48.97% available to the petitioner out of the excess votes cast which once again is in excess of the 44.95% that she actually received at the election. Therefore the picture that emerges on an 80% voter turn-out calculated on the basis suggested is that the petitioner, whether successful or unsuccessful, would have obtained a greater percentage of the extra votes cast than she actually received at the election; whereas in the case of the 1st respondent if he was successful he would have obtained a percentage of the extra votes cast, marginally above the percentage he actually received at the election, and if he was unsuccessful a percentage of the extra votes cast, much lower than that which he received at the election.

To complete the picture, I will now take a situation where hundred percent of the registered voters are considered to have voted and deal with that situation in the manner in which the petitioner dealt with an 80% voter turn-out; that is in such a way as to maintain the arithmetical majority of 279339 which the 1st respondent actually secured over the petitioner at the election. To achieve such hundred percent voter turn-out there should have been an additional 4189519 votes. Half the total number of votes cast then would have been really half the total number of registered voters and would amount to 4687871. The petitioner having received 2289860 votes, the balance required to make up one half of the total number of votes cast would have been 2398011 votes with an additional one vote necessary to achieve victory bringing the number up to 2398012. That would represent a 57.23% of the extra votes being allocated to her with the balance 42.77% available to the 1st respondent. If on the other hand the 1st respondent was to have achieved victory, in addition to the 2569199 votes he received, he would have had to obtain an additional 2118672 out of the extra votes to reach the level of one half of the votes cast with one vote added to achieve victory, that number then becoming 2118673. That would be 50.57% out of the extra votes with 49.43% available to the petitioner.

This exercise demonstrates the anomalies that arise when hypothetical figures are taken as constituting total voter turn-out percentages and it is sought to maintain the figure of 279339 being the majority the 1st respondent in fact received over the petitioner at the election. In doing so one sees that varying hypothetical

percentages of the extra votes cast have to be assigned to the parties, percentages completely different from those actually polled at the election with no basis, factual or arithmetical to justify doing so.

A more realistic method that commends itself to me is to base a possible calculation on the actual votes cast. The valid votes polled at the election were thus:–

Oswin Abeygunasekera	235719
The petitioner	2289860
The 1st respondent	2569199
The total number therefore of valid votes cast	5094778

Now the effect of what was contended for the petitioner is that to equal the 1st respondent's total of 2569199, all that was necessary was to obtain 279339 extra votes and that one more vote beyond that number would give her a majority as well as success at the election. Arithmetically it would be correct to say that she would have received such majority, assuming that the 1st respondent's number of votes remained static. By receiving this number of votes the petitioner would have overtaken the 1st respondent's total by one vote. But adding 279340 votes to the votes actually polled by the petitioner would mean that the total number of votes cast in the election would have increased by that number because such number could not have been taken out of the votes cast for either of the other candidates. When the total votes cast gets increased by 279340 adding up to the number 5374118, one half of that number becomes 2687059 and the petitioner's total would have been what she received, namely 2289860 plus the 279340 added for the purpose of this exercise, totalling to 2569220. This figure falls short of the level of one half of the total votes cast required and upon that total, she could not have been declared the winning candidate under section 56(2) of the Presidential Elections Act. Nor for that matter, would the 1st respondent have received a figure in excess of one half of the total thus made up, and this would have resulted in the need to count the preference votes in order to ascertain who the winning candidate would have been. Arithmetically it will then be seen that in order to

reach the level of one half of the total votes cast, the petitioner would have had to receive in addition to the number she actually polled, an extra 515058 votes and to exceed that number, another one vote. That too would be on the basis that neither of the other candidates received a single extra vote apart from what they actually polled. To maintain that one vote lead and at the same time to maintain the level of having reached one half of the total of the votes cast, for each one vote either of the other candidates received, the petitioner herself would have had to receive an additional countervailing vote. The manner in which the number 515058 was reached is thus. The votes received by the 1st respondent numbering 2569199 and Mr. Oswin Abeygunasekera numbering 235719 total to 2804918. The petitioner having received 2289860 could have equalled that total by obtaining 515058 extra votes and with a single vote added to that number it will be seen that while achieving victory she would have also reached the level of having secured one half of the total votes cast.

As I see it therefore, it is not accurate for the petitioner to contend in the context of the Presidential Elections Act that the majority which she had to overcome was 279339 votes, which therefore constituted only a 1/6th or 1/7th of the total votes that would have been polled had 80% of the voters in fact voted at the election, and that in consequence the majority of electors may have been prevented from electing the candidate whom they preferred in quite the manner as was contended for her.

Apart from this there is another aspect which cannot be disregarded. One must take care to be reminded of the fact that this proposition as contended for the petitioner is based upon the actual figures that became available at the conclusion of the election. The proposition is that the 1st respondent's majority over the petitioner's total of votes was only 1/6th or 1/7th of the 25% shortfall in the votes. It is with respect to such a situation that it was contended for the petitioner, that if she secured a further 279339 votes she could have erased the 1st respondent's majority over her. But the question is, if the extra 25% did vote, who is to know what the distribution pattern of these votes between the three candidates would have been, so as to enable one to say, as claimed, that if the petitioner obtained 279339 votes in addition to those she actually received, she would

have overtaken the 1st respondent's majority and at the same time received one half of the total number of votes cast. The system of preference votes could also, in certain circumstances, be imagined to have caused yet another complication, if it had become necessary to take such preference votes into account by reason of an increased voter turn-out, as a consequence of no candidate having received over one half of the total votes polled. In that situation if the candidate who received the lowest number of votes had to be eliminated, his votes would then have had to be distributed among the other candidates according to the next preference indicated by his voters. In what proportion they would have been distributed would be an unknown factor. Without knowing that, one would once again not be in a position to say, what the difference would have been in the number of votes between those secured by the winning candidate and by the runner-up, after those votes were taken into reckoning. In a situation therefore where 80% of the voters might have been expected to vote, how the extra 25% might in fact have voted not being known, one cannot say whether or not the preference votes of those who voted for the third candidate would have had to be counted and then one cannot say except as a matter of guesswork what the difference in votes would have been between those of the winning candidate and the runner-up.

The essence of Mr. H. L. de Silva's contention with respect to the order on the preliminary objections was, that in interpreting the meaning of the phrase, "the majority of electors may have been prevented from electing the candidate whom they preferred", the Court, as I earlier said, used the word "result", not in the sense of a numerical count of votes, but in the sense of a consequence or effect on the electors' choice of candidate. This, he said, was explained in the very next sentence the Court used when it said, "But it will be open to the returned candidate to show the gross intimidation could not possibly have affected the result of the election." His submission therefore was, that if the number of voters who had been prevented from voting by reason of the gross intimidation had been six or seven times as great as the majority the declared candidate secured over the next, then there is demonstrated that there had been such a consequence or effect on the electors' choice of candidate, as would enable one to say that the majority of voters may have been

prevented from electing the candidate whom they preferred. His argument therefore was, that in order to dispel the possibility so suggested that the majority of electors may have been prevented from electing the candidate whom they preferred, it became incumbent upon the returned candidate to show that the shortfall in the votes due to the gross intimidation was so small as to be less than the majority of the returned candidate, by which process the returned candidate would then have demonstrated that the gross intimidation could not possibly have affected the result of the election. There are certain matters that need to be considered in this regard. There is first Mr. H. L. de Silva's contention as to the degree of proof required, to discharge the burden that lies upon the petitioner when invoking the provisions of section 91(a) of the Presidential Elections Act to have the election declared void. The section reads to be understood that, even if it may not be proved that the majority were in fact so prevented, it would be sufficient to prove that the majority may have been so prevented. Mr. H. L. de Silva argued that the use of the word "may" in the section indicates that what was required was to show that there was that "possibility" and that such a burden therefore would be discharged upon a lower standard of proof than suggested by the word "probability". The word "may" as used in the section, he submitted, was equivalent in meaning to the use of the word "possible," used as the antonym of the word "impossible". The line of argument was that in a situation where a particular thing is "possible", equally that same thing could be, "not possible" and that these two situations could co-exist without being in conflict with each other, so that to exclude a thing being "possible", it was necessary to prove that such thing was "impossible". Counsel argued that if the evidence indicated that the winning candidate's majority was 1/6th or 1/7th of the number that constituted 25% of the total of registered voters and that they were so prevented from voting, there was an "inference" or "presumption" that arose, that the majority of electors may have been prevented from electing the candidate whom they preferred. If that is the situation contemplated by the word, "may", as meaning, "possible", the question that occurs to me is whether there could not be the same kind of possibility as a measure of the degree of proof required, in a situation where the majority secured by the winning candidate, instead of being 1/6th or 1/7th, is just short of the shortfall in votes. To displace such inference

or presumption, there was, he submitted, a burden cast on the 1st respondent according to the Court's order on the preliminary objections, to show that the majority of electors were, in fact, not prevented from electing the candidate whom they preferred, as would be the case in a situation where the number of those who were prevented from voting was less than the winning candidate's majority. What he submitted amounts to this, that the petitioner had discharged the burden which lay upon her by virtue of such inference or presumption, and that consequently the burden had shifted to the 1st respondent to show that the majority of electors were not prevented from electing the candidate whom they preferred. If it be correct that such a burden came to be cast upon the 1st respondent, what in reality is the effect of his so demonstrating in that manner that the majority of electors had not been prevented from electing the candidate whom they preferred. Then a numerical test is used to rebut a hypothetical possibility. The moment such a thing is done is there not implicit in the exercise, an endeavour at discovering whether another candidate should have achieved victory instead of the returned candidate? The effect of doing that is, as I see it, that by an exercise involving a numerical reckoning of votes, it is sought to establish that the declared candidate's success remains unaffected. To show that in that way, is to show that the result of the election was not affected, using that expression in a sense analogous to that in which its words are used in section 91 (b) of the Presidential Elections Act. Then, one is in the curious position of saying that the 1st respondent is called upon to demonstrate numerically that the result of the election was not affected, to meet a case upon which the petitioner herself is not called upon to demonstrate numerically that the result of the election was affected.

Something else needs to be said about the contention of learned Counsel, that it is sufficient to show the existence of a mere possibility that the majority of electors may have been prevented from electing the candidate whom they preferred. The section also deals with a situation of proof, to the satisfaction of the Court, that the majority of electors were in fact prevented from electing the candidate whom they preferred. This, as Mr. H. L. de Silva contended, is a degree of proof which demonstrates a measure of certainty. If then that be so, the degrees of proof covered by the section would span the whole

range, starting from a level of certainty at one end and extending to a level of a mere possibility or anything other than impossibility at the other, a situation which it does not seem at all likely that the legislature could be thought to have intended as one reads and understands the section.

Much reliance was placed for the petitioner on the judgment of the Court of Common Pleas in the case of *Woodward v. Sarsons*[10]. It was contended that, not merely does the judgment set out, correctly and fully, the common law concept of a free and fair election, but also that it was the inspiration that guided, both in language and in concept, the entry into our law of the very first section in terms similar to section 91(a) of the Presidential Elections Act. That case arose out of an allegation that there was non-compliance with the rules and forms provided for the holding of elections. The judgment of the Court (consisting of Brett, Archibald and Denmen JJ) read by Coleridge, C.J. contains (at pages 743 and 744) the following passages:

> "The questions raised for decision seem to be. First, what is the true statement of the rule under which an election may be avoided by the common law of Parliament? secondly, is the present case brought within the rule? . . .
>
> As to the first, we are of opinion that the true statement, is that an election is to be declared void by the common law applicable to parliamentary elections, if it is so conducted that the tribunal which is asked to avoid it is satisfied as a matter of fact, either that there was no real **electing** at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own

preference, by general corruption or general intimidation, or by being prevented from voting by want of the necessary machinery for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by such other acts or mishaps. And we think the same result should follow if by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have* been prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not enable the tribunal to declare an election void by the common law of Parliament. This we think, is the result of comparing the judgments of *Grove, J., at Hackney*[13] and *Dudley*[32] with the judgment of *Martin, B., at Salford*[20] and of *Mellor, J., at Bolton*[33] all of which judgments are in accordance with, but express more accurately, the grounds of the decisions in parliament in the older cases of *Norfolk*[34], *Heyw, Co. 555.*(n)[35], *Morepeth*[36], *Pontefract*[37], Coventry[38], *New Ross*[39], *& Drogheda*[40] *& the Drogheda case*[18] all of which are mentioned in Rogers on Elections, 10th ed, 365 et seq.

As to the second, i.e. that the election was not really conducted under the subsisting election laws at all, we think, though there was an election in the sense of there having been a selection by the will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as a matter of fact, that the election was not an election under the

existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws: it is necessary to be able to say that, either wilfully or erroneously the election was not carried out under those laws, but under some other method."

One sees that the Court of Common Pleas considered that a tribunal examining the question as to whether an election should be declared void by the common law, is called upon to be satisfied that there is **reasonable ground to believe** that the majority of electors may have been prevented from electing the candidate they preferred, in a situation where it is not proved that such majority of electors were in fact prevented from electing the candidate whom they preferred. Now what do the words "reasonable ground to believe", as used by the judges in that case mean? Do they or do they not have the same meaning as that which Mr. H. L. de Silva contended for, with respect to section 91(a) of the Presidential Elections Act. His response, in answer to a query from the Court as to this was, that the probative facts or the evidentiary facts have to be established upon a balance of probability, but that the factum to be proved is still in regard to the possibility of an event or an occurrence and not as to the probability of its occurrence. I must confess that I did not quite comprehend the intended meaning of this submission. Assuming that he meant by this that it had to be established upon a balance of probability, that there was a degree of general intimidation as resulted in a shortfall in voter turn-out of 25% and that there was also a probability that the majority secured by the winning candidate was as low as 1/6th or 1/7th of that shortfall, is it that there arises a possibility of an event or occurrence and if so, is that event or occurrence the prevention of the majority of electors from electing the candidate whom they preferred? That is the only factum to be proved that I can see upon this contention, that the majority of electors may have been prevented from electing the candidate whom they preferred, a factum to be proved as a mere possibility. If that be the factum to be proved as a mere possibility, that the majority of electors may have been prevented from electing the candidate whom they preferred, then the factum to be proved according to the judgment in *Woodward v. Sarsons* is also that the majority of electors may have been prevented from electing the candidate whom they preferred, but there, as set out by the Judges, as a reasonable ground of belief, which is certainly not to say as a

matter of mere possibility. If therefore the judgment in *Woodward v. Sarsons* as to the common law is embodied in section 91(a) of the Presidential Elections Act, Mr. H. L. de Silva's submission is one I find that I cannot assent to. I rather consider that the correct formulation is that which the judges in *Woodward v. Sarsons* adopted, upon which it would not suffice to say that the petitioner could discharge her burden by pointing to a mere possibility (as opposed to an impossibility) that the majority of electors may have been prevented from electing the candidate whom they preferred, but that she has indeed to satisfy the Court as a reasonable ground of belief that the majority of electors may have been prevented from electing the candidate whom they preferred, which in my understanding means the same thing as saying, furnishing proof as a matter not even of mere probability, but indeed of reasonable probability.

It now becomes necessary to say that there was a burden cast upon the petitioner to show that the majority of electors may have been prevented from electing the candidate whom they preferred, whichever meaning that expression has, which is to show that there is reasonable ground to believe that such majority were so prevented, and that renders it necessary to look at the provisions of the Evidence Ordinance relating to the burden of proof in this case. As Mr. Choksy pointed out, section 91(a) of the Presidential Elections Act requires that it must be proved to the satisfaction of the Court, that by reason of general intimidation the majority of electors were in fact prevented, or that the majority of electors may have been prevented from electing the candidate whom they preferred. As emphasized by Mr. Choksy, in terms of section 3 of the Evidence Ordinance, a fact is said to be proved, when after considering the matters before it, the Court either believes it to exist, or, considers its existence so probable that a prudent man ought in the circumstances of the particular case, to act upon the supposition that it exists. If that definition of proof is applied to the terms of section 91(a) of the Presidential Elections Act, when an election is sought to be avoided on the basis of general intimidation, the position would be thus, whichever meaning one takes to be the true meaning of the expression, "the majority of electors were or may have been prevented from electing the candidate whom they preferred".

1. On the basis that the majority of electors were in fact prevented from electing the candidate whom they preferred, (a) the Court must believe as a matter of actual existence that the majority of electors were prevented from electing the candidate whom they preferred, or, (b) the Court must consider that under the circumstances of the case, a prudent man ought to act on the supposition that the majority of electors were prevented from electing the candidate whom they preferred.

2. On the basis that the majority of electors may have been prevented from electing the candidate whom they preferred, (a) the Court must believe as a matter of actual existence that the majority of electors may have been prevented from electing the candidate whom they preferred or, (b) the Court must consider that under the circumstances of the case, a prudent man ought to act on the supposition that the majority of electors may have been prevented from electing the candidate whom they preferred.

The next point to note, and one of importance to the result of this case is as to the provisions of the Evidence Ordinance on the question of burden of proof. They do have the effect of casting the burden of proof in the case upon the petitioner to establish all the necessary ingredients which would entitle her to the relief she demands. Sections 101, 102, and 103 may usefully be reproduced here.

Section 101. " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Section 102. " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 103. " The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence,

unless it is provided by any law that the proof of that fact shall lie on any particular person."

The burden then lay on the petitioner to show, not as a matter of mere probability but as a matter of reasonable probability, that the majority of electors were or may have been prevented from electing the candidate whom they preferred, by reason of general intimidation. It is my belief that the order of the Court which Mr. H. L. de Silva said was to cast a burden on the 1st respondent, really did intend to say that the petitioner had to furnish the requisite proof as to this as a reasonable ground of belief, but that it was open to the 1st respondent to show upon a balance of probability, that a view of the whole of the evidence was one more favourable to him.

Upon the hypothesis advanced by learned Counsel for the petitioner as to the meaning to be gathered from the expression, " the majority of electors may have been prevented from electing the candidate whom they preferred", which he submitted found favour with the Court as shown by its order on the preliminary objections, I have examined the ingredients he referred to as necessary to be proved by the petitioner. Upon such hypothesis and on her own contention as to what she had to establish, I have to conclude as a matter of reasonable probability or reasonable ground of belief, that the petitioner has failed to establish, the following ingredients which are, that a particular percentage of electors refrained from voting by reason of general intimidation calculated to prevent them from doing so, that the number of additional votes sufficient to entitle her to success was the number she relied upon which therefore was a fraction of the order of 1/6th or 1/7th of the shortfall, and that there was thus demonstrated that the majority of electors may have been prevented from electing the candidate whom they preferred in the sense contended on her behalf. The reasons for saying this I have already explained with respect to each ingredient separately and thus I cannot accept that the combined effect of the material relied on to support each component was to bring about the consequence contended for the petitioner. The conclusion then must be, that upon the formulation adopted by learned Counsel for the petitioner, her case presented on the basis of general intimidation must fail.

That should perhaps ordinarily have sufficed to dispose of the matter, that being on the basis of the case presented for the petitioner, but there yet remains not ascertained, the true meaning of the expression, "the majority of electors were or may have been prevented from electing the candidate whom they preferred". I will therefore proceed to address my mind to that.

Usefully, in approaching the questions then involved, I would start with the formulation adopted by the Court of Common Pleas in the case of *Woodward v. Sarsons*. From the passages of the judgment which I have already reproduced, the following propositions as respects general intimidation can be deduced.

1. An election is to be declared void by the common law, if it was so conducted that the tribunal is satisfied as a matter of fact, that there was no real electing by the constituency at all.

2. The tribunal should be satisfied that there was no real electing by the constituency at all, if it were proved that such constituency had not, in fact, had a fair and free opportunity of electing the candidate which the majority of the electors might prefer.

3. The constituency would not in fact have had a fair and free opportunity of electing the candidate which the majority of the electors might prefer if a majority of the electors were proved to have been prevented by general intimidation from recording their votes effectively according to their own preference.

4. The same result should follow (that is that the election should be declared void), if the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented by general intimidation from electing the candidate they preferred.

5. Even if the tribunal should be satisfied that some general intimidation had taken place, but nevertheless should not be satisfied that a majority of the electors had been prevented from electing the candidate they preferred, the tribunal would not be entitled to declare

the election void by the common law, by reason only of the existence of such general intimidation.

6. Even if the tribunal should be satisfied that some general intimidation had taken place, but nevertheless should not be satisfied that there was reasonable ground to believe that a majority of the electors had been prevented from electing the candidate they preferred, the tribunal would not be entitled to declare the election void by the common law, by reason only of the existence of such general intimidation.

In order to ensure accuracy, I have endeavoured to extract these propositions from the judgment with care. If I am to rearrange the ideas expressed in the propositions numbered 1, 2 and 3 in the reverse order so as to see how they would read, this is the result. If the majority of electors were proved to have been prevented by general intimidation from recording their votes effectively according to their own preference, (which is to say they were prevented from voting as they wished) the constituency would not have had a fair and free opportunity of electing the candidate whom they preferred. If the constituency did not have a fair and free opportunity of electing the candidate whom they preferred, there would be no real electing by the constituency at all. If there was no real electing by the constituency at all, the election is to be declared void. If one examines the proposition numbered 3 alone, it will be seen that it appears to point to a situation as to when it could be said that the majority of the electors have not had a fair and free opportunity of electing the candidate whom they preferred. That is to be found in the words, "a majority of the electors . . . were prevented from recording their votes effectively according to their own preference". If the majority of electors were prevented from voting as they wished, there could then be no doubt that the election must be declared void. Let me now see what the situation is, when it cannot be said that the majority of electors were prevented from electing the candidate whom they preferred, but it is possible to say there are reasonable grounds to believe that the majority of electors may have been prevented from electing the candidate whom they preferred. In terms of the proposition numbered 4 above, then too the election must be declared void. If however the majority of the electors were not

prevented from recording their votes effectively according to their own preference, what follows? It is perhaps on the basis that it could then be said that the constituency was not deprived of and therefore did have a fair and free opportunity of electing the candidate which the majority of the electors might prefer that a position appears to have been taken for the respondents at an early stage in the case, that the charges based upon section 91(a) of the Presidential Elections Act must fail, because in the event, the majority of the electors (over 50% of the registered voters) had the opportunity and did in fact vote. I however mention this only in passing, but make no point of it.

Since the occasion lends itself to such a step, I would refer here to the aspect of the petitioner's case as pleaded in her petition in paragraph 6C based upon the provisions of section 91(a) of the Presidential Elections Act as against the 2nd respondent, on the ground of non-compliance with the provisions of the Act relating to the conducting of the election in accordance with the principles contained in such provisions. The case of *Woodward v. Sarsons* is important in this regard as well, and the several examples of voters being prevented from voting by want of the machinery necessary for so voting as shown in the quotation reproduced, are also characterised as instances demonstrating that there was no real electing by the constituency at all. A set of like propositions as respects that aspect is once again extracted from the judgment thus:–

1. An election is to be declared void by the common law, if it was so conducted that the tribunal is satisfied as a matter of fact, that there was no real electing by the constituency at all.

2. The tribunal should be satisfied that there was no real electing by the constituency at all, if it were proved that such constituency had not, in fact, had a fair and free opportunity of electing the candidate which the majority of the electors might prefer.

3. The constituency would not in fact have had a fair and free opportunity of electing the candidate which the majority of the electors might prefer if a majority of the electors were proved to have

been prevented by want of the machinery necessary for so voting, from recording their votes effectively according to their own preference.

4. The same result should follow (That is that the election should be declared void), if the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented by want of the machinery necessary for voting, from electing the candidate they preferred.

5. Even if the tribunal should be satisfied that there was some breakdown of the machinery necessary for voting, but nevertheless should not be satisfied that a majority of the electors had been prevented from electing the candidate they preferred, the tribunal would not be entitled to declare the election void by the common law, by reason only of the existence of those instances of breakdown of the machinery necessary for voting.

6. Even if the tribunal should be satisfied that there was some breakdown of the machinery necessary for voting, but nevertheless should not be satisfied that there was reasonable ground to believe that a majority of the electors had been prevented from electing the candidate they preferred, the tribunal would not be entitled to declare the election void by the common law, by reason only of the existence of those instances of breakdown of the machinery necessary for voting.

Thus, I think it can be said that, as the judgment in *Woodward v. Sarsons* shows, the English common law concept of a free and fair election has relevance not only when considering the element of general intimidation, but also in considering the element of failure to conduct an election, with the necessary machinery provided for voters to vote, in either case, so as to prevent the majority of electors from electing the candidate whom they preferred.

If that be a true statement of the common law relating to the concept of a free and fair election as it was understood in England, let me now examine our statutory provision vis-a-vis the judgment of

the Court of Common Pleas in *Woodward v. Sarsons.* It must be kept in mind that the relevant section, namely, section 91(a) of the Presidential Elections Act, is a reproduction of earlier legislation in similar terms, the earliest to be found, if I understood Mr. H. L. de Silva correctly, in the 1931 State Council Elections Order-in-Council.

Putting together the relevant parts of the main section 91 and of section 91(a), the provision may be made to read thus:–

The election . . . shall be declared to be void . . . on . . . the following ground(s) which may be proved . . . , namely, that by reason of general intimidation . . . the majority of electors were or may have been prevented from electing the candidate whom they preferred.

A rearrangement of these clauses to get out the sense more clearly would, as I see it, read:

The election shall be declared to be void on the following ground(s) which may be proved, namely, that the majority of electors were or may have been prevented from electing the candidate whom they preferred, by reason of general intimidation.

When this section is rendered in this form it helps to identify a possible misconception that can occur, of much significance in the case. It is seen at once that the ground of avoidance is that the majority of electors were or may have been prevented from electing the candidate whom they preferred. One can all too easily fall into the error of thinking that a ground of avoidance under the section is general intimidation. The ground of avoidance under section 91(a) then is really the effect, which is that the majority of electors were or may have been prevented from electing the candidate whom they preferred and not the cause, which may be general intimidation.

The Court of Common Pleas considered in the case of *Woodward v. Sarsons* that the concept of a free and fair election (or an election at which there was a real electing) implies one at which the majority of electors had the opportunity of electing the candidate whom they preferred. If they therefore, that is such majority, did not have that opportunity, then there was no free and fair election or no real

electing, to state the other side of the proposition, the consequence then being that the election must be declared void.

What then is the true meaning of the language used in section 91(a) which is said to have derived its inspiration from the judgment in this case? The answer to that is made simpler I think by the way I have rendered the section. The election shall be declared void when a certain eventuality or situation exists. What is that eventuality or situation? It clearly is that the majority of electors were or may have been prevented from electing the candidate whom they preferred, as the language used reads. Prevented how, or in what way? Prevented by reason of general intimidation or failure to comply with the elections law, as the case may be, that being therefore the agency by which such prevention was brought about. The identical position arises from the judgment in the case of *Woodward v. Sarsons*, as the propositions I have extracted show.

Such is the way I think the sense of the section must be got, because any true reading of it must give effect to all its words and clauses as may not be the case if the section is read to understand as if the ground of avoidance is general intimidation.

Something that strikes me as being supportive of the assertion I make, that what is vitally important in the section are the words suggesting the need to establish that the majority of electors were or may have been prevented from electing the candidate whom they preferred is this. Reading the section (erroneously) as if the ground of avoidance is failure of the electoral machinery, when that "circumstance" is relied on, there is no criterion upon which the election could be avoided.

Summarising what I say in this regard, in terms of section 91(a) of the Presidential Elections Act, in order to avoid an election it must be shown that it was not a free and fair one. It is proved not to be a free and fair election, when it is proved that the majority of the electors were or may have been prevented from electing the candidate whom they preferred (see here for comparison the propositions extracted from the judgment in *Woodward v. Sarsons*). That which prevents an election from being a free and fair one may be, so far as is relevant to

this case, either the existence of general intimidation or the failure to comply with the elections law. What may be thought of as the cause which could be the presence of general bribery, general treating, general intimidation, misconduct or other circumstance whether similar to these or not, must be demonstrated to be present and shown to bring about the stated effect, which is that the majority of voters were or may have been prevented from electing the candidate whom they preferred. Then only can the desired consequence be achieved, which is to have the election avoided. The cause cannot achieve the consequence without the effect being shown. It is therefore, in my view, vital to the success of the petitioner's case as based upon section 91(a) of the Presidential Elections Act to prove as the primary requisite, that the majority of electors were or may have been prevented from electing the candidate whom they preferred. If it cannot be proved that the majority of the electors were or may have been prevented from electing the candidate whom they preferred, then the very ground relied upon, the essential *factum probandum*, is not proved and it cannot then be said that there was no free and fair election, whether the basis be general intimidation or non-compliance with the elections law or any of the other factors referred to in the section, and the election therefore cannot be avoided. The concept of a free and fair election is not one to be found by reference to the words "general intimidation", but by reference to the provision, "that the majority of electors were or may have been prevented from electing the candidate whom they preferred"

I will now attempt an analytical approach to the question as to what the words of this expression mean. The section contemplates two situations. The first is one where the majority of electors were (in fact) prevented from electing the candidate whom they preferred, a situation of the highest importance in my view to the ascertainment of the true meaning of this expression. This position as requiring an element of certainty by way of proof is reflected in the propositions numbered 1 to 3 relating to general intimidation which I have extracted from the judgment in the case of *Woodward v. Sarsons*. The legislature when dealing with that situation, spells out a test in section 91(a) and, independent of any question whether what is implicit in that test is capable of proof or not, such test as a matter of clear language is this. Were the majority of electors prevented from

electing the candidate whom they preferred? If the answer to that is in the affirmative, the next question that arises from it is whether it was general intimidation that brought about that effect, the two questions having to be looked at in that order. Let me for the moment view this expression in the background of the present case. If, even in the absence of the general intimidation (or for that matter a combination of the factors of general intimidation and a breakdown of the machinery of voting), it was the1st respondent who would yet have been the successful candidate, then it could not be said that the majority of electors were prevented from electing the candidate whom they preferred, inasmuch as, with or without such general intimidation, the1st respondent would have been the preferred candidate of the majority of electors. Logically then, to be able to say that the majority of electors were prevented from electing the candidate whom they preferred, one must be in a position to say that it was someone other than the1st respondent who would have been the successful candidate whose election by the majority of electors was prevented by general intimidation, the vitiating factor, being the expression used by Mr. H. L. de Silva. Viewed from another angle, the majority of electors at this election were not prevented from voting or exercising their franchise, as over 50% did vote. That majority that did vote, were once again not prevented from electing the candidate they preferred. The question then is as to the minority who may have been prevented from voting or exercising the franchise. What would have been the position, had such minority been able to contribute their votes to the total polled? If their contribution was not to change the result as to who would have won the election, as a matter of legal consequence, the election must be sustained. If on the other hand their contribution was to change the result of the election, as a matter of legal consequence, the election must be avoided. Then, whether the election must be avoided or not, depends on whether there would have been a change in the successful candidate, had the minority of electors who were prevented from voting in fact voted, which then implies a change in the result, meaning that the result of the election was affected.

As I have pointed out, to be able to say that the majority of electors were prevented from electing the candidate whom they preferred, one must be in a position to say, that it was someone other than the 1st respondent who would have been the successful candidate

whose election by the majority of electors was prevented by the vitiating factor. It does mean then, that the expression was calculated to deal with a situation showing that someone else other than the declared candidate would have succeeded when the expression "the majority of electors were (in fact) prevented from electing the candidate whom they preferred". If that is so with respect to a situation of certainty, that is, where the majority were in fact prevented, a situation contemplated by the words "the majority of electors were prevented from electing the candidate whom they prefer", what is the position when using the expression "the majority of electors may have been prevented"? One must necessarily attribute the same meaning to the words, "majority of electors . . . prevented from electing the candidate whom they preferred", whether the gap I have left in the sentence is to be filled by the word "were" on the one hand or by the words "may have been", on the other ; else there is something very wrong in the way the expression has been structured, and I, for myself, do not see anything wrong in that regard. It deals with, as I see, a situation that had been contemplated by the judgment in the case of *Woodward v. Sarsons* and shown by me as proposition numbered 4 above, in those relating to general intimidation, where the Court is faced with a situation contemplated by the words in the judgment "the tribunal without being able to say that a majority had been prevented should be satisfied that there was reasonable ground to believe that a majority of electors may have been prevented". When encountering such a situation, the Court of Common Pleas has indicated what the proper approach should be, and that approach is not to give a different meaning to the words in the two different contexts of, "were", and, "may have been", but to provide an index as to the degree of proof then demanded which is "reasonable ground to believe" which again means, in my understanding, as a ground of reasonable probability.

If the Court is in a position to say, having reference to the facts of any case, that the majority of electors may have been prevented from electing the candidate whom they preferred, as a reasonable ground of belief or as a reasonable probability, the Court it must be noted would more readily be able to say the same when there is proof that the majority of electors were (in fact) prevented from electing the candidate whom they preferred, as a matter of certainty. That is to

say that if the legislature used only the wider expression, "the majority of electors may have been prevented from electing the candidate whom they preferred", such expression would have been adequate to encompass the narrower situation, where the majority of electors were (in fact) prevented from electing the candidate whom they preferred. Why then did the legislature use words to include that situation as well? That perhaps was done in order to give clarity to the expression so that the words "the majority of electors may have been prevented from electing the candidate whom they preferred" could get their colouration from the words "the majority of electors were prevented from electing the candidate whom they preferred", so as to denote a difference in the result if any, in the sense of another candidate's success, much the same way the Court of Common Pleas gave expression to this notion in its judgment in the case of *Woodward v. Sarsons.*

If one looks at some of the early English cases, notably those decided before the secrecy of voting provision had been introduced into the law, one may get the impression that even a small degree of general intimidation, whatever its effect on the result may have been (even if negligible), was considered to be sufficient to avoid an election (see for example the response of Mr. Justice Keogh to the arguments of Counsel in the Drogheda case that I reproduced earlier). Such an impression would be on much the same lines as that suggested by erroneously considering in the manner I have already pointed out, that under section 91(a) of the Presidential Elections Act the ground of avoidance reads to be understood to be general intimidation instead of the prevention of the majority of electors from electing the candidate whom they preferred. Mr. H. L. de Silva's strong reliance upon some of the passages in the older cases on these lines, leads me to believe that he was himself contending for such a view. Such an impression though, is not that which is reflected as the effect of the cases as the Court of Common Pleas saw it in the case of *Woodward v. Sarsons.* Even if the emphasis in the older cases dealing with this common law concept had been on the cause (general intimidation) rather than on the effect (the prevention of the majority of electors from electing the candidate whom they preferred), with time, the emphasis appears to have shifted from cause to effect. A possible rationale for that is perhaps that persons

masquerading as supporters for a particular candidate could well have brought about that cause, as for instance in electorates of small size such as boroughs with respect to which many of the early English cases had been decided, and the consequence then would have been to cause prejudice to an innocent successful candidate who found his victory taken away by a calculated contrivance intended to secure that objective.

In 1949 there was passed in England, The Representation of the People Act 1949, section 142 of which reads thus:–

> "142 (1) Where on an election petition it is shown that corrupt or illegal practices or illegal payments, employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, his election if he has been elected shall be void and he shall be incapable of being elected to fill the vacancy or any of the vacancies for which the election was held.
>
> (2) An election shall not be liable to be avoided otherwise than under this section by reason of general corruption, bribery, treating or intimidation."

The effect of subsection (2), it is to be seen, is to limit the voidability of an election on grounds of general intimidation, to instances where such intimidation is committed for the purpose of promoting or procuring the election of a particular person at such election. As I said, there could well have been this shift in the emphasis with the passage of time from cause to effect as respects the English common law concept of a free and fair election, and then The Representation of the People Act 1949, gave it a stamp of statutory authority in section 142 (1) by providing that the avoidance of the election was to be dependent on the effect, namely the affectation of the result of the election.

The section also introduced a guideline as to how it may reasonably be supposed that there has been an affectation of the

result. The words, "corrupt practices . . . have so extensively prevailed that they may be reasonably supposed to have affected the result" bring out that notion. There is therefore, an inference that is capable of being drawn as to the affectation of the result from proof of the extensive nature that prevailed of the corrupt practice, general intimidation being an example of such a corrupt practice.

Mr. H. L. de Silva, if I understood him correctly, was prepared to accept that the test implicit in this section i.e. section 142 (1) of The Representation of the People Act 1949, is not dissimilar to that which confronts the Court endeavouring to decide whether by reason of general intimidation the majority of electors may have been prevented from electing the candidate whom they preferred, using the meaning given by him to these words. Though that was with respect to the English common law concept of a free and fair election, the same must likewise apply to section 91(a) of the Presidential Elections Act, that section being in his submission, a statutory embodiment of that concept. If however one were to examine the judgment in *Woodward v. Sarsons* one sees nowhere stated, that such a test was one which a court had to adopt in deciding the question whether the majority of electors were or may have been prevented from electing the candidate whom they preferred. Similarly our statutory provision namely, section 91(a) of the Presidential Elections Act, nowhere suggests such a test in the language which the legislature thought fit to use in framing the section. It is possible to imagine that The Representation of the People Act 1949 introduced this test in this statutory form in view of the fact that in the application of the common law concept, there was not implicit that test. The effect of what Mr. H. L. de Silva suggested is, as it seems to me, to ask the Court to imply the existence of such a test from the words appearing in section 91(a) when the actual words of the section do not so indicate. The obvious question that arises then is as to why, if that was the legislative intent, the section was not structured so as to incorporate such a test. To use language similar to that contained in section 142 (1) of The Representation of the People Act 1949, by what some may term a process of judicial interpretation, would to my mind be in effect to assume the function of the legislature. For myself, I do not read and therefore cannot rewrite section 91(a) of the Presidential Elections Act to introduce such a test

as would enable the effect, which is that the majority of electors were or may have been prevented from electing the candidate whom they preferred, to be gauged by the extent of the cause, which is the degree of prevalence of general intimidation. Had that been the object of the legislature, the achievement of such object would have been a matter of simple accomplishment by the choice of language appropriate to it, and that which the legislature has not done, I do not feel free to do.

It was submitted by Mr. H. L. de Silva that unless the section is interpreted in the manner suggested by him, this being the only provision in the statute having the effect of sustaining the freedom of franchise (section 91(b) already having been emasculated in this respect by having its provisions rendered incapable of proof), a serious blow will be struck upon the democratic base of our political system. I am not convinced that this is so. It will be seen that the effect of section 142 (2) of The Representation of the People Act 1949 is to exclude general intimidation as a ground of avoidance of an election in England when such intimidation such as of a preventive kind, has been practised for a purpose other than the purpose of promoting or procuring the election of a particular person at such election. If one were to take the case of the petitioner as presented therefore, that the general intimidation complained of was calculated, not to benefit a particular candidate, but rather was of a kind intended to prevent all voters from voting, than under the law in force in England after The Representation of the People Act 1949, there would be no basis for avoiding this election. I find it difficult to believe that in England which is often held up as an example of a democracy at work, if it was thought that the effect of this provision was to bring about the consequence of weakening the democratic structure of their government, it would have been introduced into the law.

The Indian example once again demonstrates the same thing. Mr. H. L. de Silva very properly brought to our notice the current position in that country. Section 100 of The Representation of the People Act 1951 contained a provision for declaring an election void if it was shown that it had not been a free one by reason of the corrupt practices of bribery or undue influence having prevailed extensively. However by The Representation of the People (Second

Amendment) Act 1956 this provision was removed and the position now in India appears to be somewhat akin in this regard to what is to be found in England after 1949. India too is often pointed to as a country in our part of the world where democratic institutions are seen to function, and this despite the change in the law in this regard.

Since the matter of the need to ensure the preservation of democratic principles has been brought up, I think it is not out of place to make this comment. No doubt, the Presidential Election of December 1988 was not held when conditions were ideal in the country. But there was a time frame within which the election had to be held, with nothing to indicate that things would have improved in the available short term. What then were the alternatives facing the country? The alternatives were, between holding the election at this time, and not holding it before the last available date, a few weeks beyond the date on which it was actually held. If the latter alternative was chosen what would have been the result? Where would the enormous powers granted to the President under the Constitution have come to reside? Certainly not in the hands of one elected by the electors to exercise those powers.

The meaning of an expression must be arrived at as a matter of construction and interpretation of the language used. That should not be done, in my understanding, by an inquiry as to how one interprets or draws conclusions from a given set of facts and then from what emerges, strike upon the meaning of the expression. That would, as I see it, not be the method appropriate to interpretation. Having decided upon the meaning of an expression, semantically and as a matter of language, one must proceed to examine whether a given set of facts falls within the meaning of the expression as determined. That is the method I think appropriate to statutory interpretation. In adopting that approach, courts have often said that if a section is unworkable or leads to an absurd result, the remedy lies elsewhere. The Court has interpreted the language of the section as it falls to be read within the four corners of the statute. Even if the meaning gathered leads to an absurd result, there is nothing the Court can do about it.

The method of interpretation contended for on behalf of the petitioner is, as I have been able to understand, first to look at the facts and then from the conclusions drawn therefrom, strike upon the meaning of the section. I have not been able to find in Mr. H. L. de Silva's submissions any attempt at a clear interpretation of the words, "the majority of electors were or may have been prevented from electing the candidate whom they preferred", that is, an interpretation to ascertain the meaning of the words. The closest to an interpretation that I do find is a statement that, the words bring out the degree of substantiality in the effect of the vitiating factors or put differently, that they prescribed the index or measure of the effect which the law requires that the vitiating factors must have on the minds of the voters. This is however not the kind of interpretation I have in mind, which is as to an interpretation of the language as one reads and understands it. Though undoubtedly done with admirable skill, the method he adopted was this. He said there is the common law concept of a free and fair election and that the dominant attribute of that concept is the freedom of franchise. He then said that there was at this election a shortfall in the total voter turn-out attributable to general intimidation, the amount of such shortfall being many times the winning candidate's majority and that therefore, there is demonstrated that there was no freedom of franchise, thus making it possible to say that the majority of electors may well have been prevented from electing the candidate whom they preferred. How he sought to derive support for what he so contended, he did not attempt to show, as far as I could see, upon a semantic examination of the section itself, although he said that the facts as stated by him demonstrate that the majority of electors may have been prevented from electing the candidate whom they preferred. Rather, he invoked the maxim *ut res magis valeat quam pereat* and stated that the section understood in the way he contended against, results in it being reduced to a dead letter but understood the way he contended for meets the requirements of any "fact situation" contemplated by it. The maxim *ut res magis valeat quam pereat* in its complete form reads thus: *verba ita sunt intelligenda ut res magis valeat quam pereat*, which means that, words are to be so understood, that the object may be carried out and not fail. To understand "words" in that way, the language used must show that plain meaning. The basic canons of construction demand that the language as found in the

section must be interpreted as found. That does not mean that one could interpret language so as to introduce words not found. As I have said, adopting that correct approach to interpretation may well result in the provision being reduced to a dead letter, but that cannot be helped. The remedy lies in the hands of others, not in those of the Court. *Maxwell in his work "The Interpretation of Statutes", 12th Edition (1976)* at pages 28 and 29, gives the effect of the authorities thus :–

> "The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar. It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed; 'The length and detail of modern legislation', wrote Lord Evershed M. R., 'has undoubtedly reinforced the claim of literal construction as the only safe rule'. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.
>
> The rule of construction is to intend the Legislature to have meant what they have actually expressed. The object of all interpretation is to discover the intention of Parliament, but the intention of Parliament must be deduced from the language used, . . .
>
> Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. 'The decision in this case', said Lord Morris of Borth-y-Gest in a revenue case, 'calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with

another cannot furnish a guide in reaching a decision'. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the Court is to expound the law as it stands, and to 'leave the remedy (if one be resolved upon), to others'.

The general rule may be stated thus: If clear in meaning, a construction will be adopted according to that clear meaning even though the ultimate result may be unjust, absurd or inconvenient *Attorney General v. Prince Ernest Augustus of Hanover*[41]. If however words are not plain in meaning and there are two possible alternative interpretations open to the Court, an interpretation which would give this result would be avoided (*Amoah Ababio v. Turkson)* [42]. It is only when the Court has an alternative that the question of strict or benevolent interpretation arises and not when the words are clear in meaning. *Warburton v. Loveland* [43].

I will now turn to certain local cases cited to ascertain how the judges who decided them have understood the principles involved. One significant and important difference between these cases and the present one is that in all of them the intimidation was calculated to be beneficial to one candidate or prejudicial to another.

The first of them would be the case of *Ratnam v. Dingiri Banda* [5].That was a case where the charge against the respondent was one of general intimidation as contemplated by Article 53 of the (State Council Elections) Order in Council 1931. The petitioner a Ceylon Tamil received 11093 votes and the respondent a Kandyan Sinhalese 12652 votes while two other Kandyan Sinhalese candidates received 1484 and 204 votes respectively. Hearne, J. who tried the case found as a fact that the intimidation was directed

towards obstructing the Indian voters in the expectation that their votes would have been cast for the petitioner, and that that would have been detrimental to the success of the candidate who was declared to have been elected, namely the respondent. He held that freedom of choice is essential to the validity of an election and that if by intimidation of voters that freedom was prevented generally, the election would be void. Upon the facts before him, he found that there had been a deliberately planned obstruction of these voters in advance, which had the effect of eliminating this freedom. In avoiding the election he was concerned with, the facts as found being that there had been gross intimidation and that it was widespread in the areas where the petitioner had good reason to count upon heavy voting in his favour, he concluded that it might well have prevented the majority of the electors from returning the candidate whom they preferred. It is seen therefore that as a matter of reasonable probability Hearne J. was prepared, on the basis of political preference, to hold in the circumstances that prevailed, that the voters who were prevented from voting might have, if they did vote, done so for the petitioner (involving here an element of speculation), so as to prevent the returned candidate's victory (implying that the result was affected).

Pelpola v. Gunawardena[6] involved an election which was a straight contest between the respondent and the petitioner and resulted in a victory for the respondent by a comparatively narrow margin of 387 votes. One of the allegations upon which the election was sought to be avoided was that of general intimidation. The officer in charge of a particular polling station, by reference to his records demonstrated to the Court that out of 1427 registered voters, only 541 did in fact vote. The evidence showed that out of a total of 32734 voters in the whole electorate some 8375, that is over one fourth were Indian estate labourers against whom, as a body, the acts of intimidation in the electorate had been directed. It was also established that the Indian Congress Committee of a particular estate decided to support the petitioner at the election and that all the labourers had decided to vote for him. The Court also considered it not unreasonable to suppose that the Indian labourers of the neighbouring estates which included some who were proved to have been molested, had likewise decided to support the petitioner. The

evidence suggested that the intimidation had an effect on these voters and that if 400 more persons had voted and cast their votes for the petitioner he would have won the election. Windham, J. who was considering section 77 (a) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, which is in like terms as section 91(a) of the Presidential Elections Act, in setting aside the election concluded thus:

> "To establish such a charge, where the general intimidation consists, as here, of local acts or threats of violence, it is only necessary for the petitioner to show that, having regard to the majority obtained, and the strength of the polling, the result may reasonably be supposed to have been affected. On the figures and in the circumstances disclosed in the present case, it is at the very least reasonable to suppose that the result of the election may have been affected by the acts of intimidation against the Indian estate labourers."

Here too, one finds that the Court was prepared, on the basis of party affiliation, to consider it reasonable to suppose that the voters who were prevented from voting would have voted for the petitioner, once again involving an element of speculation. This election too was set aside on the basis that the result of the election may reasonably be supposed to have been affected, meaning that the reasonable probabilities were that the returned candidate would not have been entitled to success.

The case of *Tarnolis Appuhamy v. Wilmot Perera* [7], which I have already referred to, was one pertaining to an election where three candidates contested the seat in question. The allegation there had been that there was general intimidation in terms of section 77(a) of the Ceylon (Parliamentary Elections) Order in Council 1946. Nagalingam, J. in trying the case concluded with respect to the facts, that no evidence was given of what may be termed coercive intimidation, that is intimidation having for its object the use of force or threat to compel a voter to vote for a particular candidate, but what evidence was led was led to show that the election was subjected to preventive intimidation, that is intimidation which had for its object the prevention of electors from going to the poll lest the rival candidate

should get their votes, and that having regard to the number polled and to the circumstance that this electoral area had annexed to itself the highest percentage of voters in any electoral area in the island it was difficult to convince anyone that voters in general were deterred by anything savouring of intimidation from going to the polls or recording their votes. Nagalingam, J. did make this comment, one in point of fact unnecessary for the purposes of his decision:- "I must not, however, be understood as saying that if it is shown that, though a large number may have polled nevertheless a fair number of the electorate were prevented from exercising their right freely, that would not by itself be a sufficient ground for declaring the election void, but of this there is scarcely any proof in this case." Yet in refusing to avoid the election he cited with approval, the statement of Gibson, J. in the *North Louth Case* (*supra*) that "to upset an election for general intimidation it is necessary to show that there was such general intimidation as might have affected the result of the election".

Of much importance in this regard is also be the case of *Ilangaratne v. De Silva* [2]. There was an allegation in that case that by reason of circumstances attending on or following the recent floods in the District, including the disorganisation of the life of large sections of the voters, the segregation of refugees who were voters, disturbance of communication and transport and the scarcity of petrol, the majority of the electors were or may have been prevented from electing the candidate whom they preferred. Section 77(a) of the Ceylon (Parliamentary Elections) Order-in-Council 1946 was once again invoked by the petitioner to have the election set aside. *Windham, J.* was influenced by the fact of there being no evidence from which to ascertain whether the inmates of the refugee camps and also those other homeless persons who found refuge with friends did in fact refrain from going to the poll and if so why; no evidence to show what number of these persons and of the other refugees or of other persons affected by the floods were voters; and no evidence to show how many of such of them as were voters abstained from polling or that if any did so abstain it was by reason of circumstances arising from the floods. After analysing the evidence pertaining to this charge he concluded (at page 184) thus:-

> "Accordingly I cannot hold on the evidence that the majority of the electorate were or may have been prevented from

> electing the candidate they preferred by reason of the circumstances having prevented them from voting for any candidate at all". (my emphasis)

These words, in particular those emphasized by me, have to my mind a high degree of relevance to the instant case, where it is claimed that the general intimidation was directed to prevent voters from voting at the election and thus to prevent them from voting for any candidate at all.

In *Jayasinghe v. Jayakody* [4] Sharvananda, C.J. (at page 89) said:

> "If it is proved that a corrupt practice had been committed by the returned candidate or an election agent or by any other person with the knowledge or consent of the returned candidate, then the Election Judge has to declare the election void. But if the corrupt practice had been committed by a person other than the persons mentioned in section 77(c) (of the Ceylon Parliamentary Elections Order-in-Council 1946) then it must be further established that the majority of electors thereby were or may have been prevented from electing the candidate whom they preferred, for the Election Judge to declare the election void."

Thus I come to the conclusion that the words in section 91(a) of the Presidential Elections Act which are, "the majority of electors were or may have been prevented from electing the candidate whom they preferred," have the meaning that, had the constituency had a free and fair opportunity of electing the candidate the majority preferred, that candidate would or may have been someone other than the returned candidate. This would then mean that this expression that occurs in section 91(a), has the same meaning as the expression, "affected the result of the election" as those words appear in section 91(b) of the Presidential Elections Act, and that the order of the Court on the preliminary objections intended to say so. The point of difference is that while the words in section 91(b) have reference to a situation of certainty, those in section 91(a) while equally having reference to a situation of certainty, also deal with a situation of probability, which I have interpreted as reasonable probability.

I have already considered the case of the petitioner on the basis of the meaning contended for her with respect to the words, "the majority of electors were or may have been prevented from electing the candidate whom they preferred" and concluded that she has failed to discharge the burden placed on her upon that construction.

The position that then arises upon the meaning I ascribe to this expression is that a burden is cast on the petitioner under section 91(a) to show that but for the factor or factors complained of, being general intimidation and non-compliance with the provisions of the elections law, or even a combination of them, the successful candidate would or may reasonably have been someone other than the 1st respondent.

Then the next question that may be thought to arise is how one could prove this essential ingredient when the provisions of section 91(a) are invoked. To answer a question of that kind, I cannot see as being the function of a court. The Court interprets the legal provision as found and then having decided upon its meaning, embarks upon an examination of the facts, as found to see whether the fact to be proved, has in fact been established. If not proved in the Court's view, the case set up must fail. If the *factum probandum* is incapable of proof, the remedy lies elsewhere. The position is explained by Ghulam Hasan, J. of the Indian Supreme Court in the case of *Vashit Narain Sharma v. Dev Chandra* [44] although the case was with respect to a question of an improper acceptance of a nomination paper, thus :-

> "The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but neither the Tribunal, nor the Court is concerned with the inconvenience resulting from the operation of the law.
>
> How this state of things can be remedied is a matter entirely for the legislature to consider".

The petitioner's position appears to be, as I have been able to understand it, that there is no evidence before the Court to show any affectation of the result as a consequence of general intimidation. If her own assessment of the evidence placed by her before the Court is to that effect as is seen by the fact that she has not sought to identify any relevant items of evidence in support, it would be a difficult task indeed for others to undertake a search for such material.

Though a statement to that effect might have been sufficient in the ordinary kind of case to draw a conclusion unfavourable to the petitioner, and thus to dispose of the matter, in a case such as this there is a duty cast on the Court which it should not refrain from performing, and that is to examine the evidence though not necessarily in detail to see what relevant conclusions could be drawn as to this aspect. There is no clear evidence which does furnish direct proof of this requirement that I can see, and so I must ask myself whether there is any reasonable inference that could be drawn from the evidence considered as a whole as to an affectation of the result.

Before addressing my mind to that question it is necessary to consider a submission made by Mr. H. L. de Silva which I have already referred to that any exercise to determine whether the element that the result of the election may have been affected, in the sense that but for the acts complained of another candidate other than the one declared returned would have been successful, would involve a computation of numbers which necessarily must be based upon conjecture and surmise, being dependent upon circumstances totally different and unpredictable, and therefore not something that section 91(a) of the Presidential Elections Act could reasonably be thought to demand. He placed much emphasis upon certain passages (at pages 21-23) from the judgment in the case of *Shiv Charan Singh v. Chandra Bhan Singh* [12] decided by the Supreme Court of India. They read thus :-

> " The burden to prove this material effect is difficult and many times it is almost impossible to produce the requisite proof. But the difficulty in proving this fact does not alter the position of law. The legislative intent is clear that unless the burden

howsoever difficult it may be, is discharged, the election cannot be declared void. The difficulty of proving the material effect was expressly noted by this Court in Vashist Naraian Sharma and Paokai Haokip cases and the Court observed that the difficulty could be resolved by the legislature and not by the courts. Since then the Act has been amended several times, but Parliament has not altered the burden of proof placed on the election petitioner under section 100 (1) (d) of the Act. Therefore the law laid in the aforesaid decisions still holds the field. It is not permissible in law to avoid the election of the returned candidate on speculations or conjectures relating to the manner in which the wasted votes would have been distributed among the remaining validly nominated candidates. Legislative intent is apparent that the harsh and difficult burden of proving material effect on the result of the election has to be discharged by the person challenging the election and the courts cannot speculate on the question. In the absence of positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the Court should not interfere with the election on speculation and conjectures . . . it is difficult to comprehend or predicate with any amount of reasonable certainty the manner and the proportion in which the voters who exercised their choice in favour of the improperly nominated candidate would have exercised their votes. The courts are ill-equipped to speculate as to how the voters could have exercised their right of vote in the absence of the improperly nominated candidate. Any speculation made by the Court in this respect would be arbitrary and contrary to the democratic principles. It is a matter of common knowledge that electors exercise their right of vote on various unpredictable considerations. Many times electors cast their vote on consideration of friendship, party affiliation, local affiliation, caste, religion, personal relationship and many other imponderable considerations. Casting of votes by electors depends upon several factors and it is not possible to forecast or guess as to how and in what manner the voters would have exercised their choice in the absence of the improperly nominated candidate."

Although the greater part of this quotation is suggestive of matters favourable to the 1st respondent insofar as they help to sustain an

election, it is the latter part that Mr. H. L. de Silva really called in aid. When he made reference to these passages, I believe they also had a contextual relevance to his submission that arising from the shortfall in the voter turn-out consequent upon general intimidation when compared with the majority of votes which the 1st respondent secured, an inference could be drawn adverse to the latter, that the majority of electors might conceivably have chosen differently. He contended if I mistake not, that such an inference could not be rebutted by looking at past performance of voters at earlier elections and that voting patterns at subsequent elections are all unsafe and unreliable as a guide.

The circumstance with reference to which the Indian Supreme Court came to use the words it did contain in the latter part of this passage, which as I said was what Mr. H. L. de Silva relied on especially, is indicated in the judgment thus :-

> "It is manifest that law laid down by this Court in Vashit Narain Sharma case and Paokai Haokip case holds the field and it is not permissible to set aside the election of a returned candidate under section 100 (1) (d) on mere surmise and conjectures".

Two things therefore are apparent from this passage, firstly and primarily, that the Court was giving here a justification for declining to set aside the election, in other words stating its refusal to take the serious step of setting aside an election upon the basis of material essentially speculative in nature and, secondly, that the Court was following the decisions in two earlier cases, which I myself will now refer to.

In the case of *Vashit Narain Sharma v. Dev Chandra* [44] which I have already referred to the Court was concerned with the interpretation of a provision which enabled an election to be set aside upon proof that "the result of the election has been materially affected", in a context where a candidate's nomination had been improperly accepted and consequently the votes that he received at the election had been wasted. The Court (at page 515) said:

"These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate".

In my understanding of the judgment, these words constitute the Court's statement as to the mode of proof that "the result of the election has been materially affected". It is useful to note that the Court added (at pages 515 & 516) thus :-

"But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate.

The casting of votes at an election depends upon a variety of factors and it is not possible for anyone to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by section 100 (1) (c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand".

The case of *Paokai Haokip v. Rishang* [45] was also concerned with the interpretation of these identical words "the result of the election has been materially affected" occurring in the same legislative enactment. The grounds upon which the election was attacked were, that the polling had been disturbed due to

numerous circumstances such as shutting of polling stations without due notification thereof, and that there had been disruption of voting at certain polling stations due to firing of guns. In deciding the case, the Court considered the question whether the burden of proof had been discharged by the petitioner by demonstrating to the Court either "positively" or even "reasonably", that the poll would have gone against the returned candidate but for the matters complained of. In searching for an answer to the test so adopted, the Court looked at certain matters the nature of which the following words in the judgment (at page 666) show :

> "To begin with, it is wrong for the election petitioner to contend that of the 6,726 votes which were not cast, he would have received all of them. The general pattern of polling not only in this constituency but in the whole of India is that all the voters do not always go to the polls. In fact, in this case, out of 219,554 voters only 120,008 cast their votes. Even if we were to add to them the 6,726 votes, it is obvious that not more than 55% of the voters would have gone to polls. This immediately cuts down the figure of 6,726 to a little over half and the margin from which the election petitioner could claim additional votes therefore becomes exceedingly small. When we turn to the pattern of voting as is disclosed in the various polling booths at which the voters had in fact gone, we get a reasonably clear picture. At 9 polling centres, 1893 votes are actually polled. Of these, 524 votes were received by the election petitioner and 413 by the returned candidate and 1097 votes went to the other candidates. In other words, out of 20 votes 11 went to other candidates, 5 to the election petitioner and 4 to the returned candidate. If one goes by the law of averages and applies these figures reasonably to half of the votes which were not cast, it is demonstrated at once that the election petitioner could not expect to wipe off the large arrears under which he laboured and that he could not have therefore made a successful bid for the seat even with the assistance of the voters who did not cast their votes".

Of importance is also the following passage at page 667 which reads thus :-

"That section requires that the election petitioner must go a little further and prove that the result of the election had been materially affected. How he has to prove it has already been stated by this Court and applying that test, we find that he has significantly failed in his attempt and therefore the election of the returned candidate could not be avoided. It is no doubt true that the burden which is placed by law is very strict; even if it is strict it is for the courts to apply it. It is for the Legislature to consider whether it should be altered. If there is another way of determining the burden, the law should say it and not the courts. It is only in given instances that, taking the law as it is, the courts can reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not".

I think these passages effectively demonstrate that the Court had been disinclined to set aside elections, even when upon its interpretation of the legislative provision concerned, a virtually impossible burden had been cast upon the petitioner, but in its effort to search for the relevant material, the Court had not hesitated to consider figures, statistics, averages etc. all of which involve a measure of speculation and surmise.

In the cases of *Ratnam v. Dingiri Banda* [5] *and Pelpola v. Gunawardene* [6] the Court was prepared to consider it reasonable to suppose that the voters who were prevented from voting would or may have voted for the unsuccessful candidate had it not been for the acts complained of, once again involving an element of speculation.

In the *North Louth* case I have already referred to, Mr. Justice Madden thought it proper to take into consideration voting figures relating to other elections.

The petitioner's own position was that having regard to the national average of voting figures demonstrated in the post-independent period in this country, it is reasonable to state that one could have expected 80% of voters from and out of the total number of registered voters to have voted. When one endeavours in this manner

to fix upon a particular figure such as 80%, is there not involved in it something in the nature of a statistical exercise?

There may be something to be said for any criticism of the statistical method, because conclusions based upon statistics, not only in this area but in other areas as well, have been demonstrated time and again to be erroneous. Indeed in the case of *Paokai v. Rishang*[45] already referred to Hidayatullah, C.J. (at page 666) used these words of caution :-

> "While we do not think that statistics can be called in aid to prove such facts, because it is notorious that statistics can prove anything and made to lie for either case, it is open to us in reaching our conclusion to pay attention to the demonstrated pattern of voting".

I believe that in a case such as this where one attempts to draw inferences, one inevitably runs into an uncertain area of conjecture, surmise and speculation but that is something I feel that has to be accepted as inevitable. As I have already pointed out, statistics must always be viewed with caution when made the basis of conclusions. Yet, in dealing with what are necessarily hypothetical situations, such as where one endeavours to glean as to what the position might have been if things had been different, some use of statistics I think is permissible and indeed unavoidable. We have to look at them and see whether they give us any guidance in this difficult area as to whether the election should be avoided, because if one were to totally disregard them, there may then be no guiding material whatever.

Before commencing to look at the evidence, it may perhaps be useful to state something as to what the approach on behalf of the 1st respondent was. It was claimed for him that there is no justification whatever for avoiding the election, a task which a Court will not in any event lightly undertake. The endeavour was to show that any reasonable interpretation of the evidence would produce the converse result. Mr. Choksy sought to point out that the brunt of the intimidation was directed at the 1st respondent's campaign, his supporters and his party and that the adverse effects thereof were by

far upon him, and that these factors taken in conjunction with what the voting patterns indicate, must result in the petitioner's case failing. Indeed it was the 1st respondent's position that the acts of intimidation and threats of intimidation including intimidatory posters which were directed at the United National Party and its supporters, commenced at an earlier point of time, even prior to the Provincial Councils elections which the petitioner's party did not contest, and that its momentum continued throughout the period of the Presidential Election of 1988 so that it was the members and supporters of the 1st respondent's party who during this Presidential Election had every reason to be genuinely intimidated, having regard to the situation they had to face and the experiences they underwent earlier.

Mr. Choksy contended that if one has regard to the voting percentages in the 1989 general election two things are demonstrated, firstly, that the increased percentages indicate that there was an improvement in the conditions prevailing in the country and, secondly, that such improvement which resulted in a greater voter turn-out was beneficial to the United National Party. He referred to the evidence of certain witnesses who testified on the lines that there was such an improvement, evidence which I do not think necessary to reproduce here. He also contended that there was this unusual feature in this case which does not find a parallel anywhere else, that the 1989 general election was held about three months after the Presidential Election of 1988 and that both elections were held on the same electoral register and with respect to the same electoral area, namely, the whole island. He submitted that the conclusion that has to be drawn is inevitable, that with the increased voter turn-out there was a remarkable improvement in the performance of the United National Party in the 1989 general election, as contrasted with the 1st respondent's performance at the Presidential Election of 1988, which itself showed, having regard to the brief time interval between these two elections, that whatever shortfall there was in the voting at the 1988 Presidential Election, it worked to the disadvantage of the 1st respondent. The point he sought to make was that the volume of evidence which he led regarding intimidation, showed it to be directed against the United National Party, its supporters, its trade union and other organisations,

its members and those connected with it, all of which had this adverse effect on the 1st respondent's performance at the Presidential Election and that corroboration of that position was seen by the lower voter turn-out in 1988 which gave the 1st respondent percentage of the votes cast, which was considerably less than that which the United National Party received a mere three months later at the general election, when conditions as he claimed were better.

It must not be lost sight of that the petitioner and the 1st respondent, though they contested the election as individuals, were in reality representatives put forward by two major political parties in the island and therefore their candidature must be viewed in that light, so that when, one considers these figures, one must look at them largely as an index to party preference. That being so, one must once again refrain from considering any previous elections where there were no-contest pacts operating so that there would then be no blurring of the figures.

The areas of electoral boundaries have changed from time to time with delimitations, and thus a safe and adequate way of looking at any voting pattern would, to my mind, be by reference to Provinces whose boundaries have undergone no changes, and when we get as far as voting patterns in particular areas, it becomes unnecessary in my view, to refer even generally to the evidence in the case. To be able to reach the necessary conclusions in the case in this manner, eliminates a serious disadvantage which I would otherwise have been labouring under, namely, not having seen or heard a good many of the witnesses who testified.

I think it is apt to state once again at this point that the secrecy of voting provisions do not prevent the drawing of any conclusions from these voting patterns. It could not have been of much use to have asked any voter as to the manner in which he did vote and that is where the prohibition is. If at all, it is the voter who did not vote who might have been asked how he would have voted, if he had had the opportunity to do so, something I do not consider prohibited. The affectation of the result if any is as a consequence of preventing those who did not vote from doing so, as I have pointed out elsewhere.

The question then is whether the voters who did not vote if they did vote, would have changed the result.

One possible index would be to look at the figures of those who had in fact voted and say that if those who did not vote did in fact vote, such extra votes could not on the evidence be expected to have been of a greater percentage for the petitioner than that which in the event she did receive. To say differently would be to say that the evidence demonstrates that those who kept away from voting were for the most part those who would have voted for the petitioner. I have stated elsewhere what the implications of saying so would be, in terms of the percentages that she would have had to obtain out of those extra votes. I do not think that the evidence in the case suggests as reasonable such a probability. It might perhaps have been possible to contemplate it as reasonably probable, had the relevant evidence in the case not shown that the target of intimidation was by far the 1st respondent's party and his supporters. There is however something else that needs to be added here. A suggestion was made in cross-examination to certain witnesses called for the 1st respondent, the object of which appeared to be to show that the United National Party had become unpopular by reason of its policies and practices and the adoption of the Indo-Sri Lanka Accord, and what I believe was implied thereby was, that had the voters who did not vote in fact voted, that would have been advantageous to the Sri Lanka Freedom Party. I am not convinced that such a point is sustainable. One could not take as a reliable measure of popularity anything more than what the actual percentages of voters who did vote do suggest, and that is that the majority supported the 1st respondent. Upon that measure of popularity then as to what is suggested by the figures of the voters who did actually vote, the petitioner clearly not having received the greater percentage of votes cannot be thought to have been successful in sustaining this contention.

The other possible index may be that suggested by voting patterns, in examining which I will refer to voter percentages by reference to the Provinces. The figures I reproduce exclude the Northern and Eastern Provinces, the complete figures of which I do not find available, but their absence makes no significant difference.

In the Western Province at the general elections in 1977 the United National Party received 55.28% while the Sri Lanka Freedom Party received 31.63% of the valid votes cast. In 1982 at the Presidential Election the United National Party received 54.07% and the Sri Lanka Freedom Party received 40.76% of the valid votes cast. At the 1988 Presidential Election the 1st respondent received 48.24% and the petitioner received 47.03% of the valid votes cast. At the 1989 general elections the United National Party received 52.34% and the Sri Lanka Freedom Party received 35.89% of the valid votes cast.

In the Central Province at the general elections in 1977 the United National Party received 56.07% and the Sri Lanka Freedom Party received 34.15% of the valid votes cast. In 1982 at the Presidential Election the United National Party received 60.16% and the Sri Lanka Freedom Party received 36.03% of the valid votes cast. At the 1988 Presidential Election the 1st respondent received 57.12% and the petitioner received 41.27% of the valid votes cast. At the 1989 general elections the United National Party received 62.61% and the Sri Lanka Freedom Party received 30.83% of the valid votes cast.

In the Southern Province at the general elections in 1977 the United National Party received 54.81% and the Sri Lanka Freedom Party received 28.88% of the valid votes cast. In 1982 at the Presidential Election the United National Party received 49.01% and the Sri Lanka Freedom Party received 42.20% of the valid votes cast. At the 1988 Presidential Election the 1st respondent received 45.13% and the petitioner received 52.35% of the valid votes cast. At the 1989 general elections the United National Party received 51.95% while the Sri Lanka Freedom Party received 40.41% of the valid votes cast.

In the North Western Province at the general elections in 1977 the United National Party received 56.50% while the Sri Lanka Freedom Party received 35.44% of the valid votes cast. In 1982 at the Presidential Election the United National Party received 56.64% while the Sri Lanka Freedom Party received 39.20% of the valid votes cast. At the 1988 Presidential Election the 1st respondent received 52.87% while the petitioner received 45.21% of the valid votes cast. At the 1989 general election the United National Party received 59.71%

while the Sri Lanka Freedom Party received 35.14% of the valid votes cast.

In the North Central Province at the general elections in 1977 the United National Party received 54.63% while the Sri Lanka Freedom Party received 39.71% of the valid votes cast. In 1982 at the Presidential Election the United National Party received 51.82% while the Sri Lanka Freedom Party received 40.98% of the valid votes cast. At the 1988 Presidential Election the 1st respondent received 46.26% while the petitioner received 51.80% of the valid votes cast. At the 1989 general elections the United National Party received 58.16% while the Sri Lanka Freedom Party received 37.25% of the valid votes cast.

In the Uva Province at the general elections in 1977 the United National Party received 58.47% while the Sri Lanka Freedom Party received 37.44% of the valid votes cast. In 1982 at the Presidential Election the United National Party received 55.87% while the Sri Lanka Freedom Party received 38.51 % of the valid votes cast. At the 1988 Presidential Election the 1st respondent received 60.60% while the petitioner received 36.83% of the valid votes cast. At the 1989 general election the United National Party received 57.14% while the Sri Lanka Freedom Party received 37.69% of the valid votes cast.

In the Sabaragamuwa Province at the general elections in 1977 the United National Party received 54.01% while the Sri Lanka Freedom Party received 29.88% of the valid votes cast. In 1982 at the Presidential Election the United National Party received 53.95% while the Sri Lanka Freedom Party received 40.54% of the valid votes cast. At the 1988 Presidential Election the 1st respondent received 54.21% while the petitioner received 43.39% of the valid votes cast. At the 1989 general election the United National Party received 59.36% while the Sri Lanka Freedom Party received 32.68% of the valid votes cast.

A synopsis of the percentages which the petitioner and her party obtained in the aforesaid elections of 1977, 1982 and 1989 respectively are thus: Western Province 31.63%, 40.76%, 35.89%;

Central Province 34.15%, 36.03%, 30.83%; Southern Province 28.88%, 42.20%, 40.41%; North Western Province 35.44%, 39.20%, 35.14%; North Central Province 39.71%, 40.98%, 37.25%; Uva Province 37.44%, 38.51%, 37.69%; Sabaragamuwa Province 29.88%, 40.54%, 32.68%. At the Presidential Election of 1988 the petitioner received 44.95% of the total valid votes cast. It is therefore to be seen that her performance at that election was an improvement when compared with the percentages I have indicated, none of them having ever exceeded 44.95%. Upon the earlier basis which I considered, I expressed the view that upon the evidence it would not be reasonable to think that the petitioner could be expected to have received by way of a percentage out of the votes not cast, anything in excess of the percentage she actually did receive out of the votes in fact cast. Allowing her as a maximum such a percentage out of the votes not cast is then seen to be advantageous to her, as compared with a basis made to depend on figures available from other elections.

Any objective examination of these figures, subject no doubt to the infirmities that any such exercise involves, does therefore demonstrate one thing, which is, that it is not reasonably possible to say that if more voters did vote in the 1988 Presidential Election, there would have been a benefit accruing to the petitioner either by way of success at the election or indeed even by way of an increased percentage so that the difference in votes between those of the 1st respondent and herself would have become narrower. In that state of things therefore, far from saying that there was an affectation of the result in the sense that such result would have been favourable to the petitioner, the reasonable probabilities suggested are the reverse and that is that a greater voter turn-out could well have benefited the 1st respondent in the sense that his majority may well have become greater and therefore I think the point made by Mr. Choksy is not without some foundation. Therefore the conclusion that I am driven to draw is that it cannot be said, even upon a review of the evidence that the reasonable probabilities are that the majority of electors were or may have been prevented from electing the candidate whom they preferred in the sense of the success of another candidate other than the 1st respondent, that being the petitioner herself in the circumstances of this case.

The petitioner's case therefore as pleaded in paragraph 6A of her petition, upon the basis of general intimidation as a vitiating factor under section 91(a) of the Presidential Elections Act must fail by reference to a correct interpretation of the meaning of the words "the majority of electors were or may have been prevented from electing the candidate whom they preferred" understood as an affectation of the result, viewed in the light of what is suggested by the evidence.

Some of the aspects of the case that I will hereafter proceed to advert to, would not ordinarily have required examination, but in view of the public interest element involved, I will make some reference to them albeit in brief.

The next aspect of the petitioner's case is that contained in paragraph 6B of her petition which is a complaint of non-compliance with the elections law. This, as I earlier remarked, was the ground that was abandoned by Mr. H. L. de Silva on the basis that the Court interpreted section 91(b) so as to say that affectation of the result was necessary to be established, and in respect of which the petitioner has not been able to furnish the requisite proof. The Court in its order upon the preliminary objections did hold that there was a requirement under that section for the petitioner to establish that the result of the election was affected by reason of non-compliance with the elections law. There was no claim of any need to clarify anything in this regard and therefore there arises no need to examine afresh whether it is indeed an essential requirement under section 91(b) to establish affectation of the result. It would suffice I think to state two things, firstly, that apart from the authorities, the plain language of the section supports the view of the need to establish affectation of the result and therefore the Court's interpretation of section 91(b) of the Act upon its order on the preliminary objections is correct and secondly, that the petitioner's own estimate of the evidence led in the case, that there is no evidence showing affectation of the result, can undoubtedly be accepted without debate and that in any case an independent examination of that evidence does reveal that to be the correct position. In the circumstances, the ground pleaded in paragraph 6B of the petition has not been established and must fail.

The next matter to consider is the ground as pleaded in paragraph 6C of the petition which is that the pleaded items of non-compliance

with the elections law also constituted a basis of avoidance under section 91(a), as another "circumstance". In dealing with the petitioner's case based upon general intimidation, I have also dealt with such aspect of her case as pertains to what is pleaded in paragraph 6C of the petition and having regard to the conclusion I have reached with respect to the case based upon general intimidation, the latter question does not I think require any further independent examination. The requirement being that it is incumbent under section 91(a) to establish that the majority of electors were or may have been prevented from electing the candidate whom they preferred, it was incumbent on the petitioner to show that by reason of non-compliance with the elections law referred to, the consequence was that the wrong candidate was declared elected or may be reasonably thought to have been declared elected. There is no evidence affording proof as to that, and therefore the case of the petitioner as pleaded in paragraph 6C of her petition must also fail.

There then is the position taken by Mr. H. L. de Silva for the petitioner different from what is pleaded in paragraph 6C of the petition, that the non-compliance with the elections law pleaded was not something for which the 2nd respondent was accountable or responsible, but that the acts of general intimidation complained of resulted in a breakdown of the machinery of election, so that taken in conjunction with the general intimidation itself which led to that breakdown there was demonstrated another circumstance as that word is used in section 91(a) of the Presidential Elections Act and constituting a basis of avoidance thereunder. The learned Attorney-General Mr. Marapana, then the Solicitor-General, quite understandably reacted in protest so as to indicate that that was not the case he was called upon to meet upon the petition, and that it was one of a radically different nature from what he had throughout addressed his mind to. Mr. H. L. de Silva's response was that with the pressure brought about by the limited time period allowed by law for the filing of the petition, the petitioner was constrained to structure her petition as best as could be done in the circumstances, but that the Court should nevertheless investigate this complaint as all the relevant material for doing so is before it. I am far from agreeing with what I may term that explanation, based upon a claim of lack of time. The petitioner, possessed as she obviously was of the material

pleaded as constituting instances of non-compliance with the elections law, did not need much more by way of other material or time, in order to aver that such non-compliance was the result of the general intimidation complained of, without stating her case the way it has been done on the petition.

The relevant paragraph in her petition numbered 6C which I have already reproduced uses the words "the failure of the Commissioner or Elections (the Second Respondent) and/or certain members of his staff to conduct a fair and free election in accordance with the Presidential Elections Act No. 15 of 1981, more particularly set out in paragraph 9 read with paragraph 8 hereof". The plea relating to non-compliance with the elections law as a ground of avoidance under section 91(b) of the Presidential Elections Act is what is referred to in paragraph 8 of the petition and is the abandoned ground. Paragraph 8 also uses the words "by reason of non-compliance with the undermentioned provisions of the Act by the Election Commissioner and/or members of his staff and officers employed for the conduct of the election", suggesting that blame therefore should be laid at the feet of the 2nd respondent. The plea relating to non-compliance with the elections law as a basis for avoidance of the election under section 91(a) of the Act is what is contained in paragraph 9 of such petition. It mentions nothing even remotely suggesting a link with general intimidation.

To allow the petitioner therefore to urge a case founded upon an entirely different basis which seeks to attribute non-compliance with the elections law to the existence of general intimidation, and thus to seek to have the election declared void, would be, as I see it totally unfair and which I for one, do not consider as meeting the requirements of justice. Non-compliance with the elections law as another "circumstance" as contemplated by section 91(a) of the Presidential Elections Act is one thing, but non-compliance occurring as a result of general intimidation committed by others and thereby forming an aspect of the case based upon general intimidation is altogether another, and indeed one upon which the 2nd respondent need not, as of necessity, have been made a party to the petition. Properly speaking the new position taken could not be characterised as non-compliance with the elections law, but rather, would indicate

that the 2nd respondent was rendered incapable of complying with such law, or that he failed to comply with such law by reason of causes beyond his control and therefore all the pleadings on this limb of the petitioner's case as they appear in the petition must fail. As I have pointed out, the ground of avoidance under section 91(a) is one upon which the majority of electors were or may have been prevented from electing the candidate whom they preferred. The agency by which or the cause as a result of which the majority of electors were or may have been so prevented could be the prevalence of general intimidation or a non-compliance with the elections law. If it is the petitioner's case that such agency or cause was general intimidation, which in turn brought about a failure of the machinery of election, which once again produced the effect that the majority of electors were or may have been prevented from electing the candidate whom they preferred, the petition as a matter of pleadings should have contained a clear statement on those lines. What the petitioner endeavours therefore is, to do indirectly what she would not have been permitted to do directly, that is to present a case different from that pleaded in her petition, and so in effect, amending such petition in this very important regard. In principle, to permit such a course would not be to conform either to the letter or to the spirit of the law. Nevertheless it may usefully be added that even if the petitioner's case be looked at in this way, she does not overcome the effect of the absence of evidence to show that the majority of the electors were or may have been prevented from electing the candidate whom they preferred, the factual position here being that which I pointed out with regard to her case based on general intimidation.

As stated earlier, when Mr. H. L. de Silva was addressing the Court with respect to the petitioner's case as contained in paragraph 6C of the petition based upon a claim of non-compliance with the provisions of the elections law as another circumstance upon which it was sought to have the election set aside under section 91(a), he adopted a new approach to the case, subject to one claimed exception regarding which as I have said there was no clear statement nor any submissions made, so that there is no strict need to deal with that exception. However for the sake of completeness, something may be said about what I was able to gather to be that

exception, which was a reference to the electoral district of Moneragala. The allegation in the petition is that the polling in 49 polling stations was declared null and void by the 2nd respondent resulting in a failure to comply with section 46A of the Act or that there was a failure to take into account that the votes polled at those polling stations or those which would have been polled, would have affected the result of the election. It was accepted by Mr. Marapana that in the circumstances prevailing, the 2nd respondent was compelled to do so, acting under the provisions of section 46A introduced by way of amendment into the Presidential Elections Act No. 15 of 1981 by the Elections (Special Provisions) Act No. 35 of 1988. Section 46A makes provision for a situation as prevailed at those polling stations and it empowers the Commissioner of Elections to act as he did, provided that he is of the opinion that the result of the election for such electoral district would not be affected by the failure to count the votes polled or the votes that would have been polled at such polling stations. Before doing so however, the Commissioner of Elections is called upon to consult the candidates or their agents. In the course of evidence led for the 2nd respondent, the document 1R27 was produced. Such document which relates to a meeting held with the agents of the parties on 20.12.1988 shows that the agent of the petitioner had agreed with the 2nd respondent's view that the result of the election would not have been affected by the failure to count the votes that would have been polled in those polling stations. In these circumstances I think that it is "not permissible for the petitioner to make a complaint with respect to the failure to conduct the poll at these 49 polling stations. In any event, even otherwise, the number involved being only 49 out of 8025 polling stations in the island and there being no basis upon which to say how the voters at these polling stations would have voted, there is no material upon which to say that the result of the election for such electoral district would have been affected, or that at the election the majority of the electors were or may have been prevented from electing the candidate whom they preferred.

I would summarise then the effect of my findings thus :-

1. With respect to the petitioner's case as contained in paragraph 6A of her petition based upon general intimidation I hold that the

petitioner has failed to establish the allegation that the majority of the electors were or may have been prevented from electing the candidate whom they preferred by reason of general intimidation as required by section 91(a) of the Presidential Elections Act.

2. With respect to the petitioner's case as contained in paragraph 6B of her petition based upon the ground of non-compliance with the elections law I hold that the petitioner has failed to establish that the result of the election was affected as required by section 91(b) of the Presidential Elections Act.

3. With respect to the petitioner's case as contained in paragraph 6C of her petition based upon the claim of a failure to conduct a fair and free election in accordance with the provisions of the elections law, I hold that the petitioner has failed to prove that the majority of the electors were or may have been prevented from electing the candidate whom they preferred as required by section 91(a) of the Presidential Elections Act.

4. With regard to the case urged for the petitioner at the stage of addresses that by reason of a large-scale breakdown of the electoral machinery taken in conjunction with the acts of intimidation established, there was another circumstance shown to exist upon which the election was liable to be avoided, I hold that the petitioner cannot in any event succeed thereon on the basis that the majority of electors were or may have been prevented from electing the candidate whom they preferred under the provisions of section 91(a) of the Presidential Elections Act.

5. With respect to the pleaded complaint that the poll at 49 polling stations was declared null and void which was perhaps what was referred to by learned Counsel for the petitioner during his address, I hold that the petitioner has not in any event established that the 2nd respondent failed to conduct a fair and free election in accordance with the elections law so as to say that the majority of electors were or may have been prevented from electing the candidate whom they preferred as required by section 91(a) of the Presidential Elections Act.

In the result I determine that the 1st respondent was duly elected and returned to the office of President and accordingly I make order dismissing this petition.

There then remains the question of costs. The view I have been consistently holding, a view I did express during the hearing, was that the large and detailed volume of evidence led was only of marginal importance, and that view I believe is reflected in my approach to the decision of this case. I therefore think that it might have been possible for the trial of this case to have been considerably shortened and for the parties to have saved themselves a good deal of expenditure. Taking that factor into account along with the factor of the public interest element involved in the case, I would make no order as to costs.

Election Petition dismissed with costs.

Goonewardene, J. made no order as to costs.