COSTA
v.
ROWELL

COURT OF APPEAL
WIJETUNGA, J. &
ISMAIL, J.
C.A. NO. 27/83(F)
D.C. NEGOMBO NO. 2653/L
5 AND 12 JUNE 1991

Servitude of cartway – Prescription – Necessity – Division of larger land into smaller Lots.

Held :

Where a larger land, one of the boundaries of which, is a public roadway serving also as access, is divided into smaller lots, and a subdivided lot becomes landlocked in the process, the landlocked lot retains its access to the public road and is entitled to a right of way of necessity over the other intervening subdivided lots along the shortest and most convenient route to reach the public road. Such a landlocked lot cannot have a right of way of necessity over a neighbour's land even though it may be a shorter and more convenient access.

Case referred to:

(1) *Nagalingam v. Kathirasapillai* 58 NLR 371.

APPEAL from judgment of the District Judge of Negombo.

N. R. M. Daluwatte, P.C. with *P. Keerthisinghe* and *Miss S. Abeyjeewa* for defendant-appellant.

Sunil Cooray with *Chitrananda Liyanage* for plaintiff-respondent.

Cur adv vult.

4th October, 1991.

WIJETUNGA, J.

The plaintiff instituted this action claiming *inter alia* a right of cart road marked ABC in Plan No. 3528/1980 dated 5.7.80 made by H. L. Croos Dabarera, Licensed Surveyor (P1), by right of prescription and/or by way of necessity.

The defendant filed answer denying that the plaintiff had a right of way over his land and further stating that the plaintiff's land was a portion of a larger land which had been blocked out into four lots and gifted by her parents to their four children, including the plaintiff. He also claimed that there was a roadway 6 feet wide from the plaintiff's land to the Wewala-Kalaeliya main road, referred to in Deed No. 6169 dated 24.10.1945 (V3). He sought *inter alia* a dismissal of the plaintiff's action.

However, on the facts, the learned District Judge has found that the grandparents of the plaintiff, viz. Anthony Perera and Maria Sale Peiris had gifted the said block of land to Mary Perera, the mother of the plaintiff, by deed No. 6168 dated 24.10.45 (V2), who in turn had gifted the same to the plaintiff by deed No. 2087 dated 1.10.76 (P5). He has further found that the grandparents of the plaintiff had, on the same day viz. 24.10.45, gifted the other divided blocks to a granddaughter Leticia Nonis on (V3), a daughter Juliyana Perera on (V4) and a granddaughter Lily Harriet Nonis on (V5).

The case went to trial on a number of issues and the learned trial judge, while holding that the plaintiff was not entitled to the roadway claimed by her by right of prescription, nevertheless held that she was entitled to a roadway over the defendant's land by way of necessity. He, therefore, made order granting the plaintiff the roadway AB which is along the eastern boundary of the defendant's land, with a diversion at B, (as the roadway cuts across the defendant's land from B to C) so that the roadway from B would be along the northern and eastern boundaries of the defendant's land. The plaintiff was liable to pay compensation to the defendant for the roadway and the surveyor was to submit a valuation regarding the compensation payable for the same, so that the court could determine the quantum of compensation. The plaintiff was also awarded costs of action. It is from this judgment and decree that the defendant has appealed to this Court.

Among the issues raised by the defendant at the trial were the following:–

(6) Is the land of the plaintiff a portion of the larger land?

(7) Is the larger land situated to the south and east of the plaintiff's land?

(8) Is the larger land abutting Wewala-Kalaeliya high road?

These issues have been answered by the District Judge in the affirmative.

The learned trial judge has further found on the facts that, out of the larger land, only the block gifted to the plaintiff's mother by (V2) which in turn was gifted to the plaintiff by (P5) did not border the road and was thus landlocked, while the other blocks of land abutted the U.C. road, viz. the Wewala-Kalaeliya road on the east. The fact that the land of the plaintiff is landlocked has been conceded by the defendant himself.

While the trial judge held that the roadway ABC constituted the shortest and convenient access from the plaintiff's land to Suhada Mawatha, he did not consider the alternate road XYZ (depicted in plan 3557/1980 dated 22.8.80 (P3), at all convenient.

The sole matter urged before us by learned counsel for the appellant was that the plaintiff's land being a portion of the larger land which was abutting the main road, which portion had in the process of subdivision got landlocked, the plaintiff was not entitled to a right of way of necessity of the land of the defendant, being the land of a stranger, as such blocking out does not impose a servitude over the neighbour's land. It was his submission that the plaintiff was entitled instead to a roadway over the intervening subdivisions to reach the main road and that the question of convenience did not arise. He relied on the case of *Nagalingam v. Kathirasapillai* [1], where Gratien, J. held that where a land, one of the boundaries of which is a public lane, is split up into two or more portions, the back portion, which would otherwise be landlocked, must retain its outlet to the public lane over the front portion, even in the absence of an express reservation of a servitude. The splitting of the land cannot impose a servitude upon the neighbours.

Learned counsel for the respondent, on the other hand, submitted that the house of the plaintiff faced the defendant's land and was closer to the defendant's boundary, as found by the learned District Judge and he was right in granting a right of way of necessity over the defendant's land. He further submitted that the case presented to the District Judge was not on the basis of the legal principles enunciated in *Nagalingam v. Kathirasapillai (supra)* and, therefore, sought the dismissal of the appeal.

As mentioned above, the learned trial judge has come to a specific finding that the land of the plaintiff is a portion of the larger land which is situated to the south and east of the plaintiff's land and that the larger land abuts the Wewala-Kalaeliya high road (i.e. the U.C. road). The plaintiff's land is the back portion of the said larger land, which due to the subdivision has become landlocked. Both in

the answer of the defendant as well as in the issues raised at the trial, this question had been in the forefront of the case. The consequential issue No. 11 which referred *inter alia* to issues 6, 7 and 8, was whether if these issues were answered in the defendant's favour, the plaintiff could have and maintain this action. The learned trial judge having answered that issue as "does not arise", was in my opinion in error.

As stated by Maasdorp, in his *Institutes of South African Law,* (1960 Ed.) Vol. II at page 138, "In the case of a subdivided property, the owners of each of the subdivisions will be entitled to the use of a way of necessity to which the undivided property was entitled, and if any of the subdivisions are cut off from access to the right of way, the owner is entitled to a road over intervening subdivisions to enable him to reach it."

In the instant case, therefore, on the findings of the learned trial judge, the larger land having abutted a public highway, and the plaintiff's land, which due to subdivision had become the back portion and was landlocked, thus became entitled to a roadway over the intervening subdivisions by the shortest and most convenient route to enable the plaintiff to reach the said public highway. By reason of the said subdivision, a servitude could not be imposed upon the defendant who was only a neighbour.

Even if the access to the U.C. road would be less convenient from the point of view of the plaintiff, she would not be entitled to claim a right of way on the ground of necessity over the neighbour's land, when she has a legal right of access to the public highway over the intervening subdivisions of the larger land.

For the reasons aforesaid, I am of the view that on the basis of the legal principles enunciated in *Nagalingam v. Kathirasapillai (supra),* the defendant's appeal is entitled to succeed. I would, therefore, allow this appeal and dismiss the plaintiff's action with costs in both Courts.

ISMAIL, J. – *I agree.*

Appeal allowed.

IVAN APPUHAMY AND ANOTHER
v.
CHANDANANDA DE SILVA, COMMISSIONER OF ELECTIONS AND TWO OTHERS

COURT OF APPEAL
S. N. SILVA, J.,
C.A. APPLICATION NO. 530/91
12, 13 AND 19 DECEMBER 1991

Writ of Mandamus – Election Law – Count of preference votes – Right of candidates to be present – Local Authorities Election Ordinance of 1947 as amended by Law, No. 24 of 1977, Act, No. 24 of 1987 and Act, No. 25 of 1990 (ss. 60, 62(1), 63(7), 67(8)).

Held :

The Local Authorities Election Ordinance promulgated on 10.2.1947 has been preserved in its framework although it has been subject to extensive amendments from time to time. When the fifteen amendments effected to the Ordinance, commencing from 1947 and extending to 1990 are examined, it is clear that some amendments that have been put through could be aptly described as radical alterations in the scheme of elections.

Upon the amendment by Act, No. 24 of 1977 to the Local Authorities Election Ordinance of 1947, the election was to take place for the entire area of the Local Authorities and not as previously to wards within a local authority. A recognized political party or an independent group had a right to nominate lists of candidates for the Local Authorities (Section 28). These lists had a predetermined order wherein the names appearing as first and second were the candidates for the posts of Mayor and Deputy Mayor of each political party or independent group. The votes in respect of the entire Local Authority were counted at one counting and the result declared based on the total votes cast in favour of each recognized political party or independent group. (Section 65). Candidates on the respective nomination papers filed were declared elected according to the order in which their names appear in the nomination paper, on the basis of the proportion of votes received by each political party or independent group (Section 63 (1), 9a)).

In the scheme of elections introduced by Law, No. 24 of 1977 the material factors were the number of votes polled by the respective parties or independent groups and the predetermined order in which the candidates' names appear in the nomination papers that were filed. The sole concern of the candidates was to secure more votes for the party or the group and not to seek preference votes from the voters.

Section 60 of the Local Authorities Election Ordinance was amended by Law, No. 24 of 1977 and took away the right of a candidate and his agent to be present at counting and call for a recount. It is clear that the right of a candidate to appoint a counting agent and his right to seek a recount as contained in the Ordinance, were removed in view of a altered scheme of elections wherein the candidate had no individual interest in the count and had only a collective interest. Under the amended law, the Secretary or the agent of a recognized political party or a leader of an independent group that had nominated candidates at the election could appoint by written notice not more than two counting agents to attend each place where the counting takes place and also to attend the proceedings where the result is declared by the Returning Officer in terms of section 65.

The next change was by Act, No. 24 of 1987 which provided for the voters to indicate their preferences for candidates whose names on each list filed by the respective parties or independent groups. The voter had the right to indicate three preferences of candidates of the party or group for which he casts his vote but there was a restriction by which only one preference may be indicated against a candidate. This restriction was removed by the amending Act, No. 25 of 1990. Thus a candidate could be given all three preference votes by a particular voter. Hence a candidate whose name appears on the list has a live interest in ensuring that his preference votes are accurately counted.

A counting agent appointed to represent the collective interests of the party or group cannot be expected to watch the individual interests of candidates within such party or group who are rivalling with each other for preference votes.

The amendment effected by Act, No. 24 of 1987 necessarily resulted in the counting being done in two stages. This reflects two aspects of the choice given to voters. The choice of a party or group and the choice of candidates within the chosen party or group. Different interests emerge at these two stages of the count as in the electoral process which preceded it. It has to be borne in mind that legislative history reveals that in the original scheme of elections where individual candidates were contesting with each other, the applicable provisions permitted each candidate to appoint a counting agent and the candidate or the counting agent to seek a recount. The provisions were amended to what they are now when the scheme of elections introduced in 1977 removed a contest *inter se* amongst individual candidates and the voters had a choice only of lists of candidates. Therefore, the provisions of section 60 with regard to the appointment of counting agents and section 63(7) with regard to recounts should have been amended to bring these provisions in line with the scheme of elections introduced by Act, No. 24 of 1987. The failure to effect such amendments is a lacuna in the law.

The adverse impact of the lacuna in the law could have been avoided to a considerable extent by administrative action. Sections 60 and 62(1) are based on the premise that the counting officer has a discretion as to the persons who may be permitted by him to be present at the counting. This discretion could be lawfully exercised to permit individual candidates and their agents to be present at the second stage of the count when preference votes are counted. Section 63(7) also vests a power in the counting officer to carry out such number of recounts as may be deemed necessary. This power could have been exercised on an application of a candidate or his agent if they were permitted to be present at the count.

An exercise of power as above would be consistent with the general legislative purpose of the Ordinance of ensuring a fair and accurate result of the votes cast at an election.

The Elections Officer by circular 2RI restricted the exercise of the discretion vested in the counting officer by barring candidates from being present at the count when they have the greatest interest in ensuring that the count is accurately done. The circular is *ultra vires* and aggravates the adverse impact of the lacuna in law.

Where the same officers had done the main count as well as the count of preference votes non-stop for long hours, the likelihood of error is there. Further the process of recording the preferences indicated in a ballot paper on separate sheets of paper manually leaves room for human error. If the candidates and their agents had been present such error would be minimised.

The petitioners have made out a formidable case on the basis of a lacuna in the legislation, illegal administrative action in the matter of issuing circular 2RI which worsened the adverse impact of the lacuna in the legislation, the manner of counting and a serious irregularity in the declaration of the result of the preference votes.

Section 67(8) makes the decision of the counting officer as to any question arising in respect of any ballot paper final and conclusive. But this provision does not deal with the general manner in which the counting took place and the fact of the candidates not being permitted to be present at the count. The remedy by way of judicial review to verify the count is available to an aggrieved party. The writ of mandamus is the remedy available at public law for enforcing the performance of public duties by public authorities. The writ of *quo warranto* will issue where a person acts in an office to which he is not entitled. Here however the petitioners seek verification by a recount and mandamus is the appropriate remedy.

Cases referred to:

(1) *Piyasena v. De Silva* 53 NLR 460, 464.

(2) *R. v. Hanley Revising Barrister* (1912) 3 KB 518, 529.

APPLICATION for writs of certiorari and mandamus.

Asoka Gunasekera with *H. A. Seneviratne* for petitioners.

K. C. Kamalasabayson, D.S.G. with *K. Sripavan, S.S.C.* for 1st and 2nd respondent.

K. S. Thillakaratne for 3rd respondent.

Cur adv vult.

24th January, 1992.
S. N. SILVA, J.

The Petitioners were candidates of an independent group, that contested the election for the Negombo Municipal Council, held on 11.05.1991. They have filed this application for Writs of Certiorari and Mandamus. The Writs of Certiorari are to quash the determination made by the 2nd Respondent (the Returning Officer) as to the number of preference votes received by each candidate of the independent group and the declaration that six candidates of that group have been elected. The Writ of Mandamus is for a recount of the preference votes cast for the candidates of the independent group. Learned Counsel for the Petitioners submitted that the main relief sought is the Writ of Mandamus since the Petitioners and all the other candidates of the independent group are not satisfied with the manner in which the preference votes were counted and with the result that has been declared. This application to Court was in fact preceded by a written request by all 28 candidates of the independent group, including the candidates who were declared elected, for a recount of the preference votes, on the basis that they were all not satisfied with the count that has been done. The written request marked X3A was sent with letter dated 25.05.1991 of the 1st Petitioner (X3), to the 1st Respondent (Commissioner of Elections) with copy to the Returning Officer. The Commissioner and the

Returning Officer, did not reply the letter and the Petitioner filed this application on 21.6.1991.

All the candidates of the independent group other than the two Petitioners have been made Respondents to the application. They are the 3rd to 28th Respondents. On notice being issued only one of these Respondents namely, the 3rd Respondent, being the leader of the independent group filed objections. He is one of the signatories to the request X3A for a recount and he had not disputed any of the averments of fact in the petition and affidavit of the Petitioners. The only matter stated in his affidavit is that six candidates of the independent group have been declared elected and that they will be "held in abeyance on account of this application". Therefore, this application presents a unique situation where all the candidates, including those who have been declared elected, state that they are not satisfied with the count that has been done but the Returning Officer takes a persistent stand that the count has been properly done and that there should be no recount at this stage although the ballot papers have been duly preserved on an interim order made by this Court. The Returning Officer has gone to the extent of stating "specifically" in his affidavit "that the counting of preference votes was done accurately and properly" (paragraph 9 of the affidavit) whereas he was not one of the counting officers.

The Petitioners make no complaint as to the main count of ballot papers and the statement of the number of votes polled by the respective parties and the independent group, at the election. Their complaint with regard to the count of preference votes stems from an alleged denial of an opportunity to the individual candidates or their agents, to be present at the counting of these votes. The 2nd Petitioner was in fact a counting agent of the independent group but, it was submitted that he was there to represent the group and to ensure that the votes cast in favour of the group are properly counted and not to represent each individual candidate in the counting of preference votes. The Petitioners have stated that at the commencement of the count of preference votes the candidates of the independent group requested their leader, the 3rd Respondent that they or their counting agents be permitted to be present at the counting of votes. The 3rd Respondent had pointed out that

according to the instructions given by the Commissioner and the Returning Officer an individual candidate or his agent are not permitted to be present at the count of preference votes. The 3rd Respondent has not disputed these averments and it appears that he gave the information on the strength of circular marked 2R1 issued to all authorised agents of political parties and leaders of independent groups. Paragraph (3) of this circular states that a party or an independent group can be represented by only two persons at each counting centre and that no candidate has a right to enter a counting centre by virtue of only his candidature. The first part of this paragraph with regard to the number of counting agents is based on section 60 of the Local Authorities Elections Ordinance as amended by Law No. 24 of 1977. Learned Counsel for the Petitioners submitted that the second part is *ultra vires* and illegally restricts the basic right of a candidate to ensure that the votes cast in his favour are properly counted. It was also submitted that the law does not deny to a candidate this basic right and that the circular fetters the discretion vested in a counting officer to regulate the persons who may be permitted to be present at the counting. Learned Deputy Solicitor-General appearing for the 1st and 2nd Respondents submitted that in terms of sections 60 to 62 of the Ordinance only the counting officer, his assistants and the counting agents could be present at the count and that "a candidate has no place at the count of votes". It was further submitted by him that the impugned paragraph of 2R1 correctly sets out the legal position and is valid.

It is convenient at this stage to examine the legal provisions relevant to the matter of counting votes, especially because the 1st and 2nd Respondents are resisting the application for a recount on the principal ground that no application was made for a recount at the appropriate stage, prior to the declaration of the result.

Section 60 of the Ordinance as amended by Law No. 24 of 1977 permits the Secretary or the agent of a recognized political party or a leader of an independent group, that has nominated candidates at an election, to appoint by written notice, not more than two counting agents to attend each place where the counting takes place and to attend the proceedings where the result is declared by the Returning Officer, in terms of section 65. The provisions that follow regarding

the arrangements for the count (section 61), the opening of ballot boxes and the counting of the entire number of ballots [section 62(2)], the rejection of votes [section 63(3)], applications for recounts [section 63(7)] and the preparation of the written statements of votes [section 63(6)] refer to the presence of counting agents. As submitted by learned Deputy Solicitor-General these provisions do not refer to individual candidates nor do they provide for any acts to be done by such candidates at the relevant stages. But, before determining the matter upon such a narrow and literal construction, I am inclined to the view, submitted by learned Counsel for the Petitioners, that the scheme of elections as provided for in the amended Ordinance, the provisions in operation previously and the discretion vested in a counting officer to permit any person to be present at the counting by sections 60 and 62(1), should be considered.

The Local Authorities Elections Ordinance promulgated on 10.02.1947 has been preserved in its framework although it has been subject to extensive amendments from time to time. When the fifteen amendments effected to the Ordinance, commencing from 1947 and extending to 1990 are examined, it is clear that some amendments that have been put through could be aptly described as radical alterations in the scheme of elections.

The Ordinance originally provided for elections to Local Authorities where the area of each Authority was subdivided into wards. Nominations were received from candidates (whether of recognized political parties or independent) in respect of each ward [section 28(1)]. The declaration of results was also in respect of each ward [section 66(1).] Section 60(1) provided for each candidate to nominate one counting agent to attend the place where the count is done. The proviso to section 65 gives a right to a candidate or his counting agent to apply for a recount before the declaration of the result. It is seen that the Law provided a candidate an ample opportunity to ensure that the count is properly done in view of his interest in the result.

Law No. 24 of 1977 effected amendments to the Ordinance that were primarily designed to alter the aforesaid scheme of elections.

The election was to take place for the entire area of the Local Authority. A recognized political party or an independent group had a right to nominate lists of candidates for the Local Authority (section 28). These lists had a predetermined order wherein the names appearing as first and second were the candidates for the posts of Mayor and Deputy Mayor, of each political party or independent group. The votes in respect of the entire Local Authority were counted at one counting and the result declared based on the total votes cast in favour of each recognized political party or independent group (section 65). Candidates on the respective nomination papers filed were declared elected according to the order in which their names appear in the nomination paper, on the basis of the proportion of votes received by each political party or independent group [section 65(1)(d)].

Therefore, it is seen that in the scheme of elections introduced by Law No. 24 of 1977, the material factors were, the number of votes polled by the respective parties or independent groups and the pre-determined order in which the candidates' names appear in the nomination papers that were filed. The sole concern of the candidates was to secure more votes for the party or the group and not to seek preference votes from the voters. The specimen ballot paper in the Third Schedule did not carry the names of or any reference to, the individual candidates.

Section 60 was amended by Law No. 24 of 1977 providing for counting agents to be appointed only by the Secretary or the authorised agent of the party or by the group leader of an independent group. The right to seek a recount was given to the counting agent thus appointed [section 63(7)]. (It is clear that the right of a candidate to appoint a counting agent and his right to seek a recount as contained in the Ordinance, were removed in view of altered scheme of elections wherein the candidate had no individual interest in the count and had only a collective interest).

The next change was introduced by Act No. 24 of 1987. This amendment provided for the voters to indicate their preferences for candidates whose names appear on each list filed by the respective parties or independent groups. In the ballot paper the candidates are

to be denoted by a serial number assigned to them, to be determined from the alphabetical order of the names of the candidates [section 38(1)(b)]. The voter had the right to indicate three preferences of candidates of the party or group for which he casts his vote. It was provided that only one preference may be indicated in respect of each of the three candidates [section 63(6)(b)]. This restriction of indicating only one preference for a candidate was in itself removed by the amendment effected by Act No. 25 of 1990 even before any election was held under the 1987 amendment. Therefore, a candidate may be given all three preference votes by a particular voter. It is seen that in the scheme of preference votes provided for by Act No. 24 of 1987 as amended by Act No. 25 of 1990 a candidate whose name appears on the list has a live interest in ensuring that his preference votes are accurately counted. However, section 60 which provides for counting agents to be appointed only by the party or the group and section 63(7) which gives a right only to such a counting agent to seek a recount was not amended.

The omission to amend section 63(7) with regard to recounts is obvious. Section 63(6), prior to the amendment of 1987, provided for a counting officer to prepare a written statement of the votes given for each party or group. In his context it was provided by section 63(7) that a recount may be done on the application of a counting agent before a written statement as provided for in section 63(6) is made. With provision for preference votes to be cast for respective candidates being made section 63(6) was amended in 1987 by providing for the preparation of two written statements by the counting officer. The first statement indicating the number of votes polled by the respective parties or groups and the second statement indicating the preference votes polled by each candidate of such party or group. However, section 63(7) was not amended and it yet refers to the making of "a written statement referred to in subsection 6". It was submitted by learned Deputy Solicitor-General that this provision should be interpreted on the basis that the singular includes the plural and that recounts may be done before any of the written statements are prepared by the counting officer. I have to observe that such an exercise in interpretation becomes necessary only because of a failure to amend section 63(7) in keeping with the

amendments effected in 1987. Even if this construction is given the question arises as to who may seek such a recount. As submitted by learned Counsel for the Petitioners the counting agents appointed by the respective parties and groups represent the collective interests of the candidates of such parties or groups and not the individual interests of each candidate. The scheme providing for preference votes to be cast for individual candidates results in a situation where each candidate within a list is contesting with the other for such votes. The amendment of 1990 which permits a candidate to secure all the preference votes of a voter enhances the intensity of this contest *inter se* between the candidates on a single list. Therefore, can a counting agent appointed to represent the collective interests of the party or group watch the individual interests of candidates within such party or group who are rivalling with each other for preference votes? The answer is obviously in the negative.

The amendment effected by Act No. 24 of 1987 necessarily resulted in the counting being done in two stages. This reflects two aspects of the choice given to voters. The choice of a party or group and the choice of candidates within the chosen party or group. Different interests emerge at these two stages of the count as in the electoral process which preceded it. It has to be borne in mind that legislative history reveals that in the original scheme of elections where individual candidates were contesting with each other, the applicable provisions permitted each candidate to appoint a counting agent and the candidate or the counting agent to seek a recount. The provisions were amended to what they are now when the scheme of elections introduced in 1977 removed a contest *inter se* amongst individual candidates and the voters had a choice only of lists of candidates. Therefore, the provisions of section 60 with regard to the appointment of counting agents and 63(7) with regard to recounts should have been amended to bring these provisions in line with the scheme of elections introduced by Act No. 24 of 1987. I have to conclude that the failure to effect such amendments is a lacuna in the law.

I am inclined to agree with the submission of learned Counsel for the Petitioners that the adverse impact of the lacuna in the law referred to above could have been avoided to a considerable extent

by appropriate administrative action. Sections 60 and section 62(1) are based on the premise that the counting officer has a discretion as to the persons who may be permitted by him to be present at the counting. Therefore, this discretion could have been lawfully exercised to permit individual candidates and their agents to be present at the second stage of the counting, of preference votes. Section 63(7) also vests a power in the counting officer to carry out such number of recounts as may be deemed necessary. This power could have been exercised on an application of a candidate or his agent if they were permitted to be present at the count. In this way the adverse impact of an absence of a statutory right given to a candidate or his agent to be present may have been avoided. Indeed, such an exercise of power would be consistent with the general legislative purpose of the Ordinance of ensuring a fair and accurate result of the votes cast at an election. However, in this case, the administrative action taken was of a completely different nature. As stated above circular 2RI was issued by the Elections Officer of the Gampaha District who was in overall charge of the arrangement for the elections in the District. Paragraph 3 of this circular specifically stated that no candidate could enter the place of counting by virtue only of his candidature. It further provides that parties and independent groups could only be represented by two persons at such place. The two persons referred to are the counting agents appointed in terms of section 60. This circular is issued to all authorised agents of parties and group leaders. As noted above it was on the strength of this circular that the 3rd Respondent informed the candidates of the group that they cannot be present at the counting centre. Learned Deputy Solicitor-General submitted that this circular is a correct statement of the legal position that only counting agents and the relevant officials could be present at the place of counting. He further submitted that the reference to candidates should be considered as a statement that candidates have no right to be present and should not be considered as a total bar on their presence. However, the impact of this circular is quite clear. The circular makes specific reference to candidates and states that they cannot be present by virtue of their candidacy. There is no legal basis to single out candidates and to announce that they have no right to be present at the counting. Ironically, they have the greatest interest in ensuring that the count is accurately done. As noted above

sections 60 and 62(1) vest a discretion in the counting officer to permit any person to be present at the counting. The Elections Officer by this circular restricted the exercise of the discretion vested in the counting officer, in advance. The circular states that a candidate cannot even enter the place of counting. If so, how could he obtain the permission of the counting officer to be present at the place of counting? Therefore, I am inclined to agree with the submission of learned Counsel for the Petitioners that paragraph 3 of circular 2R1 which is relied upon by the 2nd Respondent, is *ultra vires* and has been issued in excess of the jurisdiction of the Elections Officer. This circular has the consequence of aggravating the adverse impact of the lacuna in the law, noted above.

The next matter on which the parties are at variance is the manner of counting preference votes. The Petitioners state that the counting was done by the same set of officials who did the main count of ballot papers and that they worked continuously from about 8.30 p.m. on 11.05.1991 till the counting of preference votes was concluded the next evening. The method adopted was for one set of officials to read out the preferences as indicated in the ballot papers and for another set of officials to record such preferences on sheets of paper. It is submitted that this manner of counting taken in relation to the fact that the officials had worked without a break for a long period of time, resulted in errors. The 2nd Respondent has stated in his affidavit that the same officials who examined the ballot papers recorded the preferences on separate sheets of paper.

The scheme of elections which provided for preference votes to be cast resulted in the need to record preferences in separate sheets of paper. Therefore, a result could not be declared entirely on a count of ballot papers as in the previous scheme. The process of recording the preferences indicated in a ballot paper on separate sheets of paper manually, according to any of the methods referred above, would leave room for human error. I am inclined to accept the submission of learned Counsel for the Petitioners that the likelihood of such error is made greater by the fact that the officials were involved in the process of counting non-stop for long hours. In these circumstances the need for vigilance by the candidates who are

directly affected by the result is enhanced. If the candidates or their agents were permitted to be present any error on the part of the relevant officials may have been detected and appropriate corrections made. In the absence of such a safeguard, the Petitioners have just cause to complain as to the result of preference votes declared on the basis of the entries made by the relevant officials.

The last matter in respect of which the parties are at variance on the facts is the declaration of the result of preference votes. The Petitioners state that there was a delay in officially declaring the result of preference votes of the independent group and of other parties that contested the election. In view of this delay they met the 2nd Respondent in the afternoon of 14.05.1991. The 2nd Respondent read out the names of the candidates of the independent group and the number of preference votes each had received. They noted that the name of P. Milton Appuhamy (candidate No. 10, 12th Respondent) was read out twice and that the name of one candidate was missing. When this was pointed out the 2nd Respondent summoned some officials (not the counting officer) and called for "the Negombo file". Having gone through the papers he made certain amendments and read out the list again. On this reading, the Petitioners found that three names of candidates who were elected on the previous reading, were substituted with three other names. The Petitioners made a request to the 2nd Respondent for a recount which was refused. Subsequently they sent the written request X3 signed by all candidates (as noted above) seeking a recount. The Petitioners specifically plead that the result published in the 'Lankadeepa' of the 15th (X1) is the first result declared by the 2nd Respondent and the result published in the 'Dinamina' of the 16th (X2a) is the second result declared by the 2nd Respondent. On a comparison of these two publications it appears that whilst the figures of votes tally three names coming within the six elected are different.

The 2nd Respondent and the two Assistant Returning Officers, whose affidavits have been annexed, state that the result was declared at 8 p.m. on the 12th. It is further stated that at the time of the declaration there were no representatives of the independent

group present. According to the 2nd Respondent on the 14th the Petitioners met him in office and he gave them the document marked 2R2, being a copy of the result that was declared. The two Asst. Returning Officers support the 2nd Respondent regarding this matter. They specifically deny that any corrections were made or that the result was read out twice.

It is thus seen that there is a clear conflict in the affidavits as to what took place on the 14th afternoon when the two Petitioners met the 2nd Respondent. According to the 2nd Respondent and the two Asst. Returning Officers the result had been declared on the 12th at 8 p.m. In these circumstances the visit of the two petitioners on the 14th would not have been of any significance to them, at that stage. The 2nd Respondent has merely handed over a copy of the result to some candidates who were not present when the result was declared. The fact that the 2nd Respondent recalled the visit of the Petitioners, shows that something more than a mere handing over of a copy of the result took place at that meeting. It is indeed strange how the two Asst. Returning Officers being public officers (a Senior Asst. Commissioner of Agrarian Services and the Chief Accountant of the Kachcheri) happened to be present when the two Petitioners made (an unarranged) visit to the 2nd Respondent. Even assuming that they were present it is more strange how they recall this visit of two candidates, who were merely given a copy of the result. A perusal of the two affidavits of these officers (2R3 and 2R4) reveals that the contents of paragraphs 6, 7, 8, 9, 10, 11, and 12 in affidavit 2R3 (which relate to the matter of declaring the result, the events of the 14th and so on) are word to word the same as paragraphs 5, 6, 7, 8, 9, 10 and 11 in the other affidavit 2R4. It is unbelievable that two officers who performed different functions could recall these events in the same manner so as to enable them to make two affidavits that are identically worded. As regards the events of the 14th paragraph 9 of 2R3 and paragraph 8 of 2R4 read as follows:

> "I state that Mr. M. A. D. G. Ivan Appuhamy and R. A. S. Ranawaka, who were members of the Independent Group which contested for the Negombo Municipal Council, entered the room of the Assistant Commissioner of Elections on the 14th May, 1991 and the Assistant Commissioner, Mr. T. Asoka Peiris

showed them the list of the number of preferences received by each candidate according to the request made by them."

These two public officers have not disclosed as to how they knew the names of the two Petitioners (who were merely two candidates), to the last initial, on the 14th. The only inference that could be drawn from these curious averments in the affidavits, that are similar even in the matter of punctuation marks and grammatical errors, is that these officers have merely signed affidavits that had been prepared somewhere else. I am reluctantly compelled to hold that no reliance could be placed on these affidavits.

On the other hand, the version of the Petitioners commends itself as reflecting the truth. The publication in the Lankadeepa of the 15th is not explained by the 2nd Respondent. According to the 2nd Respondent the release of the result to the press was done only on the 15th. If so, the paper published on the 15th could not have carried it. Furthermore, the result as reflected in the Lankadeepa is correct in every respect other than the differences in the three names. The result with regard to the votes polled by the candidates who were elected from the other two parties is the same. Therefore, the only inference that could be drawn is that there was another version of the result, which was in circulation. Furthermore, the conduct of the Petitioners in seeking a recount immediately and following up with a request to the Commissioner supports their version as to the events of the 14th. Something disturbing should have taken place on the 14th with regard to this result which prompted all 28 candidates including the candidates who were declared elected to state that they were not satisfied with the count that has taken place. In these circumstances I am inclined to accept the averments of the affidavits of the Petitioners with regard to what took place when they met the 2nd Respondent on the afternoon of the 14th.

The resulting position is that the Petitioners have made out a formidable case on the basis of a lacuna in the legislation, illegal administrative action in the matter of issuing circular 2R1 which worsened the adverse impact of the lacuna in the legislation, the

manner of counting and serious irregularity in the declaration of the result of the preference votes. I have to now consider whether they are entitled to the relief by way of a Writ of Mandamus.

Learned Deputy Solicitor-General submitted that a recount cannot take place under any circumstances after the closure of the count as provided for in section 64(1). It is submitted that a recount should have been applied before the written statement is made in terms of section 63(7) and that there is finality to the decision of the counting officer, in terms of section 63(8). It was also submitted that the proper relief if any, is by way of a Writ of a *quo warranto.*

I have considered the provisions of section 63(7) in the preceding sections of this judgment. It was noted that this section was not amended to provide for the second statement that had to be prepared in respect of the counting of preference votes. In these circumstances reliance could not be placed on this provision to deny relief to the Petitioners.

Section 67(8) relied upon by Deputy Solicitor-General reads as follows:

> "The decision of the counting officer as to any question arising in respect of any ballot paper shall be final and conclusive".

It is seen that the matters pleaded by the Petitioners do not relate to any particular decision with regard to a ballot paper but to the general manner in which the counting took place and not significantly to the fact that the candidates were not permitted to be present at the counting. This provision is intended to give finality to a decision of a counting officer with regard to a particular ballot paper. In these circumstances this section cannot be relied upon to attribute finality to the statement of the counting officer as to the result of preference votes. Furthermore, it is to be noted that the counting officer who prepared the statement giving the result of preference votes has not filed an affidavit in this case.

Learned Deputy Solicitor-General has also referred to the provisions of section 67(3) and (4). These provisions require the Elections Officer to retain the packets of ballot papers and documents for a period of six months. Section 67(4) provides that no person is entitled to inspect any packet of ballot papers. The proviso to this section reads as follows:

> "Provided, however, that nothing in the preceding provisions of this subsection shall be construed or deemed to debar any competent Court from ordering the production of, or from inspecting, or from authorizing the inspection of, any such packet or document at any time within the period of six months specified in that subsection".

As observed by Nagalingam SPJ in the case of *Piyasena v. de Silva* [1], this "section itself is framed on the footing that the Court has an inherent power to order an inspection whenever it becomes necessary in the interests of justice to do so". The legislature has not made any specific provision by way of an election petition or otherwise enabling an aggrieved party to raise any matter with regard to an election before Court. In my view the legislature had in contemplation the availability of a remedy by way of judicial review to an aggrieved party.

For the reasons stated above my finding is that the Petitioners have established their complaint with regard to the manner in which the count was done and the result declared. They seek a Writ of Mandamus for the purpose of verifying whether the count that has been done accurately reflects the choice of the voters in the matter of individual candidates. The legislative purpose underlying the Ordinance is to ensure that the result declared is a fair and accurate reflection of the votes cast by the electorate. This is the basic premise of the duties vested in the respective officials by the Ordinance. The Writ of Mandamus is the remedy available at public law for enforcing the performances of public duties by public authorities. As noted by Prof. H. W. R. Wade "within the field of public law the scope of mandamus is still wide and the Court may use it

freely to prevent a breach of duty and injustice". *(Administrative Law* 1988 6th Edition p. 652). Following this passage Prof. Wade has cited the famous dictum of Darling, J. in the case of *R. v. Hanley Revising Barrister* [2].

> "Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

A Writ of *quo warranto* lies in a situation where a person acts in an office to which he is not entitled. In this case the Petitioners are not challenging the election of any of the candidates who have been declared elected from the independent group. They are merely seeking a verification by way of a recount as to whether the result that has been declared is correct. The recount may well affirm the result that has been declared. Therefore, I am of the view that the appropriate remedy is not by way of a Writ of *quo warranto* as urged by learned Deputy Solicitor-General. As noted above the respective officials, the counting officers and the returning officer, have a public duty to make and declare, a fair and accurate result of the votes that have been cast by the electorate. The Petitioners and the other candidates were not satisfied with the count and the declaration that have been done and made a request for a recount to the 1st and 2nd Respondents. The Petitioners have in this application substantiated the legal and factual basis on which they made that request. I am of the view that the failure on the part of the 1st and 2nd Respondents to reply that request amounts to a refusal to perform a public duty. This conduct on the part of the respondents is sought to be justified on the basis of an alleged finality of the result that has been declared. For the reasons stated above I am unable to accept this plea based on finality. In my view the case of the Petitioners for a recount is well founded. Therefore I grant to the Petitioners the relief by way of a Writ of Mandamus as prayed for in paragraph C to the petition. The 1st and 2nd Respondents are directed to hold a recount of the preference votes of the candidates of the independent group that

contested the Negombo Municipal Council elections held on 11.05.1991 and to take steps as prayed for. These Respondents are further directed to hold such recount on 07.02.1992 in the presence of the candidates and/or their agents. If the result declared at such recount is the same in so far as it relates to the candidates who have been declared elected from the independent group, the Petitioners would not be entitled to any further relief. If however the result is different, these Respondents are further directed to make a declaration on the basis of that result which will supersede the declaration that has already been made and these Respondents are directed to take steps according to law to give effect to that declaration. In view of this order it would not be necessary to consider the relief prayed for by way of a Writ of Certiorari. The application is allowed and the 2nd Respondent is directed to pay the Petitioners a sum of Rs. 2500/- as costs.

Writ of Mandamus issued.

Recount ordered.