

**RAJARATNAM**  
v  
**DAYANANDA DISSANAYAKE**  
**COMMISSIONER OF ELECTIONS AND OTHERS**

COURT OF APPEAL  
TILAKAWARDENA, J. P/CA AND  
WIJERATNE, J.  
C.A. 196/2002  
MAY 5, AND  
JULY 8, 2003

*Provincial Councils Elections Act, No.2 of 1988, sections 63 and 65(2) –  
Nominated to Provincial Council by one party though not a member of the  
party – Subsequent nomination by another party to contest General Elections*

– Expelled by first party – Appointment of another nominee by the first party – Validity of the expulsion – Is the order a nullity? – Should the specific remedy under section 63(1) be resorted to first?

**Held:**

- (i) The petitioner has never been a member of the first party. In terms of section 63(1) the expulsion of a member of a political party could be done by the leadership of the particular party. The party leadership could not formally expel a person who is not a member of the particular party.
- (ii) The order or decision of an official who had no legal authority to make the said order / decision in law is not valid and is a nullity and does not exist in the eyes of the law.
- (iii) It is not compulsory to invoke the jurisdiction laid down in section 63(1) whenever a member of a Provincial Council is expelled from a party of which he is not a member.

*Per* Tilakawardana, J., (P/CA)

"In exercising his powers in terms of section 65(2) the Commissioner need not in every case, question and confirm that a vacancy had arisen when he is informed that a member had been expelled from a particular party; but in the circumstances of this particular case when the petitioner had informed the Commissioner that he was not a member of the first party and therefore powers of his expulsion could not be invoked, it is incumbent upon the Commissioner to inquire into the matter and rectify any error that had been made."

**APPLICATION** for a *writ of quo warranto*.

**Cases referred to:**

1. *Abeywickrema v Pathirana* – (1986) 1 Sri LR 120 at 156
2. *Centre for Policy Alternatives (Guarantee) Ltd., and others v Dayananda Dissanayake and others* (2003) 1 Sri LR 277
3. *Basheer Segu Dawood v Ferial Ashraff and others* (2002) 1 Sri LR 26 at 31
4. *Rajan v S.Kapukotuwa and others* CA 665/2002 - CAM 3.6.2002

*Sanjeewa Jayawardana* with *Priyanthi Gunaratne* for petitioner.

*Lakshman Perera* for 3rd respondent.

*Saleem Marsoof P.C.*, Additional Solicitor General with *Janak de Silva* for 1st and 2nd respondents.

September 25, 2003

**TILAKAWARDENA, J.(P/CA)**

The petitioner has filed this application seeking a writ of quo warranto requiring the 4th respondent to show by what authority he holds office as Member of the Central Provincial Council and declaring the 4th respondent's election as Member of the Central Provincial Council null and void. He has also sought a *writ of certiorari* to quash the said order made by the 1st respondent, dated 23/01/2002 which had been published in the Government Gazette (Extraordinary) bearing No. 1220/20 dated 23/01/2002 which has been produced and marked as P5. Admittedly the petitioner is a member of the Ceylon Workers' Alliance and had been a member of the Central Provincial Council since 10/11/2000. A vacancy had arisen in the said Council and the 1st respondent in terms of section 65(2) of the Provincial Councils Elections, Act No.2 of 1988 had requested the 3rd respondent namely, the General Secretary of the United National Party, to nominate a person and the petitioner had been duly nominated and was declared a member of the Central Provincial Council. On or about 20th of November 2001 (P2) the petitioner had been informed by the 3rd respondent that as the petitioner had been nominated as a candidate of the People's Alliance at the general election, which was to be held on the 5th of December 2001 without prior approval of the Working Committee of the United National Party, that the petitioner's membership in the party had *ipso facto* ceased. Consequently the 1st respondent by letter dated 22/01/2002 requested the 3rd respondent to fill the vacancy of the membership of the Central Provincial Council as the petitioner had been expelled from the party. Thereupon the 3rd respondent nominated the 4th respondent to fill this vacancy and the 1st respondent had declared the 4th respondent as a member of the said Provincial Council by a notice published in the Government Gazette bearing No. 1220/20 dated 23/01/2002 (P5).

The gravamen of the argument of the petitioner in this application is that the petitioner had never been a member of the United National Party and therefore could not have been expelled from the party. Therefore, since the party did not have the powers to expel

him that such expulsion was a nullity.

Therefore the main contention by the petitioner, which has to be decided by this Court, is whether the petitioner was or had been a member of the United National Party and if so whether the expulsion of the petitioner from the party was valid in law.

The Provincial Councils Elections Act, No.2 of 1988 sets out the procedure for the election of a member to a Provincial Council. Section 65(2) of the said Act states as follows. "If the office of a member falls vacant due to death, resignation or for any other cause, the Commissioner shall call upon the secretary of the recognized political party or the group leader of the independent group to which the member vacating office belonged, to nominate within a period to be specified by the Commissioner, a person eligible under this Act for election as a member of that Provincial Council, to fill such vacancy. If such secretary or group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation, as the case may be, in the form set out in the Seventh Schedule to the Constitution, taken and subscribed or made and subscribed, as the case may be, by the person nominated to fill such vacancy, the Commissioner shall declare such person elected as a member of that Provincial Council from the administrative district in respect of which the vacancy occurred. If on the other hand, such secretary or group leader fails to make a nomination within the specified period, the Commissioner shall declare elected as member, from the nomination paper submitted by that party or group for the administrative district in respect of which the vacancy occurred, the candidate who has secured the highest number of preferences at the election of members to that Provincial Council, next to the last of the members declared elected to that Provincial Council from that party or group. The Commissioner shall cause the name of the member as declared elected to be published in the Gazette."

This section provides for the nomination of a person who is eligible to be a member of the Provincial Council and does not refer to the nomination of a member of a political party to which the member vacating office belonged. Accordingly on a plain reading of the section it is apparent that it is not necessary to nominate a member of any particular political party in filling a vacancy.

Another peripheral issue that has to be decided at this stage pertains to the submissions of the respondent made in terms of section 63 (1), that if no challenge was made within the period of one month the member in question ceased to be a member of the Provincial Council by operation of law irrespective of whether the grounds on which he ceased to be a member of the recognized political party or independent group is valid or invalid. 80

Section 63(1) states "where a member of a Provincial Council ceases, by resignation, expulsion or otherwise, to be a member of a recognized political party or independent group on whose nomination paper his name appeared at the time of his becoming such member, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member". Proviso to section 63(1) reads as follows. "Provided that in the case of the expulsion of a member of a Provincial Council his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Court of Appeal by petition in writing and the Court of Appeal upon such application determines that such expulsion was invalid. Such petition shall be inquired into by three Judges of the Court of Appeal who shall make their determination within two months of the filing of such petition. Where the Court of Appeal determines that the expulsion was valid the vacancy shall occur from the date of such determination. 90

What has to be emphasized and understood here is that the word expulsion used in the said provisions contemplates a situation where a member of a particular party is expelled from that party. What is significant is that the petitioner has never been a member of the United National Party. Indeed the respondent has neither denied this fact nor has submitted any material or evidence contrary thereto. Therefore the party leadership could not possibly expel a person who is not a member of that particular political party. The words connote that the expulsion of a member of a political party could only be done by the leadership of that particular political party. Accordingly, in terms of the facts relating to this case there was no decision to be challenged in terms of section 63(1) as contended by the respondent. 100

An order or decision by an official who had no legal authority to make such order/decision is in law not valid and is a nullity and 110

does not exist in the eyes of the law. (Sharvananda, C.J. in the case of *Abeywickrema v Parthirana* <sup>(1)</sup> at 156).

Therefore the 3rd respondent had no legal authority to make an order expelling the petitioner from the United National Party. As clearly in terms of all the facts and circumstances of this particular case the petitioner was not a member of the United National Party.

The next matter that has been raised for consideration by the respondent is that if this Court grants leave to the petitioner, it would enable the petitioner to function as a member of the Central Provincial Council, when in fact the petitioner is not qualified in law to be a member of the Central Provincial Council and his name does not appear on the nomination papers of the United National Party. The respondent has relied on the decision that was reported in *Centre for Policy Alternatives (Guarantee) Limited and another v Dayananda Dissanayake and others*.<sup>(2)</sup> In this case Justice Mark Fernando had held that the secretary's power to nominate is confined to a candidate whose name appeared in the original nomination paper and who secured some preferences at the election.

However what is relevant according to the facts of this case under review is that the nomination of the petitioner as a Council Member had taken place in November 2000 and that the petitioner was nominated by the consensus of the United National Party, which fact cannot be inquired into in this application as such is not in issue. It is also relevant to note that the petitioner by letter addressed to the 3rd respondent had informed that as the petitioner was not a member of United National Party, the question of his ceasing to be a member of the said party does not arise (Vide P3). This was copied to the 1st respondent. Thus a legitimate expectation was created as to the outcome on the final decision to this effect. However no such reply was sent to the petitioner.

On the basis of the above analysis the contention of the respondent that if Court granted relief to the petitioner such would be futile as the petitioner's name did not appear on the nomination paper of the United National Party, is untenable. Therefore the expulsion of the petitioner is in the first place a nullity. Therefore the petitioner cannot be considered as appointed afresh as a member of the Central Provincial Council. The petitioner merely continues to

hold office as a member of the Central Provincial Council and the appointment of the petitioner cannot be made an issue in this matter as it is not relevant to the matters that had been placed before this Court. 150

The Supreme Court judgment relied on by the respondent cannot be made applicable retrospectively. Justice Mark Fernando in dealing with the objections raised in relation to the futility of granting relief, made it clear that the Court of Appeal judgment is set aside on the grounds of public interest, for if not the Court of Appeal judgment would be regarded as authoritative and binding in respect of all future vacancies in any Provincial Council. In this sense, such decision in that case could not be applicable retrospectively and would not be relevant to the facts in this case. 160

The respondent has also made submissions that the petitioner should have resorted to the specific remedy embodied in the proviso to section 63(1). In support of this submission the judgment in the case of *Basheer Segu Dawood v Ferial Ashraff and others* (3) at 31 has been cited. In that case it had been stated that the petitioner not being a member of the United National Party could not be expelled from it and similarly, according to the circumstances of this case, the petitioner was not a member of the United National Party and therefore could not be expelled from the party. 170

In the unreported judgment of *A.M.D. Rajan v S. Kapukotuwa and others* (4) on similar facts it was held that since the petitioner was not a member of the United National Party he could not have been expelled from the United National Party. It is interesting to note that it is not compulsory to invoke the jurisdiction laid down under section 63(1) proviso, whenever a member of a Provincial Council is expelled from a party of which he is not a member though it recognizes the remedy embodied under the proviso to section 63(1). Therefore the order made under section 65(2) declaring the 4th respondent elected, is *ultra vires* and is void. The 1st respondent could not have made such order as the office of the petitioner has not become vacant in terms of the aforesaid law. The existence of a vacancy is a precondition which is necessary for the exercise of the powers in terms of section 65(2). Without such condition powers embodied in terms of section 65(2) of the said Provincial Councils Elections Act, No.2 of 1988 cannot be invoked. 180

It is also interesting to note that in exercising his powers in terms of section 65(2) of the aforesaid Act the Commissioner of Elections need not in every case, question and confirm that a vacancy had arisen when he is informed that a member had been expelled from a particular party. But in the circumstances of this particular case when the petitioner had informed the Commissioner that he was not a member of the United National Party and therefore powers for his expulsion could not have been invoked, it is incumbent upon the Commissioner of Elections to inquire into the matter and rectify any error that had been made. Accordingly, in all the circumstances set out in this case, this Court finds this is a fit and proper case to issue a *writ of certiorari* to quash the order made by the 1st respondent dated 23/01/2002 published in the Government Gazette (extraordinary) bearing No. 1220/20 dated 23/01/2002 (P5). Therefore, the application of the petitioner seeking the aforesaid *writ of certiorari* is allowed with costs in a sum of Rs. 5000/-.

**WIJEYARATNE, J.** - I agree.

*Application allowed.*