

**VIGNESWARAN AND STEPHEN
v.
DAYANANDA DISSANAYAKE AND OTHERS**

COURT OF APPEAL
GAMINI AMARATUNGA, J.
CA NO. 1822-1823/2001
NOVEMBER 21, 2001

Writ of certiorari – Quash decision of Returning Officer – Parliamentary Elections Act, No. 1 of 1981, sections 4, 5, 10 (1), 14, 15 (1), 15 (4) and 19 (1) (a-e), – Constitution, Articles 90, 91 (1) (d) (k) and 99 (3) – Candidate not qualified – Objection to nomination papers – Should the nomination paper be rejected? Duties of Returning Officers.

The petitioner in CA No. 1822/2001, as the authorised agent of the EPDP objected to the nomination paper of the TULF on the basis that one candidate P was disqualified, and requested the Returning Officer to reject the nomination list of the TULF. The Returning Officer summarily rejected the objection.

Held:

- (1) If a valid nomination paper prepared in accordance with the legal requirements set out in s. 15 (1), (2) and (3) is not delivered in accordance with s. 15 (4) or (5) it has to be rejected.
- (2) If the Returning Officer finds any one or more of the grounds set out in s. 19 (1) (a) – (e) in respect of a nomination paper he is bound by law to reject the nomination paper.
- (3) Any of the grounds set out in s. 19 (1) (a) – (e) do not relate to qualifications/disqualifications of a candidate named in a list.
- (4) The law does not contemplate any inquiry/investigation before rejecting a nomination paper on the above grounds and no discretion is involved in the process.

Per Gamini Amaratunga, J.

“The function of the Returning Officer under s. 19 (1) of the Elections Act is ministerial in nature and there is no decision or a determination made by him capable of being quashed by a writ of *certiorari*. He is entitled to rely on the certificate signed by a candidate in column 4 of the nomination paper to say that such candidate is not disqualified in terms of the Constitution.”

APPLICATION for an order in the nature of a writ of *certiorari/mandamus*.

Cases referred to :

1. *Kodakkar Pillai v. Madanayake* – 54 NLR 433 at 438.
2. *Bandaranayake v. Weeraratne* – (1981) 1 SLR 10 at 16.
3. *Frewin & Co. v. Ranjit Atapattu* – (1993) 2 SLR 33 at 61.
4. *Atukorale v. Dissanayake* – (1998) 3 SLR 206 at 213.

R. Chula Bandara with *Rashini Mendis* for petitioner in CA No. 1822/2001.

Dr. J. de Almeida Gunaratne with *Kishali Pinto Jayawardena* for petitioner in CA No. 1822/2001.

Farzana Jameel, Senior State Counsel for 1st and 2nd respondents.

R. E. Thambiratnam with *N. Raviraj* for 3rd, 4th, 5th and 8th respondents in both applications.

Other respondents absent and unrepresented.

Cur. adv. vult.

November 23, 2001

GAMINI AMARATUNGA, J.

These two applications have been filed by the petitioners seeking – ⁰¹

- (a) a writ of *Certiorari* to quash the decision of the 2nd respondent Returning Officer and/or the 1st respondent Commissioner of Elections to reject the objection raised on behalf of the Eelam People's Democratic Party for the nomination paper submitted by the Tamil United Liberation Front for the Electoral District of Colombo for the Parliamentary Election to be held on 5th December, 2001 and;
- (b) a writ of *Mandamus* directing the 1st and/or the 2nd respondent to treat the aforesaid nomination paper as rejected. ¹⁰

Since both applications relate to the same matter and the relief claimed by both petitioners is identical, by consent of parties both applications were consolidated and heard together. The petitioner in CA application No. 1822/2001 is a citizen of Sri Lanka, a member of the Eelam People's Democratic Party (EPDP) and a former Member of Parliament for the Jaffna District. He is a person nominated by the EPDP as a candidate for the Electoral District of Colombo at the Parliamentary Election to be held on 5th of December, 2001 and accordingly the authorised agent of the EPDP in terms of section 15 (4) of the Parliamentary Elections Act, No. 1 of 1981, as amended ²⁰ for the Electoral District of Colombo for the purposes of the said Elections Act. The petitioner in No. 1823/2001 is a citizen of Sri Lanka, a member of the EPDP and a candidate nominated by the EPDP to contest for the Electoral District of Colombo at the election to be held on 05. 12. 2001.

The President, in terms of section 10 (1) of the Parliamentary Elections Act, No. 1 of 1981 (hereinafter referred to as the Elections

Act) by proclamation published in *Government Gazette Extraordinary* No. 1205/12 dated 10. 10. 2001 dissolved Parliament with effect from midnight of 10. 10. 2001 and fixed the period beginning on 20. 10. 2001 and ending 12.00 noon of 27. 10. 2001 as the nomination period during which nomination papers shall be received by the Returning Officers. ³⁰

Nomination papers for the electoral district of Colombo were tendered by the EPDP and the TULF for the 2nd respondent Returning Officer within the nomination period. Dr. Vigneswaran, the petitioner in Application No. 1822/2001 has stated in his petition that after the closing of nominations at 12 noon on 27. 10. 2001, he, as the authorised agent of the EPDP, scrutinized the nomination paper submitted by the TULF and found that M. Packiyathan, the 4th candidate named in the nomination paper of the TULF (8th respondent) was the Chairman of the Palmyrah Development Board. After this discovery Dr. Vigneswaran has tendered to the Returning Officer a written objection to the nomination paper of the TULF on the basis that the said M. Packiyathan as the current Chairman of the Palmyrah Development Board was not eligible to be a candidate for the Parliamentary Election. He has requested the Returning Officer to reject the nomination list of the TULF. Under section 19 (1A) of the Elections Act it is possible to make an objection to a nomination paper and Dr. Vigneswaran has tendered his written objection to the Returning Officer within the time specified in section 19 (1A). The petitioner has stated that the 2nd respondent without ascertaining the veracity of the objection from the authorised agent of the TULF summarily rejected the objection raised by him. The 2nd respondent in his affidavit has admitted that he rejected the objection raised by Dr. Vigneswaran. ⁴⁰ ⁵⁰

The petitioners have averred that the rejection was contrary to section 19 (1) (b) of the Elections Act read with sections 14, 15 (1) of the said Act read with Articles 91 (1) (d) (x) and 99 (3) of the Constitution. Further, reasons for the petitioners' above averment are set out in paragraphs 16 (B) to (D), 17 and 18 of the petition. ⁶⁰

Section 14 of the Elections Act enacts that any person who is qualified to be elected as a Member of Parliament in terms of Article 90 of the Constitution may be nominated as a candidate for election. According to Article 90 of the Constitution every person who is qualified to be an elector shall be qualified to be elected as a Member of Parliament unless he is disqualified under the provisions of Article 91. Article 91 (1) (d) (x) relied on by the petitioners in support of their position that the 4th candidate in the TULF nomination paper (8th respondent to the applications) makes an officer in any public corporation holding any office created after November 18, 1970, the initial of the salary scale of which is, on the date of creation of that office, not less than the initial of the salary scale applicable on that date to an office referred to in item (ix) – that is not less than Rs. 72,000 per annum – or such other amount per annum as would, under any subsequent revision of salary scales correspond to the first mentioned initial; disqualified to be elected as a Member of Parliament. 70

Article 99 (3) of the Constitution states that “any recognised political party . . . may for the purpose of any election of Members of Parliament for any electoral district, submit one nomination paper setting out the names of such number of candidates as is equivalent to the number of members to be elected for that electoral district, increased by three.” Section 15 (1) of the Elections Act has reproduced in verbatim the words of Article 99 (3) I have quoted above with the addition of the sentence “Such nomination paper shall be substantially in Form A set out in the First Schedule to this Act” at the end of the section. 80

The argument of the learned counsel for the petitioners is that the candidates to be named in a nomination list are persons qualified to be elected as Members of Parliament and if a particular candidate whose name is included in a nomination paper is a person not qualified to be elected as a Member of Parliament, such nomination paper is not a nomination paper containing the total number of candidates required to be nominated in terms of Article 99 (3) of the Constitution 90

and section 15 (1) of the Elections Act and is therefore liable to be rejected under section 19 (1) (b) of the Elections Act. The learned counsel contended that the rejection of the objection raised by Dr. Vigneswaran is contrary to section 19 (1) (b) of the Elections Act and is therefore liable to be quashed by a Writ of *Certiorari*.

Before setting out the submissions made on behalf of the respondents it is necessary to consider the provisions of sections 15¹⁰⁰ and 19 of the Elections Act. I have already referred to section 15 (1) which sets out the number of candidates to be included in a nomination paper. According to section 15 (2) the written consent of each candidate to be nominated and an oath or affirmation, as the case may be, in the form set out in the seventh schedule to the Constitution taken or subscribed or made or subscribed, as the case may be, by every such candidate shall be endorsed in the nomination paper. It is to be noted that in section 15 there is no requirement for a candidate to make a declaration that he is not subject to any disqualification to election. However, the 4th column of the form of nomination paper set out in the first schedule to the Elections Act¹¹⁰ contains the words "Signature of candidates signifying consent and certifying that he is not subject to any disqualification for election". According to section 15 (3) the nomination paper of a recognised political party shall be signed by the secretary of the party and shall be attested by a Justice of the Peace or a Notary Public. Sections 15 (4) and (5) specify the person who shall deliver the nomination paper to the Returning Officer.

According to section 19 (1) of the Elections Act the Returning Officer shall, immediately after the expiry of the nomination period,¹²⁰ examine the nomination papers received by him and reject any nomination paper for the reasons set out in subparagraphs (a) to (e). Subparagraph (a) relates to a nomination paper not delivered in accordance with the provisions of subsection 4 or 5 of section 15

of the Elections Act. Subparagraph (b) relates to a nomination paper that does not contain the total number of candidates required to be nominated in terms of Article 99 (3) of the constitution. Subparagraph (c) relates to an instance where the deposit required under section 16 has not been made. Subparagraph (d) relates to a nomination paper which does not contain the endorsement of the consent of one more candidates or the oath or affirmation in the form set out in the seventh schedule to the constitution of one or more candidates. Subparagraph (e) refers to a nomination paper not signed by the secretary of the recognised political party or a nomination paper where the party secretary's signature has not been attested as required by section 15 (3) of the Elections Act. The defects set out in subparagraphs (d) and (e) of section 19 (1) are easily ascertainable by an ordinary visual examination of the nomination paper. In respect of subparagraph (b) of section 19 (1) the total number of candidates required to be nominated can be ascertained by adding three to the number of members to be elected for a particular electoral district. Since deposits required by section 16 are to be tendered to the Returning Officer, whether the deposit has been made or not may be verified from the records of the Returning Officer. The person who delivered the nomination can be ascertained from the records of the Returning Officer. Thus, all matters set out in section 19 (1) (a) to (e) can be ascertained by a simple examination of the nomination paper and the records of the Returning Officer. No formal inquiry or investigation is necessary to ascertain all such matters. Section 19 (1) (b), (d) and (e) relate to the legal requirements necessary to make a valid nomination paper. This is clear from the words 'such nomination paper' in section 15 subsection 4 which means a nomination paper prepared in accordance with the requirements set out in sections 15 (1), (2) and (3). If a valid nomination paper prepared in accordance with the legal requirements referred to above is not delivered in accordance with section 15 (4) or (5) it has to be rejected. If the Returning Officer

finds any one or more of the grounds set out in section 19 (1) (a) to (e) in respect of a nomination paper he is bound by law to reject such nomination paper.

The law does not contemplate any inquiry or investigation before¹⁶⁰ rejecting a nomination paper on those grounds and discretion is involved in the process.

Any of the grounds set out in section 19 (1) (a) to (e) do not relate to qualifications (or disqualifications) of a candidate named in a nomination list. Section 19 (1A) provides for making objections to a nomination list within the time specified in the section. Section 19 (2) contains the phrase "where any nomination paper has been rejected by the Returning Officer under subsection (1)". This specific reference to subsection (1) indicates that objections contemplated by section 19 (1A) are also limited to matters that fall within any of the¹⁷⁰ subparagraphs of section 19 (1). If the Legislature has contemplated objections to qualifications of candidates to be elected, the Legislature could have used the word 'nominations' instead of the words 'nomination paper' in section 19 (1A) and the use of the words *nomination paper* makes it clear that objections referred to in section 19 (1A) are limited to the matters set out in section 19 (1) (a) to (e).

The learned Senior State Counsel submitted that the Legislature has not given any power to the Returning Officer to reject a nomination paper on the ground of any disqualification of a candidate named in a nomination paper. She submitted that it is a matter to be decided¹⁸⁰ by an election Judge under section 92 (2) (d) in an election petition.

On the other hand the learned counsel for the petitioners submitted that the Returning Officer should have made inquiries from the authorised agent of the TULF about the objection raised by Dr. Vigneswaran to

the nomination of the 8th respondent. They submitted that the word 'examine' in section 19 (1) of the Elections Act requires the Returning Officer to hold an inquiry about the objection and his decision on that objection was a quasi judicial act which necessitated an inquiry before his decision. The learned counsel submitted that the Returning Officer's failure to hold an inquiry is a breach of the principles of natural justice¹⁹⁰ and his duty to act fairly. However, both counsel did not specify the scope of the inquiry to be held by the Returning Officer. The learned Senior State Counsel submitted that the question whether a candidate is subject to any disqualification is a question to be decided after hearing evidence and such an inquiry by the Returning Officer under section 19 (1) was never contemplated by the legislature.

All matters to be ascertained by the examination contemplated by section 19 (1) are matters of record which can be ascertained by the mere examination of records without any inquiry or investigation. The learned Senior State Counsel submitted that section 22 of the Elections²⁰⁰ Act which requires the Returning Officer to do forthwith the acts set out therein at the expiry of the nomination period and after the rejection of any nomination paper indicates that a time consuming detailed investigation or an inquiry as suggested by the respondents was never contemplated by the legislature.

According to section 10 of the Elections Act, the nomination period and the date of the poll is to be specified in the proclamation issued by the President under that section. All such acts are to be performed within the time frame set out in the proclamation except in the situation dealt with by section 21 of the Elections Act. At the expiry of the²¹⁰ nomination period and after the rejection of any nomination paper section 22 requires the Returning Officer to do certain acts forthwith. There is nothing in section 19 to indicate that a discretion is available to the Returning Officer when he proceeds to reject a nomination paper under sections 19 (1) (a) to (e).

This is clear when one compares section 15 (8) (b) under which the Returning Officer has to be *satisfied* that an omission or an error in a nomination paper is due to inadvertance. [*emphasis added*] All matters set out in section 19 (1) (a) to (e) are matters to be ascertained from the examination of records. Taking all the above matters into consideration I hold that the examination contemplated in section 19 (1) is an examination of the records to ascertain – ²²⁰

- (a) whether the nomination paper has been prepared in accordance with sections 15 (1), (2) and (3);
- (b) whether the nomination paper has been handed over in accordance with the provisions of sections 15 (4) or (5) and;
- (c) whether the group to which section 16 of the Elections Act is applicable has made the deposit in accordance with that section.

Accordingly, I hold that nothing more is meant by the word 'examine' ²³⁰ in section 19 (1) of the Elections Act and the Returning Officer is not expected, nor is he empowered, to hold an inquiry and/or to decide on an alleged disqualification of a candidate named in the nomination paper.

The Returning Officer in paragraphs 13 and 14 of his affidavit has stated that he is not empowered to consider the objections of the nature and type specified by the petitioners and under section 19 (1) of the Elections Act he is not empowered to inquire into the qualification or disqualifications for election as a Member or Parliament. In view of my finding set out about this is the correct position. ²⁴⁰

In paragraph 8 of his affidavit, the Returning Officer has stated that the list submitted by the TULF contained the required number

of candidates. This a matter he could have ascertained by counting the number of candidates whose names are set out in the said list (nomination paper). In the same paragraph he has stated that the 8th respondent was not disqualified in terms of the Constitution. I have earlier referred to the 4th column of the nomination paper set out in form A of the first schedule to the Elections Act. The schedule is as much a part of the statute. The words "signature . . . certifying that he is not subject to any disqualification for election" in column 4 of the nomination paper, though not appearing in section 15 of the Elections Act, are not inconsistent with any of the provisions of the Act. It is a certificate by the candidate that he is qualified to be elected and to be nominated for election in terms of section 14 of the Elections Act read with Article 90 of the Constitution. The Returning Officer is entitled to rely on the certificate signed by a candidate in column 4 of the nomination paper to say that such candidate is not disqualified in terms of the Constitution. 250

Dr. Gunaratne submitted that a person who is not qualified to be nominated as a candidate is not a candidate within the meaning of section 15 (1) of the Elections Act and accordingly the Returning Officer should have rejected the nomination paper of the TULF on the basis that the list does not contain the total number of candidates required to be nominated in terms of Article 99 (3) of the Constitution. A decision that a particular candidate is not qualified to be nominated/elected is a necessary precondition to reject a nomination paper under section 19 (1) (b). The Returning Officer has no power to make such a decision and therefore there was no basis for the Returning Officer to reject the nomination paper on the ground set out in section 19 (1) (b). If the Returning Officer has proceeded to reject the nomination paper on the basis suggested by Dr. Gunaratne his act would have been invalid for the reason that he has indirectly done something which he had no power to do directly. 260 270

It is a well-established principle of construction of statutes that one cannot indirectly do what he cannot do directly. (*Kodakkan Pillai v.*

Madanayake⁽¹⁾ at 438; *Bandaranayake v. Weeraratna*⁽²⁾ at 16 and *Frewin and Co. v. Ranjit Atapattu*⁽³⁾ at 61.

For the reasons set out above I reject the contention of the petitioners and uphold the submission of the learned Senior State Counsel that the function of the Returning Officer under section 19 (1) of the Elections Act is ministerial in nature and that there is no decision or a determination made by him capable of being quashed by a writ of *Certiorari* (*Atukorale v. Dissanayake*⁽⁴⁾ at 213).²⁸⁰

In view of this conclusion, it is not necessary for me to consider the other question raised by the respondents, namely whether the chairman or a member of the Board of Directors of a Public Corporation is an officer of such corporation within the meaning of Article 91 (1) (d) (x) of the Constitution.

I, accordingly, dismiss both applications without costs. I must place on record my appreciation of the assistance given to me by the learned Counsel for the petitioners and the learned Senior State Counsel. I must also place on record my appreciation of the assistance rendered by Mr. K. Sripavan, Deputy Solicitor-General, who, at the time both applications were supported before me assisted Court on my request.²⁹⁰

Application dismissed.