

1969 Present: Sirimane, Weeramantry and Wijayatilake, JJ.

R. L. JAYASENA, Appellant, and T. B. ILLANGARATNE, Respondent

*Election Petition Appeal No. 4 of 1968—Electoral
District No. 17 (Kolonnawa)*

Parliamentary election—Election petition appeal—“Point of law”—Agency—Newspaper—False statements made by it about a candidate’s personal character and conduct—Allegation that the newspaper was agent of opposing candidate—Quantum of evidence—Agency must be proved beyond reasonable doubt—Particulars filed in election cases—Requirement that they should be precise.

Section 82 (a) of the Ceylon (Parliamentary Elections) Order in Council provides that an appeal against the determination of an Election Judge lies only on a question of law. In such cases an Appeal Court will not interfere (a) unless inferences have been drawn on a consideration of inadmissible evidence, or after excluding admissible evidence, or (b) if the inferences are unsupported by legal evidence, and (c) if the inferences are not rationally possible from the evidence, or are perverse.

Where a newspaper published false statements about the personal (as distinct from political) character and conduct of a candidate in a Parliamentary election—

Held, that the newspaper (as represented by its Editor, Printer and Publisher) was not an agent of an opposing candidate if the evidence showed that the newspaper, while it actively supported the opposing candidate, was not published for the sole purpose of supporting the opposing candidate’s political party at elections. The newspaper could not be regarded as agent of the opposing candidate even if its Editor was a prominent member of the party which supported the opposing candidate and had been invited to speak at meetings in support of that candidate. Agency in election law has to be proved beyond reasonable doubt.

Particulars which a party is required to file in an election petition take the place of a charge sheet or an indictment in a criminal case and must be accurate and precise so as to leave the other party in no doubt as to the charges he has to meet. A petitioner should not be permitted to rely at the end of the case on some item of evidence elicited, for example, in the cross-examination of a witness, to put forward a case based on a charge different from that set out in the Particulars. In such a case there must be an application to Court to amend the Particulars.

ELECTION Petition Appeal No. 4 of 1968—Electoral District No. 17 (Kolonnawa).

O. Ranganathan, Q.C., with *P. Navaratnarajah, Q.C.*, *B. J. Fernando*, *Mark Fernando*, *R. Gunaratna*, *Miss S. Chinniah*, *C. Sandarasagara* and *C. Chandrasaran*, for the petitioner-appellant.

S. Nadesan, Q.C., with *E. R. S. R. Coomaraswamy*, *Nihal Jayawickrama*, *S. S. Sahabandu*, *Dharmasiri Senanayake* and *S. C. B. Walgampaya*, for the respondent.

Cur. adv. vult.

August 7, 1969. SIRIMANE, J.—

The respondent was elected a Member of Parliament for the Kolonnawa Electorate at a by-election held on 28th February, 1967.

A petition challenging his election on grounds of bribery, undue influence and publication of false statements was dismissed by the Election Judge, and the petitioner has appealed.

The decision depended largely on findings of fact, and the main ground urged in appeal was that the learned Trial Judge was wrong in holding that the petitioner had failed to establish that a newspaper called the "Attha" was the agent of the respondent.

An appeal against the determination of an Election Judge lies only on a question of law (Vide section S2 (a) of the Ceylon (Parliamentary Elections) Order in Council, Chapter 3S1). In such cases, as pointed out in *Mahawithana v. Commissioner of Inland Revenue*¹ an Appeal Court will not interfere unless—

- (a) inferences have been drawn on a consideration of inadmissible evidence, or after excluding admissible evidence, or
- (b) if the inferences are unsupported by legal evidence, and
- (c) if the inferences are not rationally possible from the evidence, or are perverse.

The newspaper "Attha" had published certain statements, which, it was submitted, were false and related to the personal character and conduct of one of the opposing candidates—one Mrs. Kusumawathie Gunawardene. These statements were referred to in the argument as items 2, 3 and 8, as they had been so numbered in the Particulars relating to false statements filed before trial.

Item No. 2 is an article published in this newspaper which stated that one Mrs. Vivienne Goonewardene (an agent of the respondent) had said in a speech made at a meeting in support of the respondent's candidature, that the opposing candidate dominated her husband—"he dances to the drum beat played by aunt Kusuma:").

Item No. 3 is an article published in this paper that Mr. Philip Gunawardene (the husband of the opposing candidate) a Minister at the time of the by-election, was giving jobs to the voters of the Kolonnawa Electorate in various departments under his Ministry. It was alleged that the jobs were granted at an "Employment Exchange" in the house of the candidate and her husband.

Item No. 8 is a publication in this newspaper alleging that Mrs. Vivienne Goonewardene referred to above, who is said to be a niece of Mr. Philip Gunawardene, had stated that her uncle and aunt were doing menial work ("working for wages", according to one translation) for another political party—the United National Party; the allegation being that they who were once leaders of a political party were, in an inferior position in the political party which they now supported.

¹ (1962) 64 N. L. R. 217 at 223.

We are in agreement with the finding of the learned Trial Judge that this statement referred to the *political* and not *personal* conduct of the candidate. We are then left with the statements referred to in items 2 and 3.

The learned Trial Judge has held that they were false and that they referred to the personal conduct and character of the opposing candidate. It was contended for the respondent that this finding, on the face of the statements, was incorrect.

In the first statement (item No. 2) there is an allegation that the candidate made her husband dance to the beat of her drum. To say that a woman subjugates her husband is more than the expression of an opinion, and I think that the Trial Judge was right in taking that view.

The second statement (item No. 3) at first sight appears to be an allegation against the candidate's husband only, but the Trial Judge has taken the view that the allegation was that the *candidate*, who lived with her husband, was responsible for jobs being granted by her husband in their own house to the voters of the Kolonnawa Electorate. Here again, I am unable to say that the learned Trial Judge was wrong in taking this view.

He has further held on the facts that both these statements were false. The question then remains whether the newspaper "Attha" (as represented by its Editor, Printer and Publisher) is an agent of the respondent?

It is well known that different newspapers support the candidates put forward by different political parties, or candidates who support the policies which they favour. Broadly, some newspapers support those candidates who are referred to as "Right Wing" candidates, and others lend their support to the "Left Wing" candidates. A newspaper, undoubtedly, has a right to support a candidate who is pledged to follow certain policies, and such support, by itself, does not make that newspaper the candidate's agent, for no candidate can prevent a newspaper from following a policy of its own.

There was only one case cited to us where it had been contended that a newspaper was the agent for a candidate. That is the case of *Gandasing v. Rai* (Doabia's Indian Election Cases, 1935 to 1950, Volume 2, page 94), and in that case the facts were entirely different from the facts here. It was proved in that case not only that the newspaper carried extensive propaganda for the respondent, but that the respondent himself had purchased some twenty thousand copies of that newspaper and distributed them among his voters. In addition, according to the judgment, there was a good deal of evidence to show that the newspaper was freely distributed by the respondent's agents as well.

Generally, candidates have no control over articles or news items that a newspaper chooses to publish. Our attention was drawn to various news items, editorials, advertisements, etc., published by the "Attha" which strongly supported the respondent's candidature. The respondent himself had sent a notification to this paper exhorting his voters not to contravene certain election laws. There was also a notice setting out the dates and the venues of meetings in support of the respondent.

The learned Trial Judge has carefully considered all these and other publications and reached the conclusion—

- (1) that the "Attha" is not published for the sole purpose of supporting the left candidates at elections, and
- (2) that it "actively supported the respondent for election to the Kolonnawa seat".

There was another item of evidence in relation to this question which the Judge has considered. One Ratnaweera, described as a powerful speaker, had spoken regularly at meetings in support of the respondent's candidature. There was also evidence that he was a Honorary Advisory Editor of the "Attha"—though he did no editing as far as the witness who gave this evidence was aware. The learned Trial Judge considered the question of agency on the assumption that Ratnaweera was the Editor.

There can be no doubt that Ratnaweera had been invited to speak at meetings in support of the respondent. He was, therefore, an agent of the respondent for that purpose. His authority would not extend to making false statements in his speeches. But, agency in election law has a wider meaning than in the ordinary law relating to principal and agent. If, in the course of such a speech, Ratnaweera had made a false statement concerning the opposing candidate, without the knowledge or acquiescence of the respondent, yet the respondent could be held liable. But, he does not necessarily act as respondent's agent, when he does something which is totally unconnected with the purpose for which he was employed. Though the scope is wider, there can be limited agency in election law; e.g., in the *Harwich case*¹ Lush, J. said, "The relation between a candidate and a person whom he constitutes his agent is much more intimate than that which subsists between an ordinary principal and agent. The closest analogy is that of a sheriff and his under-sheriff and bailiffs. For, as regards the seat, the candidate is responsible for all the misdeeds of his agent committed within the scope of his authority, although they were done against his express directions, and even in defiance of them." He went on to say, "But if he was employed or accepted to canvass a particular class, as if a master were asked to canvass his workmen, and he went out of his way and bribed a person who was not his workman, the candidate would not be responsible, because this was not within the scope of his authority.

¹ 3 O'M. & H., p. 69.

In the *Salisbury case*¹ Hawkins, J. held that a candidate would not be responsible for bribing of a voter behind his back by a person who accompanies him to canvass voters. The learned Judge said, "Surely, taking a man to point out voters, and to influence them, if you will, in the candidate's presence, is not conclusive evidence of an employment of that person to go behind the candidate's back and bribe them."

Even if Ratnawera, on the assumption that he was the Editor, could be held responsible in an action for defamation, (for example) for the publication of these two statements in the "Attha", the respondent, in my opinion, could not be held responsible in any way on the basis that Ratnawera was his agent.

But, on this point, the finding of fact by the learned Trial Judge is that the evidence placed before him "tends to show that Ratnawera would not have dealt with matters like the impugned article and the report of the meeting." He further held that on the evidence led the petitioner had, "failed to establish that Ratnawera was concerned in the making and publishing of the impugned article and the report of the meeting."

It was also urged for the appellant that Ratnawera was a prominent member of the Communist Party which supported the respondent. The Communist Party has thousands of members (the respondent himself was not a member of that party). Every member of a political party which supports a candidate does not by virtue of his membership become an agent of the candidate to whom his party extends its support.

The observation of Nagalingam, J. in *Don Philip v. Illangaratne*² that a political party and its active members were constituted agents of the candidate which that party supported, would apply only where the facts (as found by the Judge in that case) showed such an intimate relationship between the candidate and the party or its active members that the inference of agency was irresistible.

The passage from the judgment in the *Bewdley case*,³ cited in support of the contention that an active member of a party which supported a candidate was his agent, dealt with an entirely different set of facts. In that case it was proved that an association had been formed to promote the candidature of the respondent. The respondent's agent attended the meetings of the association, and supplied its Minute Book at the respondent's expense. He used a register in common with the association which contained an account of favourable, adverse and doubtful voters. The Secretary of the association was a paid clerk of the respondent and worked in a room of his agent's house set apart for the purposes of the election. It was further proved that one Nellist, a leading member of the association, undertook to procure votes of persons over whom he was likely to have influence, and that he was actively engaged on the polling day in taking members to the poll. It was in these circumstances that it was held that "To say that the candidate is not responsible for any

¹ 3 O'M. & H., 131. ² (1949) 51 N. L. R. 561 at 570. ³ 3 O'M. & H., 145.

corrupt acts done by an active member of *such an association* would be repealing the Corrupt Practices Act, and sanctioning a most effective system of corruption.”

The law relating to agency in election matters is clearly set out in the oft quoted passage in the judgment of Channell, J. in the *Great Yarmouth case*¹ “The law of agency in election matters has been very fully brought before us, and one thing which is quite clear—not only upon this question of agency, but upon some of the other questions with which we have to deal—is that the ablest Judges have always said that you cannot lay down definite rules applicable to all cases. But there are principles, and the substance of the principle of agency is that if a man is employed at an election to get you votes, or if, without being employed, he is authorised to get you votes, or if, although neither employed nor authorised, he does to your knowledge get you votes, and you accept what he has done and adopt it, then he becomes a person for whose acts you are responsible in the sense that, if his acts have been of an illegal character, you cannot retain the benefit which those illegal acts have helped to procure for you.”

These principles must be applied to the facts of each case, and those facts have to be ascertained by the Trial Judge.

One has also to remember that agency in election law has to be proved beyond reasonable doubt. As Meller, J. observed in the *Bolton case*², “There is nothing more difficult or more delicate than the question of agency, but if there be evidence which might satisfy a Judge, and if he be conscientiously satisfied that the man was employed to canvass, then it must be held that his acts bind his principal.”

Dealing with the evidence relating to agency Blackburn, J. in the *Bewdley case*³ said, “I take it that in each case the Judge must bring common sense to bear upon it, and satisfy himself whether it is sufficient or not. I do not think that such a question as that would turn upon minute particulars as to what particular words were used or what particular thing was done, but upon the common-sense broad view of it.”

The learned Trial Judge has very carefully considered the various publications in the newspaper and all the other evidence relating to the question of agency placed before him. He has addressed his mind to the law, and, if I may say so with respect, correctly applied the law to the facts as found by him. He has reached the conclusion that the petitioner has failed to establish that the newspaper was the agent of the respondent.

I can see no ground for interfering with this finding.

I pass on to the other submission made on behalf of the appellant, viz., that there had been an “adoption” of a false statement (item No. 2) by the respondent’s agent.

¹ 5 O’M. & H., p. 178.

² 2 O’M. & H., at p. 141.

³ 1 O’M. & H., at p. 18.

It was argued that, quite apart from the question whether or not the "Attha" was the agent of the respondent, this news item was "adopted" by Mrs. Vivienne Goonewardene, the agent of the respondent.

I would like to say a word here about Particulars which a party is required to file in election cases. They must be accurate and precise so as to leave the other party in no doubt as to the charges he has to meet. The Particulars, in an election petition, take the place of a charge sheet or an indictment in a criminal case. A petitioner should not, in my view, be permitted to rely at the end of the case on some item of evidence elicited, e.g., in the cross-examination of a witness, to put forward a case based on a charge different from that set out in the Particulars. In such a case there must be an application to Court to amend the Particulars.

With reference to item No. 2, the Particulars dated 15.10.67 state that the person who committed the corrupt practice was the newspaper (represented by the Editor, Printer and Publisher) and that the publication was made by the paper as the agent of the respondent, acting with the respondent's knowledge and consent. The amended Particulars filed subsequently on 10.11.67 make no further reference to item No. 2.

It has been contended both here and at the trial that Mrs. Vivienne Goonewardene by her conduct, on some later date adopted the statement (item No. 2) published in the "Attha". Though this allegation is not set out in the Particulars filed, I have carefully considered the submission made on behalf of the appellant, but I am unable to agree with it.

The evidence which the learned Judge has accepted is, that as soon as the "Attha" published this false statement attributing it to Mrs. Vivienne Goonewardene, she got angry and contacted the Editor—one Siriwardene—and demanded that a contradiction should be published.

Newspapers are notoriously slow to admit that they are guilty of publishing incorrect news. In this instance Mrs. Vivienne Goonewardene, in order to ensure that a contradiction would be published, agreed to it being done in this manner, viz., the paper was to carry a news item, that in a speech she had made on a subsequent date at a different place she had denied the statement attributed to her in the earlier report, but said that some matters referred to by other speakers appeared to have been mixed up in her speech. I cannot agree that this amounts to an "adoption" of the statement that she has expressly denied. On the contrary it appears to be a repudiation of that statement.

The learned Judge having gone into this question very fully expressed himself as follows :—

"It is in view of this agreement that Mr. Navaratnarajah made the submission that Mrs. Vivienne Goonewardene had ratified and adopted the earlier report, subject to an alteration. I do not think the fact that Mrs. Goonewardene could not obtain a contradiction from the "Attha"

except by resorting to this subterfuge means that she adopted or ratified the false statement which had been made in the report of the proceedings (P35) and thus retrospectively authorised its publication by the "Attha".

I respectfully agree with that view, and this submission made on behalf of the appellant must also fail.

The appeal is dismissed and the determination of the Election Judge is confirmed. The respondent will be entitled to his taxed costs both here and below.

Let the certificate and the report of the Election Judge be transmitted to the Governor-General in terms of section S2 (c) of Chapter 381.

WEERAMANTRY, J.—I agree.

WIJAYATILAKE, J.—I agree.

Appeal dismissed.
