WEERASINGHE
v.
CHANDANANDA DE SILVA, COMMISSIONER OF ELECTIONS AND OTHERS

SUPREME COURT
H. A. G. DE SILVA, J.
BANDARANAYAKE, J. AND
KULATUNGA, J.
S.C. ELECTION PETITION
APPEAL NO. 1/89
30 MAY, 26 JUNE, 23 AND 24 JULY 1990

Election petition – Preliminary objection – Proportional representation – Distribution of seats to Digamadulla Electorate and election of successful candidate of the Sri Lanka Freedom Party – Preference votes – Manner of voting and marking preference votes – Rejection of votes – Recount and scrutiny – Inspection of preference votes and relevant Sheets/Statements – Recount of preference votes cast – Parliamentary Elections Act, No. 1 of 1981, S. 63(2) – Constitution of 1978, Article 99 – 14th Amendment to the Constitution – Parliamentary Elections (Amendment) Act, No. 15 of 1988, Third Schedule and Ss.37(1), 29(1)(f), 39(1), 47(2), 51, 53(1)(b) and (c), 57(7), 57(9), 60(1), 63(2), 92(1)(b), 112 - 98(c) – Concise statement of material facts – Official acts.

Porportional representation of the people in Parliament was introduced to the electoral process by the Constitution of 1978. Article 99 provided for proportional representation with a single list of candidates from a party or independent group. Election to the House was to be in order of priority of the names set out in the nomination papers. The 14th Amendment to the Constitution replaced Article 99 which, whilst retaining the concept of proportional representation by a party or

independent group, introduced the voter's choice in respect of a candidate of a particular party or independent group, by a preference vote. The Parliamentary Elections (Amendment) Act No. 15 of 1988 provided the mechanism in the electoral process for effecting proportional representation in Parliament. The third Schedule to that Act was accordingly amended to enable a voter to express his preference to the choice of a candidate. The third Schedule gives directions for the guidance of a voter in voting more specifically in accordance with sections 37(1), 39(1) and 53(1)(b) and (c). For example every voter had one vote which he could give to a recognized political party or to an independent group. The manner of voting was by marking the ballot paper with an 'X' on the right hand side of the ballot paper opposite the name and symbol of the recognised party or independent group of his choice and also indicating his preferences for not more than three candidates from among the candidates nominated by such recognised party or group by placing an 'X' mark again on the cage enclosing the serial number corresponding to the number assigned to each candidate of his preference.

The petitioner-appellant and the 32nd respondent were candidates in the S.L.F.P. candidate list. The petitioner-appellant had been assigned the serial number 9. In the distribution of seats based on the votes polled by the party or group, the S.L.F.P. won one seat of six seats of Electoral District No. 13 – Digamadulla. The 32nd respondent having polled the highest number of votes from among the S.L.F.P. candidates was declared elected to that seat. The petitioner-appellant was behind him by 76 preference votes. The petitioner-appellant alleged a miscount in that 642 preference votes cast for him had not been brought into the Court on the ground that the cross "X" mark had been placed outside the cage containing the numeral 9 assigned to him. Further in counting centres 13 and 15 about 1,000 preference votes over and above the preference votes secured by the 32nd respondent had been recorded in the analysis sheet as have been secured by the 32nd respondent. The petitioner-appellant therefore wants a recount and the election of 32nd respondent set aside. This was done by the 47th respondent with the help of several counting officers.

Held :

(1) When marking his preference for a candidate or candidates, the voter is required to place his mark "**on the cage** enclosing the serial number corresponding to the serial number assigned to each candidate". This direction by its very nature is mandatory. Section 39(1) which states that the voter shall secretly mark the ballot paper **as near as may be** in accordance with the directions can only mean one thing that when a voter is marking his preference for a candidate the cross must be placed **substantially on the cage enclosing the serial number** as there is no other way when several caged serial numbers are packed one next to the other, of indicating with reasonable certainty a

preference for a particular cage. It is to bring a substantial degree of certainty into the voting process that the 3rd Schedule in formulating directions has made this difference as to where the mark should be placed in two situations; of voting for a party or group and later expressing a preference for a particular individual of that party or group. Where the mark is placed in an open area to the right of the number it makes the vote quite uncertain and such a vote should be rejected as void and not taken into account.

(2) Kulatunga, J. (dissenting):

(a) The decision of the Election Judge refusing inspection when it is stated specifically that the voter marked his cross completely outside the cage enclosing the serial numbers of candidates, his intention is not at all clear is correct.

(b) Section 29(1) (f) enables the returning officer to do such acts and things as may be necessary for effectively conducting the election. Section 51 provides for political parties and groups to appoint counting agents to attend on the counting of votes. As a preliminary, the counting officer in the presence of the counting agents has to show the ballot paper account to them. He has to open each ballot box and count the ballots inside each box in the presence of the agents. There is no prohibition against a counting agent taking his own notes. Whilst counting, ballot papers have to be placed upwards (enabling agents to observe them and make their own notes if necessary). Again, in deciding whether to allow a ballot paper to be taken to the count or rejected, the counting officer is required to show it to the counting agents and hear their views before taking a decision. A necessary concomitant would be the counting agent can make his observation or objection to any particular vote being counted in any particular way and those objections or observations have to be recorded by the counting officer. Thus in practice, the counting officer must necessarily keep a journal which reflects the events of the day, observations and objections taken (unless not recorded of consent) in the process of the count. The counting agent is not a helpless passive spectator merely gazing at ballot papers.

It is no argument, in seeking to excuse failure on the part of an agent to ask for a recount to say that it would not have served any purpose. The complaint is one of falsely adding votes to someone not entitled to them. Such a vote can be checked and properly counted at a recount. If the statement contained inflated figures the counting agent could have protested and brought it to the notice of the Returning Officer.

The petitioner in the first instance asks for an inspection. Before the Court moves there must be credible material before it. The particulars agitated by the petitioner by his affidavit contain only bare allegations of misconduct by officials assisting in the conduct of the election. Allegations alone are not sufficient to

satisfy a Court that its jurisdiction ought to be exercised. The petitioner has not claimed in his affidavit that he requested those responsible for the Court to record his objections to the Court. The conduct of the petitioner or his agents in not making any contemporaneous recorded protest on the alleged misconduct deprives the petitioner and his supporting affidavit of reliability on the fact of the complaint. Nor is there a complaint of bias against the petitioner or in favour of the 32nd respondent. No acceptable factual circumstances are before the Court to suggest that official acts were not properly done at this election. No interim order for inspection could therefore be made in the first instance.

(c) The Court has the power to dismiss an election petition *in limine* if there was a failure to comply with a mandatory provision. Just as much as the public have an interest in the election petition there is also the principle that the election of a candidate should not be lightly interfered with.

(d) Section 98(c) requires a petition to contain "a concise statement of material acts on which the petitioner relies. But the petitioner has failed to place such material facts before the Election Judge in his petition for relief. In the circumstances the Election Judge was correct in refusing inspection and dismissing the petition *in limine*.

Cases referred to:

(1) *Woodward v. Sarsons and Sadler* (1875) LR 10 CP 733, 747 (CA).

(2) *Pontdarwe* (1907) 2 K.B. 313.

(3) *Kaleel v. Themis* 57 N.L.R. 396, 399, 402, 405.

(4) *Rajapakse v. Kadirgamanathan* 68 N.L.R. 14.

(5) *West Bromwick* (1911) 60 0' M & H 257.

(6) *Bandaranaike v. Premadasa* (1989) 1 Sri L.R.

(7) *Samar Singh v. Kedar Nath* 1957 S.C.C. 663.

(8) *Arthur Hussain v. Rajiv Gandhi* 1986 S.C.C. 313.

(9) *Kuruppu v. Hettiaratchy* 49 N.L.R. 201.

APPEAL under Section 102 of the Parliamentary Elections Act, No. 1 of 1981 read with Article 130(b) of the Constitution.

Faiz Mustapha, P.C. with *Manohara de Silva, M. S. M. Suhaid* and *G. Jayakody* for appellant.

Asoka de Silva, D.S.G. with *Kumar Arulananda S.C.* for 1st and 2nd respondents.

E. D. Wickramanayake with *Javid Usuf* for 32nd respondent.

Cur adv vult.

10th September, 1990.

BANDARANAYAKE, J.

This appeal is from the Judgment of the Election Judge dismissing a petition filed by the appellant *in limine* upon preliminary objections taken by the respondents to the hearing of the petition. The petition related to the results of the Parliamentary Election held on 15.2.89 – Electoral District Digamadulla. The petitioner claims the right to have been returned or elected at the said election and was one of nine (9) candidates nominated by the Sri Lanka Freedom Party to contest the election. There were six seats and on the party votes the distribution of seats was as follows: (a) U.N.P. – 3 seats, (b) S.L.F.P. – 1 seat, (c) T.U.L.F. – 1 seat and (d) S.L.M.C. – 1 seat. The appellant is not challenging the distribution of seats among the respective parties or the election of the candidates save and except the election of the 32nd respondent who was himself amongst the candidates contesting from the Sri Lanka Freedom Party.

The appellant challenges the election of the 32nd respondent who was declared to have secured 21,751 preference votes against the appellant who was declared to have secured 21,675 preference votes, the majority being 76 preference votes, on the ground that the 32nd respondent's election was undue and seeks the avoidance of the said election and a declaration that the appellant was duly elected.

Two grounds were urged on behalf of the appellant that:–

(i) 642 preference votes in fact obtained by the petitioner-appellant were not brought into account on the ground that the cross (X) indicating the preference, had been placed outside the cage containing the numeral (9) in a blank area near the said cage (9), which was the number assigned to the appellant. The appellant further alleged that preferences indicated in a similar manner outside the cage containing a numeral had been counted for the 11th respondent;

(ii) in counting centres (13) and (15) about 1000 preferences over and above the preferences actually secured by the 32nd respondent had been recorded in the analysis sheet as having been secured by the 32nd respondent. It was alleged that this was done by the 47th respondent in collaboration with other counting officers at the two counting centres despite the verbal protest of the appellant.

Thus upon the foregoing, the appellant sought the following reliefs:–

(a) a declaration that the election of the 32nd respondent was undue;

(b) a declaration that the appellant was duly elected.

Additionally, the appellant sought the following reliefs:–

(a) an order for inspection in terms of s.63(2) of the Parliamentary Elections Act No.1 of 1981 permitting inspection of the preference votes of the SLFP candidates and inspection of the relevant analysis Sheets/Statements of preferences and counting of same; and,

(b) A security or recount of the preference votes of the SLFP candidates.

Proportional representation of the people in Parliament was introduced to the electoral process by the Republican Constitution of 1978. Article 99 provided for proportional representation with a single list of candidates from a part or independent group. Election to the House was to be in order of priority of the names set out in the nomination papers. The 14th Amendment to the Constitution replaced Article 99 which, whilst retaining the concept of proportional representation by a party or independent group introduced the voter's choice in respect of a candidate of a particular party or independent group, by a preference vote. The Parliamentary Elections (Amendment) Act No. 15 of 1988 provided the mechanisms in the electoral process for effecting proportional representation in

Parliament. The Third Schedule to that Act was accordingly amended to enable a voter to express his preference in the choice of a candidate. The Third Schedule gives directions for the guidance of a voter in voting. These directions in fact spell out the provisions contained in Act No. 1 of 1981 dealing with the poll and the counting of votes and the declaration of results contained in Parts 3 and 4 of the enactment. More specifically, the Third Schedule contains directions in accordance with the provisions of s.37(1), s.39(1) and s.53(1)(b) and (c). For example, that every voter shall have one vote which he may give to a recognised political party or independent group and the manner in which he should mark the ballot paper; (i.e.) by placing a cross (thus 'X') on the right hand side of the ballor paper opposite the name and symbol of the recognised political party or group for which he votes; he may then indicate his preferences for not more than 3 candidates from among the candidates nominated by such recognised political party or independent group by placing a cross (thus 'X') at the bottom of the ballot paper **on the cage** enclosing the serial number corresponding to the serial number assigned to each candidate; then fold it so as to show the official mark on the reverse to the presiding officer and place the paper in the Ballot Box and quit the polling station. Those directions also set out the circumstances under which a ballot paper should be declared void and not counted.

In respect of the first ground on which avoidance was sought (viz.) that 642 preference votes obtained by the appellant were not brought into the count for reasons given, it has been submitted on behalf of the appellant that even where a voter has placed a mark such as an 'X' completely outisde the cage, still, in order to ascertain the voter's intention there must be an inspection of that ballot paper without which it is not possible for a Court to declare that a mark placed outside the cage cannot be counted. It was urged, that the election Judge's finding that upon the averments in the petition itself that the mark was placed outside the cage his intention is not clear and such votes were rightly rejected for uncertainty, is wrong in law. It was submitted that even when a cross (X) is marked completely outside a cage in an open area of the ballot paper, still it could be taken into the count provided the intention of the voter to cast his vote for a particular person was clear. Directions to voters contained in the Third Schedule were merely directory. Section 39(1) only requires a

ballot paper to be marked as near as may be in accordance with the directions. In support of his contentions Counsel cited the following:–

(1) *Woodward v. Sarsons and Sadler* (CA)[1]

"...votes marked outside the cage and in some instances by a line or mark other than a cross were held valid since upon a visual examination of the vote the Court was of the view there was a sufficient indication of the candidate". Referring to the corresponding provisions of the Ballot Act the Court held that the manner of voting was directory by that substantial compliance was necessary.

(2) *Pontdarwe* [2]

Held that a mark placed outside the ruled compartment was a valid vote provided that the mark is in such a position opposite the name of the candidate as to leave no doubt.

(3) **Law and Practice of Election Petitions by Pandit Nanak Chand,** pp. 231-234.

It would be convenient to deal with this first ground of avoidance at this stage (i.e.) that the Election Judge was wrong in determining that where a voter has placed a mark completely outside the cage, **that itself** indicated that that vote could not be counted in favour of the petitioner because the voter's intention in such a situation was not clear and was properly rejected.

The English Law provided rules and forms for the conduct of elections. The principles found in those rules were embodied into the law of Ceylon in the course of the franchise being made available to the citizens of Ceylon. Non-observance or non-compliance with them may have led to voidance of the election as being contrary to the principle of an election by ballot. We see therefore prior to the 1978 Constitution, a great similarity between the rules of the English Law and the Sri Lankan Law in regard to how a voter should cast his ballot. The 1978 Constitution brought a change in the mode of representation of the people in Parliament. As already mentioned, at

first the concept of representation in Parliament being made proportional to the number of votes cast for a political party or independent group in an electoral district as distinct from the earlier process of a candidate being directly elected to a seat in Parliament by direct vote in a constituency was introduced. This meant that the nuts and bolts process of indicating a voter's choice of party or group did not need to depart from the earlier established process of indicating a vote for an individual. Thus we see a similarity in the directions given as to how to vote – a similarity between the English Law and the Ceylon (Parliamentary Elections) Order in Council 1946 and the 3rd Schedule to Act 1 of 1981 as it first stood spelling out the process of election to Parliament in conformity with Chapter XIV of the Constitution . . . "A voter shall place a cross on the right hand side of the ballot paper opposite the name and symbol of the recognised political party or independent group . . ." This is what had obtained under the earlier Law in Sri Lanka.

Form 'C' of the 1981 Act giving the form of the front of the ballot paper shows each political party and symbol listed in separate compartments shown by ruled lines, each such compartment placed one below the other. In this situation the mark is required to be placed on the right hand side opposite the name and symbol shown. In this way when a mark is placed in line with any one of the compartments containing names of parties and symbols or on the name or on the symbol one can envisage that the voter's intention has been sufficiently clearly expressed. That is what has happened in the English cases cited as can be gleaned from the body of the judgments in these cases, to wit: in the case of *Woodward v. Sarsons (supra)* at p. 747. – Schedule 2 "Form of Ballot Paper" . . . the voter shall place a cross on the right hand side opposite the name of each candidate for whom he votes thus . . ." It is seen that the English rule is almost identical with our rule as was contained in s.42(7) and the 2nd Schedule to the Ceylon (Parliamentary Elections) Order in Council 1946 and followed in the 3rd Schedule to Act No. 1 of 1981. But we are dealing here with another situation, namely, indicating the voter's preference for a candidate or candidates of his choice of the same political party or group for whom he has voted up to a limit of three brought in by the 14th Amendment to the 1978 Constitution. Such a process is not available

in England. The directions given in the 3rd Schedule as amended by Act No. 15 of 1988 in respect of marking the preference for a candidate or candidates upto a maximum of three is different to the directions given for marking the voter's preference for a political party or independent group. The difference is this – that when marking the preference for a candidate or candidates the voter is required to place his mark "**on the cage** enclosing the serial number corresponding to the serial number assigned to each candidate". **This direction by its very nature is mandatory.** He is not permitted to place his mark beside a number in an open space on a side of the ballot paper for the obvious reason that that would lead to vagueness and uncertainty. The number of candidates taken together may be very large (in the instant case 36) and they are given serial numbers and those serial numbers are placed individually in cages in numerical order, for example from 1 – 50. Form 'C' shows that the number 1 – 50 are contained in 50 cages, there being 10 such cages on each line and we have five lines one below the other each line containing 10 numbers in 10 cages. In such a situation the direction requires a mark to be placed **on the cage** enclosing the serial number and it is apparent that that had been intended to bring about a substantial degree of certainty in indicating the voter's choice. Section 39(1) which was relied upon by Counsel for the appellant and which states that the voter shall secretly mark the ballot paper as near as may be in accordance with the directions can only mean one thing in this context that when a voter is marking his preference for a candidate that cross must be placed **substantially on the cage enclosing the serial number** as there is no other way when several caged serial numbers are packed one next the other of indicating with reasonable certainty a preference for a particular cage. It is to bring a substantial degree of certainty into the voting process that the 3rd Schedule in formulating directions has made this difference as to where the mark should be placed in the two situations; of voting for a party or group and later expressing a preference for a particular individual of that party or group. For these reasons the English cases cited have no relevance and could be distinguished. The appellant has in his petition before the Election Judge marked as 'P1' a specimen of a ballot paper and the petitioner had contended that marking a cross (X) to the right hand side of caged serial number (9) in an open area in the manner demonstrated by him indicates that the

voter intended to vote for number (9). There are in fact 8 other numbers from No. 1 to No. 8 in eight cages on the same line. My own observation in regard to 'P1' and the mark placed by petitioner's Counsel to the right of number 9 in an open area is that that mark placed in that manner makes that vote quite uncertain and such a vote should be rejected as void and not taken into account. The directions as to the manner in which a voter should mark his preference of a candidate or candidates as contained in the 3rd Schedule appears to me to set out a uniform principle so as to make certain to the officers engaged in conducting a poll the intention of the elector. This Court has to interpret the provisions of the statute so as to bring about substantial certainty to the process of determining the elector's choice. Learned Counsel for the 32nd respondent has submitted that the illustration contained in 'P1' submitted on behalf of the appellant is a clear argument that a counting officer would be right in rejecting such a vote for uncertainty. I am inclined to agree with this submission.

For the above reasons I hold that the decision of the Election Judge refusing inspection when it is stated specifically that the voter marked his cross completely outside the cages enclosing the serial numbers of candidates his intention is not at all clear is correct. Such a vote should be rightly rejected for uncertainty and I uphold the decision of the Election Judge on this point.

I now turn to the second ground relied upon by the appellant to strike down the election of the 32nd respondent (i.e.) that in counting centres Nos. 13 and 15 about 1000 preferences in excess of what the 32nd respondent actually secured has been recorded in the analysis sheet as having been secured by the 32nd respondent by or at the instance of the 47th respondent in collaboration with other counting officers at these two counting centres. The honesty and integrity of those responsible for counting the votes are challenged.

It raises the disquieting prospect of officers appointed counting officers under and by virtue of the Parliamentary Elections Act No. 1 of 1981 and chosen by the Returning Officer and entrusted with the responsibility of the proper counting of votes at counting centres and officers appointed as assistants and clerks and other officers under the aforesaid law to assist such counting officers, have at two centres

of this Electoral District, whilst being engaged in the conduct of a Parliamentary General Election and whilst exercising statutory powers and duties in terms of the electoral laws of this country, conspired together to conduct this election in an unlawful manner to the detriment of the petitioner. This is a serious allegation made against officers performing official acts who in ordinary circumstances may be presumed to have performed such official acts regularly.

One's attention is drawn to passages in the judgment of the Election Court in the case of *Kaleel v. Themis*[3]. There the Election Judge refers to an example given by the Acting Solicitor-General in the course of argument at the hearing – quote – "The acting S.G. gave as an instance a case in which a petitioner **satisfies the Court** (the emphasis is mine) that a number of counting assistants, by reason of their association with the candidate who was returned, were so biased against the petitioner that they purposely counted the votes cast for the petitioner in favour of his opponent". What Mr. Tiruchelvan imagined may happen the petitioner in the instant case says happened. This example, coupled with a narrow margin (as in the instant case) was considered by that Court (obiter) to suffice to order a recount.

In the petition and affidavit filed by the petitioner he states that at counting centre No.13 he saw:

(i) the 47th respondent incorrectly recording preferences for the 32nd respondent;

(ii) specifically witnessed the 47th respondent recording preferences over and above the actual preferences received by the 32nd respondent;

(iii) the 47th respondent committed these irregularities with the help of several counting officers whose identities are unknown to the petitioner;

(iv) that the 47th respondent was a counting officer assigned to counting centre No.15 and not to 13;

(v) the petitioner reported these irregularities to the person in charge of centre No.13 but that person did not take any step in that regard; The petitioner continued to complain and protest and eventually the 47th respondent left that counting centre;

(vi) thereafter the petitioner received information that the 47th respondent was committing the same irregularities at counting centre No.15;

(vii) the petitioner immediately visited counting centre No.15 with his agents and saw the 47th respondent recording preferences over and above the preferences actually received by the 32nd respondent. Here too the 47th respondent was assisted in committing the irregularities by several officers whose identities were unknown to him;

(viii) although he immediately reported the irregularities to the officer-in-charge of counting centre No.15 that officer took no notice;

(ix) the petitioner states that altogether he saw the 47th respondent recording more than 1000 preferences for the 32nd respondent which the 32nd respondent was not entitled to. These preferences over and above the actual member received by the 32nd respondent were recorded at counting centres No.13 and 15;

(x) the petitioner reported these irregularities to the Returning Officer who did nothing;

(xi) in consequence of these incorrect entries in the analysis sheet/statement of preferences the petitioner states he was materially prejudiced and the result of the election materially affected.

It was the submission of the appellant's counsel that the above material affirmed to by the petitioner in his affidavit constituted material facts as required by s.98(c) sufficient to move the Election

Court to proceed to take steps to inspect the votes under the powers contained in s.63(2) of the Parliamentary Elections Act No. 1 of 1981. The position of Counsel for the appellant was that the affidavit of the petitioner provided sufficient requisite facts that the Election Court needed to order an inspection and that it was not necessary for the petitioner to have appended to his petition copies of the ballot paper account prepared by the presiding officer in terms of s.47(2) or a copy of the statement of the number of preferences indicated for a candidate in terms of s.53(7) (the absence of which documents was the subject of adverse comment by Counsel for Respondents) as those documents would not contain material that would bear out the conduct of the officials now complained of. Counsel submitted that the present law provided for avoidance of an election on an election petition for non-compliance with the provisions of the Act if it appears to the satisfaction of the Election Judge that the election was not conducted in accordance with the principles laid down in the Act – *vide* s.92(1)(b) – and that therefore the Court could have the power to order an inspection and a recount.

In his original petition the petitioner prayed for a recount and/or scrutiny of the preference votes indicated by voters for the candidates of the Sri Lanka Freedom Party amongst other reliefs sought. In the argument before this Court appellant's Counsel restricted his prayer for a recount and not for a scrutiny in terms of s.110. Counsel argued that:

(1) s. 53(9) and s.112 of the Act did not stand in the way of the Court ordering a recount. The provisions of s. 53(9) preventing the decision of a counting officer in regard to a ballot paper being questioned, it was submitted, was only a fidelity clause to be applied during the progress of the actual count in order to prevent the disruption of the counting process, but did not prevent a Court upon a petition from deciding whether there has been a miscount; and that the finality clause in s.112 preventing the decision of a counting officer rejecting a vote from being questioned was referable only to a rejection of the entire ballot paper but did not contemplate the new situation created by the amending Act No. 15 of 1988 which also permitted a voter's choice of candidate to be indicated on the ballot paper. Therefore it was submitted s.112 did not operate as a finality

clause to prevent a voter's preference indicated on the ballot paper from being examined by the Court.

(ii) a. That the provisions of s.92(1) (b) were wide enough to avoid the election of candidates on preference votes if that process of counting preference votes was not conducted in accordance with the principles of the Act which occurrence would have materially affected the result;

(ii) b. that the petitioner has claimed a declaration that the election of the 32nd respondent was undue;

(ii) c. that in order to ascertain if the election of the 32nd respondent was undue consequent to the misconduct of counting officers the Court has the power to order a recount even though specific provisions for such a step have not been enacted in Part VII of the Act.

Learned Counsel for the respondents on the other hand submitted that a recount was not possible at the election petition stage as the Act only provides for recounts at the time of counting and that a recount in any event was a mere mechanical process which would not assist the Court in deciding the issues raised. Counsel for the respondents also argued that there is no provision in the Act to make a declaration that an election is partially void. Counsel submitted that s.92(1) was concerned with the avoidance of an election in respect of an entire electoral district whereas the petitioner confines the reliefs he seeks to setting aside the election of an individual member only.

It was held in the case of *Rajapaksa v. Kadirgamanathan* [4] that a recount is ordered where there has been **no count according to law.** That case went on to distinguish between a "recount" and a "scrutiny". If in fact more than 1000 votes were dishonestly added to the total votes cast for the 32nd respondent by a counting officer then the declared result of the election of the 32nd respondent would be undue. In my view the Court has inherent power to order a recount so as to give effect to the principles of the Act which is an overriding consideration. Natural justice demands the intervention of the Court and its principles will be called in aid. The provisions of s.53(9) are

inapplicable as that Section applies to an ongoing count only. The provisions of s.112 are not relevant in the instant case as the rejection of ballot papers by a counting officer has not been brought into question in the second ground urged for avoidance. Upon such count, if it is shown that the petitioner has in fact obtained a majority over the 32nd respondent, then the Court is obliged to deal with it and give the provisions of s.92(1) which has remained unamended in the face of the introduction of a voter's choice of candidate a purposeful interpretation in accordance with the policy of the legislature in enacting the amended sections 53(7), 55(b) and 60(1) of Act No. 15 of 1988. The justice of the common law will supply the omission of the statute. Thus on principle I take the view that –

(i) an order for a recount is one that is permissible and can be made by an Election Court in appropriate circumstances, and,

(ii) the Court has the power to declare that the return of the 32nd respondent was undue and that the petitioner was duly elected and ought to have been returned.

The petitioner-appellant as an interim step has prayed for an inspection of the votes as a prelude to a recount.

It is pertinent therefore to examine the machinery set up under the Act to give effect to its aims. The Commissioner of Elections, appointed in terms of Article 103 of the Constitution, appoints returning officers by notice in the Gazette for each electoral district and persons to assist the returning officers in the performance of their duties – *vide* s.6 of the Act. In practice these assisting officers are appointed counting officers by the returning officer to be in charge of the counting of votes at counting centres – *vide* Article 49. Again s.29(1) permits facilities to be provided for the purposes of an election in an electoral district. Section 29(1) (f) enables the returning officer to do "much acts and things as may be necessary for effectively conducting the election". Part IV of the Act makes provision for the counting of votes. Section 51 provides for political parties and groups to appoint counting agents **to attend on** the counting of votes. Notice in writing stating names and addresses of persons so appointed shall be submitted to the counting officer

before the count commences. Any person whose name has not been so submitted has no right of admission to the counting centre. Section 52 deals with the count. As a preliminary the counting officer in the presence of the counting agents has to show the ballot paper account to them which contains all those matters enumerated in form 'k'. He has to open each ballot box, and count the ballots inside each box in the presence of the agents. There is no prohibition preventing (forbidding) a counting agent from taking down their own notes. Whilst counting, ballot papers have to be placed upwards (enabling agents to observe them and make their own notes if necessary).

The above duties cast on the returning officer thus opens the count to the scrutiny of interested persons from its very inception. Again, in deciding whether to allow a ballot paper to be taken to the count or rejected, the counting officer is required to show it to the counting agents and hear their views – *vide* x. 53(3) and (4) before taking a decision. A necessary concomitant to all these provisions would be that the counting agent can make his observation or objection to any particular vote being counted in any particular way and that those objections or observations be recorded by the counting officer. Thus in practice the counting officer must necessarily keep a journal (may be on loose leaves in a file cover or in a register) which reflects the events of the day, observations made and objections taken (unless not recorded of consent) in the process of the count. It is only reasonable to infer therefore that the counting agent is not a helpless passive spectator merely gazing at ballot papers. He has a role to play; he represents the candidate contesting the election and he is there to ensure as far as possible a proper and fair election to the satisfaction of candidates. If he is dissatisfied with any matter he has a clear duty to point it out and have an objection or opinion recorded and he has the right to report the matter to a higher authority if still dissatisfied and that too recorded. Thus there appears to be a clear duty on his part to take an objection and have it journalised if anything improper is done during the count.

It is no argument, in seeking to excuse failure on the part of an agent to ask for a recount to say that it would not have served any purpose and that it would not have helped the petitioner as a

recount is a **mere mechanical process**. It was held to be so in *Kaleel v. Themis* [3] in view of the provisions of s.49(5) of the old law (Parliamentary Elections Order in Council, Cap. 381) (s.112 of the present law) that the decision of the Returning Officer as to whether or not a ballot paper **shall be rejected** shall be final. But we are not concerned with such a situation here. The complaint is one of falsely adding votes to someone not entitled to them. Such a vote can be checked and properly counted at a recount. So one asks the question: What is this process of counting in the presence of and under the gaze of counting agents? Is it not to ensure that everybody present has the opportunity of seeing each ballot paper and ensuring that it is added to those votes cast for that particular party or person participating in the contest so as to procure a proper result. Thus if a vote has been improperly counted, that can be pointed out and corrected or objection recorded. Such a record (and if the averments in this case are true) over a thousand such objections contemporaneously taken would be recorded in the journal if not corrected. Such a fact placed before the Court could be regarded as a material fact for the consideration of the Court. Again, another opportunity is given to a counting agent to raise an objection or express an opinion in a s.53(7) situation – (ie) to object to the information given in the written statement of the counting officer communicated to the Returning Officer giving the number of preference votes given to each candidate. The counting agent can sign that statement as a witness and copy it. Thus, if the statement contains inflated figures the counting agent could have protected and brought it to the notice of the Returning Officer. Further provision is made by s.60(1) permitting a counting agent to inspect the seals of the package containing the said written statement under s.53(7) to ensure that nothing but the statement witnessed by him is forwarded to the returning officer. Sealing would also be done in the presence of the counting agent. So we have at several stages of the count an election agent playing the role of the private eye scrutinizing the conduct of the count. These provisions provide the means to obtain agreement or acceptance of the count. A duty is cast on the counting officer to permit counting agents' access to what is being done. Counting agents are given an opportunity to witness the votes being counted, compare the official figures with their own figures and have any grievance recorded and heard before the declaration of results.

In the instant case however even the statement of preference votes cast for each candidate has not been copied by the petitioner's counting agents and produced in Court. The question thus arises, taking all these matters into consideration, whether the conduct of the petitioner's agent or agents was due to indifference, laziness, negligence, incompetence or something else. The matters complained of in the petitioner's affidavit have, therefore, to be approached with caution.

Assuming that the Court has jurisdiction in terms of s.92(1) (b) to interfere with the election of the 32nd respondent for non-compliance with relevant provisions of the Act if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance materially affected the result of the election, learned Counsel for the 32nd respondent submitted that the Court should distinguish between allegations, material facts and evidence in the case for the purpose of deciding whether an inspection should be ordered. Section 98(c) required that a concise statement of material facts be set out in the petition. Evidence is not required in the first instance. Counsel submitted that the averments in the petition and affidavit contained only allegations but included no material facts.

As it is my view that the Election Judge had jurisdiction to proceed with this case on the grounds contemplated by s.92(1)(b) it becomes necessary for this Court to consider the circumstances which have been placed before it. The petitioner in the first instance asks for an inspection. Before the Court moves it must be satisfied that there is credible material before it. The ordinary tests of common sense and prudence suggest that the particulars agitated by the petitioner by his affidavit contain only bare allegations of misconduct by officials assisting in the conduct of the election. Allegations alone are not sufficient to satisfy a Court that its jurisdiction ought to be exercised. It has been held that a petition which alleged only that the petitioner claimed a majority of good and lawful votes would be insufficient – *West Bromwick*[5] also *vide Rogers on Election*, 20th Edition, Vol II, P. 173. The petitioner has not claimed in his affidavit that he requested those responsible for the count to record his objections to the count. The conduct of the petitioner or his agents in not making

any contemporaneous recorded protest on the alleged misconduct deprives the petitioner and his supporting affidavit of reliability on the fact of the complaint. Nor is there a complaint of bias against the petitioner or in favour of the 32nd respondent. No acceptable factual circumstances are before the Court to suggest that official acts were not properly done at this election. No interim order for inspection could therefore be made in the first instance.

The remaining question not raised before the Election Judge was whether an Election Court has power to dismiss an election petition *in limine*. This question has been decided by five Judges in the Presidential Election Petition No. 1 of 1989 – *Bandaranaike v. Premadasa*[6]. It was decided that the Court did have the power to dismiss an election petition *in limine* if there was a failure to comply with a mandatory provision – quote – "Just as much as the public have an interest in the election petition there is also the principle that the election of a candidate should not be lightly interfered with". Other relevant decisions are *Samar Singh v. Kedar Nath*[7], and the case of *Arthur Hussain v. Rajiv Gandhi*[8]. In the instant case I have come to the view that no acceptable factual circumstances have been placed before the Court for it to order an inspection which is what is prayed for in the first instance. Section 98 of Act No. 1 of 1981 contains mandatory provisions regarding the contents of an election petition. Section 98(c) requires a petition to contain "a concise statement of material facts on which the petitioner relies". But the petitioner has failed to place such material facts before the Election Judge in his petition for relief. In the circumstances the Election Judge was correct in refusing inspection and dismissing the petition *in limine*. I affirm the judgment of the Election Judge and dismiss this appeal with costs.

KULATUNGA, J.

The appellant (hereinafter referred to as the petitioner) and the 32nd respondent were among the 9 candidates nominated by the Sri Lanka Freedom Party (hereinafter referred to as the SLFP) to contest Parliamentary Elections for the electoral district No. 13, Digamadulla held on 15.02.89. The said election was contested by 5 political

parties. On the basis of the votes obtained by the political parties only 4 of them became entitled to elect Members of Parliament. Of them, the United National Party became entitled to elect 3 members whilst the remaining 3 political parties became entitled to elect 1 member each, making up a total of 6 members which that electoral district was entitled to elect.

On the basis of the preference votes accrued by the SLFP candidates under the relevant provisions of the Parliamentary Elections Act No. 1 of 1981 as amended by Act No. 15 of 1988 read with Article 99 of the Constitution the 32nd respondent was declared elected as the SLFP member by a majority of 76 votes over the petitioner.

The petitioner filed an election petition for the avoidance of the said election for the electoral district No. 13, Digamadulla on the ground of non-compliance with the provisions of the Parliamentary Elections Act No. 1 of 1981 as amended relating to elections as the said election was not conducted in accordance with the principles laid down in such provisions which non-compliance materially affected the result of the said election. Section 92(1)(b) of the Act provides for such avoidance.

In his petition the petitioner prayed for declarations and orders to the following effect.

(a) a declaration that the impugned election is void to the extent that the counting/recording of preferences indicated by voters for the SLFP candidates had not been in compliance with the provisions of the Parliamentary Elections Act and in accordance with the principles laid down in such provisions;

(b) a declaration that the return of the 32nd respondent as a Member of Parliament was undue; and

(c) a declaration that the petitioner was duly elected and ought to have been returned as a Member of Parliament at the said election;

(d) an order under Section 63(2) of the Parliamentary Elections Act to inspect the ballot papers containing preferences for the SLFP candidates and of the relevant analysis sheets/statements of preferences and to copy the same; and

(e) an order for a recount/scrutiny of the preferences indicated by voters for the SLFP candidates, at the said elections.

The petitioner joined, in addition to the 32nd respondent, the Commissioner of Elections (1st respondent), The Returning Officer (2nd respondent) and one Tikiri Banda who officiated as a Counting Officer (47th respondent). He claims no relief against any of the other candidates all of whom he joined as parties.

The material facts on which the petitioner relies are :–

(a) The failure to count a total of 642 preferences which he claims to have accrued at counting centres 1, 2, 3, 4, 5, 6, 13 and 15 on the ground that the cross by which the voters had indicated their preference had been placed opposite No. 9 in the ballot papers, which was the serial number allocated to him and not on the cage enclosing the serial number.

The petitioner states that the voters who so indicated their preferences on 642 ballot papers had clearly indicated their preference for the petitioner.

(b) In counting centres Nos. 13 and 15 about 1000 preferences over and above the preferences actually secured by the 32nd respondent have been recorded in the analysis sheet/statement of preferences as having been secured by him. This irregularity was committed by the 47th respondent with the assistance of several other officers of whose identity the appellant is not aware.

In his affidavit accompanying the petition, the petitioner states that he with his agents visited counting centre No. 13 when the preferences secured by the SLFP candidates were being counted.

He saw the 47th respondent (who was the counting officer assigned to counting centre No. 15) recording preferences for the 32nd respondent over and above what he had actually secured and preparing the analysis sheets/statements relating to same. The petitioner protested to the officer-in-charge of the counting centre No.13 but the latter took no steps in that regard; when the petitioner continued to protest, the 47th respondent left that counting centre. The petitioner then received information that the 47th respondent was committing the same irregularity at counting centre No.15. The petitioner immediately visited counting centre No.15 and observed the 47th respondent recording preferences over and above the preferences actually received by the 32nd respondent, with the assistance of other officers. He reported it to the officer in charge of that counting centre, but he too did not take any steps in that regard.

Preliminary objections were filed on behalf of the 1st and 32nd respondents. These objections were fixed for inquiry at which stage the Counsel for the petitioner moved that the matter relating to the inspection of ballot papers and statements also be considered as a preliminary matter. This was allowed by the Election Judge. This was followed by a motion on behalf of the petitioner applying for inspection, under Section 63(2) of Act No. 1 of 1981 as amended, of the ballot papers and the written statements of the number of votes and references given in favour of the SLFP candidates at the election for the electoral district No. 13 Digamadulla. It is relevant to note that this motion makes no reference to the "relevant analysis sheets" referred to in the petition. The reason for this omission is obvious namely, that the power of the Court to order an inspection under Section 63(2) does not extend to such analysis sheets not being documents which the returning officer is required to retain under Section 63(1).

At the inquiry which followed Counsel for the 1st, 2nd and 47th respondents and the Counsel for the 32nd respondent were heard in support of the objections and the petitioner's Counsel replied. This was followed by written submissions. The respondents applied to have the petition dismissed *in limine* on the ground that the petitioner is, on the face of the allegations set out in the petition, not entitled to any relief. Their position may be summarized under two heads.

(a) The petitioner had not specified the section under which he sought relief. If he is seeking to have the election of the 32nd respondent declared undue and to obtain a declaration that he was duly elected, he is not entitled to such relief as he failed to plead the relevant grounds under Section 92(2) of Act No. 1 of 1981. His case is really under Section 92(1)(b) in which event the law permits a declaration that the election for the entire district is void but the petitioner has not sought such relief, instead he is seeking to avoid the election of the 32nd respondent i.e. a partial avoidance of the result which he is not entitled to under Section 92(1).

(b) As regards the petitioner's allegations in respect of the preference votes, the respondents argue that the 642 preferences referred to were rightly rejected at the counting as the intention of the voter on each preference is not at all clear. The Election Judge cannot reverse the decision of the counting officer in view of the finality provisions under Section 53(9) and the bar in section 112. If he was not satisfied about the rejection of the said preferences or the recording of the 1000 preferences referred to in the petition his counting agents were entitled to obtain copies of the statements of preferences, under Section 55(7) and to two recounts at each of the relevant counting centres, under Section 53(8). Admittedly the counting agents or the petitioner had not so applied for copies of statements or a for a recount; and the petitioner is not entitled to a recount which under the law as it stands is only available under Section 53(8). The relief of scrutiny which was available under Section 80(c) of the Ceylon (Parliamentary Elections) Order in Council (Cap. 381) is not provided for under the corresponding Section 96 of Act No. 1 of 1981; the petition is speculative and should be dismissed *in limine* as the petitioner has not placed adequate material before Court.

On the first objections the petitioner's counsel contended that the Court should give to Section 92(1) a purposive interrelation and held that the declaration provided by that section is not limited to a total avoidance of the election in any electoral district but extends to a

claim of partial avoidance of the result based on an allegation of an abuse relating to the counting of preference votes in favour of a candidate.

On the second objection, the petitioner's Counsel contended that in view of the requirement under Section 30(1) that a voter shall mark the ballot paper as near as may be in accordance with the direction given for the guidance of voters in the third Schedule to the Act, the direction in the Schedule to indicate the preference by placing a cross on the cage enclosing the serial number assigned to the candidate is not mandatory but directory; as such crosses placed "in the blank space" opposite number 9 in the ballot paper (a specimen of which has been marked 1R1) have to be considered; consequently the Court may inspect the 642 ballot papers referred to in the petition. It was also submitted that the finality under Section 53(9) is limited to the course of the election and would not preclude a challenge to the counting of preference votes in an election petition; and that the ouster under section 112 covers the rejection of a ballot paper and not the rejection of preference votes; that this is clear from the fact that the Act No. 15 of 1986 which amended Act No. 1 of 1981 to include provisions relating to preference votes did not effect any amendments to Section 112 barring the Court from reviewing the rejection of preference votes. As regards the 1000 preference votes alleged to have been irregularly recorded for the 32nd respondent, the petitioner's Counsel submits that Section 53(9) and 112 have no application to the relevant ballot papers and the Court should hear that allegation and allow the inspection sought even though the petitioner had failed to apply for copies of statements of preferences under Section 53(7) or for any recount under Section 53(8); that the right to a recount in the course of an election petition has not been taken away by the provisions of Act No. 1 of 1981. Counsel cited the decisions in *Kuruppu v. Hettiaratchy* [8] and *Kaleel v. Themis* [3] on the power of the Court to order an inspection or a recount.

The Election Judge rejected the first legal objection. He held that Section 92(1) is wide enough to make it possible to declare that the election for the electoral district of Digamadulla is void to the extent that the counting or the recount of the preference votes had not been in compliance with the Act and its principles, and therefore the return

of the 32nd respondent was undue and that the petitioner should be declared duly elected. Although this legal objection has been reiterated in the submissions for the respondents, at the hearing of the appeal before us learned Counsel for the respondents did not advert to it. I am of the view that the finding of the Election Judge on this issue is correct. However, the Election Judge proceeded to consider the other submissions of the respondents and held that on the face of the petition and on the averments contained therein, the petitioner has not made out that he is entitled to any of the reliefs he has claimed. He upheld the preliminary objections on that basis and dismissed the petition. The reasons for so dismissing the petition given in the judgment show that the Election Judge has substantially adopted the submissions of the respondents which I have summarized earlier in this judgment.

Thus, the learned Judge held that the intention of the voters on the 642 ballot papers relied upon by the petitioner is not at all clear and the preference votes thereon were void for uncertainty and were therefore rightly rejected under Section 53(7)(c) that such decision was final and conclusive under Section 53(9) and cannot be questioned in an election petition in view of Section 112.

The learned Judge next considered the alleged irregularity pertaining to the recording of about 1000 preference votes along with the prayer for the inspection of the relevant ballot papers and statements of preferences and prayer for a recount of the SLFP votes. The learned Judge repeats without comment the fact that Section 96 of the present Act does not provide for a scrutiny. He accepts the availability of provision in Section 63(2) for an inspection, does not adopt the submission that there is no right to a recount except under Section 53(8) but proceeds to hold on the strength of Kaleel's case that no recount can be allowed as the petitioner or his agents had failed to apply for it at the counting. He also held against an inspection under Section 63(2) in view of the failure to apply for copies of statements of preferences or for recounts. He thought that the petition had been filed on insufficient material and the petitioner is now seeking to use Section 63(2) to obtain material to support his case and ruled that this is not permissible.

Mr. Faiz Musthapha, PC strongly criticized the learned Judge's reasoning and confidently submitted that it contains several misdirections on the law and that the learned Judge erred in dismissing the petition *in limine* particularly for the reason that the respondents had not joined issue on the allegations levelled in respect of the irregularity pertaining to about 1000 preference votes which allegations had been supported by an affidavit. Before I consider these submissions, I wish to determine an issue which I myself raised during the argument namely whether the dismissal of the petition can be defended with reference to Section 98(c) of Act No. 1 of 1981 on the ground that the petition does not contain a concise statement of material facts on which the petitioner relies.

On reflection, I am satisfied that the petition cannot be thrown out for non-compliance with Section 98(c) as the petitioner has set out therein a concise statement of material facts on which he relies. In *Kaleel v. Themis (supra)* where the petitioner prayed for a declaration that the 1st respondent's election was undue and for a declaration that the petitioner was duly elected and ought to have been returned as the 3rd member for Colombo Central, all that he pleaded was that there was a miscount of the votes. Pulle, J. said that one of the possible meanings of this allegation was that votes cast for the 1st respondent were counted in favour of the petitioner but in the context the word "miscount" would amount to a statement that votes cast for the petitioner had been counted as votes for the 1st respondent or for one or more of the other opposing candidates. On an objection that the position was on the face of it bad Pulle, J. said (58 NLR 396 at 402) (3).

> "I do not think it would be fair to throw out a petition because an examination of its language, as strictly as one would examine the penal provisions of a statute, reveals matters which have no bearing on the reliefs claimed. There is implicit in paragraph 5 much that is germane to the relief claimed, namely, that votes that should have been counted for the petitioner were counted for his rivals".

In the instant case, there is a more specific statement of the facts relied upon and hence the petition cannot be rejected on the ground that it has been filed on insufficient material.

In *Kaleel's* case, after deciding to entertain the petition, Pulle, J. proceeded to consider the petitioner's prayer for a recount which was vital to the further prosecution of the petition. A recount was refused. In so exercising the Court's discretion Pulle, J. took into consideration the fact that the honesty, care and competence of those responsible for the counting were not challenged and the failure of the petitioner to avail himself of the right of seeking for a recount under Section 48(7) of the Ceylon (Parliamentary Elections) Order in Council (Cap. 381) from which the Court presumed that "he (the petitioner) was not then dissatisfied with the counting".

In the instant case, the petitioner has prayed for an inspection of the ballot papers and statements of preferences for SLFP candidates and a recount which in my view are vital for the further prosecution of the petition. The application for inspection was itself argued as a preliminary matter at the request of the petitioner's Counsel and the learned Judge refused it. I am of the view that if such refusal is right, the application for a recount cannot be pursued, in which event the petition has to be dismissed. I shall therefore proceed to consider the question whether in the circumstances of this case the refusal of the application for inspection is right.

I agree with the submission of Mr. Faiz Musthapa, PC that the finality provided by Section 53(9) to the decision of the counting officer as to any question arising in respect of any ballot paper applies only to the process of counting and does not preclude a challenge by election petition to the recording of preferences; I also agree that the exclusion of judicial review of a decision whether or not a ballot paper shall be rejected does not preclude the power to review a decision regarding a preference vote. I hold that the opinion of the Election Judge to the contrary appearing in his judgment where he considers the allegation relating to 642 preference votes constitutes a misdirection on the law. Although Mr. Musthapha complains that even the consideration of the alleged irregularity

pertaining to 1000 votes is vitiated by such misdirection, the judgment does not bear out this submission. On the other hand, the Election Judge considering that allegation has stated that the operation of the sections under reference "is subject to the over-riding provisions of Section 92(2) (an erroneous reference to Section 92(1)) which states that an election for any district can be avoided for non-compliance with the provisions of the Act and such non-compliance has affected the result of the election".

The Election Judge's decision refusing the inspection pertaining to 642 preference votes is primarily referable to his opinion that such preferences were void for uncertainty and were therefore rightly rejected. Mr. Musthapha, PC submits that the Court could not have decided the question without an inspection which would have revealed different combinations of marks including the case of voters who would have indicated two out of the three preferences by placing a cross on the cage enclosing the relevant serial numbers and the third by placing the cross on the space opposite number 9 assigned to the petitioner. Counsel also submits that the presence of "a cage adjacent to numeral '9' identical to the vacant cages adjacent to party symbols" may have confused the voter and led him to indicate his preference by placing the cross in that cage. I am unable to agree with these submissions, for the following reasons.

(a) Where a voter marks two out of his three preferences by placing the cross on the cage enclosing the relevant serial number and third by placing the cross outside the cage enclosing number 9, the preference claimed by the petitioner is more uncertain than in the case of a voter who exercises only one preference by placing the cross outside the cage enclosing serial number 9. In the latter case the extent of the deviation from the guidelines contained in the Third Schedule to the Act are such as cannot be permitted under Section 39(1).

Any deviation, if it is to be valid, should be rational in all the circumstances. The intention of the voter cannot be the sole criterion of such validity. A mark placed outside the cage

enclosing number 9 would not be rational. If such mark is claimable, then the petitioner will have an advantage over the other candidates he can only claim a preference if it is placed on the relevant cage.

(b) I do not accept the contention that there is a cage adjacent to number 9 resembling the cage opposite the party symbols. The specimen ballot paper 1R1 strictly conforms to the specimen appearing as Form C in the First Schedule to the Act except that in Form C provision for 10 candidates, has been included whereas 1R1 has provision only for 9 candidates i.e. the number of members that the electoral district of Digamadulla is entitled to elect. The deletion of the cage enclosing number 10 has resulted in the presence of a space opposite number 9 but the ballot paper itself strictly conforms to law and there is no such cage as alleged which would excuse a voter being misled.

Accordingly, I hold that the decision of the Election Judge refusing the inspection applied for by the petitioner with reference to the said 642 voter preferences is right and constitutes the only decision the Judge could reach in the exercise of his discretion on the facts before him.

The application for inspection pertaining to the alleged irregularity relating to 1000 voter preferences was refused as the petitioner had not availed himself of the right to obtain copies of statements under Section 53(7) and recounts under Section 53(8). The learned Judge relied on the decision in *Kaleel's case (supra).* He took the view that the Act made detailed provision for counting including provision giving the right to the petitioner's agents to obtain copies of statements of the votes for the recognized parties and preference votes for candidates. The right to obtain copies of such statement was not available under the Order in Council (Cap. 381). The Judge expressed the view that if the 47th respondent committed the alleged irregularities the petitioner or his agents could have asked for a recount then and there and further taken copies of the figures and

furnished them to Court; but he has not done any of these things. The Judge proceeded to refuse the inspection sought in that context and on the ground that the petition has been filed on insufficient material and the recourse to Section 63(2) was merely an effort to cure this deficiencey.

I think that the instant case is different from *Kaleel's case*. Firstly, in *Kaleel's case* the honesty, care and competence of the counting officers were not challenged. In this case, a serious irregularity which raises the issue of the *bona fides* of the 47th respondent and other officers has been alleged. Secondly, the kind of recount which a candidate was obliged to ask for in *Kaleel's case* was different from the recount provided for under Section 53(8). Under the previous law, a recount meant the verification of the final result based on the first post past the system of voting. At present, recounts can be applied for at such counting centre whether in relation to the votes for a recognized political party or the preference votes for a candidate. The effect of such recounts would be known only after the final count by the Returning Officer. In this context, the legal implications of the failure to ask for a recount cannot be the same as under the previous system, particularly at the General Election in question which was the first such election held under the new law. The petitioner states that he repeatedly protested and complained to the officer-in-charge of counting centres Nos. 13 and 15 against the irregularities committed by the 47th respondent but that the officer took no steps. In the context of the new election law, the need to ask for a recount of preferences at two counting centres may not strike the mind of a candidate as much as the need to lodge a complaint against an irregularity in the counting of preferences. The failure to obtain copies of statements of preferences is also not of such relevance because these statements would only contain the totals of preferences counted for the candidates. The petitioner is challenging such totals. Such statements themselves may not be of any assistance in adjudicating upon such challenge; but an inspection of the ballot papers may assist the Court.

For the foregoing reasons, I hold that the Election Judge was wrong in refusing the inspection sought relating to about 1000 voter preferences. The decisions in *Kaleel's case* (*supra*) and in *Kuruppu v. Hettiaratchy*[9] show that our Courts have considered applications for

inspection and recounts with the indulgence appropriate to a fair hearing of the petition. I allow the appeal and set aside the judgment appealed from so far as it relates to the alleged irregularity pertaining to about 1000 voter preferences. The Election Judge is directed to allow the inspection sought in that regard limited to counting centres Nos. 13 and 15 and to proceed with the trial of the petition or to dismiss it, whichever is appropriate on the result of the inspection. As the petitioner has succeeded partly, I allow him half the costs of this appeal.

H. A. G. DE SILVA, J.

I have had the advantage of reading the judgments prepared by my brothers Bandaranayake and Kulatunga, JJ. On the first matter that comes up for consideration, viz; whether the 642 preference votes obtained by the Petitioner-Appellant were rightly not brought into account on the ground that the cross (X) indicating the preference, had been placed outside the cage containing the numeral 9, the number assigned to the petitioner-appellant, I am in agreement with the conclusion arrived at by them that those preferences were rightly rejected for uncertainty and vagueness and the reasons given by for such a conclusion.

On the second question however, as to whether an order should be issued for inspection in terms of Section 63(2) of the Parliamentary Elections Act No. 1 of 1981 of the preference votes of the S.L.F.P. candidates, as well as an inspection of the relevant analysis sheets/statements of preferences and the cage of the same and a scrutiny/recount of the preference votes of the S.L.F.P. candidates. I am in agreement with the views expressed by my brother Bandaranayake, J. in the result that I too would dismiss the appeal with costs.

Appeal dismissed.