

GOONERATNE AND OTHERS
v.
CHANDRANANDA DE SILVA, COMMISSIONER OF ELECTIONS

SUPREME COURT.
SHARVANANDA, C.J.
WANASUNDERA, J. AND ATUKORALE, J.
S.C. APPLICATION No. 49/87.
JULY 13 AND 14, 1987.

Fundamental Rights—Discrimination—Eksath Lanka Janatha Pakshaya—Registration as a recognised political party for elections—Requisites— S. 7(4)(1), (5), (7)—Parliamentary Elections Act No. 1 of 1981—Article 12 of the Constitution—Equality—Patent unreasonableness—Exclusionary clause.

The 1st respondent (Commissioner of Elections) made order refusing registration as a recognised political party for the Eksath Lanka Janatha Pakshaya (ELJP).

Held—

The 1st respondent's order is vitiated by his misconception of the fundamental attributes of a political party organised to contest an election. All the evidence tends to show that the party intends to stay in the political firmament. The first respondent denies recognition because it had not been in the political arena for a sufficiently long time. In deciding to refuse recognition, the 1st respondent has given undue weightage to the age-factor of the party.

The 1st respondent's order is vitiated also by his misconception that to be entitled to become a 'recognised political party' the party should be recognised by the other political parties either by being welcomed by them or disapproved by them. Recognition by other parties is not necessary to become a recognised political party.

The ground of challenge is patent unreasonableness.

Under Article 12 discrimination between persons who are substantially similarly circumstanced is prohibited. Persons are similarly situated when they are equally qualified. The time-factor was not allowed to be decisive when the 1st respondent gave recognition to the Mahajana Eksath Pakshaya but he allowed it to be the decisive factor and refused the application of the ELJP. There is no justification for this disparate treatment. A public official should exercise his powers so as not to discriminate between two citizens who are similarly situated. Different yardsticks should not be used.

An order invalid in law is a 'no order' at all, an order without jurisdiction and subject to challenge in Court despite an exclusionary clause.

Cases referred to:

- (1) *Secretary of State for Education v. Tameside Metropolitan Borough*—[1976] 3 All ER 663.
- (2) *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*—[1947] 2 All ER 680.
- (3) *Anisminic Ltd. v. Foreign Compensation Commission*—[1969] 1 All ER 208.
- (4) *Re Racial Communications Ltd.*—[1980] 2 All ER 634, 639.

APPLICATION under Article 126 of the Constitution—refusal of registration as a recognised political party.

H. L. de Silva P.C. with Neville Jacolyn Seneviratne, R. K. W. Goonesekera, N. S. A. Goonetilleke, Faiz Mustapa, Asoka Abeyasinghe, A. Salwatura, K. S. Tilakaratne, Mrs. S. Jayalath, L. A. S. de Silva, N. Weerasooriya and G. G. Arulpragasam for petitioners.

Shibly Aziz D. S. G. with Tony Fernando S.C. for respondents.

Cur. adv. vult.

August 27, 1987.

SHARVANANDA, C.J.,

The four petitioners are members and chief officials viz. President, Vice-President/Chief Organiser, Secretary and Treasurer respectively of the "Eksath Lanka Janatha Pakshaya." The first respondent is the Commissioner of Elections and the second respondent is the Attorney-General. The petitioners state that the "Eksath Lanka Janatha Pakshaya" is an Association or Party of several citizens of Sri Lanka formed as a political association or party—one of its objects been to nominate candidates from the said Party to stand for elections, general and local when elections are held in the said Republic of Sri

Lanka. The inaugural meeting of the Eksath Lanka Janatha Pakshaya was held on 2nd January 1987 at 'Woodlands', Borella at which a Constitution was adopted and Office Bearers and Members of the Steering Committee were elected and thereafter Members were enrolled on application by them and the Membership has now exceeded ten thousand drawn from all parts of the Island and from all sections of the community. Thereafter meetings were held in various electorates and presently meetings are being held and Party Branches are being formed and Party Organisers have been elected for several electorates. In compliance with a notice issued under sub-section 7(4) (a) of the Parliamentary Elections Act No. 1 of 1981 (hereinafter referred to as the Act) by the 1st respondent, the 3rd petitioner in his capacity as the Secretary of the Party, submitted on 22nd January 1987, to the 1st respondent, an application for registration of Eksath Lanka Janatha Pakshaya (hereinafter referred to as 'E.L.J.P.') as a recognised political party for the purpose of elections. The 3rd petitioner in terms of section 7(4)(1) furnished along with the application, a copy of the Constitution of the Party and a list of office-bearers of such Party and appended to his application the following documents also:

- (a) Ten Point Programme of the Party in Sinhala, Tamil and English;
- (b) Advertisement of the Party in the 'Sun' Paper of 12.1.87 and in the 'Dawasa' Paper of 12.1.87;
- (c) Specimen copy of application form to become a Member of the Party;
- (d) Specimen membership card of the Party;
- (e) Documents of the Eksath Lanka Mahajana Sabha;
- (f) Extracts from local newspapers announcing the inauguration of the new Party;
- (g) News item in the Madras Hindu of 5.1.1957 that a new party has come into being in Sri Lanka formed by a former M.P. and nephew of a former Prime Minister, Dudley Senanayake (2nd petitioner).

Subsequently, the petitioners produced before the 1st respondent details of Bank Accounts of the Party and photographs taken at the inauguration ceremony of the Party, petitioners told the 1st respondent that they would furnish any other necessary information and documents called for by him.

In their application, the petitioners stated that "the E.L.J.P. was conceived on a resolution adopted by the Eksath Lanka Mahajana Sabha" which has functioned for over two years as a political front".

On 27th February, 1987 the petitioners met the 1st respondent and discussed matters relating to their application. According to the 1st respondent he was informed at that interview that—

- (a) Membership now stands at 7000 according to computerised list;
- (b) Branches are now being formed in different areas;
- (c) Fund raising campaigns have started;
- (d) Publicity has been given in the press and a monthly publication has just commenced;
- (e) Three meetings of the Working Committee had been held and the discussion had centered on fund raising campaigns, contesting of elections and the application for recognition;
- (f) Several preparatory meetings had been held in October, November and December 1986 prior to the formation of the Party.

The 1st respondent in his affidavit has further stated that at a meeting with the 3rd petitioner, held on 15.3.87, he was informed that since the meeting with him on 27.2.87, 3000 more members had been enrolled and that a Kantha Bala Mandalaya had also been formed.

On 31st March 1987, the 1st respondent by letter P12 informed the 3rd petitioner that he was unable to accede to the request for recognition as a political party for the purpose of elections. In the letter the 1st respondent did not give any reason for his refusal. In his affidavit however the 1st respondent has stated that "after taking into account the totality of the material available to me and having considered them in the light of the matters set out by me in paragraph 14 of the affidavit, I was of the opinion that the Eksath Lanka Janatha Pakshaya is not a political party and is not organised to contest any election under the Parliamentary Elections Act. At the end of my inquiry I was of the opinion that the Eksath Lanka Janatha Pakshaya

was in very incipient state of growth and was not sufficiently organised for the purpose of recognition as a political party." The first respondent has in paragraph 14 (j) of his affidavit set out what, in his view a party should establish to be entitled to be treated as a recognised political party in terms of section 7 (5) of the Act.

Ordinarily in normal circumstances after the submission of the Constitution and the list of office-bearers an applicant substantiates his case with the production of—

- (i) the manifesto and policy statement;
- (ii) details of membership with membership receipts and registers etc.;
- (iii) bank statements;
- (iv) statements of assets;
- (v) organisational systems;
- (vi) appointment of central and peripheral organisers dependant on the nature of the party;
- (vii) nature of activities undertaken as a separate political party."

In paragraph 14 (g) and (h) of his affidavit, the 1st respondent has enumerated further considerations relevant for giving the recognition envisaged under section 7 of the Act; he states there:—

14 (g) Those who claim the existence of a Party can be several but in my view the recognition envisaged under section 7 has to be (six) necessarily the combined effect of:—

- (i) The declaration by those who constitute such political party as a political party;
- (ii) An acceptance by its constituents and the membership of the existence of such political party;
- (iii) Its identification and acceptance by segments of the people, not necessarily confined to its own membership, as a Party;

(h) In my view the words 'organised for elections' was such that I should look for a degree of existence and growth and that the party should not be in an incipient or a formative stage of development or organisation.

The petitioners complain that the 1st respondent's decision that the E.L.J.P. is not a political party and is not organised to contest any election is "unjust, unfair and unreasonable".

They allege that his disallowance of their application—

- (a) Violates the fundamental right guaranteed under section 12 of the Constitution;
- (b) Discloses discrimination, in that, applications, for recognition with lesser qualifications had been allowed by the Commissioner of Elections.

The petitioners support their allegation of discrimination by reference to the application for recognition as a political party made by (a) the Nava Lanka Sama Samaja Party and (b) Sri Lanka Mahajana Pakshaya.

Section 28A(5) of the Ceylon (Parliamentary Elections) Order in Council 1946, enacts if the Election Commissioner is satisfied that a political Party has been engaged in political activity for a continuous period of at least five years prior to the date of the Secretary of the Party making to him an application that such party be treated as a recognised political party, or that at least two candidates nominated by such party at the last general election immediately preceding that date were elected as members, he shall make order that such party shall be entitled to be treated as a recognised political Party for the purpose of elections. This section was repealed by the Parliamentary Elections Act 1981.

Section 7(5) of the Act provides as follows:

"Upon the receipt of an application (that the Party be treated as a recognised political party) duly made under sub-section (4) on behalf of any political Party, the Commissioner shall, after such inquiry as he may deem fit: (a) if in his opinion such party is a political party and is organised to contest any election under this

Act, make order that such Party shall be entitled to be treated as a recognised political Party for the purpose of elections. (b) if in his opinion such Party is not a political party and is not organised to contest any election under this Act, make order disallowing the application."

A "recognised political party" enjoys the right to an approved symbol of its choice and certain other advantages and facilities. Further, it can exercise greater control over its members who have been elected to Parliament on its nomination paper—vide Article 99(b) of the Constitution. Being a recognised political party gives a political party certain privileges and rights which are not available to an ordinary party.

It is to be noted that while under Section 28A of the Ceylon (Parliamentary Elections) Order in Council, the Commissioner of Elections had certain objective criteria to go by viz. that the applicant political Party had been engaged in political activity for a continuous period of five years prior to the date of the making of such an application or that at least two of its candidates were at the last general election elected members for him to make an order that such party is entitled to be treated as a recognised political party, Section 7(7) of the Act substituted a subjective satisfaction on his part of two matters only viz: (a) such Party is a political party and (b) that it is organised to contest any election under the Act, to make order that such party is entitled to be treated as a recognised political party. A political party need not have been in existence for a certain length of time to qualify for recognition. A newly formed Party having the attributes of a political party and organised to contest an election is entitled to recognition, in spite of its infancy.

Politics comprehends everything that concerns the government of the country. Political parties are groups organised for the purpose of achieving and exercising power within a political system. The life of the democratic state is built upon the party system. Parties arrange the issues upon which people are to vote. They act upon the electorate. Each party attempts to bring about the election of its candidate to Parliament and by this means to control or influence the actions of the Government. Parties have one function in common; they all participate to some extent in the exercise of political power, whether by forming a government or by exercising the function of opposition. The function involves three factors: the organisation of propaganda, the selection

of candidates and the financing of campaigns. The party gives its candidates a label that serves to introduce him to the voters and to identify his position. Party membership provides the clearest indication of the real political orientation of each candidate. Because of this party label the voters are better able to distinguish the candidates. The Party also furnishes the candidate with workers to put up his posters, distribute his literature, organise his meetings and canvass from door to door. A political party possesses organizational machinery through which it acts. Such organisation is in effect, the government of the Party. It is the machinery by which party-decisions are made. The function of political parties has two main aspects; the organization of the electorate, with the purpose of obtaining a majority and the maintenance of continuous connexion between representatives and constituencies. These processes are intertwined; they have a common end viz. to obtain power over the State to realise political aims. Political parties are generally to be differentiated from interest groups which seek to influence government by such means as propaganda and persuasion rather than by putting forward candidates for election. They are groups of individuals or federations of associations founded on some common interest; exertion of influence on the government is generally only one of the purposes of such association. Professional societies for example, make themselves heard by public authorities when matters of concern to them are under consideration; but influencing public policy is not the sole objective of such societies. Interest groups may sometimes become constituent parts of a political party. The distinction between political parties and pressure groups lies in the fact that pressure groups, unlike political parties do not nominate candidates for Parliamentary or local elections or desire to accept the responsibility for management of the government. ...

According to the Consitution of E.L.J.P. its objective *inter alia*, is "to organise and carry on a political Party in Sri Lanka with a view to obtain success at any Presidential, General or other election." Its ten-point programme sets out its policies and plan of action. Any citizen of Sri Lanka over the age of 18 years and who is in agreement with the objectives and policies of the Party may become a member on the payment of the appropriate membership fee. A member of the Party is prohibited from working against a candidate nominated by the Party at any election. The Working Committee of the Party exercises disciplinary action including expulsion. At any election whether

Presidential, General or otherwise, it nominates the Party candidates, and provides an electoral organisation. It consists of—

- (a) President, Secretary and Treasurer of all Branches in the electorate;
- (b) President, Secretary and Treasurer of all Youth Leagues in the electorate; and
- (c) President, Secretary and Treasurer of all Kantha Samithi in the electorate;

The Petitioners have in their affidavit stated—

“that the E.L.J.P. is an Association or Party of several citizens of Sri Lanka formed as a political association or Party—one of its objects being to nominate candidates from the said party to stand for elections, General and Local when elections are held in the said Republic of Sri Lanka.” The inaugural meeting of the E.L.J.P. was held on 2nd January 1987 at ‘Woodlands’, Borella, at which a constitution was adopted and office bearers and members of the Steering Committee were elected. The 1st Respondent has not contested these facts, which he was made aware of at the inquiry he conducted in respect of the application made for recognition. The petitioners have stated further that after the inaugural meeting, meetings were held in various electorates and that presently meetings are being held and Party Branches are being formed and that Party organisers have been elected for several electorates. With regard to this statement the 1st Respondent has merely stated “I am unaware of the present activities of the Petitioners Party. I was made aware of certain facts relating to this Party”.

The criteria applied by the 1st Respondent for the grant of recognition under section 7(5) of the Act have been set out by him. “Though it cannot be said with any precision in relation to a time period, a political party has to be essentially a party so identified as a different entity, clearly distinguishable from the others, with a background which lends a degree of confirmation and possessing an assurance of its own for the future, the demonstration of the totality of which requires time.”

In interpreting the words 'organised for election' he states that 'I should look for a degree of existence and growth and that the party should not be in an incipient or formative stage of development or organisation.' While I agree with 1st Respondent that if an applicant can satisfy the criteria laid down by him, such political Party must necessarily be given recognition, I do think that these criteria postulate more than what is required by law. Let me examine some of the criteria adopted by the 1st Respondent—the time factor, the need for growth and the crystallisation of political consciousness.

Take for example the matter of organisation. A group of persons with political experience and with more than adequate money, resources and management skills could in a very short time (that is before the application for registration is made) come up with a fully-shaped organisation. Here there is no need for a backward glance or for a period of growth and development. But generally a period of development and organisation, short or long, may be necessary. The 1st Respondent has uppermost in mind the concept of the crystallisation of public opinion. A political party can certainly emerge from the crystallisation of public opinion. But it may be also possible to induce the crystallisation of such public opinion. A political organisation which seeks to do this is no less entitled to recognition than a political party of the earlier type.

The 1st Respondent is right in his approach of viewing this matter in its totality. The question of the organisation cannot be divorced from the political nature of the party and these composite factors constitute one concept. This is what the legislature had in mind, namely, a bona fide political organisation with its necessary structure and committed to contesting elections and taking part in the political life of the country.

In attaching undue significance to the factor of time, the 1st Respondent has misdirected himself in law and has unreasonably refused recognition of Eksath Lanka Janatha Pakshaya as a political party under section 7(5) of the Act.

The order under section 7(5) is based on the Commissioner's opinion. The sub-section is concerned only with his state of mind. However as opined by the House of Lords in *Secretary of State for Education v. Tameside Metropolitan Borough* (1) the use of subjective language does not preclude the intervention of the court under the

principles set out in *Associated Provincial Picture House Ltd., v. Wednesbury Corporation* (2). The court may intervene if the official concerned is shown in a material respect to have misdirected himself in law in forming the relevant opinion or to have taken into account matters which on the true construction of the statute, he should not have taken into account or to have failed to take into account relevant matters. Did the 1st Respondent direct his mind to the right question in forming his opinion? Was his opinion influenced by facts which ought not to have been taken into account? Has he acted on extraneous considerations which ought not to have influenced him? If the 1st Respondent has misdirected himself in law, then his opinion, however, bona fide it may be, becomes capable of challenge. The ground of challenge is patent unreasonableness.

Section 7(7) provides that the order of the Commissioner on any application made under sub-section (4) shall be final and shall not be called in question in any court.

The House of Lords in *Anisminic Ltd., v. Foreign Compensation Commission* (3) decided that a preclusive clause of the kind contained in Section 7(7) of the Act cannot oust the jurisdiction of the court to declare void a determination or order based on an error of law on a jurisdictional matter.

"The breakthrough made by *Anisminic* was that, as respects administrative tribunals and authorities the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity." Per Lord Diplock in *Re Racal Communications Ltd.* (4).

In the instant case the 1st Respondent has not questioned the existence of those facts pleaded by the petitioners in support of their application for E.L.J.P. to be treated as a recognised political party. The reason for his decision not to accord recognition was that the party was in its infancy and that hence these facts were not sufficient to qualify E.L.J.P. to be a political party, organised to contest an election. If the order made by the 1st Respondent was invalid in law it was really a 'no order' at all and so the court is not acting contrary to the

statutory requirement that the order shall not be questioned. The exclusionary clause in section 7(7) has no effect in excluding judicial review on the basis of *ultra vires*. Lack of jurisdiction may arise if the 1st Respondent has asked himself the wrong question as to what constitutes a political party or when it is organised for elections and has thereby come to an erroneous decision. Through an error of law, he has stepped outside his jurisdiction. The preclusive clause will not save such a decision from challenge.

The 1st Respondent's order is vitiated by his misconception of the fundamental attributes of a political party organised to contest an election, that it must necessarily have been in existence for some appreciable length of time. The material placed before him abundantly pointed to E.L.J.P. being a Party with a policy and programme, organised to capture political power by putting forward candidates at elections, Presidential, General or Local Government, with a view to play a role in the government of the day. The Party has a Constitution and an organisation with a sizeable membership, and a potentiality for growth as is manifest by the fact that seven thousand at the time of the application, 22.01.87 rose to ten thousand at the time of the interview on 27.02.87. The 1st Respondent does not doubt that the Party has taken shape and had come into existence with a definite identity of its own. He does not characterise it as a mushroom party that sprouts when an election is in the offing, with no assurance of its surviving the election. All the evidence tends to show that the party intends to stay in the political firmament. However the 1st Respondent denies recognition because it had not been in the political arena for a sufficiently long time. In deciding to refuse recognition, the 1st Respondent has given undue weightage to the age-factor of the Party. He has overlooked the fact that the five years of political activity required by section 28A of the 1946 Elections Order in Council, has been dispensed with by section 7 of the Act. It is not necessary today that the applicant party should have been in existence for an appreciable time, for it to become entitled to the status of a recognised political party. The 1st Respondent's order is vitiated also by his misconception that to be entitled to become a 'recognised political party' the party should be recognised by the other political parties either by being welcomed by them or be disapproved by them. Recognition by other parties is not necessary to become a recognised political party. Thus the order made by the 1st Respondent disallowing the application made by E. L. J. P. for recognition suffers from these vitiating defects.

The Petitioners complain of inequality of treatment. They state that, in the matter of granting recognition, the E.L.J.P. has been discriminated against, that in similar circumstances Sri Lanka Mahajana Pakshaya was granted the status of recognised political party, while the E.L.J.P. was denied by the 1st Respondent that status. Article 12 of the Constitution conceives persons to be similarly situated when they are equally qualified. It provides that persons similarly circumstanced should be treated alike both in privileges conferred and liabilities inflicted—like should be treated alike. What is prohibited is discrimination between persons who are substantially similar circumstanced. Between two parties applying for the grant of the status of "recognised political party" the Commissioner should not apply two different yardsticks or criteria for their identification as political parties organised for election.

The petitioners have filed this petition under Article 126 of the Constitution, complaining of infringement of their fundamental right of equality guaranteed to them by Article 12 of the Constitution. They refer to the applications made to the 1st Respondent for recognition as a political party under section 7(5) of the Act by the Nava Lanka Samasamaja Party and Sri Lanka Mahajana Pakshaya and they charge that the 1st Respondent had, on far less material than that furnished by the petitioners, granted recognition to them. I have examined the files relating to the applications of the (1) Nava Lanka Samasamaja Party (2) The Sri Lanka Mahajana Pakshaya and (3) the E.L.J.P. In my view the circumstances of the Nava Lanka Samasamaja Party are not similar to those of E.L.J.P. and the recognition of that Party cannot be faulted. But, there appears to be some substance in their allegation of discrimination in respect of the application of Sri Lanka Mahajana Pakshaya to be treated as a recognised Political Party. The time-factor to which the 1st Respondent attached so much importance in considering the case of E.L.J.P. did not prove fatal in the case of Sri Lanka Mahajana Pakshaya which had a life of only a few days, having been inaugurated on 22nd January, 1984 when it made its application on 30th January 1984 to the 1st Respondent for recognition. The 1st Respondent made order on 22nd March 1984, recognising the Sri Lanka Mahajana Pakshaya as a Political Party under sec. 7(7) of the Act. The 1st Respondent was, in spite of the infancy of the Party, satisfied that it was a separate political Party organised for election and that it was widely accepted as a political Party and that the other opposition parties such as Sri Lanka Freedom Party,

Mahajana Eksath Pakshaya, the Lanka Sama Samaja Party and the Communist Party had recognised it as a separate party. The petitioners complain, with a degree of legitimacy, that the 1st Respondent did not, in the case of Mahajana Eksath Pakshaya "look for a degree of existence and growth and that the Party (applicant) should not be in an incipient or a formative stage of development or organisation," to be satisfied that it was organised for elections. In my view the 1st Respondent had, in refusing the application of E.L.J.P. for recognition applied criteria which the minimum requirements of the law did not postulate. Further, though he had applied the correct yardstick in not allowing the relevance of the time-factor to outweigh other considerations in the case of Mahajana Eksath Pakshaya, he had chosen to elevate the time-factor to be the decisive factor in the case of E.L.J.P. He had thus accorded unequal treatment to E.L.J.P. There is no justification for this disparate treatment. A public official should exercise his powers so as not to discriminate between two citizens who are similarly situated.

I am of the view that the 1st Respondent has erred in refusing the application of the Petitioners for recognition of E.L.J.P. as a Political Party and had infringed their fundamental right of equality. I allow the application and set aside the order of the 1st Respondent dated 31st March 1987 contained in P12 and direct him to grant the petitioners' application made under section 7(7) of the Act for E.L.J.P. to be registered as a recognised Political Party and to make other relevant consequent orders.

I make no order as to costs.

WANASUNDERA, J.—I agree.

ATUKORALE, J.—I agree.

Application granted.