

KUMARANATUNGE

v.

JAYAKODY AND ANOTHER**SUPREME COURT.**

SHARVANANDA, C. J., WANASUNDERA, J., COLIN-THOMÉ, J.

ATUKORALE, J. AND L. H. DE ALWIS, J.

S.C. ELECTION PETITION APPEAL No. 5/84.

ELECTION PETITION No. 7/83.

FEBRUARY 25, 26, 27 AND 28 AND MARCH 1, 4, 5, 7 AND 8, 1985.

Election petition – President impleaded as respondent alleging commission of corrupt practice of making false statements of fact in relation to personal character and conduct of petitioner – Affidavit containing averments based on information from undisclosed sources – Meaning of false statement of fact in relation to personal character and conduct – Article 35 of Constitution – Sections 58 (1) (d), 77 (c) and 80A (1) (b), 80B (d) of the Ceylon (Parliamentary Elections) Order-in-Council – Articles 161, 168 (1) and (2) of the Constitution.

The petitioner who was an unsuccessful candidate for election to the Mahara seat at the Parliamentary Elections held on 18th May 1983 challenged the election of the 1st respondent who was the successful candidate on the sole ground that the 2nd respondent who was the President of the Republic had at an election meeting held in support of the 1st respondent's candidature committed the corrupt practice of making false statements of fact in relation to the personal character and conduct of the petitioner by referring to him, inter alia, as a Naxalite for the purpose of affecting the returning of the petitioner. On behalf of the respondents three preliminary objections were argued :

- (1) The petition is bad and cannot be entertained because the President of the Republic had been impleaded as the 2nd respondent.
- (2) The affidavit filed was not proper and did not comply with the legal requirements and the petition should therefore be rejected.
- (3) The statements alleged to have been made by the 2nd respondent do not amount to false statements of fact in relation to the personal character and conduct of the petitioner.

Held – (1) (Affirming finding of Court of Appeal)

Article 35 gives blanket immunity to the President from proceedings of any kind whatsoever instituted or continued against him in any court in respect of anything done or omitted to be done by him either in his official or private capacity during the tenure of his office.

(2) (Reversing finding of Court of Appeal)

Where some of the statements in the affidavit accompanying the petition are based on the knowledge of the deponent and some on information received from others, the affidavit is defective. But the petition should not be dismissed on that ground of defect in the verification. The allegation of corrupt practice cannot be ignored merely on the ground that the source of information is not disclosed when the allegation is based on information as it is not a requirement of law that the source of information or the grounds of the deponent's belief should be set out, and the form of the mandatory affidavit has not been prescribed.

(3) (Reversing finding of Court of Appeal)

The false statement must be in relation to the personal character or conduct of the candidate as distinct from his political or public conduct. The words of the statement will be interpreted according to their real and true meaning and not according to their literal sense. The true meaning will depend on the occasion of the publication, the person publishing, the person attacked and the readers intended to be addressed. In the present case the sense in which the alleged statements were understood by those present at the meetings is relevant. What is meant by the term Naxalite and how the term was understood by the said voters and whether they understood it as relating to the personal or public conduct of the petitioner has to be determined on the evidence of witnesses.

(4) Held further : affirming decision of Court of Appeal. (Wanasundera, J: dissenting)

The impugned election petition is a proceeding against the President and is violative of Article 35 (1) of the Constitution. An election petition with the President as a respondent cannot be instituted or sustained or proceeded with. Making the President a party respondent is fatal to the petition. Article 35 (1) of the Constitution constitutes an exception to section 80A (1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council 1946 and ousts the jurisdiction of the Court to inquire into the conduct of the President except in the circumstances specified in Article 35 (3).

Case referred to :

(1) *Kobbekaduwa v. Jayewardene and Others S.C. No. 3/82 – S.C: Minutes of 10.1.1983.*

APPEAL from Judgment of Election Judge reported in [1984] 2 SLR 45.

Nimal Senanayake, P.C. with Sanath Jayatileke, Nimal Siripala de Silva, Saliya Mathew, Mrs. A. B. Dissanayake, L. M. Samarasinghe and Miss. A. D. D. N. Telespha, for the petitioner.

K. N. Choksy, P.C., with George Candappa, P.C., Ben Eliyathamby, Daya Pelpola, D. H. N. Jayamaha, Ronald Perera, and Lakshman Perera for the 1st respondent.

2nd Respondent absent and unrepresented.

K. M. M. B. Kulatunga, P.C., Solicitor-General, with Sarath Silva, Deputy Solicitor-General and A. Kasturiaratchi, State Counsel for Attorney-General as amicus curiae on notice.

Cur. adv. vult.

July 8, 1985.

SHARVANANDA, C.J.

The Parliamentary Election for the Mahara Electorate was held on the 18th May, 1983. At the said election the petitioner-appellant and the 1st respondent, amongst others were candidates and the 1st respondent was declared elected.

The present election petition was filed on 09.06.83 by the petitioner wherein he seeks to have the election declared void on the ground that the 2nd respondent, as agent of the 1st respondent, committed the corrupt practice of making false statements of fact in relation to the personal character and conduct of the petitioner for the purpose of affecting the return of the petitioner at the said election, in terms of section 58(d) read with section 77(c) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

The petitioner alleges –

- (1) That, on 08.05.83, at public meetings held at Malwathuhiripitiya and Narammala, in support of the 1st respondent's candidature, the 2nd respondent uttered the following words – "It is with my full knowledge that certain individuals belonging to opposition political parties were taken into custody after Presidential Elections and the Referendum. There had been plans made by those individuals to create various disturbances in this country. After Tyrell Gunatillake was entrusted to hold an inquiry on these people we released the Naxalites, but after the inquiry report on 21st we will suitably punish those people who are guilty." (Para 4A of the petition).

- (2) That on 08.05.83, at public meetings held at Malwathuhiripitiya and Narammala, in support of the 1st respondent's candidature, the 2nd respondent uttered the following words – "Vijaya Kumaranatunga is supposed to be saying that he was taken into custody. He was not just taken into custody but with my full knowledge. Those who are creating disturbances cannot be allowed to play with the people. If you vote for Vijaya Kumaranatunga the people of this seat will only find themselves abandoned. Therefore when voting, vote with due consideration." (Para 4B of the petition).
- (3) That on 08.05.83, at a public meeting held at Malwathuhiripitiya, in support of the first respondent's candidature, the 2nd respondent uttered the following words – "The candidate for Sri Lanka Freedom Party for the seat has announced that we kept him in custody. He was kept in custody according to my order. Why is that? At Mr. Kobbekaduwā's meetings some persons have said that if they win, J.R. will be hanged. J.R.'s intestines will be taken out. Another person had said that I will be killed and they will walk on my blood to President's House. We got C.I.D., Tyrell Gunatillake to make inquiries to find out the purpose behind these statements. Vijaya Kumaranatunga was taken into custody to inquire into that. We will get that report before the 21st. It will be decided accordingly whether the suspects will be prosecuted or not." (Para 4C of the petition).

Mr. Senanayake, for the petitioner concedes that at all times material to this petition, including the date on which this petition was filed, the 2nd respondent held the office of President of the Republic of Sri Lanka.

On behalf of the 1st respondent, four objections, in limine, were raised before the Election Judge and the court was asked to reject and/or dismiss the petition.

The objections were –

- (1) the 2nd respondent could not have been made a party-respondent in these proceedings, his joinder contravenes Article 35(1) of the Constitution ; the petition could not have been instituted ; the court could not have entertained this petition ; no process could have issued on the petition, and the petition must be rejected. The Election Judge will not proceed with the petition and make order either dismissing or rejecting it.
- (2) Rs. 10,000 paid as security is inadequate and in terms of Rule 12(3) of the 3rd Schedule to the Elections Order-in-Council, 1946, the petition should be dismissed.
- (3) there is no proper affidavit in support of the allegation of corrupt practices pleaded in the petition and therefore there is no valid petition before court in terms of section 80(d) of the Elections Order-in-Council. The petition, therefore, cannot be proceeded with.
- (4) the statements alleged to have been made by the 2nd respondent do not in law constitute false statements of fact in relation to the personal character or conduct of the petitioner and these statements do not fall within the provisions of section 58(1)(d) of the Election Order-in-Council. If so, the petition does not disclose the commission of corrupt practices and there is nothing upon which this court could proceed to inquire into.

On the question of inadequacy of security, the petitioner had deposited sums totalling Rs. 30,000. In view of this, Counsel for the 1st respondent did not press his objection in regard to security.

The Election Judge upheld the other three objections and dismissed the Election Petition with costs fixed at Rs. 1,500, payable to the 1st respondent. Against this order of dismissal the petitioner appellant has preferred this appeal.

Article 35 of the Constitution provides as follows –

- (1) While any person holds office as President no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

- (2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.
- (3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President.

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

The sole ground for avoidance of the election is the allegation that the 2nd respondent, as agent of the 1st respondent committed a corrupt practice under Section 58 (1) (d) read with section 77 (c) of the Ceylon (Parliamentary Elections) Order-in-Council.

Section 80A-(1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, requires the petitioner to join as respondent in the Election Petition, any person against whom any allegation of any corrupt practice is made in the petition. Sections 81, 82 and 82D make manifest the purpose of this mandate.

Section 81 of the Ceylon (Parliamentary Elections) Order-in-Council provides that –

"At the conclusion of the trial of an election petition the Election Judge shall determine whether the Member whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination in writing under his hand.

Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided."

Section 82 of the Ordinance further provides –

"At the conclusion of the trial of an election petition the Election Judge shall also make a report under his hand setting out –

- (a) whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and
- (b) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice ;"

Section 82D (1), (2) (b) provides that – where the report of the Election Judge is to the effect that a corrupt practice has been committed by any person that person shall be subject to the same incapacities as if at the date of his report that he has been convicted of such practice.

According to these sections where the agent of the candidate commits a corrupt practice in connection with the election, not only will that be a ground for the avoidance of the election on an election petition, and the candidate's election declared void but the agent also shall be reported by the Election Judge to the President that he had committed a corrupt practice. On such a report being rendered, the agent would be subject to the same incapacity as if he had been convicted of the practice. Section 58 (2) of the Ceylon (Parliamentary Elections) Order-in-Council states that –

"every person who is convicted of a corrupt practice under this section shall, by conviction, become incapable for a period of seven years from the date of his conviction of being registered as an elector or of voting at any election under this Order or of being elected or appointed as a Member of Parliament."

Mr. Senanayake, Counsel for the petitioner-appellant submitted that it was in compliance with the mandatory requirement of Section 80A (1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council, that he joined the 2nd respondent, as a respondent to this Election Petition. When confronted with the absolute prohibitions of Article 35

of the Constitution he submitted that Article 35 is not relevant and does not apply to the case for the reason that though he was joined as a respondent to the Election Petition, the Election Petition is not a proceeding against the President. His contention was that the Election Petition is a proceeding only against the candidate and not against anybody else. He contended that the test to identify whether the proceeding is against a person is to look at the relief sought by the petitioner. According to him the object of the Election Petition and the relief claimed thereon by the petitioner is to have the Election declared void. He emphasised that no relief was claimed by the petitioner against the 2nd respondent and that it was in compliance with the mandatory provision of Section 80A (1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council that the latter was joined as a respondent to the petition.

I cannot agree with the construction urged by Mr. Senanayake. The legislature had a purpose in requiring the agent, against whom an allegation of corrupt practice is made to be joined as a respondent to the election petition. An election petition is a proceeding "sui generis". The petitioner and the respondent to the election petition are not the only parties having status in or interested in the election petition proceedings. It cannot be equated to a private litigation between two parties. The State and the public are interested in the proceedings and that is why an election petition, once filed cannot be withdrawn without leave of the Election Judge. Further the Election Judge is called upon not only to make a determination whether the election is void or not but also is charged with the duty of making a report whether any corrupt practice had been committed. He has to report the offender to the President and certain penal consequences flow from the report to the person reported. It is not only the candidate who will be on trial in an election petition proceeding but also all persons against whom allegations of any corrupt or illegal practice are made in the petition and who are named as respondents to the petition in terms of section 80A. In these proceedings such persons are put in jeopardy of being reported to the President under section 82 and incurring the penalties stipulated by section 82D. If the allegation of corrupt practice set out in the election petition is proved against 2nd respondent adverse consequences not only against the 1st respondent (candidate) but also against the 2nd respondent will inexorably flow. Hence an election proceeding is, in my view, a proceeding not only against the candidate but also against the

respondents joined to the Election Petition as mandated by Section 80A (1) (b). Whether the proceedings following on such joinder is against the person joined or not, has to be tested from this angle and not from the vantage point of the petitioner though no relief is claimed by him against the person joined as respondent, in terms of section 80A (1) (b). The election proceeding is a proceeding against him also as he is put in jeopardy of being reported by the Election Judge under section 82.

Article 35 gives a blanket immunity to the President from having proceedings instituted or continued against him in any court in respect of anything done or omitted to be done by him either in his official or private capacity during the tenure of his office. It is not confined to proceedings of civil or criminal nature. The immunity extends to any proceedings of whatever nature, civil, criminal, quasi civil or quasi criminal etc.

Article 35 ousts the jurisdiction of the court to inquire into the conduct of the President, except in the circumstances specified in Article 35(3). This Article is an integral part of the Constitution defining the powers, functions, immunities and tenure of office of the President. It supersedes the provisions of the ordinary statute law, wherever the latter is in conflict with or inconsistent with it. Article 168(1), appearing in Chapter 21 relating to transitional provisions, however provides-

"Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution shall mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue to be in force."

Article 168(2) however states—

"Save as otherwise provided in the Constitution, existing laws, written laws and unwritten laws are not and shall not in any manner be deemed to be provisions of the Constitution."

The Ceylon (Parliamentary Elections) Order-in-Council, 1946, was repealed by Act No. 1 of 1981. The 5th Amendment to the Constitution amending Article 161 (certified on 25.02.83) has restored parts 4 to 6 (both inclusive) of the Ceylon (Parliamentary Elections) Order-in-council 1946 and has enacted that—

"the aforesaid parts of the Ceylon (Parliamentary Elections) Order-in-Council 1946, shall for the purpose of the Election, notwithstanding the repeal of such Order-in-Council, be deemed to

be in force and shall, mutatis mutandis and except as otherwise expressly provided in the Constitution apply to such election. The law applicable to election petitions in relation to each Electoral District shall be the aforesaid parts of such Order-in-Council as applied as aforesaid."

Article 161 commences with the words "notwithstanding anything to the contrary in any other provisions of the Constitution."

Mr. Senanayake submitted that the opening words of Article 161 would admit the construction "notwithstanding Article 35(1) of the Constitution". He urged that the expression used in the 5th Amendment is "mutatis mutandis, and except as otherwise expressly provided in the Constitution" and not "subject to the provisions of the Constitution", as in Article 168(6). Mr. Senanayake further argued that parts 4 and 5 of the Elections Order-in-Council had been elevated to the status of constitutional provisions and that section 80(a) (1) (b) which is a part of part 5 supersedes Article 35(1) of the Constitution as the 5th Amendment is a later Act. The short answer to this last submission is that Articles 161, as amended by 5th Amendment has to be read along with 168, which provides "Save as otherwise provided in the Constitution, existing laws are not and shall not in any manner be deemed to be provisions of the Constitution."

The words "mutatis mutandis" means subject to necessary alterations.

The words "notwithstanding anything to the contrary in any other provision of the Constitution" prefacing Article 161 mean that during the transition period the provisions of Article 161 shall apply to the matters dealt with by Article 161 even though such matters have been provided for otherwise in the other Articles of the Constitution. Article 161 deals with the concept of the first Parliament, and of the election to such Parliament and of election petitions in relation to such elections. Article 62 provides that the Parliament shall consist of 196 members, elected by the electors, in accordance with the provisions of the Constitution, namely proportional representation as provided for by Article 99. By operation of the opening words in Article 161, the provisions of Article 62 of the Constitution which would otherwise be applicable will not apply to the first Parliament. The words "except and otherwise expressly provided in the Constitution" mean that in matters where there is a conflict and there is no express provision in the Constitution in respect of the matter, the provision of the Elections

Order-in-Council will apply. In this context the question arises whether section 80(A)(1)(b) of the Ceylon (Parliamentary Elections) Order-in-Council: 1946, has to yield to Article 35(1) of the Constitution.

Section 80(A)(1)(b) contains a general rule that a person against whom allegation of corrupt practice is made in the election petition must be joined as respondent thereto. Article 35(1) is a special provision dealing with a special situation, namely, immunity of the President from proceedings in court. Halsbury's Laws of England, 3rd Ed. Vol. 36, page 397, para 597 states—

"Whenever there is a particular enactment and a general enactment in the same statute, and the latter taken in its most comprehensive sense, would override the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

"Where a general intention is expressed, and also a particular intention which is incompatible with the general one the particular intention is considered as an exception to the general one."

(Churchill v. Crease) 1828, 5 Bing 177, at 180 per Best, C.J.

That is, though section 80(A)(1)(b) provides that all persons against whom allegations of corrupt practice are made in the petition must be joined as respondent, Article 35(1) of the Constitution provides for the particular case of the immunity of the President from proceedings in court and constitutes an exception to the general rule contained in section 80(a)(1)(b). Article 161 as amended by the 5th Amendment will thus have to be read subject to Article 35 of the Constitution. Accordingly no election proceedings can be instituted or maintained with the President being a party to it.

Mr. Senanayake further submitted that Article 35 jars with the concept of democracy, purity of elections, right of franchise which according to him are the basic features of the Constitution. In this connexion he referred us to Articles 1, 3 and 4 (e) of the Constitution. He submitted that Sri Lanka cannot be a Democratic Socialist Republic, if the President is given the comprehensive immunity visualised by Article 35 of the Constitution. I cannot see any conflict between Article 35 on the one hand and Articles 1, 3 and 4 (e) on the other. Article 35 is an integral part of the Constitution dealing with the powers, functions and immunities of the President, as much as

Articles 1, 3 and 4 (e) of the Constitution. The absolute immunity of the President may conceptually be inconsistent with principles of democracy and sovereignty of the people. But it is not for a court of law to question the validity of any particular provision of the Constitution. Where the language of the Constitution is plain and unambiguous, effect has to be given to it and a court cannot cut down the scope or amplitude of such provision for the reason that notionally it cannot harmonise with an ideal of the Constitution.

The impugned election petition is in my view a proceeding against the President and is violative of Article 35 (1) of the Constitution. There is a constitutional bar to the President being made a party to an election petition. An election petition with the President as a respondent, cannot be proceeded with. In fact such an election petition cannot in law be instituted. I agree with the Election Judge that the impugned election petition cannot be sustained. The preliminary objection is fatal.

In regard to the charge relating to the making of false statements Mr. Choksy submitted that the alleged statement does not, in law constitute a false statement of fact in relation to the personal character of the petitioner and therefore does not disclose a corrupt practice within the meaning of section 58 (1) (d) of the Election Order-in-Council.

An essential requirement of a statement, for it to come within the meaning of section 58 (1) (d) of the Elections Order-in-Council, is that it must be in relation to the personal character or conduct of the candidate as distinct from a statement relating to his political or public conduct.

"The principle underlying this provision of law appears to us to be that public character or conduct of the public man or politician is public property and the risk of persons being misled regarding a candidate by a false statement relating to his public or political character or conduct is therefore slight and is outweighed by the paramount necessity of allowing free and unfettered criticism of the public or political acts of public men and politicians. Whilst on the other hand facts relating to the personal character or conduct of such men, are in the nature of things, not generally known, and a false statement relating to the personal character or conduct of the

candidate may be calculated seriously to mislead the electors to the prejudice of such candidate." *Kobbekaduwa v. J. R. Jayewardene and Others* (1).

"The false statement of fact need not be defamatory at common law, so long as it is a statement which is calculated to influence the electors, as, for instance, a statement made in a hunting country that the candidate has shot a fox or a statement made to promoters of total abstinence that the candidate has taken a glass of wine ; but it is essential that it should relate to the personal rather than the political character or conduct of the candidate. The words of the statement will be interpreted according to their real and true meaning, and not according to their literal sense. The question to be determined is what, in the circumstances, is the true meaning which the reader would place upon the statements. The true meaning will depend on the occasion of the publication, the persons publishing, the person attacked and the readers intended to be addressed." *Halsbury's Laws of England* – 4th Ed. Vol. 15, para. 790.

The Election Judge has taken the view that the sense in which the alleged false statements were understood by persons present in the meeting is irrelevant and that it is for the court to interpret the alleged statement and not for witnesses to say what they understood the statement to mean. The Election Judge held that "If to label a candidate as a communist, even if it is false, is not a reference to his personal character and conduct, I fail to see how to call a candidate a Naxalite, relates to his personal character and conduct." The Election Judge upheld the objection that the impugned statement did not in law constitute a false statement of fact in relation to the personal character or conduct of the petitioner and that therefore the petition did not disclose a corrupt practice within the meaning of section 58 (1) (d) of the Elections Order-in-Council, 1946. In my view the Election Judge is in error in holding that the sense in which the alleged statements were understood by those present at the meeting were irrelevant. As stated in the passage in Halsbury's Laws of England, cited (*supra*) the true meaning of the statement will depend inter alia on the readers intended to be addressed. Hence unless the meaning cannot be disputed and is obvious, how the impugned statement was understood by the members of the audience is relevant to determine the nature of the statement and the sense in which it was understood. The statement intended was calculated to influence the voters who were present at the meeting and hence what is meant by the term

'Naxalite' and how the term was understood by the voters present at the meeting and whether the said statement was understood by the said voters to be relating to the personal or public conduct of the petitioner has to be determined on the evidence of witnesses.

In my view it was premature for the Election Judge to have upheld this objection that the petition did not disclose a corrupt practice within the meaning of section 58 (1) (d) of the Elections Order-in-Council without having the benefit of evidence showing that these alleged statements were understood by the voters to refer to the petitioner and what is meant by the term 'Naxalite' and whether the statement relates to the personal character or conduct of the petitioner. The learned Election Judge misdirected himself in law in upholding the objection, when the meaning of 'Naxalite' was not certain. He could have ruled on that objection only after hearing evidence of what that word was understood to mean or signify.

The third objection relates to the adequacy of the affidavit filed along with the petition. Paragraph 2 of the affidavit of the petitioner states – "that the particulars of the commission of corrupt practice set out therein are made from my own personal knowledge and observation, or from personal inquiries conducted by me in order to ascertain the details of the incident referred to in the petition." The Election Judge states that the petitioner does not say in his affidavit which facts in the petition are based on personal knowledge and which of them are based on information. He however holds that the affidavit can be one based on personal knowledge or on information and belief provided that if the latter, the deponent must disclose the source of information and the grounds of his belief. He also held that the function of an affidavit is to verify and support the allegation of corrupt practice made in the petition and that an affidavit that fails to perform the function is not an affidavit in the eye of the law. The Election Judge has held that the affidavit is defective in that the deponent has not disclosed the source of information and the grounds of his belief. He concludes –

"I reject the affidavit filed by the petitioner on the ground that the petitioner has not verified and confirmed the facts stated in the petition. I upheld the objection that there was no proper affidavit supporting the allegation of corrupt practice pleaded in the petition and therefore the petition was defective."

Section 80 B of the Ceylon (Parliamentary Elections) Order-in-Council provides that –

"The petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice."

Admittedly no form has been prescribed for the affidavit to conform to.

I agree with the Election Judge that where some of the statements in the paragraph of the affidavit accompanying the election petition are based on the knowledge of the deponent and some on information received from others, the affidavit is defective. But I do not agree with the Election Judge that the petition should be dismissed on that ground of defect in the verification. The allegation of corrupt practice cannot be ignored merely on the ground that the source of information is not disclosed, when the allegation is based on information, as it is not a requirement of law that the source of information or the ground of the deponent's belief should be set out, since the form of the mandatory affidavit has not been prescribed.

I agree with Samarawickrema, J., that an election petition should not be dismissed on the ground of defective affidavit, where no form has been prescribed by law.

I uphold the Election Judge's ruling on the first preliminary objection and dismiss the election petition. There will be no order for costs.

COLIN-THOME, – I agree.

ATUKORALE, J. – I agree.

DE ALWIS, J. – I agree.

WANASUNDERA, J.

I shall now address myself to the second appeal No. 5/84. The petitioner who is an unsuccessful candidate has filed the second petition against the winning candidate, the 1st respondent, and Junius Richard Jayewardene (who is the President of the Republic) as the 2nd

respondent: The petitioner sought the avoidance of the election on the ground that the 2nd respondent, as the agent of the 1st respondent, committed the corrupt practice of making false statements of fact in relation to the personal character and conduct of the petitioner for the purpose of affecting the return of the petitioner. The ground is section 77 (c) and the petition contains three charges.

At the commencement of the hearing, three preliminary objections were taken on behalf of the 1st respondent. The 2nd respondent did not appear in court, nor was he represented. The Solicitor-General however appeared as *amicus curiae* and assisted the court in regard to the constitutional question as to the validity of joining the 2nd respondent as a party respondent. These objections are :—

- (a) The joinder of the 2nd respondent contravenes Article 35 (1) of the Constitution which grants immunity of action to the President. The petition is accordingly invalid and the court had no jurisdiction to proceed with the petition.
- (b) The affidavit is inadequate and accordingly the petitioner cannot proceed with the petition as it is not properly constituted.
- (c) The statements complained of do not in law constitute false statements of fact in relation to the personal character or conduct of the petitioner and do not fall within the provisions of section 58 (1) (d) of the Order in Council.

Grounds (b) and (c) need not detain us. We decided at the hearing that as ground (a) contains a factual element, it has in any event to be left to the election court for determination. I have already dealt with and disposed of the objections relating to ground (b) in the judgment delivered today in the connected appeal No. 4/84.

Ground (a) however constitutes the main objection and remains to be considered.

It would be useful, however, to go back to the analysis of the provisions of the Ceylon (Parliamentary Elections) Order in Council made by me in the earlier judgment. For the purpose of this analysis I have accepted almost in toto the submission of Mr. Choksy and to a great part that of Mr. Candappa as regards the dual functions vested in the election court.

The result of this analysis shows that an election petition proceeding contains within it notionally two separate kinds of inquiries wrapped in one proceeding. First, there is the proceeding against the successful candidate for the avoidance of the election, and second, the subsidiary inquiry as to whether any person has committed a corrupt or illegal practice.

I have discussed these provisions in detail in the connected judgment referred to, but would like to stress that prior to the amendment of 1970, the person involved in the subsidiary proceeding was not even required to be made a respondent to the main proceedings; but in the event evidence comes to light in the main proceedings, sufficient to establish a case against him, such person would be given an opportunity of meeting these charges at a later stage. The successful candidate shouldered the entire burden of defending his election and no complaint was made that he was in any way handicapped by the absence of the other person. The present law is that such a person has now to be made a respondent – this being merely a procedural improvement on the old law – but in my view his involvement in the proceedings in no way alters the nature of the main proceedings which is directed towards the avoidance of the election and nothing else.

The presence of the person involved in the subsidiary inquiry is not essential as a matter of substance for the determination of the election petition. His presence, which was not originally required, is now provided for by amendment and is a pure procedural measure made in the interest of such person alone and not of the successful candidate. Where the main inquiry is concerned, I do not think that in law the 2nd respondent could be regarded as a necessary party to the proceedings. He has no interest in the subject-matter of the main petition, and it is also possible for the court to make an effective order in that matter without his presence.

There are other weighty considerations for holding against the respondents on this issue. The democratic structure under which this country is administered works on the basis that the People in whom the Sovereignty is vested, rule through their lawfully elected or appointed representatives. These representatives, who act in their name and on their behalf, must bear proper credentials. They must be lawfully elected at a fair election. An allegation that a successful candidate has been improperly returned is a grave one and touches the very basis of the governmental structure of this country.

The effect of the respondents' argument for the dismissal of the whole petition is that, if a corrupt or illegal practice is committed by the President, acting in his political capacity as the agent of a successful candidate, the immunity of the President should be regarded as extending to cover the action of such candidate so as to make him immune from action, thus preventing the validity of his election being challenged, although founded on an illegality. This would place such a candidate in a special position not enjoyed by other successful candidates. Such a view appears to strike at the very roots of the democratic process that obtain in this country. If that argument is valid, then it would be possible for a party, whose majority is due solely to the fact that some of its candidates have been improperly elected to foist on this country a Cabinet and a Government, which in the eye of the law should have no legal validity.

The question about the validity of an election, therefore, is a serious matter. If we are concerned about the proper working of the Constitution and the protection of democracy in this country, the legal procedure for challenging such an election must be allowed to prevail and operate unless there are very sound and compelling reasons to the contrary. The immunity given to the President is not a blanket cover to protect the wrongful activities of other persons, who may have some indirect connection with the President. The President himself is a component of our democratic process and functions within its confines. He does not stand beyond or above it. The immunity he enjoys is a shield and meant to protect the President alone from harassment as long as he holds office. It cannot be used as a sword especially by others.

As far as the 1st respondent is concerned, he can point to no inconvenience or disadvantage which he would suffer by the absence of the 2nd respondent in the proceedings against him. The election petition for the avoidance of the election could continue to be validly constituted notwithstanding the fact that the 2nd respondent cannot be impleaded as the law cannot reach up to him. I can see no impediment to the court inquiring into the petitioner's complaint for the avoidance of the election and coming to a finding in the absence of the 2nd respondent.

The office of the President is an onerous one and a wide coverage for his acts has been claimed on his behalf. The Solicitor-General stated that this immunity was unparalleled in any part of the world and there may be some truth in this statement when we compare his position with that of many other Heads of State. But, on closer examination it does not appear to be that wide and one discerns certain limitations, some expressly indicated and others of an extraneous nature inherent in the matrix in which this immunity is embedded. This immunity, whatever its coverage and range appears to be, essentially of a functional nature and designed to ensure the smooth functioning of the office of President, for the President under the present Constitution exercises the totality of the Executive power of the State.

I would however accept the submission of both the Solicitor-General and the respondents and hold that the President cannot be impleaded by reason of the immunity contained in Article 35. While the provisions of the Elections Order in Council must be read subject to the overriding provisions of Article 35 in this regard, Article 35 cannot be held to give wider coverage than what may be required for the specific purpose and object it was intended. It does not have the effect of stifling an election petition, which is an important part of the machinery of the democratic process.

Having regard to the views expressed earlier, the Election Petition should then proceed to trial notwithstanding the absence of the 2nd respondent who falls out of the picture as a respondent due to the overriding legal operation of Article 35. As to whether any further proceedings can be taken in respect of the 2nd respondent at a later stage is not a matter on which an expression of opinion is called for now, as it is a hypothetical question. It is indeed rendered doubly academic now in view of the majority decision terminating all these proceedings.

In my view this appeal should be allowed with costs payable by the 1st respondent, and the Election Judge proceed with the hearing of the petition in the absence of the 2nd respondent.

Appeal dismissed.