

PELENDAGAMA

v.

COMMISSIONER OF ELECTIONS AND OTHERS

COURT OF APPEAL
WIGNESWARAN, J.
ELECTION PETITION 9/99
FEBRUARY 2, 2000.
MAY 5TH, 2000.
JUNE 22ND, 2000.
AUGUST 30TH, 2000.

Election Petition - Provincial Council's Election Act 2 of 1988 - S. 51(7) (11)(ii), S. 53(h), S. 58(1)(a) S. 92(1)(b), S. 95, S. 96, S. 97(1)(a), S. 115, S. 129 - Allegation that Counting Officers exercised discretion arbitrarily and maliciously - Free and fair election - Recounting of preferential votes - is it available ? - necessity to seek a declaration that the election for the entire District to be declared null and void - What is an Election?

The Petitioner was a Peoples Alliance (P/A) candidate at the Provincial Council Election for the Administrative District of Ratnapura in the Sabaragamuwa Province in the 1999 election. The Petitioner contended that the Counting Officers failed to exercise their discretion properly but exercised it arbitrarily and maliciously by not holding a proper count of the preferential votes cast to the Petitioner. It was alleged that there was no free and fair election in respect of the Petitioners candidature for election and non compliance of the provisions of S 51(7) (ii), S.53h, 58(1)a of Act 2 of 1988. The Petitioner prayed for an order to (1) Recount the preferential votes cast to the candidates of PA list (2) re-scrutinise the said preferential votes (3) declare the the Petitioner duly elected.

The 1st-4th Respondents raised preliminary objections viz: (1) that the Petition does not prima facie set out an entitlement to the relief (ii) the only relief available in law is for a declaration that the election for the entire District be declared void (2) recount of preferential votes is not among the reliefs available in law under S. 96. (3) Rule 14 of the Provincial Council Rules 1989, has not been complied with (4) failure to join all the candidates of all parties/groups is fatal.

Held :

- (1) Unless the non compliance with the principles laid down in the Act had the additional qualification of materially affecting the result (S.

92(1) (b) grounds such as non compliance or failure to perform duties enumerated in the Act would not give cause to file an Election Petition.

- (ii) Result of the Election cannot mean which person was preferred among the candidates from the same party but which party was preferred among several parties contesting the election.
- (iii) The relief claimed is to order a re-count and recounting of the preferential votes of the candidate of a particular party and a declaration in respect of the Petitioner that he ought to have been returned in preference to those already elected from his party - granting of such a relief does not seem to be contemplated under S. 96.
- (iv) The reliefs referred to in S.96 have to be understood in relation to the provisions of S.92. The latter section amplifies and explains the nature of reliefs limitedly enshrined in S.96.

Election Petition in respect of the Administrative District of Ratnapura.

F.C. Perera with Upali Ponnampereuma for Petitioner.

Ms. M. Fernando, S.S.C. with M.R. Ameen, S.C. for 1-4th Respondents
Other Respondents barring the 76th Respondent absent and unrepresented.

Cur. adv. vult.

December 13, 2000.

WIGNESWARAN, J.

The Petitioner was a People's Alliance candidate at the Provincial Council Election for the Administrative District of Ratnapura in the Sabaragamuwa Province in the 1999 Election held on 6.4.1999.

Those who were elected from the People's Alliance list at the said Election were the 57th to 67th Respondents and those not elected were the Petitioner and the 68th to 81st Respondents. The 5th to the 56th Respondents were the Counting Officers at the 52 Centres. The 4th Respondent was the Government Agent, Ratnapura who was the Returning Officer for the Election.

This action was filed on the basis that the 5th to 56th Counting Officers failed to exercise their discretion properly but exercised it arbitrarily and maliciously by not holding a proper count of the preferential votes cast to the Petitioner. It was alleged that there had been no free nor fair election in respect of the "Petitioner's candidature for election", and non-compliance *inter alia* with the provisions of Sections 51 (7), 51 (11), 53 (h) and 58 (1) (a) of the Provincial Councils Election Act No. 2 of 1988 as amended.

The Petitioner prayed for an order of this Court to

- (i) re-count the preferential votes cast to the candidates of the People's Alliance List,
- (ii) re-scrutinise the said preferential votes and to
- (iii) declare that the Petitioner was duly elected and therefore ought to have been returned as an elected candidate in preference to any one of the 57th to 67th Respondents and for
- (iv) costs.

The Agent/Attorney-at-Law for the 1st to 4th Respondents filed preliminary objections and moved this Court to dismiss the application *in limine*. This order deals with the preliminary objections which are as follows:-

- (a) that the Petition does not *prima facie* set out an entitlement to the relief (c) prayed for in the Petition *viz.*, that the Petitioner be declared duly elected in preference to any one of the 57th to 67th Respondents, for the reason that, where non-compliance with the procedure stipulated in the Provincial Councils Elections Act No. 2 of 1988 is alleged, the only relief available in law is for a declaration that the election for the entire Administrative District be declared void;

- (b) that in any event, the Petitioner is not entitled to the reliefs (a) and (b) prayed for in the Petition, viz., for a recount of the preferential votes, for the reason that, the aforesaid reliefs are not among the reliefs available in law to be prayed for as stipulated in Section 96 of the Provincial Councils Elections Act No. 2 of 1988;
- (c) that the mandatory 10 day time limit with regard to the service of notice of presentation of the Petition stipulated in Rule 14 of the Provincial Council Election Petition Rules of 1989 has not been complied with; and
- (d) that the Petitioner has failed to join all the candidates of all the political parties and independent groups that contested the election as parties to the Petition as mandated by Section 97(1) (a) of the Provincial Councils Elections Act No. 2 of 1988.

The abovesaid objections would now be examined.

Part VII of the Provincial Councils Elections Act No. 2 of 1988 deals with Election Petitions.

The reliefs that may be granted when an Election Petition is addressed to Court are set out in Section 96 which reads as follows:-

“All or any of the following reliefs to which the petitioner may be entitled may be claimed in an election petition, namely:-

- (a) a declaration that the election in respect of any administrative district is void;***
- (b) a declaration that the return of any person elected was undue;***
- (c) a declaration that any candidate was duly elected and ought to have been returned.”***

While Section 95 sets out the persons who may present an Election Petition, Section 96 limits the reliefs that may be claimed by way of an Election Petition to a declaration

- (1) that an Election was void,
- (2) that the return of any person elected was undue and
- (3) that any candidate was duly elected and therefore ought to have been returned.

The relief claimed in the present application is to order a re-count and re-scrutiny of the preferential votes of the candidates of a particular party and a declaration in respect of the Petitioner that he ought to have been returned as an elected candidate of that particular party in preference to those already elected (i.e. 57th to 67th Respondents) from the same political party.

The granting of such a relief does not seem to be contemplated in the abovesaid Section 96.

The learned Counsel for the Petitioner argued that in order to obtain "a declaration that any candidate was duly elected and ought to have been returned" as per Section 96(c) of the Act, it was necessary to point out to Court that votes at a count had been improperly accepted or rejected. He argued that a re-count and a re-scrutiny of the preferential votes became necessary with such an end in view. But the end in view is reflected in prayer (c) of the Petition which prayed for a declaration that the Petitioner was duly elected and ought to have been returned as an elected candidate in preference to any one of the 57th to 67th Respondents. In other words it is not the election and return of the Petitioner in preference to candidates from the opposing party that had been prayed for but an election and return of the Petitioner in preference to those elected from the same party.

"Election" means according to Section 129 of Act No. 2 of 1988, an election held in an Administrative District of a Province

for the purpose of electing members to the Province. The purpose of an Election therefore is to elect members to the Provincial Council. No such Election held under Act No. 2 of 1988 shall be invalid by reason of any failure to comply with the provisions of the said Act if it appeared that the Election was conducted in accordance with the principles laid down in such provisions and that such failure did not affect the result of the Election. (Vide Section 115 of the Act). Result of the Election cannot mean which person was preferred among the candidates from the same party but which party was preferred among the several parties contesting the Election. This is borne out by the provisions of the sections in Part VII of the Act which give importance to the avoidance of an election on the ground of bribery, treating or intimidation or other misconduct due to which reason or reasons Electors were prevented from voting for a recognised political party or independent group and thereby materially affected the result of the Election, (Section 92(1) (a)) or non-compliance with the provisions of the Act relating to Elections where such non-compliance affected the result of the Election (Vide Section 92(1) (b)). In other words Part VII of Act No. 2 of 1988 deals with actions whose paramount consideration was the material affecting of the result of the entire Election. The matters enumerated in the Petition filed in this case and the reliefs prayed for do not have such a goal or target in view.

Even if the Petitioner were to have had genuine grievances with regard to the matters mentioned in the Petition filed in this case, the scope and nature of actions contemplated in Part VII of Act No. 2 of 1988 do not seem to encompass such cases.

The 76th Respondent argued that provisions of Sections 51(11), 51(7), 53(h) and 58(1) (a) of the Act cast certain duties on Counting Officers and the failure on the part of such Officers to carry out those duties gave rise to a right to file an Election Petition to compel conformity.

There is no doubt that the Sections mentioned do cast upon Counting Officers certain duties such as recounting, forwarding

of written statement in terms of Section 51(7) and determination of votes in respect of parties and candidates. But the question is whether the failure on the part of Counting Officers to perform their duties could give rise to an Election Petition in terms of Part VII of Act No. 2 of 1988. It is my view that unless the non-compliance with the principles laid down in the Act had the additional qualification of materially affecting the result of the Election (Vide Section 92 (1) (b)), grounds such as non-compliance or failure to perform duties enumerated in the Act would not give cause to file an Election Petition. Thus the Petitioner must be deemed to have been not entitled to the reliefs (a) and (b) prayed for in the Petition.

What Section 96 seems to mean when setting out the nature of reliefs that may be claimed is that

- (i) either an Election must be found to be void in terms of the law or
- (ii) the choosing of a candidate at such Election unfair and therefore undue or
- (iii) that a person was wrongly not chosen at such Election and therefore must be elected and returned in terms of the law though not so done at the end of the Election. Preference votes, inter-se, as between candidates from the same party do not therefore seem to come within its purview since the Election itself was not in question. The Petitioner in this action has not challenged the Election held on 6.04.1999 to the entire Administrative District.

The reliefs referred to in Section 96 have to be understood in relation to the provisions of Section 92. The latter Section amplifies and explains the nature of reliefs limitedly enshrined in Section 96.

Section 92(1) (a) and (b) refer to the relief mentioned in Section 96 (a). But in both cases it is important to prove that either general bribery, general treating or general intimidation or other mis-conduct (Section 92 (1) (a)) or non-compliance

with the provisions and principles laid down in Act No. 2 of 1988 (Section 92(1) (b)). also had the added consequence of materially affecting the result of the Election. Thus whether “X” or “Y” was returned from a particular political party would not materially affect the result of the Election. It is only a difference in the political party which wins the Election that could materially affect the result of the Election.

Section 92(2) deals with the conduct of a person returned, who, due to his conduct (or misconduct) was unduly elected (Section 96(b)) or should have been duly elected in preference to others but not so elected (Section 96 (c)). It is to be noted that Section 92(1) deals with general misconduct while Section 92 (2) deals with misconduct by a specific candidate. Misconduct or conduct unbecoming of an Officer, by a person who acted as a Counting Officer, is not contemplated in Section 92(2). It is referred to in Section 92 (1) (b) but such conduct on the part of the Counting Officer must have the added qualification that his non-compliance with the principles laid down in the Act materially affected the result of the Election in respect of the entire Administrative District.

In this instance the Petitioner has neither prayed for a declaration that the Election to the entire Administrative District was void nor that a candidate elected had committed any of the mis-conduct enumerated in Section 92 (2) (a) to (d).

Instead, the complaint is against the Counting Officers and that too not with a view to have the Election to the entire Administrative District declared void. Clearly Sections 92 and 96 do not give the Petitioner a right to obtain the reliefs he has claimed in his petition.

In view of this finding I deem it unnecessary to examine the objections referred to in (c) and (d) of the preliminary objections raised.

I uphold the preliminary objections (a) and (b) raised by the Senior State Counsel on behalf of the 1st to 4th Respondents

and dismiss the Petition. The Petitioner shall pay the taxed costs of this application to the 1st to 4th Respondents.

Preliminary objections upheld.

Election petition dismissed.