

**SARATH FONSEKA V. MAHINDA RAJAPAKSE AND OTHERS**

SUPREME COURT

J. A. N. DE SILVA, C.J.,  
DR. SHIRANI A. BANDARANAYAKE, J.,  
SRIPAVAN, J.,  
RATNAYAKE, J., AND  
IMAM, J.

S. C. PRESIDENTIAL ELECTION PETITION NO. 1/2010  
SEPTEMBER 13<sup>TH</sup>, 14<sup>TH</sup> AND 15<sup>TH</sup>, 2010

***Election Petition – Presidential Election – Preliminary Objections – Dismissal in limine – Prayer to the petition misconceived in law – Failure to join necessary parties – Failure to furnish material facts in terms of Section 96(c) of the Presidential Elections Act, No. 15 of 1981 – Petition does not conform to the requirement set out in Section 96(d) of Act, No. 15 of 1981 – Petition does not set forth full particulars of any corruption or malpractices the petitioner had alleged – Jurisdiction to hear a Presidential Election petition – Article 130 of the Constitution – Section 94 of the Presidential Election Act – Not sought a declaration that the election was void. Maintainability, of the Petition?***

The Petitioner, one of the unsuccessful candidates at the Presidential Election held in 2010, sought to have the election of the candidate, the 1<sup>st</sup> Respondent declared null and void.

When the Petition was taken up for hearing, the several Respondents informed Court that they had already filed preliminary objections to the maintainability of the Petition. The Petitioner was granted permission to file the Petitioner's Statement of Objections at least one week prior to the hearing of the preliminary objections raised by the Respondents.

When the Petition was taken up again, it was observed that no Statement of Objections was filed by the Petitioner to the preliminary objections raised by the Respondents and therefore the Supreme Court proceeded to hear the preliminary objections raised by the Respondents. Oral

submissions were accordingly made by the Counsel in respect of the following preliminary objections;

- (a) The reliefs sought in the prayer to the Petition are misconceived in law and cannot be granted by Court,
- (b) The Petitioner has failed to join necessary parties as Respondents,
- (c) The Petitioner has failed to furnish material facts in terms of Section 96(c) of the Presidential Elections Act, No. 15 of 1981, and
- (d) The Petition does not conform to the requirements of Section 96(d) of Act No. 15 of 1981, in that, it does not set forth full particulars of any corrupt or malpractices the Petitioner has alleged.

It was also brought to the notice of Court by the learned President's Counsel for the 1<sup>st</sup> Respondent that the Petitioner has not sought a declaration that the election was void as provided in Section 94(a) of the Act No. 15 of 1981 [Act].

**Held**

- (1) The Supreme Court derives its jurisdiction to hear a Presidential Election Petition in terms of Article 130 of the Constitution and not from Section 91 of the Act.

Per J.A.N. De Silva, C.J. -

"It is well settled that the language of a statute constitutes the depository or reservoir of the legislative intent and the duty of the Court is to interpret the words the legislature has used and not travel outside on a voyage of discovery. Every word of a statute should be construed with reference to the context in which it has been enacted."

Section 94 is clear, unambiguous and specifies the only reliefs that may be claimed by the Petitioner in an Election Petition. The Petitioner cannot ask for any other reliefs other than those specified in Section 94.

Where the Act makes general provisions in terms of Section 91 for the avoidance of election on an election Petition and makes a specific provision with respect to the reliefs which may be claimed,

the latter must prevail over the general provision in relation to the different reliefs that a Petitioner could claim.

Section 94(a) is a stand alone section and must be interpreted strictly in accordance with its plain and natural meaning. Hence the relief sought by the Petitioner in paragraph (a) of the prayer to the Petition cannot be granted.

Though the Petitioner has pleaded general intimidation, general treating, general bribery and non-compliance with the provisions under Section 91 (a) and 91 (b) of the Act in paragraph 7 of the Petition, the Petitioner has failed to seek a declaration that the election was void. In these circumstances, in the absence of a specific relief in terms of Section 94(a), the Supreme Court is precluded from granting a declaration that the election was void.

- (2) Section 95 (1) (b) mandates that the Petitioner should join as Respondents to his election Petition, any other candidate or person against whom allegations of any corrupt or illegal practice are made in the Petition. By the use of the word “shall”, Section 95 is couched in mandatory terms, so that strict compliance with every letter of the law is necessary.

The failure to add the Sri Lanka Rupavahini Corporation, Sri Lanka Broadcasting Corporation, “Lakhanda” and the Independent Television Network as parties to the Petition is a fundamental flaw and amounts to non-compliance with Section 95(1)(b) of the Act.

- (3) When there are violations as alleged by the Petitioner and the said election was not free and fair, all what the Court could do is to declare the election void. As the Petitioner has not prayed for such relief, the Court cannot, in law, grant a declaration that the Petitioner be duly elected as the President of Sri Lanka.
- (4) A scrutiny of ballots in terms of Section 94 of the Act is possible only on the ground of a claim made by an unsuccessful candidate who had obtained “a majority of the lawful votes” and not “majority of the votes”.
- (5) Quoting the relevant sections is not a substitute for the mandatory requirement contained in Section 96 (c) of the Act to plead material facts on which the Petitioner relies.

- (6) Failure to file proper pleadings is fatal to an Election Petition and no amendments of the pleadings are permissible at the stage when the matter is taken up for Argument. If a proper Petition is before Court, the Supreme Court may, upon such terms as to costs or otherwise as the Court may deem fit allow the particulars of any corrupt practice specified in the Petition to be amended or amplified in terms of Section 97 of the Act. However, if the pleadings do not disclose proper reliefs worthy of being tried by Court, pleadings are liable to be struck off and the Election Petition is liable to be dismissed *in limine*.

**Cases referred to:**

1. *Nanayakkara v. Kiriella* – (1985) 2 Sri L.R. 391
2. *Gamini Athukorale v. Chandrika Bandaranayake Cumaranatunga* – (2001) 1 Sri L.R. 60
3. *Kobbekaduwa v. Jayawardena* – (1983) 1 Sri L.R. 416
4. *Bandaranaike v. Premadasa* – (1989) 1 Sri L.R. 240
5. *Wijewardene v. Senanayake* – 80 CLW 1
6. *Dhartipakar Madanlal Agarwal v. Shri Rajiv Gandhi* – (1987) 3 SCR 369
7. *Tamworth* – (1861) 1 O & H 82
8. *Udhav Singh v. Madhav Rao Scindia* – 1977 1 Supreme Court Case
9. *Hari Shanker Jain v. Sonia Gandhi* – (AIR) 2001 SC 3689
10. *Samant N. Balakrishna etc vs George Fernandez and others* – (1869) 3 SCR 603.
11. *Jitender Bahdur Singh vs. Krishna Behari* – (1969) 2 SCC 433.
12. *V. S. Achuthanandam vs. P. J. Francis and another* – (AIR) 1999 3 SCC 737
13. *Jayasinghe v. Jayakody and others* – (1985) 2 Sri L.R. 77

Presidential Election – Preliminary objections

*Upul Jayasuriya with Sandamal Rajapakse, Madubshana Ariyadasa and Sehan Kumarsinghe for the Petitioner*

*D.S. Wijesinghe, P.C. with Nihal Jayamanne, P. C. S.S. Sahabandu P.C., D.P. Mendis P.C., Palitha Kamarasinghe, P.C., Jayatissa de Costa, P.C., Upali Senaratne, Sagara Kariyawasam, M.U.M. Ali Sabry, Kaushalya Molligoda, Chamila Jalagoda and Isuru Somadasa for the 1<sup>st</sup> Respondent.*

*Nihal Jayammanne, P.C., with W. Dayaratne, P.C., Chadana Liyanapatabendi, Ananda Goonathilake, Champani Padmasekera, Ajith Munasinghe, Ms. Nurani Amarasinghe, Ms. Uditha Kollure, Dilan de Silva, Ms. Mokshini Jayamanne, Shanthie Herath, Premachandra Epa and Sarathchandra Liyanage for the 6<sup>th</sup> Respondent.*

*S.S. Sahabandu, P.C., with Dr. Jayatissa de Costa, P.C., Jayantha Weerasinghe, P.C., Sankaya Gamage, Saman de Silva, Senerath Jayasundara, Hariguptha Rohanadeera, Saliya Mathew and Upali Samaraweera for the 17<sup>th</sup> Respondent.*

*Palitha Kumarasinghe, P.C., with Sunil Abeyratne, Mayura Gunawansa, Viraj Premasiri, Chinthaka Mendis and Viran Fernando for the 18<sup>th</sup> Respondent.*

*Manohara de Silva, P.C., with Kuvera de Soysa, Palitha Gamage, Ranjith Caldera, Pathmapriya Ranawaka Rasanga Harischandra and Lalith Gunaratne for the 20<sup>th</sup> Respondent.*

*Gamini Marapana, P.C., with Nihal Jayawardena, B. Manawadu, K. Liyanagamage, Manoj Gamage, Manjula Wellage, A. Ariyapperuma, Tissa Gunawardena, Naveen Marapana and Rohana Deshapriya for the 23<sup>rd</sup> Respondent.*

*Kushan de Alwis with Kaushalya Nawaratne and Chamath Fernando for the 24<sup>th</sup> Respondent.*

*Priyantha Jayawardene with Rasika Balasuriya, Shan Senanayake, Ms. Sumana Ariyadasa and Priyani Perera for the 25<sup>th</sup> Respondent.*

*S.L. Gunasekara with J.M. Wijayabandara, Lalith Abeysiriwardene, Ajith Prasanna, Ruwan Udawela and Akalanka Ukwatte for the 26<sup>th</sup> Respondent.*

*W.P.G. Dep P.C., Solicitor General with Ms. Indika Demuni de Silva, D.S.G., A.J.M.D. Nawaz, D.S.G. and M. Gopallawa, S.S.C. for the 22<sup>nd</sup> Respondent.*

October 29<sup>th</sup> 2010

**J.A.N. DE SILVA, CJ**

When this petition was taken up on 5<sup>th</sup> July 2010, several Counsel appearing for the 1<sup>st</sup>, 6<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 20<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup> and 26<sup>th</sup> Respondents informed Court that they have already filed preliminary objections to the maintainability of the petition. Learned Counsel for the petitioner was granted permission to file petitioner's statement of objections at least one week prior to the hearing of the said preliminary objections. The Court fixed 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> September 2010 for the hearing of the said preliminary objections.

When the petition was taken up again on 13<sup>th</sup> September 2010, it was observed that no statement of objections were filed by the petitioner. Learned Counsel for the petitioner informed Court that the petitioner has only filed a motion dated 13<sup>th</sup> September 2010 together with an affidavit of Mr. Vijitha Asoka Samararatne, dated 12<sup>th</sup> September 2010 and two registered postal article receipts marked as **Z1** and **Z2**. As no objections were filed by the petitioner to the preliminary objections raised by several Counsel for the Respondents, the Court proceeded to hear the said preliminary objections raised by the Respondents. Oral submissions were made by the Counsel in respect of the following preliminary objections:

- (a) The reliefs sought in the prayer to the petition are misconceived in law and cannot be granted by Court;
- (b) The petitioner has failed to join necessary parties as Respondents;
- (c) The petitioner has failed to furnish material facts in terms of Section 96(c) of the Presidential Elections Act No. 15 of 1981; and,

- (d) The petition does not conform to the requirements of Section 96(d) of Act No. 15 of 1981, in that, it does not set forth full particulars of any corrupt or malpractices, the petitioner has alleged.

Learned President's Counsel for the 1<sup>st</sup> Respondent brought to the notice of Court that the petitioner has not sought a declaration that the election was void as provided in Section 94(a) of Act No. 15 of 1981 (hereinafter referred to as the "Act").

Section 94 of the Act provided all or any of the reliefs that could be claimed in an election petition:

- (a) A declaration that the election is void;
- (b) A declaration that the return of the person elected was undue;
- (c) A declaration that any candidate was duly elected and ought to have been returned;
- (d) Where the office of the President is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny.

Counsel for the Petitioner and the Counsel for the 10<sup>th</sup> Respondent sought to argue that Section 91 of the Act must be read with Section 94 in order to interpret the reliefs that could be claimed by the petitioner in terms of Section 94(a). Both Counsel submitted that the Court assumed jurisdiction to declare the election of the Office of the President void by virtue of the provisions contained in Section 91.

I regret that I am unable to agree with this submission. The Supreme Court derives its jurisdiction to hear a

Presidential Election petition in terms of Article 130 of the Constitution and not from Section 91 of the Act. It is well settled that the language of a statute constitutes the depository or reservoir of the legislative intent and the duty of the Court is to interpret the words the legislature has used and not to travel outside on a voyage of discovery. Every word of a statute should be construed with reference to the context in which it has been enacted. The marginal note to Section 94 also gives an indication and furnishes a clue to the meaning and purpose of the said Section. Thus, in my view, Section 94 is clear, unambiguous and specifies the only reliefs that may be claimed by the petitioner in an Election Petition. The petitioner cannot ask for any other reliefs other than those specified in Section 94 in this petition, the petitioner has chosen not to ask for the relief specified in Section 94(a). However, the Petitioner has asked for the following relief in paragraph (a) of the prayer to the petition, not specified in Section 94:

- (a) That Your Lordships' Court be pleased to determine and declare that the election of the 1<sup>st</sup> Respondent above named void.

Where the Act makes general provision in terms of Section 91 for the avoidance of election on an election petition and makes a specific provision with respect to the reliefs which may be claimed, the latter must prevail over the general provision in relation to the different reliefs that a petitioner could claim. In the case of *Nanayakkara vs. Kiriella*<sup>(1)</sup>, Thambiah, J. at 411, made the following observations regarding the proceedings in an election petition.



*“Election petition proceedings are purely statutory proceedings, unknown to the common law and, therefore, considerations of equity which guide Courts in dealing with matters of civil rights and their remedies will have no place in dealing with election petitions. The statutory requirements of Election Law must be strictly observed.”*

Considering the observations made by Thambiah, J. I am unable to agree with the Learned Counsel for the petitioner and the Learned Counsel for the 10<sup>th</sup> Respondent that the relief sought to in Section 94(a) must be read with Section 91 and a liberal interpretation be given to Section 94(a). I am of the view that Section 94(a) is a stand alone section and must be interpreted strictly in accordance with its plain and natural meaning. Thus, the Court cannot grant the relief sought by the petitioner in paragraph (a) of the prayer to the petition.

In the case of *Gamini Athukorala vs. Chandrika Bandaranaike Cumaratunga*<sup>(2)</sup>, **S.N. Silva, C.J.** at 68 succinctly states the legal effects of Sections 91 and 96 as follows:

*“It is to be noted that grounds (a) and (b) of Section 91 are of a general nature with a concomitant impact on the result of the election. If these grounds are established, the election would be declared void. Whereas, grounds (c), (d), (e), and (f), are what may be described as “candidate specific grounds,” where a particular action of a candidate or his agent or any disqualification of the candidate is drawn in issue. Unlike in the case of grounds (a) and (b) the entire election itself would not be drawn in issue in relation to the latter set of grounds. If any of these grounds are established in relation to the particular candidate who is elected, the return of the person so elected would be*

*declared undue. Section 96, which specifies the contents of an election petition, reads as follows:*

*“An Election Petition –*

- (a) shall state the right of the Petitioner to petition within Section 93;*
- (b) shall state the holding and result of the election;*
- (c) shall contain a concise statement of the material fact on which the Petitioner relies;*
- (d) shall set forth full particulars of any corrupt or illegal practice that the Petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice; and shall be accompanied by an affidavit in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice;*
- (e) Shall conclude with a prayer as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or as the case may be, and shall be signed by all the Petitioners;*

*Provided, however, that nothing in the preceding provisions of this section shall be deemed or construed to require evidence to be stated in the petition.”*

*Paragraphs (a), (b), (c) would apply in relation to any Petition, whatever be the ground of avoidance that is*

*relied on. Whereas paragraph (d) would apply in relation to the specific grounds of corrupt of illegal practice as stated in Section 91(c)."*

Having pleaded general intimidation, general treating, general bribery and non-compliance with the provisions under Section 91 (a) and 91(b) of the Act in paragraph 7 of the petition, the petitioner has failed to seek a declaration that the election was void. Thus I hold, even if the incidents referred to are proved by the petitioner, the absence of a specific relief in terms of Section 94(a), precludes this Court from granting a declaration that the election was void.

The second relief claimed by the petitioner in terms of paragraph (b) of the prayer to the petition reads thus:

*"(b) That Your Lordship's Court be pleased to determine and declare that the return of the 1<sup>st</sup> Respondent was undue."*

In order to succeed to the grant of this relief, the petitioner must prove the corrupt practices referred to in paragraphs 14, 15 and 16 of the petition. Further, Section 95(1) (b) mandates that the petitioner should join as Respondents to his election petition, any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition.

Learned President's Counsel for the 1<sup>st</sup> Respondent submitted to Court that the petition does not comply with the mandatory provision of Section 95(1)(b) of the Act, in that, the petitioner has failed to join as Respondents to the petition, Sri Lanka Rupavahini Corporation, Sri Lanka Broadcasting Corporation, "Lakhanda" and the Independent Television

Network. The Learned Counsel drew the attention of Court to paragraph 16(c) of the petition which reads as follows:

“(c) Commencing approximately at 1 p.m. on the day of the Election, 26<sup>th</sup> January 2010, Upali Sarath Kongahage, Razik Zarook, Kalinga Indatissa, Hudson Samarasinghe and Wimal Weerawansa (the 20<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup> & 26<sup>th</sup> Respondents hereto) made false statements, that the petitioner was not qualified to be elected as President of Sri Lanka, and that even if the petitioner were elected as President he will be disqualified from holding such office. These false statements were broadcast without break until the close of poll at 4 p.m. by Sri Lanka Rupavahini Corporation, Sri Lanka Broadcasting Corporation, Lakhanda and the Independent Television Network. These false statements repeatedly broadcast on the above media had a deterrent effect preventing voters supporting the petitioner from exercising their franchise. The said Upali Sarath Kongahage, Razik Zarook, Kalinga Indatissa, Hudson Samarasinghe & Wimal Weerawansa were supporters of the 1<sup>st</sup> Respondent, and had been actively engaged in speaking and working to promote the candidacy of the 1<sup>st</sup> Respondent throughout the period from the nomination to the close of the poll. The said institutions which broadcast the said false statements were owned and/or controlled by the State and therefore by the 1<sup>st</sup> Respondent, and were agents of the 1<sup>st</sup> Respondent. The said false statements were made and broadcast with the knowledge and consent of the 1<sup>st</sup> Respondent.”  
(emphasis added)

Thus, the petitioner claims that the aforesaid institutions which broadcast false statements were agents of the first Respondent. Further, in paragraph 22 of the petition, the petitioner alleges that the said agents of the said Respondent are guilty of the corrupt practice of making false statements. It is on this basis, the learned President's Counsel argued that agents referred to in paragraphs 16(c) and 22 should have been made as Respondents in terms of Section 95(1) (b) of the Act. Counsel also submitted that the failure to join necessary parties as Respondents was a fatal irregularity and that the petition be dismissed in limine.

By the use of the word "shall", Section 95 is couched in mandatory terms, so that strict compliance with every letter of the law is necessary. The non-observance of Section 91(1)(b) and a departure from it is fatal to an election proceedings. In this regard, it may be relevant to consider the observation made by Sharvananda, J. in the case of *Kobbekaduwa vs. Jayewardene*,<sup>(3)</sup> at 443.

"In this case the petitioner has filed one petition challenging the 1<sup>st</sup> respondent's election on the grounds that the respondent had committed corrupt and illegal practices and has furnished security on the basis of one petition. The petition has to stand or fall as a single petition and not as an aggregate of petitions depending on the number of grounds of challenge. In the circumstance it is not open to the petitioner to seek to salvage his petition by stating that the failure to join the United National Party as a Respondent against whom the allegation of illegal practice was made avoids only that charge but that the petition is good for the purpose of maintaining the other charges preferred in it. In my view, this course of action is

not available to the petitioner; for the vice of the omission to join the United National Party to his election petition which included an allegation of illegal practice against the Party affects the entire petition and renders the entire petition as a nullity. Had there been two petitions, one incorporating the charges of corrupt practice and the other the charge of illegal practice the position would have been different; the petition relating to the corrupt practice would have been saved. But, we have only one petition and that petition has not complied with the imperative requirements of section 95.”

Thus, in *Kobbekaduwa’s* case, the Court held that although the United National Party was an unincorporated body it should have been made a respondent in compliance with the imperative provisions of Section 95(1) (b) of the Act. It was also held that the provisions of Section 95 are mandatory and failure to comply with them renders the whole petition a nullity and not merely a particular part of it invalid.

Further, in the case of *Bandaranaike vs. Premadasa*.<sup>(4)</sup>, Ranasinghe, C.J., at 253 noted that –

*Election petitions have been dismissed for non-joinder of necessary parties though in both the 1946 Order in Council and in Act No. 15 of 1981, the consequences of the failure to comply with mandatory provisions regarding joinder has not been stated [See Wijewardene vs. Senanayake<sup>(5)</sup>: Kobbekaduwa vs. Jayewardene]. (supra)*

Ranasinghe, C.J., took the view that non-compliance with the mandatory provisions for non-joinder of necessary parties and non-service of the notice of presentation of the petition are fundamental and fatal defects which render

the whole petition bad and a nullity. Thus, at page 255, the Court took the view that it has the power to reject an election petition in limine, if there is a fundamental defect in an election petition arising out of non-compliance with a mandatory provision.

Though the Act did not define the term “person”, Section 2(c) of the Interpretation Ordinance defines the term “person” s including “any body of persons corporate or unincorporated”. Out of the media institutions against whom the allegations of committing the corrupt practice of making/ broadcasting a false statement has been made, it is observed that Sri Lanka Rupavahini Corporation and the Sri Lanka Broadcasting Corporation are incorporated bodies in terms of Section 2(2) of the Sri Lanka Rupavahini Corporation and Section 6 (2) of the Sri Lanka Rupavahini Corporation Act No. 6 of 1982 respectively. The Independent Television Network is a corporate entity incorporated in terms of the Companies Act and Lakhanda is a unincorporated body amalgamated to Independent Television Network. Accordingly, I hold that the failure to add the aforesaid institutions as parties to this petition is a fundamental flaw and amounts to a non-compliance with Section 95(1)(b) of the Act. Thus, the 1<sup>st</sup> Respondent is entitled to succeed in his preliminary objection that the petition should be dismissed in limine.

The third relief sought by the petitioner in terms of paragraph (c) of the prayer to the petition reads as follows:

*(c) “That Your Lordships’ Court be pleased to determine and declare that the petitioner was duly elected and ought to have been returned as the President of Sri Lanka.”*

Having pleaded general intimidation, general treating, misconduct, non-compliance with the provisions of the

Act and corrupt practices in paragraph 7 of the petition, in paragraph 17 the petitioner states that the majority of the electors were or may have been prevented from electing the candidate whom they preferred. Further, in paragraph 18 of the petition, the petitioner states that in view of the cumulative effect of the facts and circumstances set out in paragraphs 8 – 16, the said election was not free and fair. In view of the said averments, it is not possible for this Court to declare that the petitioner was duly elected and ought to have been returned as the President of Sri Lanka. It appears that the relief sought in paragraph (c) of the prayer to the petition is inconsistent with the several averments referred to in the petition. When there are violations as alleged by the petitioner and the said election was not free and fair, all what the Court could do is to declare that election void. However the petitioner has not prayed for such a relief and the Court cannot, in law, grant a declaration that the petitioner be duly elected as the President of Sri Lanka. Thus, I hold that the petitioner cannot succeed in obtaining the relief sought in paragraph (c) of the prayer to the petition.

The petitioner claims the following relief in paragraph (d) of the prayer to the petition:

*“(d) That Your Lordships’ Court be pleased to order a scrutiny of all the ballots cast at the said election held on 26<sup>th</sup> January 2010 to be carried out by the 22<sup>nd</sup> respondent and his officials in the presence of the petitioner and 1<sup>st</sup> to 21<sup>st</sup> Respondents and/of their authorized representatives.”*

Upon the careful perusal of Section 94(d), it would appear that a scrutiny is possible only on the ground of a claim made



by an unsuccessful candidate who had obtained a majority of **“lawful votes”**. (emphasis added).

Nowhere in the petition, the petitioner claims to have obtained a majority of lawful votes. The petitioner in paragraph 26 of the petition only avers that in view of the facts and circumstances set out in paragraphs 8 – 16 (viz., general intimidation, general treating, general bribery, false statements which constitute misconduct, non – compliance with the provisions of the Act, corrupt practice, etc.) he had obtained a majority of the votes and therefore entitled to a scrutiny of the ballots. What is required for a scrutiny of the ballots in terms of Section 94 of the Act was **“a majority of the lawful votes”** and not **“a majority of the votes”** Hence, the petitioner does not become entitled to the relief sought in paragraph (d) of the prayer to the petition. (emphasis added).

The Learned President’s Counsel for the 1<sup>st</sup> Respondent also raised a preliminary objection on the failure to comply with Section 96(c).

Section 96 (c) stipulates that

“An Election Petition shall contain a concise statement of the material facts on which the petitioner relies.”

I have already dealt with the issues where the Petitioner has pleaded “general grounds” of avoidance but not sought relief by way of avoidance of the election. Accordingly it would be necessary only to deal with what was referred to as “candidate specific grounds” for avoidance. Under this area, the Petitioner has focused on corrupt practices allegedly committed by the 1<sup>st</sup> Respondent which he claims, fall within Sec. 91 (c) of the Act.

In India there is an identical provision to Section 96(c) of the Act, in the Indian Representation of the Peoples' Act of 1951. Hence, it would be relevant to consider Indian Authorities in dealing with this objection.

The Indian Supreme Court has applied a very strict standard when considering the pleadings relating to corrupt practices in respect of the identical provision in the said Indian Representation of the Peoples' Act. In the case of *Dhartipakar Madanlal Agarwal vs. Shri Rajiv Ghandi*<sup>(6)</sup> it is stated "Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid fishing and roving inquiry. It is therefore necessary for the Court to scrutinize the pleadings relating to corrupt practice in a strict manner."

In the case of *Gamini Athukorale vs. Chandrika Bandaranaike Cumaratunge* (*supra*) the test to be applied to determine whether the required material facts had been correctly pleaded was laid down in the following manner ". . . . The test required to be answered is whether the Court could have given a direct verdict in favour of the election petition in case the returned candidate has not appeared to oppose the election petition, on the basis of the facts pleaded in the petition." Accordingly, the pleadings should contain sufficient material that could permit the Court to give the decision in favour of the Petitioner if the returned candidate does not appear and oppose.

The Petitioner has averred treating, bribery and false statements as corrupt and illegal practices which grounds fall within Section 91(C) of the Act. The provisions in respect of corrupt practices are laid down from Section 76 to 80 of the said Act.

When it comes to dealing with the corrupt practice of treating and bribery it has to be kept in mind that the 1<sup>st</sup> Respondent was the Executive President on the material dates referred to in the petition. Accordingly, his official position requires him to have meetings with various groups of people in the performance of his duty. Therefore, it would be necessary for the Petitioner to state material facts which would show that these meetings were at least beyond his performance of official functions.

Sir Hugh Fraser in *The Law of Parliamentary Election and Election Petitions*, 3<sup>rd</sup> Edition at 108 states thus:-

“Any act of treating tending to interfere with the free exercise of the franchise was always considered a corrupt and illegal act at common law. But it has never been considered necessarily a corrupt thing for persons interested in particular subjects to invite other persons to a discussion relating to the subject, even though some entertainment may be provided. It would, we think, be to impose restrictions upon the advocacy of many public questions which the Legislature never intended to be imposed, if it were to be held that a temperance meeting or a meeting to advocate the admission of women to the franchise, or a meeting for the disestablishment of the Church in Wales, at which tea or other refreshments were provided, was to be considered as a corrupt act,

simply because the effect of the meeting might be to give force and strength to an agitation in favour of a political measure to carry out the views of the promoters of the meeting.”

“When that eating and drinking take the form of enticing people for the purpose of inducing them to change their minds, and to vote for the party to which they do not belong, then it becomes corrupt, and is forbidden by the statute. Until that arrives, the mere fact of eating and drinking, even with the connection which this supper had with politics, is not sufficient to make out treating”.

In the above treaties, Fraser has also cited a passage from Willes J. in *Tamworth*<sup>(7)</sup> as follows:-

“Treating to be corrupt, must be treating under circumstances and in a manner that the person who treated used meat or drink with a corrupt mind, that is, with a view to induce people by the pampering of their appetite to vote or abstain from voting, and in so doing to act otherwise than they would have done without the inducement of meat or drink. It is not the law that eating and drinking are to cease during an election.” (emphasis added)

Averments in the petition in respect of the corrupt practice of treating is given in paragraph 14 of the petition. Names of various associations/ groups/ professional bodies have been given and the dates and the venues have also been given. But significantly the names of the persons who participated have not been given. Participants are described as “Artists”, “Ayurveda Physicians,” “Graduates,” “Dharma School teachers” etc. No facts are stated or material given to establish that these meetings went beyond the official functions of the 1<sup>st</sup>

Respondent who was the Executive President at the relevant time.

Applicable provisions of the Act clearly and expressly state that these acts have to be done with a “corrupt” intention. There was not even an express averment in the petition to this effect.

Averments in respect of the corrupt practice of bribery is given in paragraph 15 of the Petition. Similar deficiencies as stated in respect of the corrupt practice of treating could be seen in these pleadings. It is observed that even in these pleadings there is no express averment of the corrupt intention. Pleadings are also insufficient for the Court to arrive at an inference of a corrupt intention, more so in the context of the fact that the 1<sup>st</sup> Respondent was performing the function of the Executive President at the relevant time.

Facts relating to the corrupt practice of making false statements are contained in paragraph 16 of the petition. These averments do not give the exact words used in the alleged false statements supposed to have been made by the 1<sup>st</sup> Respondent or on his behalf by the Respondents referred to. In respect of the “fake document” referred to in paragraph 16 (a) and (b) of the petition at least a copy has not been produced by the Petitioner.

As stated even the Indian Supreme Court has emphasized the necessity of the allegations not being vague. (*Dhartipakar Madanlal Agarwal vs. Shri Rajiv Ghandi (supra)*).

The Learned President’s Counsel for the 1<sup>st</sup> Respondent in his submissions drew the attention of Court to many local and Indian cases to show that false statements made in

respect of the candidates public conduct and character as opposed to his personal conduct and character do not fall into the category of corrupt practice. He took up the position that the statements referred to do not touch on his personal conduct and personal character. In my view, due to the basic deficiencies in the pleadings in respect of the allegation of false statements it is not necessary for this Court to consider or decide on these aspects.

The consequences of non compliance was dealt with in *Kobbekaduwa vs. Jayawardena (supra)* in the following manner:

“Material facts are those which go to make out the Petitioner’s case against the Respondent. The word ‘material’ means necessary for the purpose of formulating the charge and if any one material fact is omitted statement of claim is bad and liable to be struck out.”

In the case of *Udhav Singh vs. Madhav Rao Scindia*<sup>(8)</sup> the Indian Supreme Court held,

“. . . In short all those facts which are essential to cloth the petitioner with a complete cause of action are “material facts” which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of Section 83(1) (a)”.

During the hearing of the case the counsel for the petitioner submitted that the relevant sections of the Act have been expressly quoted and pleaded in the petition and accordingly there is sufficient compliance with the requirements of section 96(c). In this regard, I would like to cite the following quotation from the Indian Supreme Court in the case of *Hari Shanker Jain vs. Sonia Gandhi*<sup>(9)</sup>.

“Material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908. The expression “cause of action” has been compendiously defined to mean every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet (See *Samant N Balakrishna etc. vs. George Fernandez and others*<sup>(10)</sup> etc. – (1969) 3 SCR 603, *Jitender Bahadur Singh vs. Krishna Behari*<sup>(11)</sup>(1969) 2 SCC 433.) Merely quoting the words of the section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In *V.S. Achuthanandam vs. P.J. Francis and another*<sup>(12)</sup> (1999 3 SCC 737) this court had held on conspectus of a series of decisions of this court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead material fact is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time limit prescribed for filing the election petition.” (Emphasis added)

Thus, quoting the relevant sections is not a substitute for the mandatory requirement contained in section 96(c).

Due to the above facts I hold that the election petition does not comply with the requirements contained in Section 96(c) of the Presidential Elections Act. Learned Counsel for the 24<sup>th</sup> Respondent submitted that no proper affidavit had been filed by the Petitioner to comply with the mandatory requirements contained in Section 96(d) of the Act.

Section 96 or any other provision of the Act do not prescribe the form of the affidavit.

Paragraph 1 of the affidavit sworn by the Petitioner himself states as follows:- I am affirmant hereto and the petitioner above named. I affirm to this affidavit from facts within my personal knowledge and obtained by me from the supporters of the New Democratic Front and the other political parties who supported me at the election held on 26<sup>th</sup> January 2010 who were connected with me and/or had personal knowledge of the several acts and incidents on which relief is prayed for by me in the election petition.”

Based on the above statement and the contents of the affidavit the Respondents allege that the affidavit is based on “hearsay” and accordingly contains facts which are not within the affirmant’s personal knowledge but obtained from elsewhere. The Petitioner could have filed affidavits “from supporters of the New Democratic Front and other political parties” referred to in the 1<sup>st</sup> paragraph to his affidavit who may have personally witnessed the events referred to in the affidavit.

During the course of the submissions the Counsel for the Petitioner referred to the wording of the section which speaks of “an affidavit” and submitted that he was restricted to filing one affidavit. But the Counsel for the Respondents drew the attention of Court to Section 2 of the Interpretation Ordinance



where it states “. . . . words in the singular number shall include the plural and vice versa”.

*Jayasinghe vs. Jayakody & others*<sup>(10)</sup> is a case where the election of a Member of Parliament was challenged under the provisions of the Ceylon Parliamentary Election Order in Council 1946 as amended by Act 9 of 1970. Section 80 of the Ceylon Parliamentary Election Order in Council also has a similar provision in respect of an affidavit in the following manner.

“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.”

In paragraph 2 of the affidavit filed by the Petitioner in *Jayasinghe vs. Jayakody*, (*supra*) it is stated as follows:-

“That the averments of facts set out in my petition and the particulars of the commission of corrupt practice set out therein are made from my 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.”

Even in *Jayasinghe vs. Jayakody* (*supra*), the Petitioner did not say in his affidavit which facts in the petition are based on personal knowledge and which of them are based on information. In that case the Election Judge held that the affidavit can be based on personal knowledge or on information and belief provided that in the latter the deponent must disclose the source of information and the grounds of his belief. The Election Judge rejects the affidavit in the said case due to the above reason in the following manner. “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 uphold the objection that there was no proper affidavit supporting the allegation of corrupt practice pleaded in the petition and therefore the Petition was defective.” But in the appeal to the Supreme Court Sharvananda CJ. held as follows:-

“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’ belief should be set out, since the form of the mandatory affidavit has not been prescribed. In my view the Election Judge was in error in upholding this objection regarding the affidavit.

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

Accordingly Sharvananda C.J. held that the affidavit is defective but did not dismiss the election petition on that ground alone.

In the matter before us, the Petitioner has obtained most of the facts in the affidavit “from the supporters of the New

Democratic Front and other political parties who supported” the Petitioner at the election. The name of the supporters or at least the name of the political parties from whom the information was obtained have not been disclosed. In the circumstances, on the same reasoning of Sharvananda CJ in the case of *Jayasinghe vs. Jayakody (Supra)*, I do not dismiss the election petition on this ground alone but hold that the affidavit filed in this case is defective.

The totality of the circumstances referred to above establish defects in the pleadings of the petitioner. It is the duty of the Court to examine the petition and make a decision to reject it if it is misconceived in law. Failure to file proper pleadings, is fatal to an election petition and no amendments of the pleadings are permissible at this stage. If a proper petition had been filed, this Court may, upon such terms as to costs or otherwise as the Court may deem fit allow the particulars of any corrupt practice specified in the petition to be amended or amplified in terms of Section 97 of the Act. However, if the pleadings, do not disclose proper reliefs worth to be tried by Court, the pleadings are liable to be struck off and the election petition is liable to be dismissed in limine.

For the reasons set out above I uphold the preliminary objections raised by the respondents and dismiss the petition in limine. However, I order no cost.

**DR. SHIRANI A. BANDARANAYAKE J.** – I agree.

**SRIPAVAN J.** – I agree.

**RATNAYAKE J.** – I agree.

**IMAM J.** – I agree

*Petition dismissed.*