

1931

Present: Drieberg J.

IN THE MATTER OF THE UDUGAMA DIVISION ELECTORATE.

DIAS *et al.* v. AMARASURIYA.

Election petition—Claim for scrutiny—Personation—Application to inspect documents—Tendered ballot papers—Ceylon (State Council Elections) Order-in-Council, Article 45 (10).

Where in an election petition, in which a scrutiny was claimed on the ground that an unsuccessful candidate had a majority of lawful votes, the petitioners limited their application to votes obtained by personation and asked that these be struck off and that the tendered votes be added to the poll,—

Held, that the petitioners were entitled to have the votes declared void by reason of personation excluded, and the tendered votes added, in cases where tendered votes have been submitted.

Held further, that the petitioners were entitled to inspect and have copies of the following documents:—(1) tendered voters' list, (2) the marked register, (3) the declarations made by voters who were given tendered ballot papers; but not the tendered ballot papers nor the ballot papers or the counterfoils of the ballot papers, corresponding to the tendered ballot papers, before a vote is declared void on the ground of personation.

THIS was an election petition in which a scrutiny was claimed on the ground that the unsuccessful candidate had a majority of lawful votes. The petitioners moved that they be allowed to inspect and take copies of—

- (a) The tendered voters' list.
- (b) The tendered ballot papers in favour of Mr. Neil Hewavitarne and the respondent Mr. H. W. Amarasuriya.
- (c) The marked register.
- (d) Ballot papers and counterfoils corresponding to the tendered ballot papers that were delivered under clause 38, sub-clause (2), of the Order-in-Council and in respect of which tendered ballot papers were subsequently delivered under clause 42.
- (e) Declaration made by the voters who were given tendered ballot papers.

R. L. Pereira, K.C. (with him *E. G. P. Jayetilleke*), for petitioner.—Section 45 (10) expressly states that the Judge may make an order that any ballot paper or document may be inspected if necessary to maintain an election petition.

Section 83 states that the English practice applies only to cases which are not expressly provided for in the Order-in-Council.

Hayley, K.C. (with him *B. F. de Silva* and *Cooray*), for respondent.—Section 45 (10) states that the Court shall not allow the inspection of a ballot paper or document unless it is proved that it is necessary to maintain an election petition.

In exercising this discretion the Court must be guided by the English practice which is contained in the Ballot Act, 1872, rules 41 and 42.

The ballot papers should not be given for inspection unless it has been first proved that there was personation (*Rogers II.*, 243 (1918 ed.); *Rogers II.*, 110 (1918 ed.); *Stowe v. Jolliffe*¹).

Pulle, C.C., for Returning Officer.—The principle of the secrecy of the ballot must be maintained on grounds of public policy.

R. L. Pereira, K.C., in reply.—There is no secrecy about a tendered ballot paper as it has the name of the voter on the face of it.

The tendered ballot papers are available in England (*Rogers II.*, p. 111).

August 7, 1931. DRIEBERG J.—

This is an election petition in which the petitioners claim a scrutiny on the ground that an unsuccessful candidate, Mr. Hewavitarne, had a majority of lawful votes. The petitioners limited their application to votes obtained by personation and asked that these be struck off and that the tendered votes be added to the poll. Mr. Hayley contended that the petitioners should be restricted to those cases of personation of voters in which tendered votes were subsequently submitted. I do not think that the application should be limited to such cases. The petitioners are entitled to have the votes declared void by reason of personation excluded, and tendered votes added in cases where tendered votes have been submitted.

The proctor for the petitioners moved that he be allowed to inspect and take copies of—

- (a) The tendered voters' list.
- (b) The tendered ballot papers in favour of Mr. Neil Hewavitarne and the respondent, Mr. Henry Woodward Amarasuriya.
- (c) Marked register.
- (d) Ballot papers and counterfoils corresponding to the tendered ballot papers that were delivered under clause 38, sub-clause (2), of the Order-in-Council and in respect of which tendered ballot papers were subsequently delivered under clause 42.
- (e) Declarations made by the voters who were given "tendered ballot papers".

Mr. Pereira agreed to limit his application under (b) to the tendered ballot papers in favour of Mr. Hewavitarne.

All ballot papers and other documents relating to the election are in the custody of the Returning Officer, in this case the Government Agent of the Southern Province, and I directed that he should have notice of this application.

The provisions of the Ceylon (State Council Elections) Order-in-Council, 1931, on the question of inspection of such documents are simpler than those of the Ballot Act, 1872, rules 40, 41, and 42 of the first schedule of which deal with this subject.

¹ 43 L. J. C. P. 173.

Article 45 (10) provides that a Judge of the Supreme Court may allow inspection of any ballot paper or document relating to an election but that he shall not allow it unless satisfied that such inspection is required for the purpose of instituting or maintaining an election petition.

No distinction is drawn between the various kinds of documents in the possession of the Returning Officer, but in the exercise of the discretion given under this article I cannot do otherwise than follow the principles of the law in England that care should be taken that the mode in which any particular voter has voted shall not be discovered until he has been proved to have voted and his vote has been declared by a competent Court to be invalid.

Mr. Hayley objected to inspection of the tendered ballot papers and the ballot papers and the counterfoils corresponding to the tendered ballot papers, and the marked register. Mr. Pulle, for the Returning Officer, took the same position except as regards the marked register, of which he was prepared to allow inspection.

There is no reason why the petitioners should not be allowed inspection of the marked register. It will only enable them to ascertain what votes were recorded, and this they are entitled to know. Inspection of the marked register is allowed in England (*Stowe v. Jolliffe*¹).

Nor can there be any objection to the petitioners being allowed inspection of the declarations made by those who were given tendered ballot papers.

No objection is raised regarding the list of tendered votes.

There only remains the question of the tendered ballot papers in favour of Mr. Hewavitarne and the ballot papers and counterfoils corresponding to these.

As regards these ballot papers and counterfoils it is clear that the petitioners are not entitled to inspect them; with the aid of the counterfoils it can be known for whom a person voted. Mr. Pereira's reason for wanting inspection of these is this: There were four candidates at this election, the other two being Mr. Sirimane and Mr. Abeyewickreme. He says that where the petitioners have evidence that a voter has been personated there would be no purpose in their making it the basis of a charge unless the personated vote was given to the respondent; if given to one of the other two candidates it would not affect the position between Mr. Hewavitarne and the respondent. He says that unless the petitioners can select the personated votes given for the respondent much time will be expended unnecessarily in getting a declaration that certain votes are void on the ground of personation which may later be found to have been given for one of the other two candidates.

But this cannot be avoided; the rule of the secrecy of the ballot is strict, and not even the Election Judge is entitled to know until a vote has been declared invalid for whom it was given. Grove J. in *Stowe v. Jolliffe* (*Rogers, Volume II., page 203*), dealing with a case of two candidates, says that it is of the utmost importance for the objector before objecting to a vote to make as certain as possible that it was not given

¹ (1874) L. R. 9 C. P. 446; 43 L. J. C. P. 173.

for himself and he refers to cases where the objectors have procured the rejection of votes which subsequently were found to have been given to themselves.

As regards the tendered ballot papers in favour of Mr. Hewavitarne it is said that the requirements of secrecy are not the same as in ordinary ballot papers for the reason that in the case of the former the name and number of the voter is entered on them by the Presiding Officer. Where, however, there has been personation, knowledge of whom the tendered vote has been given to would suggest the inference in most cases that the vote originally given was not given to the same candidate.

But in any case the petitioners do not need these at this stage for "maintaining" the petition. They will only need these when they have a vote declared void, and not until then, in which case if there is a good tendered vote corresponding to it, they can have it added to Mr. Hewavitarne's votes. For whom a tendered vote is given is not an absolute secret, for it is known to the Presiding Officer and this cannot be avoided, but that is no reason why the information should be given to others unless it is necessary for the purposes of the election petition and this, it is not at this stage.

I allow the petitioner's motion of July 20 last for inspection and copies of—

- (1) The tendered voters' list.
- (2) The marked register.
- (3) The declaration made by voters who were given tendered ballot papers.

I make no order regarding costs as between the petitioners and the respondent; it will be dealt with by the Judge who hears this petition.

The petitioners will pay the costs of the Returning Officer.

