

**ALEXANDER  
V.  
CHANDRANANDA DE SILVA, COMMISSIONER OF ELECTIONS  
AND OTHERS**

**SUPREME COURT.  
DHEERARATNE. J.  
WADUGODAPITIYA, J, AND  
WIJETUNGA, J.  
S.C. APPEAL NO. 1/95.  
C.A. ELECTION PETITION NO. 2/94.  
1ST NOVEMBER, 1995.  
14TH AND 21ST DECEMBER 1995.**

*Election Petition - Parliamentary Elections Act - Sections 91 and 92 - Non compliances relating to counting of preference votes - whether such non compliance is a ground for avoiding the election of an individual candidate as a member - Interpretation of statutes.*

The Appellant was a candidate of the Podujana Eksath Peramuna (PA) at the Parliamentary Elections in 1994 for the electoral district No.9 Hambantota. P.A. won four seats. On the basis of the preference votes for P.A. candidates the Returning Officer declared elected as members the 20th, 19th, 17th, and 13th Respondents in that order. The Appellant obtained 388 preferences less than the 13th Respondent and was unsuccessful. In his Petition the Appellant alleged non-compliance with the provisions of the Act in the counting of preferences which is a ground set out in section 91(1) (b) of the Parliamentary Elections Act No. 1 of 1981 for challenging an election in respect of any electoral district. The Petitioner sought inter alia, for a declaration that the return of the 13th Respondent as elected was undue and for a declaration after a re-scrutiny of preference votes for the P.A., that the Appellant is duly elected as a member of Parliament.

**Held:**

- (1) The Petitioner ought, on the ground alleged by him, have prayed for avoidance of the election in respect of the electoral district and not the election of a member.
- (2) The Court cannot by giving a purposive interpretation to section 92(1) of the Parliamentary Elections Act permit a partial avoidance of the election. Such an attempt would cross the boundary between construction and legislation.

**Cases referred to :**

1. *Munasinghe v. Corea* (1953) 55 N.L.R. 265.
2. *Bandaranaike v. Premadasa* (1989) 1 Sri L.R. 240.
3. *Conganige Emmanuel Wallman Anthony v. S.H.M. Chandrasena S.C.* Appeal No. 1/94 S.C. Minutes of 14th July 1994.
4. *Weerasinghe v. Chandrananda de Silva, Commissioner of Elections* 1922 - 1 Sri L.R. 76.
5. *Cramas Properties Ltd., v. Connaught Fur Trimmings* (1965) 1 W.L.R. 892.
6. *Regina v. Broadcasting Complaints Commission Ex-parte Owen* (1985) 1 Q.B. 1153.
7. *Johnson v. Moreton* (1980) A.C. 37.
8. *Federal Steam Navigation Co., Ltd., v. Department of Trade & Industry* (1974) 2 All E.R. 97.
9. *In Re Lockwood (deceased) Atherton v. Brook* (1957) 3 All E.R. 520.
10. *Jones v. Wrotham Park Settled Estate* (1979) 1 All E.R. 286, 289.

**AN APPEAL** under Section 102 of the Parliamentary Elections Act No. 1 of 1981 read with Article 130(b) of the Constitution against an order of an election Judge.

*Faisz Musthapha, P.C. with Mahanama de Silva, N.M. Saheed and Gaston Jayakody* for Appellant.

*K.C. Kamalabayson, D.S.G. with Chanaka de Silva, S.C.* for 1st and 2nd Respondents.

*Cur.adv.vult.*

26th January, 1996.

**DHEERARATNE J.**

This is an appeal from an order of the Election Judge dismissing a Petition filed in terms of section 92 of the Parliamentary Elections Act No. 1 of 1981 on a preliminary objection taken on behalf of the 1st and 2nd Respondents. The objection relates to a pure question of law, and in order to appreciate the nature of that objection and the content of arguments adduced for and against, it would be convenient initially to set out the legislative background in which the Petition was filed.

Article 101(1) of the Constitution enabled the Parliament, by law to make provision inter alia for the procedure for election of Members of

Parliament (e); creation of offences relating to such elections (f); the grounds for avoiding such elections (g); and the manner of determination of disputed elections and such other matters as are necessary or incidental to the election of Members of Parliament (i). Article 102 (2) provided that until Parliament by law makes provision for such matters, the Ceylon (Parliamentary Elections) Order in Council as amended from time to time, shall subject to the provisions of the Constitution, *mutatis mutandis*, apply. By the Parliamentary Elections Act, No.1 of 1981, among some other matters, provision was made for what was contemplated in subsections (e) (f) (g) and (i) of Article 101(1) mentioned above; parts dealing with those matters in the Order in Council were repealed.

By the 14th Amendment to the Constitution which came into operation on 24.5.1988, Article 99(2) was amended to enable every elector, in addition to his vote, to indicate his preferences for not more than three candidates nominated by the same recognized political party or independent group in whose favour he was exercising his vote. This was an important departure from the original Article 99(2) which provided for a recognized political party or an independent group contesting elections to set out in the nomination paper the names of candidates in order of priority - the order of priority being that determined by such party or group. The novel concept of preferential vote, necessitated amendments to be made to the Parliamentary Elections Act, in several directions. Primarily, the priority list had to give way to a list of names submitted in the alphabetical order in the nomination paper; each candidate had to be assigned a serial number so that preferences of electors could be conveniently indicated ; counting of votes had to be done preference - wise too ; declaration of results and filling of vacancies in accordance with the number of preference votes obtained by each candidate had to be provided for. These, the legislature sought to accomplish by enacting the Amendment Act No. 15 of 1988 which came into operation on the same day as the 14th Amendment. Thus, subsections of the principal enactment 15(1) (Nomination papers), 20(1) (Uncontested elections), 24(1)(b) (Notice of the poll), 30(1)(b) (Notices to be exhibited at polling stations), 32(1)(a) (Ballot papers), 53(7) (Counting officer's written statement), 55(h) (Counting officer's sealed packet of documents to be sent to the returning officer), and 60(1) (Declaration of the result), were repealed and suitable substitutions

made. Appropriate amendments to the principal enactment were also made in Form A of the first schedule (Form of the nomination paper), Form C of the same schedule (Form of the Ballot paper), Form B of the second schedule (Form of declaration of identity), and in the third schedule (Form of directions for the guidance of a voter in voting to be exhibited outside every polling station and in every compartment of every polling station ), in order to accommodate preferential voting.

However, the legislature chose to make no amendments to part VII of the principal enactment titled "Election Petitions". I shall set down in full sections 91 and 92 appearing in that part which are relevant to the present case. It may be noted that the emphasis placed on some words in those sections are my own.

**91. The election of a candidate as a Member is avoided by his conviction for any corrupt or illegal practice.**

**92(1). The election in respect of any electoral district shall be declared to be void on an election Petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely -**

(a) that by reason of general bribery, general treating or general intimidating or other misconduct or other circumstances whether similar to those enumerated before or not a section of electors was prevented from voting for the recognized political party or independent group which it preferred and thereby materially affected the result of the election;

(b) non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted with the principles laid down in such provisions and that such non-compliance materially affected the result of the election.

**(2) The election of a candidate as a Member shall be declared to be void on an election Petition on any of the following grounds which may be proved to the satisfaction of the Election Judge namely-**

(a) that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by any agent of the candidate;

(b) that the candidate personally engaged a person as a canvasser or agent or to speak on his behalf knowing that such person had within seven years previous to such engagement been found guilty of a corrupt practice under the law relating to the election of the President or the law relating to Referenda or under the Ceylon (Parliamentary Elections) Order in Council, 1946, or under this Act, by a court of competent jurisdiction or by the report of an Election Judge;

(c) that the candidate personally engaged a person as a canvasser or agent or to speak on his behalf knowing that such person had been a person on whom civic disability had been imposed by a resolution passed by Parliament in terms of Article 81 of the Constitution, and the period of such civic disability specified in such resolution had not expired;

(d) that the candidate was at the time of his election a person disqualified for election as a Member.

The Interpretation section 131 of the Act defines an 'election' (unless the context otherwise requires) as meaning an election for the purpose of electing a Member of Parliament.

It is seen that the ground (b) of avoidance of **the election in respect of any electoral district** consists of three ingredients, which are:-

- (1) non-compliance with the provisions of the Act;
- (2) appearance that the election was not conducted with the principles laid down in such provisions; and
- (3) such non-compliance materially affecting the results of the election. [*See - Munasinghe v. Corea<sup>(1)</sup> and Bandaranaike v. Premadasa<sup>(2)</sup>*]

The Petitioner unsuccessfully contested as a candidate of the Podujana Eaksath Peramuna (PA) at the parliamentary elections held on 16th August 1994 for the Electoral District No. 9 Hambantota. The 1st and 2nd Respondents are the Commissioner of Elections and the Returning Officer of the Electoral District Hambantota respectively, while the 3rd to 81st Respondents are all other candidates who contested the said election in that Electoral District. Out of the total number of seven seats allotted to the Electoral District the PA won four seats. According to the official results determined in terms of

preferential votes following candidates of the PA were elected with the indicated number of preferences:-

20th Respondent	78977
19th Respondent	63698
17th Respondent	46034
13th Respondent	39376

The Petitioner had obtained according to the official results, 38988 preferences, which is 388 less than the number secured by the 13th Respondent. The Petitioner made several allegations relating to counting of preferences cast in his favour and non-compliance with the provisions of the Parliamentary Elections Act in the process of counting of preferences, the details of which I need not elaborate here. The reliefs the Petitioner prayed for in his Petition are briefly;-

- (a) A declaration that the election for the Electoral District of Hambantota was void to the extent that counting and/or recording of preference votes relating to candidates nominated by the PA was not in compliance with the Parliamentary Elections Act.
- (b) A declaration that the return of the 13th Respondent as elected was undue. (emphasis added)
- (c) A declaration that the petitioner was duly elected and/or ought to have been returned as a Member of Parliament at the election.
- (d) A declaration that such of the candidates of the PA have been duly elected at the election after a recount.
- (e) To make an order permitting the Petitioner or his agents to inspect all ballot papers and other documents relating to the counting of preference votes of the candidates of the PA at the said election in terms of section 63(2) of the Parliamentary Elections Act.
- (f) To make an order for a recount and/or scrutiny of the preference votes obtained by the candidates of the PA at the said election.

The preliminary objection raised on behalf of the 1st and 2nd Respondents was that the Election Court had no power to grant reliefs prayed for as non-compliance with the provisions of the Parliamentary Elections Act in the conduct of the election alleged by the Petitioner is a ground for avoidance of the election in respect of any Electoral

**District in terms of subsection 92 (1) and not a ground for avoidance of the election of a Candidate as a Member as specified in subsection 92 (2) ; therefore it was contended that the declaration sought for partial avoidance of the election for the Electoral District was bad in law. In support of the objection reliance was placed on the decision of this Court in *Canganige Emmanuel Wallman Anthony v. S.H.M. Chandrasena*.<sup>(3)</sup> That is a decision on section 92 of the Provincial Councils Elections Act, No.2 of 1988. which is couched in almost identical language as the provision under consideration and where the identical question was dealt with in detail. The Petitioner on the other hand relied on another decision of this Court in *Weerasinghe v. Chandrananda de Silva, Commissioner of Elections*,<sup>(4)</sup> where the contrary view was expressed, somewhat briefly, on the identical question now at hand relating to the Parliamentary Elections Act.**

Learned DSG for the 1st and 2nd Respondents drew the attention of Court to the scheme adopted by the legislature to provide for avoiding an election in respect of any Electoral District on the one hand and in respect of a Member on the other. He submits that in terms of section 91 an election of a member is avoided by his conviction for any corrupt or illegal practice and further intervention of a Court is unnecessary to unseat him. Section 92 on the whole deals with avoidance of elections through the machinery of an election Petition. Subsection 92 (1) deals exclusively with the avoidance of the election in respect of any Electoral District and the grounds of avoidance are set out in limbs (a) and (b) which are of a general nature likely to affect the whole election. Subsection (2) deals exclusively with avoidance of the election of a candidate as a Member and the grounds of avoidance specified in limbs (a) to (d) in that subsection are of a personal nature relevant to a Member. It was further submitted by him that if non-compliance with the provisions of the Act as complained of by the Petitioner is proved, that could not have materially affected the election of the 13th Respondent only, but the result of the entire election as no reliance could be placed on the official counting of all preference votes at the election in the Electoral District.

Learned President's Counsel for the Appellant, probably in view of the provisions of Article 101 of the Constitution, did not urge that this Court has any jurisdiction under 'common law' to supply any supposed

omission in the Election Law, but he strenuously invited us to adopt a purposive and strained interpretation to section 92. We were rightly not invited to read limb (b) of subsection 92(1) as also appearing as a limb of subsection 92 (2) ; that would be tantamount to legislating and not interpreting. Learned Counsel however submitted that we should read the words **the Election in respect of any electoral district** as also meaning any part of the election in respect of any electoral district, so as to accommodate avoidance of an election of a Member on the ground of non-compliance with the provisions of the Act ; he contended that the "whole" includes a "part" and we are therefore amply justified in giving the construction he advanced by adopting a purposive interpretation. It was contended that one of the purposes of the Act was to ensure purity of elections, which is the foundation of a democratic system of government.

Learned Counsel for the Appellant cited several decisions where purposive interpretation was resorted to or discussed and some of the important cases cited by him were - *Cramas Properties Ltd v. Connaught Fur Trimmings*,<sup>(5)</sup> *Regina v. Broadcasting Complaints Commission, Ex parte Owen*,<sup>(6)</sup> *Johnson v. Moreton*,<sup>(7)</sup> *Federal Steam Navigation Co Ltd v. Department of Trade & Industry*<sup>(8)</sup> and *In Re Lockwood (deceased) Atherton v. Brook*.<sup>(9)</sup> One can hardly dispute the principles so well enunciated in those decisions.

But, the primary question we have to decide is whether or not conditions necessary for the application of a **purposive interpretation for the words the election in respect of any electoral district** have arisen in this case. There must exist a compelling reason for us to give a strained interpretation. Looking at the scheme of the Act, I am not convinced that any absurdity, or repugnancy, or inconsistency or frustration of the purposes of the Act or the like has arisen in the application of the ordinary sense of those words and I am unable to say that they attract any secondary meaning capable of advancing the Appellant's case. If I understood the submission of Learned President's Counsel correctly, his position was that the legislature by some inadvertence overlooked to provide for avoidance of an election of a candidate as a Member on the ground of non-compliance of the provisions of the Act. Perhaps, it was so supposed in *Weerasinghe's* case (*supra*). Assuming there was such inadvertence, I think it is

relevant in that connection to remind ourselves the words of Lord Diplock in *Jones v. Wrotham Park Settled Estates*<sup>(10)</sup> where he said;

.....I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd.*\* provide an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill was passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts.

Considering the purpose which the enactment sought to achieve, could it ever be said that "it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved"? I should think not. This apart, the fact that this very purpose to be achieved after the new system of voting was decided upon, was to bring the existing provisions into line with the new concept of preferential voting, and to this and several amendments were made to the principal enactment. The indication, therefore, clearly

\* 1970-2 All ER 871

is that the attention of the legislature was specifically directed to this, very end. In these circumstances I find it impossible to accept the suggestion of the Appellant that there was inadvertence on the part of the draftsman or Parliament. Thus the only interpretation possible is that what was enacted did in fact give effect to the intention of the legislature. Then again, if, as invited to do so by learned President's Counsel, we were to interpret the words "election in respect of any electoral district" to mean and include "any part of it", and therefore to mean "election of a member" by a process of judicial activism or purposive interpretation, we will then run into certain other difficulties. First, we would have to totally disregard the sharp distinction so neatly drawn by the legislature between subsections 92(1) and 92(2). Secondly, we have to permit parties to seek partial avoidance of an election in respect of an electoral district even on the several grounds mentioned in subsection 92(1)(a) as well, **a situation the legislature seems to have never contemplated.** In my view, therefore what learned President's Counsel for the Appellant is asking this Court to do is to cross the boundary between construction and legislation and usurp the function of Parliament. Such a thing this Court cannot do.

If the allegations made by the Petitioner regarding counting of preference votes are correct, I am in agreement with the observations of my brother Kulatunga, J. in *Anthony's case (supra)* that the several acts of non-compliance with the provisions of the Act, having regard to their magnitude or implications must logically affect the result of the election of the entire district, and therefore, in terms of the Act, the Petitioner ought to have prayed for avoidance of the election of the electoral district.

For the above reasons, the order of the Election Judge is affirmed and the appeal is dismissed with costs payable to the 1st and 2nd Respondents fixed at Rs.10,000/-.

**WADUGODAPITIYA, J. – I agree.**

**WIJETUNGA, J. – I agree.**

*Appeal dismissed.*