

ANTHONY AND OTHERS
V.
CHANDRASENA, RETURNING OFFICER AND OTHERS

SUPREME COURT.
G.P.S. DE SILVA, C.J.
KULATUNGA, J. AND
PERERA, J.
S.C. APPEAL NO.1/94.
C.A. (PROVINCIAL COUNCILS) ELECTION
PETITION NO. 4/93.
23RD JUNE 1994.

Election Petition - Provincial Councils Elections Act No. 2 of 1988 - Sections 91, 92, 95 and 96 - Non compliance with - the provisions of the Act - allege lapse in counting preference votes - whether the election of an individual candidate as a member may be challenged - Intention of Parliament.

The Appellants were among 39 candidates who were put forward by the Podujana Eksath Peramuna for the administrative district of Gampaha at the Western Provincial Councils Elections held in 1993. On the votes polled by the party it became entitled to return 17 members. But on the basis of the preferences indicated by the electors, the Appellants were among the unsuccessful candidates. The Returning Officer declared elected 2nd to 18th Respondents from that party. The Appellants filed an Election Petition under section 95 of the Provincial Councils Elections Act, No. 2 of 1988 read with section 96 challenging the return of the said Respondents as members on the ground that the counting of preferences was not done in accordance with the provisions of the Act; and that the said non-compliance materially affected the result of the election of candidates of the Podujana Eksath Peramuna. The Appellants sought a declaration that the election of 2nd to 18th Respondents was undue, and a declaration, after a re-scrutiny of the preference votes for the Party, that the Appellants or any one or more of them or any of the unsuccessful Respondents are duly elected as members. The relief thus sought was based on section 92(1) (b) of the Act.

Held:

(1) The grounds for the avoidance of the election of a candidate as a member of a Provincial Council are expressly provided by sections 91(1) and 92(2). There are grounds which have relevance to the election and generally based on personal conduct of the candidate or his agent. On the other hand, the grounds for the avoidance of the election in respect of any

administrative district are contained in section 92(1) (a) and (b). The scheme of the Act and the language of section 91(1) show that the "election" referred to therein is the entire election held in an administrative district of a Province for electing members to the Provincial Council in that province.

(2) Upon the allegation of such non-compliances as are competent under section 92(1)(b) Parliament could not have intended to permit an election Petition where the relief claimed is merely to have the election of a candidate as a member of the Provincial Council declared void and to have another candidate declared duly elected.

Case referred to :

Curtis v. Storm (1889) 22 QBD 513.

AN APPEAL under section 102 of the Provincial Councils Elections Act No. 2 of 1988 against the order of an Election Judge.

S.C.B. Walgampaya with F.H. Boniface Silva and Vijitha Meegahawatha for Appellants.

K.C. Kamalabayson, D.S.G. with Kumar Paul S.C. for 1st Respondent.

Cur. adv. vult.

14th July, 1994.

KULATUNGA, J.

The nine Appellants were among 39 candidates whose names were set out in the nomination paper submitted by the Podujana Eksath Peramuna for the administrative district of Gampaha at the Western Province Provincial Councils Elections held on 17.05.93. On the votes polled by that party it became entitled to return 17 members for that district. According to the result announced by the 1st Respondent (The Returning Officer) 2nd to 18th Respondents were declared elected from that party, on the basis of preferences indicated by the electors. The Appellants and 19th to 31st Respondents were unsuccessful.

The Appellants do not challenge the election, so far as the count of the votes for their party in the administrative district of Gampaha is concerned. There is also no dispute as regards the quota of members their party was declared entitled to return for that district. However, they allege that the election of any one or more of 2nd to 18th

Respondents is void for non-compliance with the provisions of the Provincial Councils Election Act, No. 2 of 1988; that the counting of preferences was not done in accordance with the principles laid down in the Act; and that the said non-compliance materially affected the result of the election of candidates of the Podujana Eksath Peramuna and more particularly the election of the 1st to 9th Appellants or any one of them. On that basis the Appellants filed an election Petition under section 95 of the Act read with section 96 praying for a declaration that the return of any one or more of the 2nd to 18th Respondents was undue and for a declaration that the Appellants or any one or more of them and any of the 2nd to 31st Respondents are duly elected as members of the Western Province, Provincial Council.

The Appellants also prayed for an order on the 1st Respondent directing him to rescrutinise the tally sheet and summary sheets maintained at the count and to add up and determine according to law and under the directions of the Election Judge the number of preferences indicated for each candidate of the Podujana Eksath Peramuna at the election held in the administrative district Gampaha.

At the hearing of the Election Petition, learned Deputy Solicitor General for the 1st Respondent raised a preliminary objection that the Appellants are not entitled to the relief sought by them as the Petition is based on section 92(1)(b) of the Act which sets out a ground of avoidance of the election in respect of the entire administrative district whereas the grounds on which the election of a candidate as a member of the Provincial Council may be declared void on an election Petition are found in section 92(2). The Election Judge upheld the preliminary objection and dismissed the Petition. The Appellants appeal to this Court by virtue of section 102 of the Act.

At the hearing before us, learned Counsel for the Appellants submitted that the grounds for declaring void the election of a candidate as a Member of a Provincial Council are not limited by section 92(2). He argued that the expression "election" under section 92 (1) connotes two elections viz. election of the party and the election of candidates; and this is supported by the definition of "election" in section 129. Under that section "election" means an election held in an administrative district of a Province for the purpose of electing

members to the Provincial Council established for that Province. Hence, in an election Petition based on the ground of non-compliance with the provisions of the Act, the Petitioner is not compelled to pray for the avoidance of the entire election in respect of the administrative district but may pray for the lesser remedy that the election of a candidate as a Member of the Provincial Council is void. Counsel added that if this were not possible it would leave an aggrieved party without relief, even in a case where due to a patent error in the counting of preference votes a candidate has been wrongly declared elected. Counsel submitted that it is inconceivable that the legislature intended such a situation; hence this Court should construe the statute giving it a sensible meaning. *Curtis v. Storm*.⁽¹⁾

Learned Deputy Solicitor General drew our attention to the scheme of the Act. Firstly, section 91(1) provides for avoidance of **the election of a candidate as a Member** by his conviction for any corrupt or illegal practice. Thus, under the relevant sections of the Act, if at the date of conviction of a person for such practice he has been elected as a member of a Provincial Council, his election shall be vacated from the date of such conviction. Secondly, section 92 provides for avoidance of election on election Petition. Under section 92(1) **the election in respect of any administrative district** shall be declared to be void on the grounds of general bribery etc. or non compliance with the provisions of the Act relating to elections as provided by sections 92(1)(a) and (b), respectively. The election can be avoided on any such ground if it is proved inter alia that it has materially affected the result of the election.

Under section 92(2) **the election of a candidate as a Member of the Provincial Council** shall be declared void on the grounds set out in paragraphs (a), (b), (c) and (d) thereof namely, the commission of a corrupt or illegal practice by the candidate or his agent, canvassing through an agent who has been convicted of a corrupt practice or subjected to civic disability in terms of Article 81 of the Constitution or where the candidate was, at the time of his election, a person disqualified for election as a Member.

Section 96 sets out the reliefs which 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.

Under section 29 "election" means an election held in an administrative district of a Province **for the purpose of electing members** to the Provincial Council established for that Province.

The Deputy Solicitor General submitted that the use of the word "purpose" in the above definition is of significance. In terms of this definition "election" cannot mean **election of a member** but it is **election held for the purpose of electing members**; hence in section 92(1) the word "election" necessarily refers to the entirety of the election and not the election of a member.

There is force in the submissions of the Deputy Solicitor General. The grounds for the avoidance of the election of a member of the Provincial Council (whether by conviction or on election Petition) are expressly provided by sections 91(1) and 92(2), respectively. These are grounds which have relevance to the purity of the election and generally based on the personal conduct of the candidate or his agent.

On the other hand, the grounds for the avoidance of the election in respect of any administrative district are contained in sections 92(1) (a) and (b). The scheme of the Act and the language of section 92(1) show that the "election" referred to therein is the entire election held in an administrative district of a Province for the purpose of electing members to the Provincial Council for that Province. Thus in terms of section 3(2), every administrative district in a province shall, for the purpose of elections to the Provincial Council established for that Province, constitute an electoral area. The Western Province, Provincial Council has as its electoral areas the administrative districts of Gampaha, Colombo and Kalutara. The Appellants' Petition is based on a ground for challenging the election in respect of the administrative district of Gampaha, which in the context must refer to the entire election and not the election of a member.

The nature of the grounds of avoidance under section 92(1) also indicate that the said election refers to the avoidance of the entire election in the administrative district; for grounds such as general bribery, general treating or general intimidation or non-compliance with the provisions of the Act which, having regard to their magnitude or implications, affect the result of the election must logically vitiate the entire election in the administrative district. If so, the proper relief to be claimed in the instant case on the ground of such non-compliance should be a declaration that the election in respect of the administrative District of Gampaha is void. I find that the total number of preference votes for the candidates of the Podujana Eksath Peramuna is 970,280 preferences. The prayer for a rescrutiny involves all such preferences. If there were irregularities which merit rescrutiny of so many preferences, it is probable that there were similar irregularities affecting the candidates of the other political parties as well at the said election. In fact all of them have been made parties to the Petition with the result that there are 226 respondents. So it seems that on the basis of the Appellants allegations also, they ought to have prayed for a declaration that the entire election in the district is void.

I am of the view that upon the allegation of such non-compliances as are competent under section 92(1)(b) Parliament could not have intended to permit an election Petition where the relief claimed is merely to have the election of a candidate as a member of the Provincial Council declared void and to have another candidate declared duly elected. We cannot under the guise of Interpretation, read such meaning into the said section. As indicated in an earlier part of this judgment the language of section 92(1) itself is against the construction urged on behalf of the Appellants, in particular when such language is contrasted with the language of section 92(2).

For the foregoing reasons, I dismiss the appeal and affirm the judgment of the Election Judge with costs fixed at Rs. 1000/- payable to the 1st Respondent.

G.P.S. DE SILVA, C.J. – I agree.

PERERA, J. – I agree.

Appeal dismissed.