

1952

Present : Swan J.

J. C. W. MUNASINGHE, Petitioner, and S. C. S. COREA *et al.*,  
Respondents

*Election Petition No. 11 of 1952 (Chilaw)*

*Election Petition—Returning officer—Is he a necessary party?—Inspection of documents—Secrecy of ballot—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 42 (2), 45, 47 (1), 48 (10), 49 (1).*

The returning officer is not a necessary party to an election petition if the only complaint made against him in the petition is that many ballot papers delivered to the voters were not stamped or perforated with the official mark as required by section 42 (2) of the Parliamentary Elections Order in Council, 1946.

Application by motion was made by the petitioner in an election petition, prior to the date of its hearing, asking for inspection of the following documents :—

- (i) the tendered votes lists made by the presiding officers,
- (ii) the declarations made by the persons who voted on tendered ballot papers,
- (iii) those rejected ballot papers which were not stamped or perforated with the official mark, and
- (iv) the marked registers.

*Held*, that in the circumstances of the case inspection was necessary in respect of the tendered votes lists, the declarations made by persons who voted on tendered ballot papers and the marked register so that the petitioner might maintain the charge of personation set out in the election petition. The petitioner should therefore be allowed to inspect and take copies of those documents.

In regard to "those rejected ballot papers which were not stamped or perforated with the official mark", the petitioner should be allowed to inspect them but not to take copies of them.

**M**OTIONS in connection with Election Petition No. 11 of 1952 :  
(Chilaw).

*S. J. V. Chelvanayakam, Q.C.*, with *A. C. Nadarajah, S. Thangarajah, B. S. C. Ratwatte, W. Mendis* and *C. V. Munasinghe*, for the petitioner.

*E. B. Wikramanayake, Q.C.*, with *A. H. C. de Silva, G. T. Samarawickreme* and *A. K. Premadasa*, for the 1st respondent.

*T. S. Fernando*, Acting Solicitor-General, with *V. Tennekoon*, for the 2nd respondent.

*Cur. adv. vult.*

October 28, 1952. SWAN J.—

There are two matters that arise for consideration and adjudication, namely :—

- (1) the application of the 1st respondent on his motion dated 16.7.52 asking for inspection of certain documents, and
- (2) the application of the 2nd respondent on his motion dated 12.7.52 to be discharged from the proceedings.

I shall deal with the second application first. The Acting Solicitor-General appearing for the 2nd respondent (who is the returning officer) contends that the 2nd respondent is not a necessary party inasmuch as he has no interest in the result of the election petition and would not be affected adversely or otherwise, by any order that the Court may make thereon.

Mr. Chelvanayakam for the petitioner submits that the 2nd respondent is a necessary party. He points to paragraph 4 (a) of the petition which states that—

“ many ballot papers delivered to the voters were not stamped or perforated with the official mark as required by section 42 (2) of the said Order in Council ; in the result a large number of votes given in favour of the petitioner were not counted as votes for him. ”

He submits that inasmuch as an allegation of misconduct has been made against the returning officer he should be a respondent. He has, in this connection, drawn my attention to section 108 (2) of the Representation of the People Act, 1949,<sup>1</sup> which follows section 51 of the Parliamentary Elections Act, 1868,<sup>2</sup> and subsequent legislation. It would appear that under the law as it obtains in England the returning officer is “ *deemed to be a respondent* ” where the petition “ *complains* ” of his conduct.

In further support of his contention that the 2nd respondent is a necessary party, Mr. Chelvanayakam cited the case of *Islington*<sup>3</sup> in which it was held that a returning officer might be joined where there was conduct by himself or his deputies *not amounting to wilful misconduct or wilful misfeasance*. In that case complaint was made that the polling stations were kept open too long, that the seals of a ballot-box were improperly broken to allow the inspection of a ballot paper, and that the numbers on the back of certain ballot papers were made known to an agent.

He also referred me to the case of *Wilson v. Ingham*<sup>4</sup> where the name of a candidate who had withdrawn was inadvertently printed on a ballot paper. In that case Day J. observed that if he had been satisfied that there had been gross negligence he would not have hesitated to mulct the returning officer in costs.

<sup>1</sup> 12 and 13 Geo. VI c. 68.

<sup>2</sup> 31 and 32 Vict. c. 125 (a).

<sup>3</sup> (1901) 5 O' M & H 132.

<sup>4</sup> 64 L. J. Q. B. 775. 72 L. T. 796.

The Acting Solicitor-General submits that the English Law is different from our law ; that under our Order in Council there is no similar provision regarding the returning officer, namely, that he is deemed to be a respondent in certain cases. In the absence of any such provision the general law would apply ; and the general law is that only such persons should be made parties as are interested in the matter of the application and would be affected by any order made thereon.

Mr. Wikremanayake for the 1st respondent adopts a neutral attitude and says that from his client's point of view it is immaterial whether the 2nd respondent is a party or not.

There may be instances where the returning officer could and should be made a party respondent to an election petition but I am not satisfied that this is one. I would therefore make order discharging the 2nd respondent from the proceedings. In the circumstances of this case I make no order in his favour for costs against the petitioner.

I shall now deal with the other application, namely, the application of the petitioner on his motion dated 16.7.52 to inspect and take copies of—

- (a) the tendered votes lists made by the presiding officers,
- (b) the tendered ballot papers,
- (c) the counterfoils of tendered ballot papers,
- (d) the declarations made by the persons who voted on tendered ballot papers,
- (e) those rejected ballot papers which were not stamped or perforated with the official mark,
- (f) the counted ballot papers,
- (g) the counterfoils of the original ballot papers on which the alleged personators voted,
- (h) the journals of the presiding officers, and
- (i) the marked registers.

In the course of his reply to Senior Counsel for the 1st respondent and the learned Acting Solicitor-General (who appeared in this matter as *amicus curiae*) Mr. Chelvanayakam said that he was not pressing his application in respect of (b), (c), (f), (g) and (h). I shall therefore confine my attention to the documents mentioned in (a), (d), (e) and (i).

Mr. Wikremanayake says that to allow the petitioner inspection of the marked register, the tendered votes lists and the declarations would violate the rule of secrecy. He points to section 47 (1) of the Order in Council which requires every presiding officer of each polling station at the close of the poll to "make up into separate packets, sealed with his own seal and the seals of the candidates or their agents if they desire to affix their seals—

- (a) the unused and spoilt ballot papers placed together,
- (b) the marked copies of the register of electors, and the counterfoils of the ballot papers, and
- (c) the tendered votes lists.

. . . and despatch each such packet . . . in safe custody to the returning officer."

In the case of *Dias and others v. Amarasuriya*<sup>1</sup> Drieberg J. acting under section 45 (10) of the Ceylon (State Council Elections) Order in Council, 1931 (in which similar provision was made to that contained in section 48 (10) of the present Order in Council) allowed inspection of the tendered votes lists, the declarations made by the voters who were given tendered ballot papers and the marked register. It should be noted that neither Counsel for the respondent in that case nor Crown Counsel who appeared for the returning officer raised any objection to inspection of the tendered votes lists. As regards the marked register while Counsel for the respondent objected, Crown Counsel said he was prepared to allow inspection. Dealing with this matter Drieberg J. stated—

“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.”

In respect of the application for inspection of the declarations made by those who had given tendered votes neither Counsel for the respondent nor Crown Counsel raised any objection, and Drieberg J. in allowing the application merely stated that there could not be any objection to the petitioners being allowed inspection of those documents.

In the case of *Saravanamuthu v. de Silva*<sup>2</sup> de Kretser J. refused to allow inspection of the marked registers and the tendered votes lists. In that case the application was also made under section 45 (10) of the Ceylon (State Council Elections) Order in Council, 1931. It was made *by the respondent during the course of the trial* and the learned Judge said that he could not allow the application as it was not made for the *purpose of instituting or maintaining an election petition but in order to refute an allegation that certain persons had not voted*. In the course of his order de Kretser J. drew attention to the fact that the English Law is different from our law; that under Rule 42 of the Ballot Act all documents other than ballot papers and counterfoils were open to public inspection, and that the marked register was therefore a document that the petitioner in an election petition would in England be entitled to inspect.

In the case of *Kuruppu v. Hettiaratchy*<sup>3</sup> Nagalingam J. dealing with an application made under the present Order in Council refused to allow inspection of (a) the journals of the presiding officers on the ground that they were private documents which were not liable to be disclosed, and (b) rejected and tendered ballot papers on the ground that disclosure would violate the rule of secrecy. He allowed inspection of (c) the tendered votes lists, (d) the declarations made by those persons who voted on tendered ballot papers, and (e) the marked register. Dealing with (c) and (e) my learned brother observed :—

“The list of tendered ballot papers and the marked register are documents which I think the petitioner is entitled to inspect in view of the allegation that voters who would have cast their votes in favour of the petitioner have been personated at the election.”

<sup>1</sup> (1931) 33 N. L. R. 169.

<sup>2</sup> (1941) 43 N. L. R. 77.

<sup>3</sup> (1947) 49 N. L. R. 57.

Dealing with (d), namely, the declarations made by the persons who voted on tendered ballot papers, he remarked—

“The declarations . . . . to my mind are not documents which would furnish information to the petitioner any greater than what the list of tendered ballot papers and the marked register would show ; but as Counsel for both the respondents have consented to those documents being made available to the petitioner, and as I can see no harm in granting the petitioner’s request in regard to them I would allow their inspection too.”

On reading section 45 (which deals with tendered votes) I find that the declarations would *prima facie* contain more information than the lists ; for whereas the latter give only the numbers of the voters the former disclose their names as well. Of course it could be said that when the numbers are given the names are ascertainable from the register. But to my mind the declarations would help the petitioner to decide whether the persons who voted on tendered ballot papers were the real electors appearing on the register or impostors.

Mr. Wikremanayake says that if the polling agents of the petitioner were wide awake and conscious of their responsibilities they should have noted the numbers and names of the persons who claimed and obtained tendered ballot papers. Those remarks would apply equally to the marked registers, for each polling agent could have ticked off on his own copy of the register the voters who obtained ballot papers. In the absence of any provision that every polling agent should keep his own marked register and also note the numbers and/or names of persons who obtained tendered ballot papers I do not think inspection could be refused on the particular ground urged by Counsel for the 1st respondent.

As regards the rule of secrecy of the ballot I cannot see how it would be infringed by allowing the petitioner to have inspection of the tendered votes lists, the declarations and the marked registers. These documents would not reveal for whom the electors voted.

Mr. Wikremanayake also contends that inspection of the documents to which Mr. Chelvanayakam has confined his application are not necessary for the purpose mentioned in section 48 (10), namely, of “*instituting or maintaining . . . . an election petition* in connection with the petition.” He also submits that I should not allow inspection unless I am satisfied beyond reasonable doubt that inspection is necessary. Section 48 (10) reads as follows :—

“A Judge of the Supreme Court may make an order that any ballot paper or other document relating to an election which has been sealed as required by this Order be inspected, copied, or produced at such time and place and subject to such conditions as the Judge may deem expedient, but shall not make such an order unless he is satisfied that such inspection, copy or production is required for the purpose of instituting or maintaining a prosecution or an election petition in connection with the election. Save as aforesaid, no person shall be allowed to inspect any such ballot paper or document after it has been sealed up in pursuance of sub-section 9.”

It would thus appear that inspection cannot be had for the mere asking. In fact as I construe the section I realize that I am forbidden to allow inspection unless I am satisfied that inspection is necessary for the petitioner to maintain his petition.

On the material placed before me and the submissions made by Counsel for the petitioner, I am satisfied that inspection is necessary in respect of the tendered votes lists, the declarations made by persons who voted on tendered ballot papers and the marked register so that the petitioner may maintain the charge of personation set out in paragraph (5) of the petition. The petitioner will therefore be allowed to inspect and take copies of these documents.

I shall now deal with the application for inspection of (e) "those rejected ballot papers which were not stamped or perforated with the official mark." Undoubtedly the decision of the returning officer regarding these rejected votes is final. Section 49 (1) requires him to reject *inter alia* all ballot papers which are not stamped or perforated with the official mark; and sub-section 5 declares that "the decision of the returning officer whether or not any ballot paper shall be rejected shall be final and shall not be questioned on an election petition. But the Order in Council does not anywhere state that an election shall not be declared void on the ground alleged. Whether the alleged issue by the Presiding Officers and their Assistants of a large number of ballot papers without the official stamp or perforation would avoid the election is a matter that will have to be considered at the trial.

In my opinion the petitioner should be allowed inspection of these papers. He will, however, not be allowed to take copies, because the taking of copies will not only be unnecessary for his purpose but may infringe the rule of secrecy. In order to insure secrecy these papers must be inspected face upwards, and all proper precautions should be taken to prevent any person from seeing the numbers printed on their backs.

Inspection of the documents of which I have allowed inspection will be had by the petitioner or his duly authorised agent in this behalf in the immediate presence of the returning officer and of Mr. Navaratnam, Deputy Registrar of this Court. The 1st respondent or his duly authorized agent in this behalf will also be entitled to be present. The Deputy Registrar is directed to see that no others are present.

I make no order as to the costs of this inquiry.

*Motions allowed.*

---