

1944

*Present: Wijeyewardene J.*KARUNARATNE BANDA *v.* ALADIN.IN THE MATTER OF AN APPLICATION FOR A WRIT OF *quo warranto*, No. 592.

Village Committee election—Allotting of colours to candidates—Mistake on the part of presiding officer—Confusion caused in the minds of voters—Alleged acquiescence on part of respondent—Election declared void.

At an election for a Village Committee, on nomination day, the petitioner was allotted green as the colour of his ballot box and the respondent was given yellow as his colour.

On election day the presiding officer, acting on official records, decided that yellow should be considered the colour given to the petitioner and green the colour allotted to the respondent.

Petitioner protested but did not withdraw from the election.

Held, that the change in the colours had misled a large number of voters and had prevented them from registering their votes and that the election should be declared void.

Held, further, that petitioner's conduct on election day did not amount to acquiescence in the proceedings and that, even if there had been acquiescence on his part, the Court should not uphold the election.

THIS was an application for a writ of *quo warranto*.

H. Wanigatunge (with him *Mahesa Ratnam*), for the petitioner.

U. P. Weerasinghe, for the respondent.

June 26, 1944. WIJEYEWARDENE J.—

This is an application by the petitioner for a declaration that the election of the respondent as Member for Ward No. 2, Kudabage, Bambarakotuwa (East) in the Village Committee of Uda pattu in Navadum korale, Sabaragamuwa, is null and void.

The following facts are admitted:—On October 19, 1943, nomination papers were received by Mr. D. Wanasundera, Office Assistant to the

Government Agent, Ratnapura, for the election of a Village Committee Member for the Ward in question. Mr. Wanasundera recorded the names of the petitioner and the respondent as Candidate No. 2 and Candidate No. 1 nominated for election and directed a poll to be held. The polling took place at the Government School at Bambarakotuwa from 9 A.M. to 11 A.M. on November 16, 1943, the presiding officer being Mr. G. L. S. Illangakoon. There were two ballot boxes, one coloured green and the other yellow; and the presiding officer counted 210 and 147 ballot papers in the green and yellow boxes respectively. The respondent who was, thereupon, declared duly elected took his seat in the Village Committee and signed the Register of Members on December 7, 1943.

The dispute in this case arises as to the colour which was allotted to each of the candidates. I think it best to consider this question under two headings:—

- (i) What were the colours which the petitioner and the respondent believed were allotted to them?
- (ii) What were the colours which were, in fact, allotted to the petitioner and the respondent by Mr. Wanasundera.

The petitioner says that he was allotted green and the respondent, yellow, on the nomination day. The respondent says, that he was allotted green and the petitioner, yellow.

Soon after the colours were allotted, the petitioner informed the village headman of Bambarakotuwa village that he was allotted green and the respondent, yellow. The petitioner got the handbill annexed to P 4 printed on November 12, 1943, and handbill P 1 printed about the same time and a few days before the election. In both these handbills the petitioner informed his supporters that his colour was green. He displayed green flags near his house and the lorry which was used to transport his voters carried a green flag when it went on its first trip on the election day to bring the voters of Balakotunne village; while the respondent displayed some yellow flags near his house and exhibited a board informing his supporters that his colour was yellow. The petitioner met Mr. S. C. Faulkner, the Manager of Alupola Group, Ratnapura, and got his permission to drive a lorry along the tarred road passing through the estate "for the purpose of taking people for Village Committee elections". The permit P 2 issued by Mr. Faulkner is dated November 15, 1943, and states that the petitioner's "flag will be green". The petitioner wore a green rosette, when he went to the polling station on the election day, and protested when Mr. Illangakoon told him that his colour was yellow according to the record R 2 made by Mr. Wanasundera on the nomination day. The petitioner is supported by the village headman of Bambarakotuwa, Ratranhamy, the tax collector of the Village Committee, Singho Appuhamy and William. I would not take into consideration the evidence of D. B. Appuhamy in assessing the evidence led on behalf of the petitioner. Appuhamy appeared to me to be a witness on whose evidence it would not be safe to act.

As the petitioner was giving evidence before me, it transpired that Mr. Illangakoon had endorsed on R 1 on the election day that he "observed on arrival at the polling station that candidates Nos: 1 and 2

wore rosettes of yellow and green respectively". It is not improbable that the knowledge of this endorsement had some effect on the evidence of the respondent. The respondent says that he had no doubt whatever in his mind up to the morning of November 15, that his colour was green and that he had informed all his supporters that his colour was green. A doubt arose in his mind when he saw P 1 on November 15 about 10 A.M., but he took no action although he could have gone to the Ratnapura Kachcheri and ascertained the true state of affairs. Yet, this doubt affected his mind to such an extent that he made a yellow rosette that night and took it with him and wore it when he went to meet Mr. Illangakoon. The record made by Mr. Illangakoon made it impossible for him to deny that he was wearing a yellow rosette when he met Mr. Illangakoon, but he made a pitiful effort to give as late an hour as possible for the wearing of the yellow rosette. He said he did not wear that rosette, when he left the house that morning, as he was certain in his mind that his colour was green. But, when he was asked what made him put on the yellow rosette before meeting Mr. Illangakoon, he was unable to give an explanation. Nor was he able to give any reason for asking his supporters to carry yellow flags on the vehicles long before he left home that day for the polling station. Though he says he knew and believed that green was his colour, he did not make a green rosette at any time and he said in explanation "I could have 'improvised' the colour green because green is everywhere, I mean the leaves of trees are green. I thought I could use the leaf of a tree in case it turned out that my colour was green". While according to him he had told his supporters earlier his colour was green, he did not take any action to inform his supporters about the uncertainty created in his mind by the appearance of P 1, though he allowed it to affect him so much as to wear a yellow rosette and direct the use of yellow flags on his vehicle. He could not possibly deny that his vehicles carried yellow flags in view of the definite evidence given by Eramanis, a disinterested witness, who drove his lorry that day.

I have not the slightest hesitation in rejecting the evidence of the respondent whom I consider as an untruthful witness. I hold that both the petitioner and the respondent believed in good faith that their respective colours were green and yellow and acted in that belief from the nomination day right up to the hour when they met Mr. Illangakoon on the election day.

It is more difficult to decide the question as to the colours that were in fact allotted to the respective candidates on the nomination day. After a careful consideration of the evidence, I have reached the decision that the probabilities are in favour of the finding that the colour green was given to the petitioner and colour yellow to the respondent. It is hardly necessary to observe that in coming to this decision I do not question in the least degree the veracity of Mr. Wanasundera. I think that owing to a certain confusion created perhaps by the description of the petitioner, then sitting member, as Candidate No. 2 and the respondent as Candidate No. 1, Mr. Wanasundera *bona fide* made a mistake in recording the colours allotted to the candidates.

There is the fact as found by me that the petitioner and respondent believed from the very commencement that their colours were green and

yellow respectively. The petitioner says that he was in fact, given green and the respondent, yellow. Ratranhamy, who seconded his nomination and was present at the time the colours were given, supports the petitioner. I do not take into consideration the evidence of Abilinu Sinno who too supports the petitioner. On the other hand there is of course the evidence of the respondent. The respondent has not called in support either his proposer or seconder who were present on that occasion. Mr. Wanasundera's evidence is based entirely on his record as he has no independent recollection of the fact. It is hardly to be expected that this witness would have such an independent recollection considering that he had presided over 112 nominations in 1943. In fact his own endorsement made on P 4 on November 27, 1943, shows that even at that time his recollection was faulty and he thought that red was the colour given to the petitioner. It is easy to understand from an examination of R 2 how a *bona fide* mistake could have been made with regard to the colours by Mr. Wanasundera on the nomination day. On one page of R 2 are written the names of the respondent and the petitioner and their respective proposers and seconds. The respondent is there described as Candidate No. 1 and the petitioner as Candidate No. 2. On the other page of R 2 occurs the following entry:—

To Candidate: No. 1 Green.
No. 2 Yellow.

Both Nos. 1 and 2 ask for green.
Colour is decided by casting lots.

It is not improbable that when he proceeded to make the above record Mr. Wanasundera made the mistake of thinking that the petitioner the sitting member, was Candidate No. 1 and the respondent was Candidate No. 2.

I think it more probable that the petitioner and respondent were in fact given green and yellow respectively and I hold accordingly.

Mr. Illangakoon who had no choice but to act according to the official records decided on the election day that yellow should be considered as the colour of the petitioner and green as the colour of the respondent. The petitioner protested against it but did not withdraw from the election. While Mr. Illangakoon did his best to remove the confusion that was created by the mistake as to the colours, I am satisfied that there remained a great deal of confusion in the minds of the illiterate voters in spite of Mr. Illangakoon's efforts. It is clear that Mr. Illangakoon's announcement made from time to time with regard to the colours could not have reached all the voters who came to vote. There is the definite evidence of Singho Appuhamy and William that they cast their ballot papers in the belief that green was the colour of the petitioner. There is also the fact that owing to this "change" in colours only a few voters from Balakotunne were able to register their votes, as the petitioner's lorry which was to bring the voters was not allowed to go on the estate road as the vehicle did not carry a green flag as required by the Permit P 2, after Mr. Illangakoon informed the petitioner at the commencement of the poll that his colour was yellow.

On the evidence before me I am satisfied that the change in the colours misled a large number of voters and it operated in the nature of a trap.

in the case of the illiterate voters who formed the majority. It has also been proved that a large number of voters from Balakotunne were prevented from registering their votes as a result of this change.

The Counsel for the respondent contended that the petitioner acquiesced in the proceedings on November 16, 1943, and thereby agreed that the election should be held on the footing that the petitioner's colour was yellow and the respondent's green. He drew my attention to a passage from a judgment of Abbott C.J. cited in *Shortt on Mandamus* (at page 151):—

“ A person is not to be permitted to impeach a title conferred by an election in which he has concurred, or the titles of those mediately or immediately derived from that election.”

and argued that the present application should, in any event, be dismissed, leaving it open to an aggrieved voter to institute fresh proceedings against the respondent.

Now it is laid down in the *Encyclopaedia of the Laws of England* (Volume I., page 130) that—

“ Acquiescence during the progress of the infringing act, or of steps necessarily leading to it, will bar a legal right only where it amounts to an encouragement to do the act or take the steps, in the belief or expectation that the right does not exist or has been abandoned (“standing by”), or is such as to raise an inference that the parties have acted upon an agreement inconsistent with the right asserted.”

I do not think that the petitioner's conduct on the election day amounts to such an “acquiescence”. He protested against the change of colours but was told by Mr. Illangakoon that the election would have to proceed on the basis that the colours were as shown in R 2. When Mr. Illangakoon asked the petitioner and the respondent at the close of the poll to sign R 1 expressing “their satisfaction at the manner in which the election was conducted”—meaning thereby the arrangements made by Mr. Illangakoon—the petitioner agreed to do so but insisted that a record should be made of his protest at the commencement of the poll with regard to the change in the colours, and Mr. Illangakoon recorded it accordingly. The petitioner did nothing to encourage the respondent to take part in the election in the belief or expectation that the petitioner had abandoned his right to challenge the election. The evidence shows not only that he protested but made it clear that he would continue to make his protest.

Even if there was an “acquiescence” on the part of the petitioner, could a Court uphold the election in the circumstances of this case as some of the voters had been misled by the mistake of the returning officer and some others had been prevented from recording their votes? In circumstances somewhat similar to those in the present case an election was declared void in *Wilson v. Ingham and others*¹.

In that case, through the mistake of a clerk of the returning officer, the ballot papers contained the name of a candidate, J. M. Meek, who had withdrawn shortly after the nomination and within the time prescribed for that purpose. When the returning officer, who acted as presiding

¹ (1895) 64 L. J. Q. B. D. 775.

officer at the election, became aware of the mistake just before the commencement of the poll, he informed most of the voters while handing them their ballot papers that Meek was not a candidate for election and that his name appeared on the ballot papers by mistake. When the votes were counted, it was found that 34 votes had been given to Meek. These votes "if otherwise given might have affected the result of the election". The respondent's Counsel in that case does not appear to have even suggested that the petitioner was debarred from questioning the validity of the election, as he "acquiesced" in the proceedings after the mistake was discovered.

In *Rambukwelle v. Silva*¹ it was found after the voting had gone on for sometime that the presiding officer had failed to stamp the ballot papers on the back with the official stamp. The presiding officer, thereupon, consulted the polling agents of the two candidates and in accordance with their agreement, opened the box, took out the ballot papers, stamped them with the official stamp, put them back in the ballot box and sealed it. The petitioner made this irregularity one of the grounds for impugning the validity of the election and the respondent contended that the petitioner was estopped from relying on this ground. Bertram C.J. held against the plea of estoppel and said:—

"If this were a case in which the parties were alone concerned, if it were simply a question whether Mr. Rambukwelle (petitioner) or Mr. de Silva (respondent) should be a member for the division, I think this principle might well be applied. Undoubtedly, but for the acquiescence of Mr. Timothy de Silva (respondent's agent), Mr. Rambukwelle's agent would not have consented to the stamping of the ballot papers. But, as Mr. Pereira (petitioner's Counsel) justly argued, the public interests have also to be regarded. The voter has rights as well as the candidate. The voters are entitled to have the result of the election declared according to the law, and not according to an agreement between the candidates. No authority has been cited in which the principle of estoppel has been applied as between candidates at an election, and I do not feel justified in giving effect to it here."

Both *Wilson v. Ingham and others* (*supra*) and *Rambukwelle v. Silva* (*supra*) were, no doubt, proceedings on election petitions, while the application in this case is for "a mandate in the nature of a writ of *quo warranto*" (Legislative Enactments, Chapter 6). The Village Communities Ordinance (Legislative Enactments Chapter 198) does not make any provision for testing the validity of an election under that Ordinance by means of an election petition, and a person has, therefore, to adopt the procedure followed in this case if he desires to have the election declared null and void (*vide Piyadasa v. Goonesinha*)². Moreover, this is not an application to substitute the petitioner in the office of the respondent, and this application could have been made successfully by any qualified voter like the witness William who had been misled by the change in colours. The adoption of the suggestion of the respondent's Counsel that the present application should be dismissed on the ground that the petitioner is disqualified and that it should be left

¹ (1924) 26 N. L. R. 231.

² (1941) 42 N. L. R. 339.

open to a voter to make a fresh application would only result in unnecessary expense and inconvenience to all the parties concerned. In all the circumstances of the case I would adopt the ruling of Bertram C.J. in *Rambukwelle v. Silva* (*supra*) and hold against the respondent, even if there had been an "acquiescence" by the petitioner.

For the reasons given by me I declare the election of the respondent to be void.

The rule *nisi* is made absolute and the petitioner is granted the costs of these proceedings.

Election declared void.
