

1948

Present : Canekeratne J.

KURUPPU, Petitioner, and D. F. HETTIARACHCHI, et al.,
Respondents.

Election Petition No. 6 of 1947, Nivitigala.

Election petition—Objection to ballot papers—Void for uncertainty—Duty of Returning Officer before declaring result—Decision final—Right to object on petition—Parliamentary Elections Order in Council, 1946—Section 49 (5).

Under the Parliamentary Elections Order in Council, 1946, a duty is cast on the Returning Officer to examine the ballot papers before he declares the result of the poll. When the Returning Officer looks at a ballot paper he is in an attitude of consciousness to it and if he has counted it as a vote a Court would, in the absence of evidence to the contrary, come to the conclusion that he has decided on the validity of the ballot paper: his decision is final under section 49 (5) of the Order in Council.

THIS was an election petition presented against the return of the 1st respondent as member for the Nivitigala Electoral District, at the election held on August 28, 1947.

N. E. Weerasooria, K.C., with *E. B. Wickramanayake, Christie Senewiratne, George Samarawickreme*, and *A. B. Perera*, for the petitioner.

S. Nadesan, with *Sylvan Fernando* and *Titus Goonetilleke*, for the 1st respondent.

T. S. Fernando, Crown Counsel, with *M. Tiruchelvam, Crown Counsel*, for the 2nd respondent.

Cur. adv. vult.

April 30, 1948. CANEKERATNE J.—

The petitioner and the 1st respondent (Mr. Hettiarachchi) were two of the candidates at the Parliamentary Election for the Nivitigala Electoral District, on August 28, 1947. The 2nd respondent is the Returning Officer for the district. The 1st respondent was returned as being elected by a majority of 24 votes, the numbers being 5,626 votes for him and for the petitioner 5,602 votes. The petitioner's case, as it appears in the petition and particulars, is that the election of the 1st respondent ought to be held bad on account of breaches of the law relating to Parliamentary elections which the petitioner alleges to have been committed. The principal grounds were delivery of ballot papers which were not stamped or perforated with the official mark, (which may be called the first ground), the number of voters to whom ballot papers were issued and marked in the Register of Electors not corresponding with the total number of voters declared by the Returning Officer to have voted at the election, (which is referred to hereafter as the second ground), ballot papers which were unmarked or void for uncertainty being counted as valid votes, (which may be called the third ground), votes of persons who committed personation should be struck off and the tendered votes cast for the petitioner be added to the poll, (which is referred to hereafter as the fourth ground).

At the trial of this petition, not less than 1,256 votes were objected to on one side or the other—of these, 589 were votes for the 1st respondent and 667 for the petitioner. Shortly after the commencement of the trial the objections to 254 were abandoned by the petitioner and to 278 by the 1st respondent. Twenty of the remaining votes—of these 6 were votes for the 1st respondent, and 14 for the petitioner—were objected to on the ground that the ballot papers on which such votes were given had no official mark. It was common ground between the parties that one vote cast for another candidate had been counted for the 1st respondent and six votes cast for the 1st respondent had been counted for the petitioner. After the cross-examination of the 2nd respondent whom he called as a witness, Mr. Weerasooria informed the Court that he would not proceed with the second ground as all the presiding officers had not been summoned or with the fourth ground as the total number of tendered votes would not affect the ultimate result of the case. The

whole dispute then between the parties on the first day was whether the remaining 328 votes cast for the 1st respondent and the 369 votes cast for the petitioner were invalid. These votes may be divided into two groups—where the cross is placed immediately upon the symbol attached to the candidate and where a mark, *e.g.*, a cross, a line, is not so placed. There were 102 ballot papers of the 1st respondent and 13 of the petitioner falling within the former group.

A voter can only record his vote upon a ballot paper provided for him by the presiding officer (or his agent) and handed to him in the polling station. The form of such ballot paper is prescribed by the Order in Council—section 40 (2) and Form 1. It is to be attached to a counterfoil. The front or face of the ballot paper must contain a list of the candidates, showing their names and arranged alphabetically in English in the order of their surnames or *ge* names, and the symbol allotted to each candidate printed opposite his name. The second parallelogram of the ballot paper contained the name of the 1st respondent, his symbol an elephant and the voting space. The first step for a voter to take is to apply at his polling station for a ballot paper. Before, however, a ballot paper is delivered to an intending voter, it is required by section 42 (2) that it be stamped on the back or perforated with the official mark. The duty so to mark or perforate or to see that a ballot paper is so marked or perforated before it is delivered clearly lies on the presiding officer. On receipt of the ballot paper the voter shall go into one of the places set apart and there secretly mark his paper and fold it so as to conceal his vote, and then put his ballot paper so folded up into the ballot box, and quit the polling station (sub-section 3). One of the directions in the second schedule requires that the voter shall place his ballot paper in the box “after having shown” the official mark at the back to the presiding officer. In the box, therefore, the backs alone are exposed. By section 48 (4) before the Returning Officer proceeds to count the votes in the presence of such of the candidates and their counting agents as attend, he is required to open each ballot box and take out the papers therein, and mix the whole of the papers in the boxes together; to do this he must of necessity see the papers folded with only the backs exposed as they were placed in the box. Sub-section 4 also requires the Returning Officer, while counting the votes, to keep the ballot papers with their faces upwards and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers. In order to fulfil the requirements of this rule it is absolutely necessary that the folded papers should be opened in order to expose their faces. It is his duty to count the votes and the first paragraph of sub-section 1 of section 49 expressly enacts that he shall not count any ballot paper which is not stamped or perforated with the official mark and that a ballot open to this objection shall be invalid.

Mr. Weerasooria contended that a ballot paper, (1) on which votes were given to more candidates than the voter is entitled to, or (2) which is void for uncertainty, was void and must not be counted (sub-section 1, b, and e).

The form of the mark is, in the absence of evidence of collusion or prearrangement, immaterial. The main consideration is to ascertain

whether the voter has by any mark indicated for whom he intended to vote ; and if such a mark exists within the candidate's compartment of the ballot paper, the vote may be held good whatever be the shape or instrument by which the mark is made. But when the mark is so placed as to render it impossible to decide for whom the vote was intended to be given the ballot paper must be rejected. If the only mark on a ballot paper is a cross made immediately upon the name of one of the candidates in such a way as to make it appear possible that the voter intended to strike out the name the ballot paper is void for uncertainty.

Mr. Weerasooria's contention was that the same rule is applicable where the only mark was a cross made immediately upon the symbol allotted to the candidate. The symbol, he argued, is the distinguishing mark for those who are illiterate. A proper name is a mark which one connects in his mind with the idea of the object, in order that whenever the mark meets his eyes or occurs to his thoughts, he may think of that individual object ; it retains a meaning as a complex of sounds or letters and it serves to distinguish one object from the others in a row. The usual method employed is that of designating persons by a family name and a Christian name—this is a case of a verbal name. There may be a symbolic name, as in Astronomy where both names, a verbal and a symbolic, are found. The respondents contended that the symbol has not the same characteristics as the name of the candidate and that it is only a description. Mr. Fernando further argued that the rules in the second schedule were silent as regards the symbol and that the mark had to be placed on the space opposite the name of the candidate. But the language used in the Rules is different, it is a cross "in the space provided for the purpose on the right hand side of the ballot paper opposite the name of the candidate".

After Mr. Weerasooria had concluded his argument, I intimated to Counsel for the respondents that they should address me on the first group of ballot papers. Counsel for the 1st respondent concluded his argument and when Mr. Fernando had come almost to the end of his argument the hearing was adjourned for the following day. The main contention advanced by Counsel for the 2nd respondent on the second day was a new one, that the Returning Officer had come to a conclusion on these ballot papers and that his decision was final (section 49 (5)). This contention was directly challenged by Counsel for the petitioner. There is no decision, he said, where the parties have not been heard, where there was no inquiry into the validity of the ballot papers. He urged that Counsel had by the procedure adopted agreed to relax the rule and had thus waived the benefit of the section ; this also caused prejudice to the petitioner. Parties may contract themselves out of their rights, but they cannot contract the Court out of its duty. As the first question does not arise unless I am with the petitioner in his contention that there was no decision on the ballot papers on the day of counting, it will be convenient to discuss that contention first.

The Returning Officer should reject as invalid any ballot paper coming under any of the five heads mentioned in section 49 (1) : he must endorse on the rejected ballot paper the word "rejected". The counting is to proceed continuously as far as practicable. The duty of a Returning

Officer is upon the completion of the counting to declare that candidate elected who has received the majority of votes (section 48, 5, 7). 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. What is the decision referred to? It is whether a ballot paper shall be rejected or shall not be rejected—if he determines that a particular ballot paper is invalid that decision is final, similarly if he determines that it is valid. The duty is cast on him to examine the ballot papers before he declares the result of the poll. He must keep the ballot papers with their faces upwards whilst counting the votes and ascertain whether they are obnoxious to the provisions of paras. *b, c, d* and *e*. His function is to see whether they comply with the statute or whether there is any objection to them. When the Returning Officer looks at a ballot paper, he is in an attitude of consciousness to it, he attends to the object before him; if his first impression would appear to be that the paper in question seems to fall within one of the sub-heads of section 49 (1) he must show it to each candidate (or his agent) and hear what he has to say before he determines to reject it (49 (4)). But he is under no such duty if his first impression is that it is not invalid. Objection may, however, be taken by a candidate (or his agent) spontaneously to the validity of a ballot paper, then he would make a decision in respect of that paper. The mind has to form a judgment. One finds oneself forced to think in a given manner in spite of an attempt to think otherwise. Whenever the mind entertains the possibility of an alternative which it is ultimately driven to reject there is a limitation of subjective activity. It is a case where one view is taken not one where a fact is simply given and accepted. The Returning Officer has to form the best judgment he can after looking at the document and listening to any argument if it is proffered, otherwise without any such help. His jurisdiction to reject or admit a ballot paper is rightly exercised although he has taken, if the contention of the petitioner is correct, an erroneous view of the law with regard to Parliamentary Elections. The result of his investigation cannot be challenged. Internal evidence furnished by the form of the mark, its position, and the place where it is found in the impugned ballot papers shows that a question as to the validity of the majority of these papers was probably present at the time of the counting of the votes. Further there are some cases in which it is very likely that an objection was taken: in each of these the voter has marked a long cross, each line thereof, being partly in the square allotted to one candidate and partly in that of another candidate—in two cases partly in that of two other candidates. There is no evidence to show that the Returning Officer has not come to a decision as regards these votes. In the case of the unperforated ballot papers, on the other hand, the internal evidence leads to the conclusion that he could not have considered them with reference to part “a” of section 49 (1).

I am of opinion that the 1st respondent was duly returned as the member for Nivitigala Electoral District.

The question of costs is reserved.

Petition dismissed.