RAJAPAKSE AND ANOTHER

v.

GUNASEKERA AND OTHERS

SUPREME COURT.

SHARVANANDA, J., WANASUNDERA, J. AND WIMALARATNE, J.

S. C. ELECTION PETITION APPEAL No. 1 OF 1983 AND S. C. ELECTION PETITION No. 2 OF 1983 (CONSOLIDATED).

ELECTORAL DISTRICT No. 159 – KALAWANA.

FEBRUARY 27, 28, 1984, MARCH 1, 12 TO 15, 19 TO 22 AND 26 TO 29, 1984.

Election Petition – Corrupt practice of publishing false statements concerning personal character and conduct.

Section 58(1)(d) read with section 77(c) and section 82 A(1) of the Ceylon (Parliamentary Elections) Order in Council, 1946.

Appeal on question of law – Burden of proof – Standard of proof – Were the statements made and were they false ?

Section 80 (B) (d) of the Order in Council – Affidavit accompanying petition – If facts stated in affidavit not based on personal knowledge – should petition be rejected ? – Jurisdiction of Election Court.

At two by-election meetings held on 31.12.1980 and 2.1.1981 the 2nd respondent Mahinda Rajapakse speaking in support of the candidature of the 1st respondent Sarathchandra Muttetuwegama for the Kalawana seat in Parliament made two statements imputing immoral conduct with women in his room at Sravasti on the part of the petitioner Lionel de S. A. Gunesekera who was the opposing candidate. The 1st respondent won the election and the petitioner filed an election petition seeking to have the election avoided on several grounds. Among these grounds was the allegation of the commission of the corrupt practice of publishing false statements in relation to the petitioner's personal character and conduct by the 2nd respondent with the knowledge and consent or as agent of the 1st respondent at the aforesaid meetings of 31.12.1980 and 2.1.1981 and within the meaning of section 58 (1) (*d*) read with section 77(*c*) of the Ceylon (Parliamentary Elections) Order in Council, 1946 (paragraphs 4 and 5 of the petition).

The Election Judge found that the above mentioned charge of publishing false statements had been proved and declared the election of the 1st respondent void. The other charges were held not to have been proved. The respondents lodged separate appeals to the Supreme Court.

With his petition, the petitioner filed his own affidavit but the averments in the affidavit in regard to the false statements the 2nd respondent was alleged to have made were based on what he had heard off a tape recording (not produced) of 2nd respondent's speeches. Yet he declared in his affidavit that the averments therein were on the basis of his knowledge. The petitioner denied the accusations of immoral conduct with women at Sravasti. The respondents gave no evidence but the evidence was that the petitioner was living in open adultery with one Manel Wijesinghe having seduced her when she was a minor on the promise of marrying her. He was married to Nanda Fernando whom he had kept as his mistress prior to marriage. He had fourteen children – seven by each of these women and had made false declarations in respect of the birth registration of every one of his fourteen children. More women voters than men visited him in Colombo because he was "very young" He served a three year term of rigorous imprisonment for bribery but now attributes the conviction to his counsel being a Tamil and not understanding his instructions. He had made false statements as to his date of birth in the Book of Parliament and falsely denied his presence in Parliament in order to explain his failure to attend at voting time at a crucial debate.

Held–

(1) The Supreme Court cannot review a finding of fact by the Election Judge unless a question of law is involved or the finding itself is in a legal sense a question of law as section 82(A)(1) of the Ceylon (Parliamentary Elections) Order in Council, 1946, provides an appeal only on any question of law but not on any question of fact. Inferences from primary facts may themselves be findings of fact. But inferences from primary facts may also be inferences of law in their application to mixed questions of law and fact. The decision of an Election Court as to the legal effect of a question of mixed fact and law is reviewable. The Supreme Court in appeal under section 82A of the Order in Council will interfere with conclusions of facts only if it is shown either that the Election Judge had erred in law or reached a conclusion on the facts which it finds no reasonable person applying the law could have reached.

(2) Under Section 58 (1) (*d*) read with section 77 (*c*) of the Ceylon (Parliamentary Elections) Order in Council, 1946, to invalidate the election the petitioner must prove –

(i) that there has been a making or publishing before or during the election time by the winning candidate or his agent of a statement of fact.

(ii) that the statement of fact is false.

(iii) that the statement is in relation to the personal character or conduct of the petitioner.

(iv) that this has been made for the purpose of affecting his return.

What is objectionable is not adverse criticism however severe, however undignified or ill-mannered, however regrettable, not an expression of opinion however unfounded or unjustified but a false statement of fact. The attack must be on the person beneath the politician – his personal character, integrity and veracity.

(3) Charges of corrupt practice being quasi-criminal in character must be sufficiently clear and precise and proved conclusively by the petitioner. The burden of proof is on the petitioner and the standard of proof must be proof beyond reasonable doubt. If any reasonable doubt arises in respect of any of the ingredients of the charge the benefit thereof should go to the person charged. This is because of the penal consequences which follow a finding that a corrupt practice has been committed.

(4) The affidavit which the petitioner filed complies in form with the requirements of section 80B (*d*) of the Order in Council and is bona fide and not fraudulent or dishonest and so long as this is so the petition cannot and should not be dismissed or rejected in limine on the ground of incorrect or erroneous averments in the affidavit filed in support of the allegation of corrupt or illegal practice. The Election Judge enters on the exercise of his jurisdiction on the basis of the averments in the election petition and where corrupt or illegal practice is alleged on the footing of the allegations in the petition supported by an affidavit which on the face of it conforms to the law. Hence the objection to the affidavit was rightly overruled.

(5) The Election Judge held as a fact that the 2nd respondent did make the statement he is alleged to have made at the two election meetings and as this finding cannot be branded as irrational or perverse or based on no-evidence the finding must be accepted.

(6) On the assumption that the 2nd respondent did make the impugned statements the burden is still on the petitioner to prove beyond reasonable doubt that the statement was false. The petitioner's unchallenged denial that he took any women to his room at Sravasti for any immoral purpose establishes only that that reason for the 2nd respondent's conclusion that the petitioner is a man of immoral character is not well-founded. The onus of falsifying that conclusion independent of the facts which impelled that conclusion, still remained to be discharged by the petitioner.

The petitioner's uncorroborated testimony has not been correctly evaluated in the light of his proved disregard for truth. The trial Judge stated that the petitioner's falsehoods were in relation to unconnected matters but he had failed to appreciate the significance of these admissions of his falsehoods and the vital bearing they have on the question of the petitioner's credibility and character moral and otherwise.

If the right question, whether the petitioner had established that the accusation in regard to moral character was false had been posed the Judge would at least have entertained some reasonable doubt as to the falsity of the allegation. An error of law exists whenever the conclusion is one to which no court applying the relevant law as to the burden of proof could have reasonably come. Whether the evidence is in a legal sense sufficient to support a determination of fact is a question of law. Where the trial Judge's finding has been reached without any consideration whatever of the intrinsic and palpable infirmity in the evidence or without taking into account relevant considerations such as the danger of accepting the sole evidence of a witness who has a record of lying even though in unconnected matters, the appellate court is entitled to hold that the finding is erroneous in law. This error of law has vitiated the Judge's finding that the impugned statements complained of by the petitioner are false.

Cases referred to :

(1) *G. V. Naidu & Co. v. Commissioner of Income Tax,* AIR 1959 SC 359.

(2) *Mahavithane v. Commissioner of Inland Revenue, (1962) 64 N.L.R. 217, 222.*

(3) *Subasinghe v. Jayalath, (1966) 69 N.L.R. 121, 126.*

(4) *Edwards v. Bairstow, [1955]Œ " ALL ER 48, 57.*

(5) *Collettes Ltd. v. Bank of Ceylon – S.C. Ref.6/32 (C.A. 325/74 – D.C. Colombo 73754/M).*

(6) *Sree Meenakshi Mills Ltd. v. Commissioner of Income Tax, AIR 1957 SC 49.*

(7) *In re W. (An Infant), [1971] 2 ALL ER 49, 56; [1971] 2 W.L.R. 1011, 1021; [1971] AC 682, 700.*

(8) *R. v. Maqsud Ali, [1965] 2 ALL ER 464.*

(9) *Satish Kumar v. Election Tribunal, AIR 1963 Rajasthan 157.*

(10) *Kobbekaduwa v. Jayewardene, S.C. 3/82. S.C. Minutes of 10.1.82.*

(11) *Marjan v. Burah, (1948) 51 N.L.R. 34, 38.*

(12) *Muttetuwegama v. Gunasekera et al, S.C. 4/81 – S.C. Minutes of 6.4.82.*

APPEAL from the judgment of an Election Judge.

Dr. Colvin R. de Silva with *Miss Suriya Wickremasinghe, Mrs. M. Muttetuwegama, D.S. Wijesinghe, C. Boange, N. V. de Silva, S. Yusoof* and *Miss S. de Silva* for 2nd respondent-appellant in S.C. Appeal No. 1/83.

H. L. de Silva, President's Counsel, with *Neville de Jacolyn Seneviratne, K. Shanmugalingam, Sidat Sri Nandalochana, Peter Jayasekera, M. Y. M. Faiz* and *L. de Silva* for 1st respondent-appellant in S.C. Appeal No.2/83

George Candappa, President's Counsel, with *S.C. Crosette Thambiah, Waruna Basnayake, Daya Pelpola* and *Ronald Perera* for petitioner-respondent in both appeals.

Cur.adv.vult.

May 16, 1984.

SHARVANANDA, J.

In the by-election to Parliament held on the 12.1.1981, for the Electoral District of Kalawana, the 1st respondent, Sarathchandra Muttetuwegama, was returned as the duly elected Member. The

petitioner Lionel de Silva Abeyweera Gunasekera contested the seat as an independent candidate and the 1st respondent as a Member of the Communist Party. The petitioner by his petition dated 22.1.81 sought to have the said by-election declared void on the grounds set out in paragraphs 4, 5, 6 & 7 of his petition. The ground of general intimidation contained in paragraph 7 of the petition was abandoned by his Counsel at the commencement of the hearing of the trial.

After trial the Election Judge held that the corrupt practices of publication of false statements concerning the personal character and conduct of the petitioner, referred to in paragraphs 4 & 5 of the petition within the meaning of section 58 (1) (*d*) read with section 77 (*c*) of the Ceylon (Parliamentary Elections) Order in council 1946, were committed by the 2nd respondent-appellant, Mahinda Rajapakse, with the knowledge or consent or as the agent of the 1st respondent and accordingly declared the election of the 1st respondent void and that he was not duly elected as Member of Parliament for Kalawana. In respect of the charge of publishing the false statement, referred to in paragraph 6 of the petition, the trial Judge has held that it had not been established. The two respondents have each preferred an appeal to this court from the said Judgment. In appeal S.C. 1 of 1983, the 2nd respondent who is hereinafter referred to as the 2nd respondent and in S.C. 2 of 1983 the 1st respondent who is herein referred to as the 1st respondent are the respective appellants. The petitioner-respondent who is referred to herein as the petitioner is the respondent in both appeals. Both appeals were taken up together for hearing.

Counsel for the petitioner has relevantly stressed the limited scope of the appellate jurisdiction of this court when hearing an appeal from the determination of an Election Judge. Section 82 (A) (1) of the Ceylon (Parliamentary Elections) Order in Council, provides that an appeal to the Supreme Court lies *on any question of law,* but not otherwise against the determination of an Election Judge under section 81. This court cannot, therefore, review the finding of fact by a trial Judge unless a question of law is involved in the finding or the finding itself is, in a legal sense, a question of law.

An appellate jurisdiction ordinarily embraces the power to review not only conclusions of law but also findings of fact. In such situations the appellate court is not restricted to the "no evidence rule" in respect of findings of fact ; it has to exercise its jurisdiction as a tribunal of appeal on matters of fact, as well as on matters of law. It is not precluded from forming its own independent opinion of the facts, both in respect of perception and evaluation of facts. Upon an appeal from a judgment where both facts and law are open to appeal, the Appeal Court is bound to pronounce such judgment as in its view ought to have been pronounced by the court from which the appeal proceeds. In the exercise of the appellate jurisdiction an appellate court may not be disposed to take a different conclusion on questions of fact unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion.

On the other hand the scope of the powers of an appellate court where a right of appeal to the court lies only on a question of law, is much more restricted. It is bound by the findings of fact unless the conclusion of fact drawn by the tribunal appealed from is not supported by any legal evidence or is not rationally possible. If such plea is established the court may consider whether the conclusion in question is not perverse and should not therefore be set aside. Vide the judgment of Gajendragadkar, J. in *G. V. Naidu & Co., v. Commissioner of Income Tax,* (1) cited with approval by our Supreme Court in *Mahawithane v. Commissioner of Inland Revenue* (2) and *Subasinghe v. Jayalath,* (3).

Lord Radcliffe in *Edwards v. Bairstow* (4) also elucidated the criteria for identifying errors of law.

> "I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case, and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad in

law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been an error in point of law."

Inferences from primary facts may be inferences of law or inferences of fact. Where a finding is given on a question of fact, based upon inferences from facts, that is not always a question of law. The proposition that inferences from primary facts found are matters of law–*Collettes Ltd., v. Bank of Ceylon* (5)–will be correct in its application to mixed cases of law and facts, but not to pure questions of fact. Inferences from facts would be questions of facts or of law accordingly as the point for determination is one of pure fact or of mixed question of law and fact. Where the point for determination is a mixed question of law and fact, while the findings of the election court on the facts found are final, its decision as to the legal effect of those findings of proved facts is a question of law which can be reviewed by this court. Where the finding is one of facts, the fact that it itself is an inference from other basic facts will not alter its character as one of facts. Vide *Sree Meenakshi Mills Ltd., v. Commissioner of Income Tax* (6).

When the legislature has restricted the power of this court to review the decisions of the Election Judge to questions of law, it obviously intended to shut out questions of fact from the purview of its appellate jurisdiction and to clothe them with finality. This court is bound and therefore cannot question the correctness of a finding of fact unless it is not supported by any evidence or if it is unreasonable or perverse. Where there is evidence to support the findings of fact the decision of the Election Judge is final even though this court might not, on the materials, have come to the same conclusion, had an appeal on the facts been competent and this court had the power to substitute its own judgment. This court on an appeal under section 82 A of the Ceylon (Parliamentary Elections) Order in Council will interfere with the conclusion of facts only if it was shown either that the Election Judge has erred in law or reached a conclusion on the facts which it finds that no reasonable person applying the law could have reached.

In para. 4 of the petition, the petitioner alleged that the 2nd respondent at a public meeting in support of the 1st respondent held on 31.12.80 made the following false statement of fact. (The English translation of the Sinhala statement is set down as there is no controversy about its accuracy) :

"When I was a student in 1960, I lived in Sravasthi with my father Lionel Gunasekera also was there in the upstairs. One morning I saw him bringing a woman to his room. I thought it was his wife. In the evening another woman was brought in. In the morning it was yet another woman who went out of the room. Then I knew what type of person he was. If he comes to your home you will have to protect your young women. I wonder what will happen to your young girls and young mothers if this man goes to Parliament."

In para. 5 of his petition, the petitioner alleged that the 2nd respondent, at another public meeting held on 2.1.81 also in support of the 1st respondent made the following false statement of fact :

" As though it were today I could remember the sixties, when I was residing with my father at Sravasthi and attending school. Lionel Gunasekera lived upstairs. One morning I saw Lionel taking a woman into his room. I thought she was his wife. In the evening I saw him bringing another woman into his room. In the morning it was a different woman that came out of the room. Then I knew who the man was and this happened to be his daily routine. Is this the type of man you intend sending to the Parliament ? The one advice I could give the voters of Kalawana is, if ever this cad happens to come canvassing for votes to your home protect your innocent wife and daughter. It is even difficult for an elderly woman to escape him. If this cad is sent to the Parliament and your wife or daughter happens to go to him for a favour what will be the outcome ? I am warning you in advance."

In order to bring the case within the ambit of section 58 (1) (*d*), read with section 77 (*c*) of the Ceylon (Parliamentary Elections) Order in Council, 1946, as a ground for invalidating the election of the 1st respondent the petitioner must prove *firstly*, that there has been a making or publication, before or during the election time, by the 1st respondent or his agent of a statement of facts, *secondly*, that the statement of fact is false ; *thirdly*, that the statement is in relation to

the personal character or conduct of the petitioner himself ; *fourthly*, that the statement has been made for the purpose of affecting his return

Adverse criticism, however severe, however undignified or ill-mannered, however regrettable it might be, in the interest of purity and decency of public life, in relation to the political views, position, reputation or action of a candidate will not bring it within the mischief of the section. Political statements not calculated to attack the personal character or conduct of any rival candidate do not come within the pale of this section. Further what is objectionable is a false statement of fact and not a false statement of opinion, however unfounded or however unjustified. It is only when the person beneath the politician is sought to be attacked and his personal character, integrity and veracity are challenged and such statement is false, can it be said that a false statement within the meaning of section 58 (*d*) has been made. Once it is established that such a statement is made, the question whether there was malice or not is immaterial.

Charges of corrupt practice are quasi-criminal in character and the allegations thereto must be sufficiently clear and precise and must be proved by evidence of a conclusive nature. The burden of proving the alleged corrupt practice is on the petitioner and the allegations must be proved beyond reasonable doubt. If any reasonable doubt arises, after the evidence has been scrutinized, in respect of any of the ingredients of the charge, the benefit thereof should go to the person charged. This is because of the penal consequences which flow from a disqualification arising out of a finding that a corrupt practice has been committed. Vide sections 58 (2) and 82 (D) (2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council. If the evidence adduced is not sufficient and trustworthy to prove the charge, the case of the petitioner cannot be said to be proved and the election cannot be set aside on such evidence.

The principal matters in dispute between the parties in this case are (1) whether the second respondent made the aforesaid statements alleged in paragraphs 4 & 5 of the petition and (2) whether the said statements were false. If these questions are answered in the affirmative, it cannot be seriously contended that the statements were made in relation to the personal character or conduct of the petitioner for the purpose of affecting the return of the petitioner.

The Election Judge has, on an analysis and evaluation of the evidence found that the 2nd respondent did make these two statements, referred to in paragraphs 4 & 5 of the petition in the circumstances referred to therein. The cross examination of the petitioner's witnesses does not show that it was disputed that the 2nd respondent did address the meetings held in support of the 1st respondent at Pallegama on 31.12.80 and at Weragama on 2.1.81, in the presence of the 1st respondent. Proof of the fact that the 2nd respondent did make the impugned statements consist only of the direct evidence of P.C. Ratnayake, who, in the course of his duties is alleged to have covered both meetings held on 31.12.80 and 2.1.81 and of P.C. Yapa, who accompanied P.C. Ratnayake. In the course of his evidence for the purpose of refreshing his memory in regard to the proceedings of the said two meetings, Ratnayake produced his rough note-book (P 1) which is really an attendance register which he stated he used to record speeches that tended to provoke breaches of the peace or which contained attacks on the character of opposing candidates. According to P.C. Ratnayake and H.Q.I. Ratnasingham, the latter had instructed P.C. Ratnayake to record in long hand in addition to the matters referred to in the I.G.P.'s circular (P 4), any statements made in speeches which constituted an attack on the character of the opposing candidate. Ratnayake said that that was why he had recorded in P 1 the speeches of the 2nd respondent on 31.12.80 and on 2.1.81 relating to his seeing the petitioner taking different women to his room at Sravasthi. As this was an attack on the petitioner's personal character, P.C. Ratnayake had taken it down in P 1. According to him it was his practice to read out to H.Q.I. Ratnasingham the following morning the notes of the speeches entered in P 1 and on this occasion the H.Q.I. had asked him to enter the character-attack in a sentence in the official tape-recording-information book, which he did. Though in the course of the trial, the Election Judge had ruled out the production of the entries in the tape-recording-information book as substantive evidence under section 35 of the Evidence Ordinance, the book was produced in court for perusal at the instance of the respondents and the witnesses were cross examined on that. This tape-recording-information book in which the entries of the minutes were made is an official book kept in the custody of the H.Q.I. The learned Judge has observed in his judgment, that P.C. Ratnayake has made brief notes in the tape-recording-information book that the 2nd

respondent in his speech on 31.12.80 had referred to the " Sravasthi women story " and on 2.1.81 that he had made a similar speech. Both counsel for the respondents have quite vehemently and with a certain measure of validity impeached the genuineness of the note book P 1 and have characterised it as having all the hall marks of fabrication.

must admit that I was impressed with the criticism levelled by Counsel for the respondents, of the document P1 and of the explanation given by Ratnayake ; how he came to maintain and preserve that document and of the entries therein. But fortunately for Ratnayake, the H.Q.I. Ratnasingham has testified that in addition to the instructions contained in P4 he had instructed P.C. Ratnayake to take down in long hand character-assassination speeches and that in pursuance of such instructions Ratnayake had come to maintain the rough note book P1 and that he got Ratnayake to read out P1 to him every morning following a meeting which P.C. Ratnayake had covered the previous evening. The Judge after consideration rejected the suggestion that P1 is a fabrication made for the purpose of this case and has held that it is a genuine rough note book used by P.C. Ratnayake to record the notes of speeches of the meetings which he covered. In respect of the credibility of P.C. Ratnayake, the Judge had observed–

> " P.C. Ratnayake was cross examined at length and was recalled twice into the witness box. He stood up to the test of cross examination by Counsel for the respondents confidently and his evidence stands unshaken and firm as a rock. I am satisfied beyond reasonable doubt that he speaks the truth in regard to the statement made by 2nd respondent in the course of his speech on the 31.12.80 and on 2.1.81 even though that evidence stands alone."

The learned Judge has also accepted the evidence of H.Q.I. Ratnasingham and has stated that–

> " His evidence corroborates both P.CC. Ratnayake and Yapa in regard to the existence of P1 during the course of the election."

He has also accepted the evidence of P.C. Yapa who stated in evidence that he accompanied Ratnayake to the meeting on 31.12.80 refered to by Ratnayake and that he was able to recollect that the 2nd respondent spoke of the petitioner bringing women to Sravasthi, at the said meeting. He has characterised the evidence of

Yapa as that of a truthful witness and that it supports the evidence of P.C. Ratnayake. On the basis of the evidence of P.C. Ratnayake and the entries in the document P1 the trial Judge has concluded that 2nd respondent did make the two statements referred to in paragraphs 4 & 5 of the petition. It is to be noted that neither of the respondents got into the witness box to contradict the evidence of P.C. Ratnayake. Counsel for the respondents have attacked this finding and have invited this court to reject the evidence of Ratnayake and to hold that the document P1 is a document fabricated for the purpose of this case.

As I stated earlier, in appeals against the decision of an Election Judge, this court does not sit as a court of appeal on facts and will not interfere with the findings given by the Election Judge on a consideration of the evidence, unless it is perverse or irrational or based on no evidence. A critical study of the evidence tends to support the Judge's conclusion that the 2nd respondent did make the two impugned statements. On the evidence placed before court the Judge was entitled to come to that conclusion and it cannot certainly be branded as irrational or perverse or founded on "no-evidence". It may be, had this court been vested with the plenitude of appellate jurisdiction, both in respect of questions of law and of fact, that it might have on its own perception and evaluation of the evidence come to a different conclusion and reversed the finding of the Election Judge. Hamstrung as it is by the provision that its appellate jurisdiction is limited to questions of law only, this court cannot substitute its finding of facts for that of the Election Judge and reverse it as long as it is neither irrational nor perverse having regard to the evidence placed before him. His conclusion is based on the evidence on record and on the credibility of witnesses and is one which a judicial mind could reasonably come to ; hence that finding has to be treated as final. All that very persuasive arguments of counsel for the respondents would tend to show is that one can perfectly reasonably come to the opposite conclusion on the material before court. But that will not suffice to justify this court reversing the finding of the Election Judge. What Lord Hailsham said in *re W. (an Infant)* (7) is apposite in this context :

> " Two reasonable (persons) can perfectly reasonably come to opposite conclusions on the same set of facts without forefeiting their title to be regarded as reasonable . . . . Not every reasonable exercise of judgment is right and not every mistaken exercise of judgment is unreasonable."

Hence on the assumption that the 2nd respondent did make the impugned statement, I shall proceed to consider the next relevant question whether the statement made by the 2nd respondent was a false statement in relation to the character of the petitioner.

It was submitted by Counsel for the respondents that the trial Judge had erred in law in holding that the affidavit of the petitioner (1R5) accompanying his petition that was filed by way of complying with section 80 B (*d*) of the Ceylon (Parliamentary Elections) Order in Council, 1946, was in conformity with the law notwithstanding the admission by the petitioner, in the course of his evidence, that he had no personal knowledge of what was spoken at the meetings at which the impugned statements were made.

Section 80 B (*d*) mandates that –

" An Election Petition shall set out full particulars of any corrupt or illegal practice that the petitioner alleges . . . . . and shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt and illegal practice and the date and place of the commission of such practice "

Admittedly no form has been prescribed by the legislature. Though the affidavit that accompanies the petition need not be that of the petitioner, in this case it is that of the petitioner himself. In paragraphs 5 & 6 of that affidavit the petitioner states, with reference to the alleged false statements made by the 2nd respondent : " I am personally aware that the said false statement was made by the 2nd respondent in a public meeting held in support of the 1st respondent." In the course of the trial while the petitioner was giving evidence he stated n answer to questions put in cross examination as follows :

"Q. You said you were not present at the meetings held in Palakada, Weragama and Wewelkada ?

A Yes

Q Were you personally aware of your own knowledge of the alleged false statements made at the meetings at Weragama and Wewelkada ?

A No

Q (Shown 1R5) In the second portion of the 6th paragraph, you have said " I am personally aware . . . . . " That is not true ?

A I listened to what they had tape-recorded.

Q You were personally not present at the meeting ?

A No.

Q Whose tape recording was it that you listened to ?

A Mr. Pilapitiya's.

Q He played it back to you ?

A Yes.

Q When did you listen to the tapes ?

A Before filing this petition.

Q Is that tape available with Mr. Pilapitiya ?

A That was with him but now his children had erased it.

In view of the petitioner's answers set out, counsel for the respondents contended that the petitioner had in fact sworn a false affidavit, in that, what he has deposed to as being "personally aware of" was what he had heard or gathered from the play back of the tape-recording of the two impugned statements made by the 2nd respondent and not from personally listening to the 2nd respondent's speeches at the said meetings. According to counsel, they were all hearsay evidence. Counsel submitted that the petitioner, in the circumstances, should not have testified in his affidavit that he was personally aware that the statements were made by the 2nd respondent, but should have stated that he believed that the 2nd respondent did make the impugned statements at the said meeting and should have disclosed the source of his information. He contended that the affidavit was based on hearsay and that the petitioner had misrepresented to court that he was personally aware of the alleged facts when he had heard of them only and hence the relevant averments are incorrect and untruthful. Mr. H. L. de Silva, referred to Section 181 of the Civil Procedure Code which provides that –

> "Affidavits shall be confined to the statement of such facts as the declarant is able from his own knowledge and observation to testify to, except on interlocutory applications, in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit."

He urged that the petitioner's affidavit is not an affidavit in terms of this section. The burden of counsel's argument was that an untruthful affidavit is a nullity and cannot serve any legal purpose and hence should be rejected and disregarded. Counsel urged that the legal consequences of a rejection of the petitioner's affidavit would be that in law, the petition of the petitioner was not accompanied by the affidavit contemplated by section 80 B (*d*) of the Ceylon (Parliamentary Elections) Order in Council and that there was no proper petition under section 80 B for the Court to proceed with.

The Election Judge has held that the petitioner's affidavit had been made in that form, bona fide. He has accepted the petitioner's explanation that he affirmed to the relevant averments in his affidavit, as of his own knowledge, because he heard the play-back of Mr. Pilapitiya's tape of the 2nd respondent's speeches. It was not disputed that Mr. Pilapitiya had got the 2nd respondent's speeches tape-recorded, though these tapes were not produced in evidence (according to the petitioner these tapes had not been preserved). The petitioner was cross examined on the basis that Mr. Pilapitiya had in fact got 2nd respondent's relevant speeches tape-recorded. A tape-recording is admissible in evidence provided the accuracy of the recording can be proved and the voices recorded properly identified – *R. v. Maqsud Ali* (8).

I agree with the Election Judge that the affidavit 1R5, upon the face of it complies, in form, with the requirements of the law and that it was made in that form bona fide by the petitioner. Since the petitioner had heard the tape-recorded speech of the 2nd respondent, he had bona fide assumed that he would be justified in swearing that he had personally heard the 2nd respondent's speeches. It is quite apparent that he had not fraudulently or dishonestly stated in his affidavit 1R5 that he was personally aware that the 2nd respondent made the impugned statements when in fact he had only heard them by listening to the tape-record of the speeches of the 2nd respondent.

When an affidavit is filed along with the petition in terms of section 80 B (*d*), the only question that arises thereon is whether the document that purports to be an affidavit is in form an affidavit supporting the allegations of the corrupt or illegal practice complained of. The court is not called upon to make any order to the prejudice of the respondent, on the basis of the prima facie evidence furnished by the affidavit nor to inquire into the truth of the averments in the

affidavit before taking the further steps on the petition. The affidavit filed in terms of the section, does not serve as evidence of any fact stated therein in coming to any determination on that election petition.

In *Sathiakumar v. Election Tribunal* (9) the court observed, with reference to the similar obligation under the Indian Representation of the Peoples' Act, 51, to file an affidavit with the Election Petition :

> "It is incumbent upon every petitioner filing an election petition to support it by an affidavit in the prescribed form in case any corrupt practice was alleged. It appears that the intention of the legislature to introduce this proviso (that an affidavit should be filed with the election petition) was to prevent the petitioner filing an election petition from making wild allegations about corrupt practices and to impose on him a reasonable restraint so that if false statements were made he would be prosecuted for perjury."

Commenting on section 96 (*d*) of the Presidential Elections Act, No. 15 of 1981, which similarly requires that the election petition shall be accompanied by an affidavit in support of the allegation of corrupt practice this court, in the course of the judgment in election petition, *Kobbekaduwa v. Jayewardene et al* (10) observed –

> "The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. Section 13 of the Oaths and Affirmations Ordinance (Cap. 17) furnishes the sanction against a false affidavit by making the deponent guilty of the offence of giving false evidence."

In my view the only penalty for filing a false affidavit along with an election petition under section 80 B (*d*) of the Elections Order in Council, 1946, is the punishment prescribed by section 13 of the Oaths and Affirmations Ordinance (Cap. 17). Such affidavit will not affect the validity of the election petition. The jurisdiction of the Election Court depends on the allegations made in an election petition which ex facie conforms to the requirements of section 80 B of the Ceylon (Parliamentary Elections) Order in Council and not upon the allegations which may ultimately be found established. Such allegations though supported by an affidavit as required by section 80 B, may, after the trial be held to be unfounded and in that case the petition will be dismissed not because the court had no jurisdiction to

try the election petition, but because the allegations on which it was based are found to be untrue. Nagalingam, J. observed in *Marjan v Burah* (11).

> "As stated by Hukm Chand (1894 Ed. page 240) jurisdiction does not depend upon facts or the actual existence of matters or things, but upon the allegations made concerning them."

In my view, unless the evidence led at the trial of the election petition discloses that the affidavit was made fraudulently or dishonestly for the purpose of complying with section 80 B (*d*) an affidavit of facts supporting the allegation of the corrupt or illegal practice complained of in the petition satisfies section 80 (B) (*d*) of the Ceylon (Parliamentary Elections) Order in Council, though it may contain untrue and incorrect averments. An election petition cannot and should not be dismissed or rejected in limine on the ground of incorrect or erroneous averments made in the affidavit filed in support of the allegations of corrupt or illegal practice. The Election Judge enters on the exercise of his jurisdiction on the basis of the averments in the election petition and where corrupt or illegal practice is the ground of the petition, on the footing of the allegation in the petition supported by an affidavit which on the face of it conforms to the law. I agree with the Judge in overruling the objection to the affidavit filed by the petitioner in this case.

It is not necessary on the facts of this case to decide the other question canvassed by Counsel whether the term "Affidavit" referred to in section 80 (B) (d) of the Ceylon (Parliamentary Elections) Order in Council, covers only an affidavit deposed to from the declarant's own knowledge or includes an affidavit deposed to from information and belief of the deponent. Since the affidavit 1R5 is on the face of it an affidavit of personal knowledge, the question does not arise for decision. I reserve the resolution of the question to a more appropriate case where the decision turns on that issue.

It was vehemently contested that the statement made by the 2nd respondent and referred to in paragraphs 4 & 5 of the petition have not been proved beyond reasonable doubt to be a false statement and that the Judge had erred in holding that it has been proved to be false in relation to the personal character or conduct of the petitioner.

To avoid an election on the ground of corrupt practice, under section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order in Council read with section 77 (*c*), the petitioner has to establish the

falsity of the 2nd respondent's statement of fact conclusively. The evidence must be such as to bring the charge home to the 2nd respondent beyond all reasonable doubt. Therefore if the evidence adduced is not sufficient and trustworthy to establish the element of falsity, the case for the petitioner cannot be said to be proved and the election cannot be set aside on such evidence. Even though the allegation made by the petitioner involves in a sense the proof of a negative, viz., that the statement made by the 2nd respondent is not truthful, the legal burden of proving it beyond reasonable doubt still rests on the petitioner.

Though the statements made by the 2nd respondent and set out in paragraphs 4 & 5 of the petition charged the petitioner –

(*a*) That the petitioner took a woman one morning to his room at Sravasthi, who the 2nd respondent thought was his wife

(*b*) That in the evening another woman was brought in and,

(*c*) Then in the morning it was yet another woman who went out of the room,

the underlying allegation is that the petitioner is a man of immoral character in relation to women. The three allegations of fact referred to in paragraphs 4 & 5 of the petition only form the basis for 2nd respondent's conclusion and allegation that the petitioner is a man of immoral character. A bench of five Judges of the Supreme Court in this very case held on an earlier appeal on the question of sufficiency of security for costs, in respect of the number of charges contained in paragraphs 4 and 5 of the petition that –

> "There is only one charge in each of the paragraphs 4 & 5 of the petition. The allegation that women were seen either going into or coming out of the candidate's room on three different occasions constitutes only the reason for making the statement that the candidate is a man of immoral character . . . . . They constituted the particulars of the corrupt practice alleged."
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> *Muttetuwegama v. Gunasekera et al (12).*

In his Judgment the Election Judge states –

> "The corrupt practice complained of by the petitioner in the present case is confined solely to the words uttered by the 2nd respondent, and mentioned fully in paragraph 4 of the petition. The statement the 2nd respondent made is in regard to two incidents

occurring in one day and another in the following morning. The petitioner has denied on affirmation that he took any women to his room for an immoral purpose on any day and has thereby denied in toto the truth of the 2nd respondent's statement made at the meetings of 31.12.80 and 2.1.81 Not one suggestion was put to the petitioner challenging his denial of these three incidents, namely, that the 2nd respondent has seen him taking women to his room in the morning, again another woman in the evening and finally two different women coming out of his room the following morning" and he concluded that "the false statement therefore of the 2nd respondent of the two visits of different women on any day to the petitioner's room and third woman emerging from his room the following morning remains unchallenged."

Both counsel for the respondents have legitimately urged that the trial Judge has failed to identify correctly the false statement that formed the substratum of the charge of corrupt practice preferred by the petitioner. They rightly pointed out that the Judge has not referred to the elucidation given by the Supreme Court in this matter on the earlier appeal and referred to above and that the Judge has further erred in law in assuming that, in order to establish that the 2nd respondent's statement was false, it would be sufficient for the petitioner to prove that the three incidents referred to in the statement did not take place. The petitioner's denial on oath that he took any women to his room at Sravasthi for any immoral purpose and such denial remaining unchallenged, only established that the reason for 2nd respondent's conclusion that *the petitioner is a man of immoral character* was not well-founded. The onus of falsifying that conclusion, independent of the facts which impelled that conclusion, still remained to be discharged by the petitioner. Ordinarily in the case of a candidate who has led a chaste life or whose moral character is beyond question and free from any taint, denial by him on oath will be sufficient to discharge the burden of showing that the allegation of immoral character is false. Where the denial on oath by the candidate affected is allowed by the respondent to remain unchallenged or where the assertion of falsity of the statement complained of remains unshaken in cross examination whether it be by general impeachment of the credit of the candidate or by refutation which will erode his credibility or belie his denial, then there is sufficient proof of the falsity. But a denial on oath will not be sufficient in the case of a candidate who has had an ignominious or questionable past which will not bear examination. Other cogent and

positive evidence of regeneration and of having turned a new leaf besides the petitioner's denial will be necessary to rebut the allegation of immoral character against him. Unless there is fairly convincing evidence of reformation the claim of a person with an unenviable record, to a title to good character has to be examined with caution. If added to past transgressions of the moral code, the candidate has shown himself wanting in integrity and truthfulness, his credibility requires much more than his sworn testimony to commend itself for acceptance in a court of law. Reasonable doubt will militate against accepting his uncorroborated testimony. Unfortunately for the petitioner, he has been shown to be a man of the latter category and hence the respondents are entitled to contend that the court was not justified in acting on the sole evidence of the petitioner, unsupported by any other evidence in substantiation of any allegation made by him. They say that his past record of proved falsehood reflects low credibility that should generate at least reasonable doubt respecting the trustworthiness of his testimony. In my view, there is substance in their complaint that the trial Judge has completely failed to correctly evaluate the petitioner's evidence in the light of his proved disregard of truth. True, ordinarily the assessment and evaluation of evidence and credibility of witnesses is the province of the trial Judge ; but where the trial Judge's finding has been reached without any consideration whatever of the intrinsic and palpable infirmity in the evidence or without taking into account relevant considerations such as the danger of accepting the sole evidence of a witness who has a record of lying even though in unconnected matters, the appellate court is entitled to hold that the finding is erroneous in law. An error of law exists whenever the conclusion is one to which no court applying the relevant law as to burden of proof could have reasonably come ; whether the evidence is in the legal sense, sufficient to support a determination of fact is a question of law – vide *(Collettes Ltd. v. Bank of Ceylon (supra))*

With reference to his character and to his credibility, the following facts have been admitted by the petitioner in cross-examination :

(1) When he was about twenty years old and a student in 1951 he started keeping one Nanda Fernando as his mistress. He had been boarded at her parent's house when the intimacy commenced. He thereafter kept her as his mistress and took her to his home and told his mother falsely that he was married to her. He has seven children by her.

(2) In 1961 he seduced one Manel Abeysinghe, who was a minor, on the promise of marrying her. When Manel was seven months pregnant, he married Nanda. The explanation he gave is that he did not wish to jeopardise the chances of marriage of his daughters by Nanda. In spite of his marriage to Nanda, he continued to keep Manel as his mistress and has seven children by her. According to his affidavit 1R6 he did not disclose his association with Nanda to Manel when he seduced the latter though he said earlier in evidence, before he was confronted with the affidavit, that Manel was aware of his association with Nanda and that he had children by her. He is now living in open adultery with Manel Abeysinghe.

(3) As a Member of Parliament he had accepted a bribe and had been convicted and was sentenced to three years rigorous imprisonment by the Supreme Court.

(4) He made fourteen false declarations that his fourteen children were legitimate, when they were born illegitimate – vide their birth certificates.

(5) The petitioner falsely sought to lay the blame for his conviction on his counsel who he said was a Tamil and did not understand him. This is clearly a false excuse because the petitioner could converse in English and gave his evidence in English and would have had no difficulty in giving his instructions.

(6) The petitioner while in jail was sent to the Mental Hospital at Angoda. He was either actually of unsound mind or successfully had malingered the mental condition to avoid the rigours of prison life. His facile explanation was that he was sent to Angoda to relax.

(7) With regard to his conduct in Parliament when he was an SLFP Member, on 3.12.1964 when the debate on the Throne Speech leading to the defeat of the government took place : he falsely denied his presence in the House and said he was at Ratnapura on that day in connection with a case in which he was a witness. The Minutes of the House showed that he was present. He falsely said that he was absent in order to avoid answering the question why he was not present at voting time.

(8) The Judge has held that petitioner's version that he was held up at Ratnapura in a case is not true.

(9) Even in the Ratnapura case in which the petitioner said that he was a witness, he admitted he was not a witness but was the defendant having been sued for the recovery of Rs. 6,000 given to him by one Jaineris to obtain a crown land.

(10) When his date of birth was 19.4.30 he had given his date of birth in his son's birth certificate as 18.4.33.

(11) In the Book of Parliament, his date of birth appears as 19.4.1933 though he says that he gave the year as 1930.

The Judge has dismissed these admissions in the judgment with the observation – "several falsehoods uttered by him in documents *relating to unconnected* matters were elicited from him under cross-examination and his credibility was sought to be assailed." This observation shows that the judge has failed to appreciate the significance of these admissions of his falsehoods. These all have a vita bearing on the question of the petitioner's credibility and character, moral and otherwise. In this connection petitioner's answer in cross-examination is revealing of his prurient bent

Q. Were there more women voters than men voters who come to see you in Colombo ?

A. At that time there would have been many women voters who came to see me because I was very young.

The petitioner's dishonourable record shows the petitioner in a very poor light. It depicts him at least to be a man who does not regard himself bound by rules of conventional morality and who is pre-disposed to lie when it suits him or who does not believe in the sanctity of truth. On the basis of the petitioner's admissions, the respondents are very relevantly entitled to invite court to hold with them that there is substance in their accusation that the petitioner is a man of immoral character, and that it is highly unsafe to accept his bare denial of the allegation and to convict the respondents of the charge of corrupt practice. The respondents have in my view, very effectively challenged the petitioner's denial on oath and have at least raised reasonable doubt about his character in general and his moral character in particular. It has to be remembered that the voters of Kalawana to whom that impugned statement was published are a segment of oriental society which holds conservative views on morality and which is not disposed to tolerate permissiveness in any measure. In that social perspective a person whose life-style consists

in cohabiting with a concubine in disregard of canons of conventional morality runs the risk, when he is seeking to be their representative in Parliament, of the electors being warned that he is a man of immoral character ; and he cannot then legitimately complain that he is falsely accused of being a man of immoral character A Member of Parliament should be an example of good character for people to repose confidence in him.

The Learned Judge appears to be of the view that it was sufficient for the petitioner to deny on affirmation the allegation that he took any women on any day into his room at Sravasthi for immoral purposes and since "not one suggestion was put to the petitioner challenging his denial of those incidents, namely that 2nd respondent had seen him taking one woman to his room in the morning and again another in the evening and finally seen a different woman coming out of the room on the following morning" he had countered the allegation of immoral character. The judge has overlooked the fact that the thrust or gravamen of 2nd respondent's allegation was that the petitioner is a man of immoral character and that the three instances referred to by the 2nd respondent constituted only the basis for his conclusion regarding the petitioner's lack of morality. On the evidence before court, since William's evidence that he had seen the petitioner closeted with women at Sravasthi was rightly rejected by him, the Judge was justified in holding that there was no proof of those instances. But that was not enough. It was still necessary for the petitioner to rebut the allegation that he was a man of immoral character in order to discharge the onus that the law had placed on him to establish the falsity of the 2nd respondent's allegation against him. The Judge has not asked himself the right question and has not directed his mind to the principal question involved in the case viz : whether the petitioner had established to the satisfaction of court that the accusation of immoral character was false, beyond reasonable doubt. On the other hand the Judge had conceded that it was sufficient for the petitioner to establish that there was no truth in the three specific instances referred to by the 2nd respondent in order to falsify the impugned statements. In my judgement, had the learned judge posed the right question he would have in view of the petitioner's proneness to lie when it suited him and in view of his past record cautioned himself "whether it is reasonable to act on the sole and uncorroborated testimony of the petitioner that the allegation of immoral character did not savour of any truth " and would then have found it difficult to

answer the poser in the affirmative with confidence ; he would at least have entertained some reasonable doubt about the falsity of the allegation.

In failing to address himself to the right questions involved in the case and in neglecting to apply the proper criteria in evaluating the evidence against the respondents, the Election Judge has misdirected himself in law. This error of law has vitiated his finding that the impugned statements complained of by the petitioner are false.

I therefore set aside the judgment of the Election Judge and allow the two appeals and quash the determination of the Election Judge holding that the 1st respondent's election is void and that the 1st and 2nd respondents had committed the corrupt practices referred to in paragraphs 4 & 5 of the petition. The petitioner-respondent will pay the 1st respondent viz : the 1st respondent-appellant in appeal S.C. 2 of 1983, the costs of his appeal and costs of the trial in the Court of Appeal and also pay the 2nd respondent viz : 2nd respondent-appellant in appeal S.C. 1 of 1983, the costs of his appeal only.

WANASUNDERA, J.—I agree.

WIMALARATNE, J.—I agree.

Appeals allowed.