KULARATNE AND ANOTHER
v.
RAJAPAKSE

SUPREME COURT.
SHARVANANDA, J., WANASUNDERA, J. AND ABDUL CADER, J.
S.C. No. 1/84 AND S.C. No. 2/84.
ELECTION PETITION No. 8/83.
SEPTEMBER 19, 20, 21, 24, 25, 26, 1984.

Election petition – Corrupt practice of false statement of fact relating to personal character and conduct of petitioner – Section 58 (1) (d) of Ceylon (Parliamentary Elections) Order-in-Council – Scope of appellate jurisdiction of Supreme Court in appeal from determination of Election Judge – Section 82 (A) (1) of Ceylon (Parliamentary Elections) Order-in-Council.

The petitioner an unsuccessful candidate at the by-election for the Mulkirigala Electoral District held on 18th May 1983 filed this petition seeking to have the election of the 1st respondent at the said election set aside on the ground that the 2nd respondent had as the agent and/or with the knowledge and/or consent of the 1st respondent committed the corrupt practice of making a false statement relating to her personal character and conduct at a meeting at Middeniya to support the 1st respondent's candidature.

The 2nd respondent had in his speech at the said meeting made statements imputing that the petitioner had shown no love or gratitude to her late father George Rajapakse who earlier represented this electorate and that she was a hypocrite and a fraud to ask the voters to vote for her to show their gratitude to the late George Rajapakse. The 2nd respondent did not dispute making the impugned statements nor did the respondents challenge the fact of the agency of the 2nd respondent.

The respondents also pointed to a deficiency in the pleadings. The petitioner had failed to aver that the false statements were made for the purpose of affecting her return. It was also argued that the statement related to the public or political character of the petitioner since gratitude to her late father was an election issue.

Held –

(1) If the election judge's determination cannot be shown to be erroneous in point of law it is final and the finding of the Election Judge cannot be upset in appeal. Section 82A (1) of the Ceylon (Parliamentary Elections) Order-in-Council provides for an appeal to the Supreme Court only on a question of law and not otherwise. The Supreme Court can interfere with the conclusion of the Judge only if it is shown that he had erred in law or has reached a finding which no reasonable tribunal, properly instructed, could have reached.

(2) The burden is on the petitioner to prove beyond reasonable doubt that the statement complained of was made by the 2nd respondent and that it is false.

(3) On the evidence and concession made by Counsel for the respondents the Judge was perfectly justified in concluding that the 2nd respondent was an agent of the 1st respondent and that the speech was made by the 2nd respondent acting as such agent and with the knowledge and consent of the 1st respondent.

(4) What is forbidden by section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council is a false statement of fact in relation to the personal character of the candidate for the purpose of affecting the return of such candidate. A politician may be criticised or held up to obloquy for his public conduct but the man beneath the politician cannot be assailed in respect of his honour, veracity and purity by false statements.

(5) The evidence led justifies the determination of the trial Judge that there has been no ingratitude on the part of the Petitioner.

(6) In her pleadings it was sufficient for the petitioner to allege that the respondents committed the corrupt practice set out in section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council without specifying the elements constituting the offence. The failure to specify that the false statement was made for the purpose of affecting her return is a failure to refer to one element of the corrupt practice. At most it is an irregularity which caused no prejudice and no objection on the point had been taken at the trial.

(7) The charge of filial ingratitude is essentially a reflection on the private character of the petitioner and gravely prejudices her. If the allegation is unfounded as here it is a false statement affecting private character and will offend section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council.

Case referred to :

1. *Rajapakse v. Gunasekera* [1984] *2 Sri LRI, 17-19.*
2. *Edward v. Bairstow* [1956] *AC 14.*
3. *Pioneer Shipping Co. Ltd. v. B.T.P. Tioxide Ltd.* [1982] *AC 724, 752.*
4. *North Louth case. [1910]* 6 O M & H. 10.

Appeal from the Election Court.

K. N. Choksy, P.C. with *Mark Fernando, D. H. N. Jayamaha, Miss. I. R. Rajepakse* and *Nihal Fernando* for 1st respondent-appellant in appeal No. 1/84 and for 1st respondent-respondent in appeal No. 2/84.

Mark Fernando with *Daya Pelpola* for 2nd respondent-appellant in appeal No. 2./84.

H. L. de Silva, P.C. with *Gomin Dayasiri* for petitioner-respondent in both appeals.

Cur. adv. vult.

December 12, 1984.

SHARVANANDA, C.J.

The petitioner-respondent filed the present election petition in respect of the by-election for the Mulkirigala Electoral District No. 75 held on 18th May, 1983. At the said election the 1st respondent – appellant

was declared elected as the Member of Parliament for the said electoral district. The petitioner was one of the unsuccessful candidates. By her petition the petitioner sought for a declaration that the election of the 1st respondent was void and/or should be set aside, on the ground that a false statement of fact relating to the personal character and conduct of the petitioner had been made and published by the 2nd respondent (2nd respondent-appellant in S. C. Appeal No. 2/84) in terms of section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council, as the agent of the 1st respondent (1st respondent-appellant in S. C. Appeal No. 1/84), and/or with the knowledge and/or consent of the 1st respondent.

The petitioner set out the allegation relied on by her as follows in paragraph 5 (*a*) of her petition :

"At a meeting held at Middeniya in the Electoral District of Mulkirigala in support of the candidature of the 1st respondent for the U.N.P., held on or about 14th May 1983, the 2nd respondent made a speech immediately after the 1st respondent had spoken, and while the 1st respondent was himself present at the platform. In his speech the 2nd respondent said that the petitioner who was the daughter of late Mr. George Rajapakse was campaigning for the votes of the people upon a poster which called for gratitude or "Kalaguna Selakeema" towards the late Mr. Rajapakse. The 2nd respondent said that on the day that late Rajapakse was leaving Sri Lanka for open heart surgery in England, he wanted to see his children to say good-bye and had gone to the house where they lived, but that the petitioner had shut the door in his face, refused him admission and turned him out."

The petitioner further alleged in paragraph 7 of her petition that the aforesaid statement is false and affects her personal character and/or conduct and that the said statement implied –

(*a*) that she had no love or gratitude, as daughter towards her own father ;

(*b*) That she was a hypocrite and fraud in asking for votes on the basis of the peoples' gratitude for her late father who had been the former Member of Parliament for Mulkirigala from 1960 to 1976.

After trial the Election Judge held that the 2nd respondent, as agent of the 1st respondent and with his knowledge and consent, made a false statement of fact in relation to the personal conduct of the petitioner for the purpose of affecting the return of the petitioner as candidate for the Electoral District of Mulkirigala and thereby committed a corrupt practice as alleged in paragraph 5 (1) of the petition, in breach of section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council. Accordingly he declared that the election of the 1st respondent as Member of Parliament for the Electoral District of Mulkirigala was void and he certified that as his determination and directed that the respondent should pay the petitioner a sum of Rs. 2100 as costs. Against the decision of the Election Judge the 1st respondent has filed S.C. Appeal No. 1/84 and the 2nd respondent has filed S. C. Appeal No.2/84. Both Appeals were taken up together for argument.

In *Rajapakse v. Gunasekera* (1) I referred to 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 for an appeal to the Supreme Court only on a question of law and not otherwise. emphasised there at page 5 that –

> "This Court cannot review the findings 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".

If the determination cannot be shown to be erroneous in point of law, it is final and the findings of the Election Judge cannot be upset by this Court in appeal. This Court can only interfere with the conclusion of the Judge if it is shown that he had erred in law or has reached a finding which no reasonable tribunal, properly instructed, could have reached. *Edward v. Bairstow* (2), *Pioneer Shipping Co., Ltd. v. B.T.P. Tioxide Ltd.* (3) (per Lord Rosknill). Therefore this Court is not entitled to intervene unless it is satisfied that the Election Judge has misdirected himself in law and has reached a perverse finding, unwarranted or unsupported by the evidence of record.

I approach the decision of this appeal with the consciousness of the statutory limitation of the appellate jurisdiction of this Court that it cannot question the correctness of the findings of fact reached by the Election Judge unless they are not supported by any evidence or are

unreasonable or perverse ; if there is evidence to support the finding of fact, the finding is final and this Court cannot vary or reverse the decision unless it is satisfied that the Election Judge has erred on a question of law, but must loyally accept the conclusion of fact reached by him, though uninhibited by any such limitation, it may find or weigh the facts differently. The Election Judge is the tribunal of fact charged with the function of finding and assessing qualitatively the factual circumstances. It is only if the weight given by him to a particular factor shows a misdirection in law that this Court in the exercise of its limited appellate jurisdiction will interfere and substitute its own decision on the supposition that, but for the error of law, the election tribunal would not have reached such a decision. In the absence of such a circumstance, this Court cannot review and re-evaluate the evidence placed before the Election Judge.

The entire evidence was subjected to a very critical analysis by Counsel for the appellants in an endeavour to persuade us that the Election Judge had erred in his assessment of the evidence before him. I have given my anxious consideration to their submissions, having regard to the consequences which will befall the appellants if the decision of the Election Judge is upheld. But to accept their contentions would amount to this Court usurping the function of the Election Judge and transgressing the statutory limitation placed on this Court in appeal. I cannot, with all respect to Counsel for the appellants, hold that this is a case in which no reasonable tribunal could have reached the conclusion arrived at by the Election Judge. Counsel rightly pointed to one error of law in the judgment under appeal, where the Judge stated that the essence of the allegation in paragraph 5 (*a*) is that "the petitioner refused admission to her father when the latter came to see her". I agree with Counsel that the Judge was wrong in taking such a narrow view of the allegation contained in the said paragraph. He had probably been misled by the petitioner's averments in her petition. In my view, the gravamen of the allegation is that the petitioner is an ungrateful daughter of the late George Rajapakse and hence is least entitled to call upon the voters to show their gratitude or 'kala guna selakeema' towards her father the late George Rajapakse by voting for her. The alleged occasion of the petitioner refusing admission to her father when the latter came to see her is only one manifestation referred to by the 2nd respondent to substantiate his allegation that the petitioner is an ungrateful daughter. However, this misdirection of law did not constrict the view of the

Judge to the totality of the evidence of other instances of ingratitude relied on by the respondents, tending to show that the petitioner is an ungrateful child. The respondents sought to support their allegation of ingratitude by reference to three instances. The Judge did not rule out any evidence which the respondents proposed to lead to establish their allegation of filial ingratitude. We have the benefit of the finding of the Judge on the evidence placed before him by the respondents to establish their general allegation except on one matter, referred to below. In the circumstances the error of law committed by the Judge in his encapsulation of the allegation of the petitioner has not affected his judgment. The said error of law does not vitiate his judgment.

The burden lay on the petitioner to prove beyond reasonable doubt that the statement complained of was made by the 2nd respondent and that the statement was a false statement *(Rajapakse v. Gunasekera* (supra).

The finding that the second respondent made the impugned statement was not challenged in appeal. The 2nd respondent's speech was tape-recorded –P 9 (*a*) and P 10 (*a*). The passage of speech relied upon by the petitioner as having been made by the 2nd respondent is P 10 (*g*). The tape was played in the election court and 2nd respondent's voice was identified. The respondents did not go into the witness box to challenge the evidence of the petitioner and of the witness Galappathi who taped the speech, identifying the voice of the 2nd respondent. The Judge has held that the tape P 9 (*a*) contains an authentic record of the speech of the 2nd respondent and P 10 an accurate transcript of the speech and has further found that the 2nd respondent made the statement set out in P 10 (*g*) in the course of his speech.

At the trial Counsel for both respondents specifically stated that they were not challenging the 2nd respondent's agency.

On the evidence and concession made by Counsel for the respondents, the Judge was perfectly justified in concluding that the 2nd respondent was an agent of the 1st respondent and that the speech was made by the 2nd respondent, acting as such agent and with the knowledge and consent of the 1st respondent.

What is forbidden by section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council is a false statement of fact in relation to the

personal character or conduct of a candidate for the purpose of affecting the return of any candidate. In the *North Louth case* (4) Gibsen, J., at page 163 stated that –

"A politician, for his public conduct may be criticised, held up to obloquy ; for that the statute gives no redress, but when the man beneath the politician has his honour, veracity and purity assailed, he is entitled to demand that his constituents shall not be poisoned against him by false statements containing such unfounded imputations".

In this context, it is stated in Halsbury's Law of England, 4th Ed. Vol. 15, paragraph 790, pages 431-422 that –

"the false statement of fact need not be defamatory at common law, so long as it is a statement which is calculated to influence electors, as for instance, a statement made in a hunting county that the candidate shot a fox or a statement made to promoters of total abstinence that the candidate has taken a glass of wine ; but it is essential that it should relate to the personal rather than the political character or conduct of the candidate. The question to be determined is what in the circumstances is the true meaning which the reader would place upon a statement. The true meaning will depend on the occasion of the publication, the persons published, the person attacked and the readers intended to be addressed."

Counsel for the 2nd respondent took objection that the petition of the petitioner is not in order and should have been rejected in limine on the ground that the petitioner had failed to plead in the petition, that the impugned statement was made for the purpose of affecting the return of the petitioner. What the petitioner has stated in paragraph 4 of her petition is as follows :

"The petitioner states that the election of the respondent is void and is liable to be set aside in terms of section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council . . . . by reason of the commission of the corrupt practice of the making of, and the publishing of a false statement concerning the personal character and conduct of the petitioner, by the 2nd respondent who was an agent of the 1st respondent and/or a person who acted with the knowledge and/or consent of the 1st respondent."

I do not think there is any substance in this objection. It is true that the petitioner has not specifically referred to one of the elements of the offence of corrupt practice, viz : that the statement was made for the purpose of affecting her return, but she has referred to the relevant section of the Election Order-in-Council defining the offence of corrupt practice and had pleaded that the respondents had committed the corrupt practice. It would have been sufficient for her to have pleaded that respondents committed the corrupt practice set out in section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council with respect to her. When she proceeded to specify certain elements of the offence of corrupt practice, she did something which was not necessary and hence when she failed to refer to one element of the offence viz : that the statement was made for the purpose of affecting her return, she failed to state part of something which was not necessary. At most, the said failure was an irregularity which did not cause and could not have caused any prejudice to the respondents in their having a fair trial of the petition. It is to be noted that this objection was not taken in the lower court.

At the trial, the respondents based their allegation of ingratitude following three instances :–

(i) that the petitioner shut the door in the face of the late George Rajapakse, her father, when he wanted to see her and her mother in the house where they lived to say good bye before he left for open heart surgery in England ;

(ii) the petitioner did not go to the Airport, Katunayake when her father went abroad for a surgical operation ; and

(iii) the petitioner had not, to date, built a tomb to deposit her father's ashes.

In regard to the first and second instances the petitioner in her sworn evidence said that no incident as stated by the 2nd respondent ever took place and further stated that on 5.5.76 when her father was leaving the country, he came to their house, spoke to her and her brother and advised each of them and requested them to attend to their studies. According to her, he did not want them to come to the airport but took them by car to their respective schools. Further, before he left the house, he had given them his picture post-cards P 1 and P 2 dated and signed by him. She admitted that she did not go to the airport that day to see him off, the reason being not that she was

indifferent to her father's departure, but because he did not want her and her brother to come there, though she in fact wanted to go to the airport. As against her evidence, there was no contradictory evidence of any eye-witness. The 2nd respondent though he described graphically in his statement P 10 what he alleges to have happened when George Rajapakse want to petitioner's house to bid good bye, did not get into the witness box to contradict the petitioner's version of what happened on the morning of 5.5.1976 at the petitioner's house. When the petitioner gave evidence not even a suggestion was made to the petitioner that an incident as referred to by the 2nd respondent ever took place between the petitioner and her father that morning of 5.5.1976. The trial Judge was, in the circumstances justified in accepting petitioner's evidence on this point – in fact, any other finding would on the evidence have been perverse. As regards the petitioner's failure to go to the airport, the trial Judge has accepted the petitioner's explanation for not going. He has rejected the evidence of Kamala Wickremanayake, the 2nd respondent's witness, that the deceased, her brother had expressed at the airport disappointment at his daughter's failure to come to the airport. He had characterised her evidence as patently tainted and partisan and that she was ill disposed towards her niece (the petitioner) seeking a political career. A better reason for rejecting Kamala Wickremanayake's evidence would have been the belatedness of her story – according to her she had not communicated the late George Rajapakse's expression of disappointment to anybody nor did she convey it to the petitioner her niece nor take her to task, at any time, for her failure. She had kept it locked up in her bosom from 1976 to 1983. Further she was not well disposed towards the petitioner as is evident from the fact that she had addressed five or six election meetings on the last day in favour of the 1st respondent and hence her evidence against the petitioner is suspect. There is no good reason for holding that the trial Judge was not justified in rejecting Kamala Wickremanayake's evidence as against petitioner's evidence. Then, there are the letters P 3, P 4 and P 7 written by the petitioner's father to the petitioner and her brother which give the lie to Kamala Wickremanayake's story of disappointment or displeasure at the petitioner's conduct. The letter P 4 was written in flight, addressed to my darling Nero and Shyam' (Petitioner and her brother) advising them "Please look after yourselves and do not lose heart that you have lost your father." Counsel for the appellants dissected the letters and

subjected them to an unemotional analysis in an endeavour to show that they reflected a sense of grief on the writer's part. The trial Judge has commented that–

> "these letters lead to the irresistible conclusion that there was a close bond of love and affection between the petitioner and her father. There is no doubt that there is some expression of sadness shown in some of these letters. But such expressions are natural and to be expected."

I am not satisfied that this observation is irrational. Perhaps, the deceased had a premonition of premature demise. I share the trial Judge's conviction "beyond a reasonable doubt that there was no displeasure between the petitioner and her father".

The petitioner in her petition has not complained of the 2nd respondent's allegation in his speech that she had not to date interned her father's ashes and had so failed to perform her duty by her father. The petitioner in her evidence has stated that her father's ashes had not been interned because of numerous problems. She said that members of the Rajapakse family had tried to make political capital of the ashes at the 1976 by-election and the 2nd respondent himself at the 'General Election of 1977. According to her, the relations were interested in the ashes to advance the interests of Rajapakses' respective candidates. It was not possible in those circumstances to entomb the ashes and the petitioner did not give in to their requests. With the passage of time, the petitioner had changed her mind on the question of entombing the ashes and she does not now like to intern the ashes for the reason "Everyday those ashes are in our room. When I see the ashes I feel as though I can see my father. Therefore I did not like to entomb the ashes. I feel that entombing the ashes is like throwing the ashes into the jungle". The petitioner has given a very reasonable explanation for not entombing the ashes. Her conduct does not show any contumacy on her part. No evidence has been placed before court that such conduct savours of ingratitude or that it is obligatory on the part of children to intern the ashes of their parents under any circumstances and that failure to do so, for whatever reason, good or bad is regarded by the community as an act of filial ingratitude. Counsel for the petitioner mentioned cases of some eminent persons whose ashes have not been interned, but have been otherwise preserved. Applying ordinary norms of filial conduct one cannot say that preserving the ashes of a dead father without entombing them for the purpose referred to by the petitioner

manifests ingratitude on the part of the children. All that the petitioner has admitted is that internment of ashes is a sacred thing as far as the Sinhala people are concerned, but from that the conclusion cannot be drawn that preserving the ashes without interning them would be regarded by the Sinhalese community as heinous and smacking of ingratitude on the part of the deceased's children. A court can act only on proof of what is generally regarded by the community as an act of filial ingratitude. The facts of this case have no resemblance to the case of a man having a number of illegitimate children or mistresses and he being described as a man of immoral character. By all accepted norms the court will readily endorse that description. But, the instant case is different and evidence should have been led by the respondents to show that the mere non-internment of ashes for whatever reason is ipso facto regarded by the community as an act of filial ingratitude. The election-judge has not recorded his finding on this matter. I can very well appreciate the failure of the election-judgment to make any pronouncement on this issue, when he had no evidence to guide him, and the petitioner has not admitted that such failure to intern the ashes would constitute ingratitude on her part. In my view, the allegation of ingratitude on this account stands unsubstantiated.

The petitioner has established that the passage in 2nd respondent's speech P10 contains a false statement relating to her personal character and conduct which is calculated to mislead the electors to her prejudice. The statement of the 2nd respondent must be judged in the context in which it was made. The 2nd respondent alleged that the petitioner was seeking to use her father's name in furtherance of her candidature on a poster which called for gratitude from the voters towards her father to whom she herself was an ungrateful daughter and hence was least entitled to cash in on it. The allegation that she was ungrateful is a false allegation and was calculated to denigrate her and affect her return. It was not a statement of opinion but was a statement of fact in relation to the personal character or conduct of the petitioner. Mr. Mark Fernando contended that the statement was made in regard to the public or political character of the petitioner as a candidate and not to her personal character, since gratitude to her late father had been made an election issue by the petitioner. I cannot agree with his submission. The charge of filial ingratitude is essentially a reflection on the private character of the petitioner. The impugned statement affected the candidate beneath the politician. It touched her private character. A statement that she was endeavouring to

perpetuate dynasty-rule or family bandyism would have been criticism casting no reflection on her private character but would have been criticism of her public character and hence would not have constituted a corrupt practice. But to attribute filial ingratitude to any opposing candidate is to touch on her private character which would gravely prejudice her and if that allegation is unfounded it is a false statement affecting private character and will offend section 58 (1) (*d*) of the Parliamentary Election-Order-in-Council.

The election-judge was entitled, in the circumstances to accept and act on the denial of the petitioner who, unlike the case of the petitioner in the case of *Rajapakse v. Gunasekera* (supra) had not been proved to be an untruthful witness. His determination cannot be characterised as irrational or perverse.

This appeal is an appeal on questions of fact and no material misdirections in law are involved in it. I dismiss S.C. (Election Petition) Appeal No. 2/84 with costs payable by the 2nd respondent-appellant to the petitioner-respondent and I dismiss S.C. (Election Petition) Appeal No. 1/84 without costs.

WANASUNDERA, J. – I agree.

ABDUL CADER, J. – I agree.

Appeal dismissed.