1949 *Present :* **Nagalingam J.**

In re FRED E. DE SILVA

IN THE MATTER OF THE ELECTION PETITION FOR THE ELECTORAL DISTRICT OF KANDY AND IN THE MATTER OF AN APPLICATION UNDER SECTIONS 74 AND 75 OF THE CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCIL, 1945, AS AMENDED BY PARLIAMENTARY ELECTIONS (AMENDMENT) ACT, NO. 19 OF 1948

Election petition—Illegal practice—Notice to show cause—Return of expenses—Can notice issue to a witness ?—Excuse—Inadvertence—Ignorance of law—Meaning of " clerk "—Parliamentary Elections Order in Council, 1946—Sections 68, 74, 75 and 82.

The term " all persons " in section 82 of the Parliamentary Elections Order in Council embraces every individual who may have been proved at the inquiry to have been guilty of a corrupt or illegal practice and is not limited to any particular class.

A translator is not a clerk within the meaning of section 68 of the Order in Council.

Ignorance of the law is not inadvertence and is not sufficient ground for relief under sections 74 and 75.

APPLICATION for orders under sections 74 and 75 of the Parliamentary Elections Order in Council, 1946.

G. E. Chitty, with *G. T. Samarawickrema*, for applicant.

M. Tiruchelvam, Crown Counsel, for Attorney-General as *amicus curiae*.

Cur. adv. vult.

April 7, 1949. NAGALINGAM J.—

This is an application by the petitioner for orders under sections 74 and 75 of the Order in Council allowing, firstly, the payment of Rs. 40 made by him to one Ganeshan for translating his English manifesto into Tamil to be an exception from the provisions of the Order in Council and, secondly, the failure to include the payment of the said sum of Rs. 40 in the return of election expenses made by him to be an authorised excuse.

The application is a sequel to a notice issued on the petitioner in terms of section 82 of the Order in Council directing him to show cause why he should not be reported for having been guilty of illegal practice in connection with the Kandy bye-election. The facts, evidence of which was given at the trial of the election petition by the petitioner himself and which formed the basis of the notice issued on him, have not been challenged but evidence of certain surrounding circumstances has been led in order to explain the conduct of the petitioner and in mitigation of it.

The following facts may be accepted as proved : The petitioner who was a candidate at the bye-election referred to had prepared his election manifesto in English and in order to place the contents thereof before those electors who were unacquainted with the English language and acquainted only with the Tamil language caused a translation of his manifesto to be prepared by one Ganeshan. At the time that Ganeshan was entrusted with the task of translation the petitioner says he had no idea that he would have to make payment for the reasons (*a*) that he considered Ganeshan to be one in sympathy with his candidature and therefore out to assist him in his campaign, and (*b*) that he regarded Ganeshan as a friend of his.

On the footing, therefore, that he had incurred no liability in regard to the Tamil translation of his manifesto, the petitioner says that he sent in his return respecting his election expenses and the return in these circumstances contained no, and could not very well have contained any, reference to a debt due to Ganeshan or to a claim by the latter. The petitioner, however, says that about two or three weeks after he had furnished his return to the Returning Officer, Ganeshan asked him for payment for the translation he had made and that he thereupon paid a sum of Rs. 40 for such translation. Ganeshan supports the petitioner's statement that at the time he undertook the task nothing was said about payment for his services and that in fact he himself regarded the task as a labour of love for he thought that he was doing the work for a friend and not for a fee. Ganeshan also says that at the date he made the translation he was a full-time employee as sub-editor of the *Veerakesari*, a Tamil newspaper. He further says that later his services were dispensed with by that paper and being short of funds he applied to the petitioner for payment for the translation and the latter readily made payment. The evidence of both these witnesses therefore establishes that at the time Ganeshan rendered his services to the petitioner it was the intention of both parties that no fee was to be paid but after the return of election expenses had been made payment was made for those services and, it must therefore follow, gratuitously.

Before I enter upon a discussion of the grounds relied upon by the petitioner as entitling him to the relief prayed for, I shall deal with a preliminary objection raised by Counsel on his behalf ; for, according to Counsel, if the objection succeeds, the notice issued on the petitioner under section 82 would fail and the petitioner would not unduly be perturbed as to the result of this application. The objection taken is that the notice on the petitioner directing him to show cause why he should not be reported in terms of section 82 had issued *per incuriam*, as on a true construction of the section it would be found that the Legislature did not contemplate the reporting of persons other than (1) the successful candidate, (2) persons who with the knowledge and consent of such candidate had committed corrupt or illegal practice, (3) the agent of such candidate and (4) the unsuccessful candidate on whose behalf the seat is claimed. The contention, in other words, is that (1) persons who may have been proved to have been guilty of corrupt or illegal practice but who nevertheless did not do so with the knowledge and consent of the successful candidate and (2) the unsuccessful candidate on whose

behalf no recriminatory case had been set up, cannot be reported under the section. Mr. Chitty's argument, as I understood it, ran somewhat on these lines: He argued that sub-section (*a*) of section 82 dealt with three classes of persons who were liable to be reported: (1) the candidate, (2) other persons who had committed corrupt or illegal practice with the knowledge and consent of the candidate, (3) the agent of the candidate; the necessity for restricting the term "candidate" in all these cases to a successful candidate and for the inclusion of the unsuccessful candidates on whose behalf seats were claimed as a separate class he based upon the proviso to the section.

It is hardly necessary to set out in detail the logical process by which the result was arrived at, for the premises from which he deduced his inferences are fallacious. A reading of sub-section (*a*) of section 82 reveals only two classes or persons who could be reported at best. I say "at best" for the primary concern of the sub-section is not so much with persons as with offences. It requires that a report should be made whether corrupt or illegal practice has or has not been proved to have been committed, not that a person or persons should be reported; it however proceeds to limit and narrow down the offences that are to be reported by confining them to offences committed by certain classes of persons. The reference to persons in this sub-section is therefore incidental to the sole question whether offences have been committed, and strictly speaking, the report contemplated by sub-section (*a*) should run not in the active or personal form but in the passive or impersonal form, that is to say, not that X has been proved to have committed corrupt or illegal practice but that corrupt or illegal practice has been proved to have been committed by X; although for practical purposes one form has nothing to commend itself more than the other, nevertheless the adherence to the proper form would tend to afford a clearer insight into the meaning of the section and the mind of the Legislature.

In regard to the classes of persons dealt with by the sub-section, it will be seen that it deals with two classes of persons and not with three as contended by Mr. Chitty. The two classes are (1) the candidates and (2) their agents. It is true that in regard to candidates it is not only offences committed by them that become liable to be reported but also offences which have been committed with their knowledge and consent by, it must necessarily be, other persons. I do not think Mr. Chitty is right when he contends that the persons who commit offences with the knowledge and consent of a candidate constitute a third class of persons who become liable to be reported. In fact no such class is expressly referred to in this sub-section and any such class can only be inferred, and in view of what I have said earlier it will be apparent that persons who with the knowledge and consent of a candidate commit the offences or illegal or corrupt practice do not become liable to be reported under this sub-section. Nor can I see any reason why the term "candidate" in this sub-section should be limited to the successful candidate alone. The words used are "any candidate" and there is nothing in the section which constrains one to limit the section to offences committed only to those by a successful candidate, and to exclude those committed by an unsuccessful candidate. In fact, the proviso to the

section makes it quite clear, for it expressly dispenses with notice in regard to a candidate on whose behalf the seat has been claimed at the election petition before a report is made against him, implying clearly, therefore, that a candidate on whose behalf the seat has not been claimed is himself liable to be reported but that before any report is made against such a candidate he should be given an opportunity of showing cause against it.

Mr. Chitty's further argument was that sub-section (*b*), in view of the construction he placed on sub-section (*a*), is limited to those persons who had been proved to have committed offences with the knowledge and consent of the candidates and that it is only those persons who are liable to be reported.

I do not agree that this construction is sound either. The words "all persons" contain no restriction whatever, and there is nothing in the context to warrant any limitation being placed on them. In fact, Mr. Chitty sought to reinforce his argument by his assertion that he has not been able to come across a single reported case where a notice had been issued to a person who was a witness *simpliciter* in an election petition inquiry, and not a party to it.

Mr. Tiruchelvam appearing on behalf of the Attorney-General referred to the case of *Q. v. Mansel Jones*[1] which shows that a notice had in point of fact issued on a witness, but the point that came up for consideration was whether in view of the occur ence of the words "by himself" after the words "an opportunity of being heard" in the provision corresponding to the proviso to our section 82, the party noticed had a right to appear by Counsel or Solicitor. In that very case, there is also a reference to another case of a witness being noticed to show cause. On the question, however, as to whether a notice can issue on a witness or a person who, though not a witness, is proved at the inquiry to have committed the offence of corrupt or illegal practice, with a view to reporting him, it is correct to say there is no direct authority, and the reason for that is that the language of the section is simple and admits of no argument. The proviso to the section itself is a clear pointer in the direction that the term "all persons" embraces every individual who may have been proved at the inquiry to have been guilty of corrupt or illegal practice, whether a witness or not, a candidate or not, and is not limited to any particular class. In my view a candidate himself is liable to be reported under section 82 (*b*) provided the other requirements are satisfied.

The objection, therefore, fails.

Now to turn to the merits of the application, the first contention put forward is that the payment is in itself a legal one and that it does not infringe the provisions of section 68 of the Order in Council. It is said that this section permits a candidate to employ clerks and that Ganeshan when he was called upon to translate the English manifesto into Tamil became clothed with the mantle of a clerk. I do not think that a person who is employed because of the special knowledge he has of particular

[1] (1889) *L. R.* 2 Q. B. D. 29.

languages for the purpose of translating a document in one language into another is a clerk. A clerk is one whose function it normally is to keep accounts or to attend to correspondence. It may be that where the main duties of a person are strictly clerical and he is called upon, as ancillary to his main employment, to render a document in one language into another, although he may in so rendering really act otherwise than as a clerk, may yet for all practical purposes be deemed to continue his clerical character. But where a person does none of the normally recognised functions of a clerk and is not employed in a clerical capacity but is only employed to make a translation from one language to another and when further it is shown, as it has been in this case, that the person so employed pursues the occupation of a translator to add to his income, it is well nigh impossible to regard such a person as a clerk.

Learned Crown Counsel himself submitted that as the constituencies in the country were inhabited by people speaking not one language but different languages, the employment of a translator may be necessary to further one's candidature and that the term "clerk" therefore in section 68 should be given a very wide interpretation so as to include a translator. I do not think I should be justified in assenting to this view. Learned Crown Counsel's argument to my mind proceeds upon a fallacy. Apparently, it is assumed in the argument that English is the language of the constituency. I have not been referred to any provision of the law which in fact supports this assumption. On the contrary, I think there is every reason to hold, and common sense will dictate, that no one language where several languages are spoken can be deemed to be the medium for conducting an election campaign. One language may reach a larger number of voters than another but that is far from saying that the language of the majority of the voters or for a matter of that of the minority of the voters, as in the case in this instance, is the language which the law recognises as the language for the purposes of the election.

It is quite conceivable that a candidate who may have no knowledge of the English language may wish to reach the English speaking section of the voters in his electorate and he may then be justified in employing a person who has a command of the English language to do an English translation of his manifesto. I do not think Crown Counsel went to the length of saying that in such a case the English translator would also come within the category of clerks and that his employment too must be deemed to be sanctioned by section 68. If Crown Counsel's contention is sound, in fact one might go further and contend that persons may be employed for remuneration in order to interpret a speech delivered in one language into other languages as such persons would then fall under the category of clerks. I do not think the argument went so far. If it be thought that it is desirable that translators or interpreters should be permitted to be employed by a candidate, then that is a matter for the Legislature to step in and make the necessary amendments in the law. The Court certainly cannot torture words which have well known and well accepted meanings into meaning something different for no purpose other than that of enabling a party to do that which it is deemed desirable he should possess the power to do but which the Legislature has not empowered him to do.

The conclusion I reach, therefore, is that a translator is not a clerk within the meaning of section 68 of the Order in Council and that the payment to such a person offends against the provisions of that section and is illegal.

The next contention is that if the payment is deemed to be illegal then the payment was made without the petitioner realising that he was contravening the provisions of the Order in Council and as a result of inadvertence and not from any want of good faith. That the payment must necessarily be deemed to have been made for the purpose of promoting the election of the petitioner has not been contested. Further, that at the time the services of Ganeshan were accepted not only was there no agreement to pay any remuneration for those services but that in fact no payment was to be made for those services was what was within the contemplation of both the petitioner and Ganeshan is manifest from the evidence of both of them.

The petitioner has stated specifically that he did not regard Ganeshan as his clerk. It follows therefore that up to the time that the petitioner made his return in respect of his election expensees he had conducted himself quite properly and in accordance with and without violating the relevant provisions of the Order in Council. His conduct and his behaviour therefore clearly demonstrate that far from not having been aware of the provisions of the Order in Council he had acquired a sufficient knowledge of its provisions. That the petitioner is a proctor of experience cannot be ignored and it can hardly be said that it was beyond his legal attainments to have appreciated the simple provision of the law when it says that any claim against a candidate in connection with the election should be sent to the election agent within the time prescribed by the Order, namely within a period of fourteen days of the declaration of the polls and that any claim not so sent would be barred and that no payment should be made in respect of such a claim.

The plea of the petitioner really turns on the question whether the term "inadvertence" includes a case of ignorance of the law. The term "inadvertence" has received varying meanings dependent on whether the inadvertence was one which was slight and excusable in the circumstances of its commission or whether it was grave and culpable. In the former case, ignorance of the law has been sometimes held to be covered by the term "inadvertence". In the latter the contrary view has been expressed.

The case of *Nicol v. Fearby and Nicol v. Robinson* [1] illustrates the first part of this proposition. In that case the two defendants, Fearby and Robinson, had been returned as the successful candidates at a Municipal election. Both of them had failed to make a return of their election expenses within the period specified by law and continued to sit and vote. They were sued by the plaintiff as common informer to recover penalties under section 21 (4) of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. Application was made to the Judge for an authorised excuse in terms of sub-section 7 of the same section, which is similar to section 75 of our Order in Council. It was also found by the Judge

[1] *(1923) 128 L.T.R. 662.*

that the defendants had relied upon the Town Clerk to inform them of the obligations imposed on them under the Act but the Town Clerk harboured animosity against both of them and deliberately abstained from informing them of their duties. Though the defendants were each allowed to spend a sum of £48 in connection with the election, Fearby had spent only £4 10*s*. 9*d*. and Robinson £3 19*s*. 6*d*. In this state of facts McCardie J. held that :

> " Ignorance of the law may, as I have held, be inadvertent. It does not follow however that relief should be given for acts or omissions due to ignorance of law "

and he saw his way to granting the applications of the defendant.

A case of the latter class is that of *Walsall*[1]. In that case, contrary to the provisions of the Order which prohibited any payment being made for the purpose of promoting or procuring the election of a candidate at an election on account, *inter alia*, of " flags, banners, cockades, ribbons or other marks of distinction ", the candidate ordered and paid for printing of hat-cards which were to be stuck on the hats of voters a sum of £2 18*s*. Baron Pollock, with whom Hawkins J. agreed, refused to allow the application for an authorised excuse, expressing himself thus :—

> " This therefore being an illegal practice, the only question is whether it can be relieved against, on the ground of inadvertence or accidental miscalculation or other ground of a like nature under section 23. If it were once allowed that a breach of the law, in the sense that there was a misconception of the law, is to be treated as an inadvertence, I do not know where there is to be any limit. If one man is entitled to say, ' I did this by way of inadvertence, because I did not think, or it did not occur to me, that this was a mark of distinction ', another might just as well say, ' Well, I know there was an Act of Parliament, and I know one of the sections was directed against music and flags and so on, but I did not read it ; somebody told me about it. It never occurred to my mind that so innocent a thing as a cockade or ribbon could be an illegality ' "

and the candidate was unseated. So that, whether the term " inadvertence " includes a case of ignorance of the law depends on the circumstances of each case. In the case of *Nicol v. Fearby and Nicol v. Robinson* (*supra*) McCardy J., after referring to certain earlier decisions where the true meaning to be attached to the term " inadvertence " had been considered, proceeded to say :

> " In the *West Bromwich* case (1911) 6 O'M. & H. at p. 289 Bucknill J. said : ' I am not going to attempt a definition of ' inadvertence ', but it certainly does not include ignorance of the law. ' Ridley J. in the same case used less definite diction. He appeared to think that in some cases ignorance of the law may be ' inadvertence ', in other cases not, and he added (6 O'M & H. at p. 287) : ' Inadvertence does not cover a case where in the immediate duty which he is performing he ought to have a full knowledge of the law.' If this dictum be correct, it follows that ignorance of the law may be inadvertence,

[1] *4 O'M. & H 128.*

but that whether it in fact be so or not depends on the circumstances. It is difficult to extract a principle from the decisions already cited, unless it is to be found in the above dictum of Ridley J."

The petitioner should have, and must indeed be held to have known—and that is clear from his own conduct—that not only was there a time limit for claims to be sent but also for claims to be paid and, what is more, that the return in regard to the election expenses had to be made within a prescribed period of time. The slightest attention to these provisions would have made him pause to ask himself the question what the position was in respect of claims not so preferred or paid or included in the return. The answer to that question he certainly would have discovered when he attended to the making of his return. It would, therefore, be idle for the petitioner to say that he was not aware that he was contravening the provisions of the Order when he made the payment to Ganeshan. The more reluctant am I to take any other view inasmuch as at the trial of the election petition one of the grounds upon which it was sought and in fact the successful candidate was unseated was that false statements of fact in relation to the petitioner had been made, suggesting that he had employed men to write out for fee or reward his election manifesto. While that allegation was false in fact, the conduct of the petitioner, however, shows that when there was no legal claim on him he made a payment to a person for having promoted his candidature. The fact that the payment was made gratuitously though there was no legal obligation to do so makes the conduct of the petitioner more heinous than it would otherwise be, for the payment assumes the character of a bribe. Section 57 (*g*) of the Order in Council provides, to quote the words relevant for the purpose of the present discussion, that every person who after any election directly or indirectly by himself receives any money on account of his having induced any other person to vote at such election would be guilty of bribery. This sub-section, therfore, tends to assign to the petitioner the role of one who paid a bribe. In this view of the matter, even the allegation of good faith fails.

I do not think that the very salutary provisions of the Order in Council should be whittled away by relaxing their stringency, for by doing so the Court will only be encouraging laxity on the part of candidates, leading to the purity of elections being grievously assailed.

Having regard to the foregoing, I cannot but hold that the petitioner was aware of the provisions of the Order in Council and that he made the payment deliberately and that there was also lack of good faith in making the payment. But even if the petitioner be held to have been ignorant of the relative provisions of the Order in Council and even if one were inclined to adopt the reasoning of McCardie J. it cannot be said that the conduct of the petitioner falls within the category of slight and excusable acts that it could justifiably be excused, more so as there has also been lack of bona fides in making the payment.

I am therefore not satisfied that the petitioner has made out a sufficient case to entitle him to the relief applied for. The application fails and is refused.

Application refused.