1941 *Present* : **de Kretser J.**

SARAVANAMUTTU *v.* DE SILVA.

In re ELECTION PETITION No. 1 OF 1941

Election petition—Application by respondent to inspect marked registers and tendered votes lists—Scope of Article 45 (10)—Purpose of instituting or maintaining election petition—Power of election Judge to hear application—Ceylon (State Council Elections) Order in Council, 1931—Article 45 (10).

An application under Article 45 (10) of the Ceylon (State Council Elections) Order in Council, 1931, to inspect any of the documents mentioned therein may be made only for the purpose of instituting or maintaining an election petition. A respondent to an election petition may not in the course of the hearing make such an application in order to refute the allegation that certain specified persons had not voted.

An election Judge, who is also a Judge of the Supreme Court, may deal with such an application.

THIS was an application made by the respondent to an election petition during the course of the hearing to inspect the registers used by the presiding officers at the election in question and the tendered votes list.

J. E. M. Obeyesekere (with him *M. M. I. Kariapper* and *C. Barr Kumarakulasingham*), for petitioner.

U. A. Jayasundere (with him *V. F. Guneratne, A. C. Alles, S. R. Wijayatilake, P. Malalgoda* and *G. P. A. Silva*), for respondent.

M. W. H. de Silva, S.-G., (with him *R. R. Crosette-Thambiah, C.C.*), for the Attorney-General, on notice.

Cur. adv. vult.

November 3, 1941. DE KRETSER J.—

On October 13, 1941, the proctor for the respondent submitted a motion in the following terms :—" I move that in terms of Article 45 (10) of the Ceylon (State Council Elections) Order in Council, 1931, as amended by the Ceylon (State Council Elections) Amendment Orders in Council, 1934 and 1935, Your Lordships' Court may be pleased to order that the Returning Officer do permit Mr. S. R. Wijayatilake, Advocate, and

Mr. T. M. Fernando, Proctor, on behalf of the respondent to inspect—(1) the registers used at all the polling booths by the presiding officer at the election in question, marked in terms of Article 38 (2), despatched to the Returning Officer in terms of Article 44 and retained in terms of Article 45 (9), and (2) the tendered votes lists (*vide* Article 44 (1) (c) ".

The motion is entitled "In the Supreme Court of the Island of Ceylon ",—

" Election Petition No. 1 of 1941 ", and it will be noted that in the body of it the motion refers to " Your Lordships' Court ".

This motion was submitted to me in chambers and I made order that the application should be supported and that the petitioner's lawyers should have notice thereof. After hearing Counsel I intimated that I was not disposed to grant the application but that if a considered order were desired I would like to hear the Attorney-General as my order may effect other elections as well. As the result of a considered order being desired, the learned Solicitor-General appeared to assist the Court and I am much indebted to him.

When the original motion was filed it was unsupported by any affidavit. Before the first argument, however, an affidavit was filed, paragraphs 3, 4 and 5 of which ran as follows :—

" 3. A considerable volume of evidence has already been led on behalf of the petitioner to establish that on account of treating, undue influence, and general intimidation a very large percentage of voters refrained or were prevented from recording their votes.

" 4. I maintain that these allegations are false and that voters were not so prevented from recording their votes. The documents of which I seek inspection contain information which would materially help me to refute these allegations.

" 5. It has become necessary for the purpose of my case to inspect and, if necessary, to take copies of the said documents ".

It will be noted that inspection was desired because the documents " contain information which would materially help (respondent) to refute the allegations " made by the petitioner.

The matter is governed by Article 45 (10) of the Order in Council governing elections to the Ceylon State Council. That sub-section empowers a Judge of the Supreme Court to make an order for inspection but it also expressly states that he " shall *not* make such an order unless he is satisfied that such inspection, copy, or production is required for the purpose of instituting or maintaining a prosecution or an election petition in connection with the election. Save as aforesaid, no person shall be allowed to inspect any such ballot paper or document after it has been sealed up in pursuance of sub-clause (9) ". Mr. Jayasundere argued that the latter part of the qualifying clause should be read as follows :— (*a*) for the purpose of instituting or maintaining a prosecution, or (*b*) for the purpose of an election petition.

He urged that the provision had been modelled on Rule 40 of the Rules for Parliamentary Elections to be found in the English Ballot Act of 1872 (35 & 36 Vict. cap. 33). He also urged that as inspection of the marked register is allowed in England it should be allowed here. He was keen only about the marked register.

I did not think then nor do I think now that the English rules are a safe guide, except to a limited extent, for the provisions of our law are different in many respects. Rule 40 of the Ballot Act applied only to inspection of rejected ballot papers. Rule 41 applied to the counterfoils and the counted ballot papers. Rule 42 allowed public inspection of all documents forwarded by a returning officer other than ballot papers and counterfoils. The marked register was, therefore, by virtue of Rule 42, open to public inspection.

Article 45 (10) puts all public documents relating to an election on the same footing as a ballot paper. In my opinion what follows is, *not* that a ballot paper should be as lightly considered as a marked register but that a marked register is raised to the level of a ballot paper. The Article does not justify different considerations being applied to the different documents.

The learned Solicitor-General was inclined to think that the English practice should be followed as the inspection of the marked register would not violate the secrecy of the ballot and could do no harm. Article 83 (4) allows the procedure or practice followed in England on an election petition *to* be invoked only so far as they are not inconsistent with the express provisions already made by the Order in Council and the rules annexed thereto. Article 83 (4) relates to any matter of procedure or practice arising on an election petition, whereas Article 45 (10) applies to a stage even *prior to* the filing of a petition. I think the learned Solicitor-General was right when he said that it seemed to be intended mainly for proceedings prior to an election petition being presented. Express provision having been made, this Court must construe such provision and can only take the English law as a guide on such points as have not been covered by legislation.

The Solicitor-General also raised the question whether I could deal with this application, seeing that I was sitting as an "Election Judge"; and on my inquiring whether I had therefore temporarily ceased to be a Judge of the Supreme Court he was rather inclined to think I had! He pointed to the fact that under the Parliamentary Elections Act of 1868 the Court is expressly given the powers, jurisdiction and authority at the trial as a Judge of one of the superior Courts and as a Judge of Assize and *Nisi Prius*,—in Scotland the powers of a Judge of the Court of session for the trial of a civil cause without a Jury,—whereas in Ceylon no such provision had been made, and Article 75 (3) had conferred on an election Judge the powers, jurisdiction and authority of a District Court, for the purpose of summoning or compelling the attendance of witnesses. If this objection were sound all I need do is dismiss the application and leave it to the applicant to move elsewhere. But I think the argument is unsound on two grounds, namely, that I still remain a Judge of the Supreme Court and can exercise jurisdiction as such, and the mere accident of this matter being dealt with by me in the Court in which the election petition is being tried does not deprive me of jurisdiction; and secondly, that Article 75 (1) expressly states that an election petition shall be tried by the Chief Justice or by a Judge of the Supreme Court, and it is only with regard to the summoning of witnesses that the powers of an election Judge are in any way defined by Article 75 (3). Article 75 (3)

is modelled probably on sections 31 and 32 of the Parliamentary Elections Act of 1868. The procedure provided by the Criminal Procedure Code would be inappropriate and there are no rules regarding the right of parties to call evidence before the Supreme Court in its appellate jurisdiction. Article 75 (3) was therefore a necessary provision.

It must be remembered that Article 45 (10) embraces a case where there is no election petition and consequently no election Judge. It must also be borne in mind that it may apply to a time prior to the presentation of an election petition. Once an election petition is presented the rules in Schedule VI. would apply to the extent therein indicated. For the purpose of those rules, unless the context otherwise requires, the word "judge" means the election Judge and "registrar" means the Registrar of the Supreme Court. There is no provision in the Order in Council for the appointment of a registrar for the election court such as there is in England. Article 75 (5) enacts that all interlocutory matters in connection with an election petition may be dealt with and decided by *any* Judge of the Supreme Court unless the Chief Justice orders otherwise. Any interlocutory matter would be most conveniently dealt with by the election Judge and there is no provision which justifies an interpretation which excludes the election Judge in his capacity of a Judge of the Supreme Court.

Article 75 applies to the trial of an election petition and the Chief Justice is not required to nominate a Judge as soon as an election petition is received by the Registrar. The rules in Schedule VI. are brought into effect by Article 83 (1) and regulate the procedure and practice on election petitions.

"The Judge" is first mentioned in Rule 5 which deals with an application by the respondent for particulars. This is to be dealt with by the election Judge, who in the absence of nomination, would be the Chief Justice. Rules 7 and 8 apply to the Judge at the trial or inquiry. Rule 12 again brings in "the Judge",—so do Rules 20 and 21, all relating to the furnishing of security. Rule 22, however, refers to "a Judge". Taken strictly the position is this : if no security is furnished "the Judge" may dismiss the petition ; "the Judge" considers the sufficiency of the security tendered and may order additional security, and if the additional security is not given "a Judge" may order dismissal of the petition. It is difficult to reconcile Article 75 (3) with some of the rules. The system is different in England where the election Judges are drawn from a rota and so are in existence immediately. Article 75 (5) finds its counterpart in rule 44 of the English rules, which do not refer to "the Judge" at any time but to "a Judge" and sometimes to "the Court", the Court there now consisting of two Judges. The difficulty really arises from our rules defining the term "Judge" to mean the election Judge, apparently in forgetfulness of the provisions of Article 75 (3). Had there been no such definition the expression "the Judge" might mean the Judge to whom a matter was submitted for order and "a Judge" in Rule 22 would only mean the same thing. As regards the trial the expression would mean the election Judge.

It seems to me that Article 83 (2) may be usefully applied to clarify this point and that meanwhile the matters mentioned in the rules must be

dealt with by the Chief Justice unless and until he nominates an election Judge, and that other matters may be dealt with by any Judge of the Supreme Court including the Chief Justice, who is the election Judge until some other Judge is nominated. If then the Chief Justice, who is in the first instance the election Judge, may deal with an application under Article 45 (10), there is no reason why any other Judge should be disqualified from doing so merely because he is nominated to try the election petition.

I have indicated sufficiently that there are differences between the English law and the law obtaining here. It must be borne in mind that in England the House of Commons claimed the right to decide on the validity of all elections and exercised its power through the medium of Select Committees. It was only in 1868 that this right was transferred to a Judge. Rule 40 provided for an order for inspection of rejected ballot papers being made not only by one of Her Majesty's Superior Courts but also by order of the House of Commons. Rule 41 provides for an order by the House of Commons or by any tribunal having cognisance of petitions complaining of undue returns or undue elections. Rule 42 contemplates the making of regulations by the Speaker to govern the Clerk of the Crown in Chancery. It will be seen that the procedure in Ceylon has been much simplified.

Turning now to the motion, the position is that English law with regard to the marked register cannot be applied in Ceylon. It is probably true—in fact there is every reason to believe it to be true—that the draftsman of the Order in Council had before him the English enactments. He has departed from them and one must assume that he has done so for good reason. The Legislature having enacted Article 45 (10) I must give effect to it to the best of my ability. It is not as if it has been shown that there could have been no possible reason for not following the English rules. One would have thought that if that were so the simplest and easiest course would have been to copy the English rules. Before the Ballot Act voting was open, and when that Act was introduced particular care was taken to secure the secrecy of the ballot papers ; but experience may have shown that it was desirable to secure the secrecy of other documents as well, and it may have been realized that conditions in Ceylon required rather different provisions. It is idle to speculate.

The next matter that arises is with regard to the latter part of Article 45 (10). Rule 40 required that the Court should not order inspection unless it was satisfied by evidence on oath. Article 45 (10) requires it to be "satisfied". It can only be satisfied by evidence.

In *James v. Henderson* [1], leave to inspect the marked register was allowed on the ground that it was by Rule 42 open to the public inspection. It is therefore of no assistance. In *Stowe v. Joliffe* [2], Grove J. said (page 457) :—"Is this Court, in every case, to grant inspection as a matter of course upon the mere production of an affidavit of the agent that in his judgment and belief such inspection is necessary to enable him to prepare the petitioner's case ? If that had been the intention of the Legislature it might have been expressed in a few lines : I do not think these long provisions would have been necessary . . . . So to hold

[1] *(1874), vol. 43, L. J. Common Law.*

[2] *L. R. 9, C. P. 446.*

would be to say that every petitioner is to have access to everything on a scrutiny, upon a mere suggestion that it would afford him useful information. Such would be the effect of granting what is here asked. . . . I do not say that the Court has not power under any circumstances to allow inspection of the rejected ballot papers and the counterfoils of ballot papers; but I think, before such inspection is allowed, a very strong prima facie case should be made out".

The Court must be satisfied, and I think the standard set in England with regard to inspection of ballot papers must be the standard which this Court will follow in dealing with applications under Article 45 (10). There can be no such thing as being more easily satisfied with regard to some applications and less easily satisfied with regard to others.

Next, the Court has to be satisfied on certain points: one is that such inspection is required for the purpose of instituting or maintaining a prosecution. The learned Solicitor-General drew attention to the fact that an accused person would not have the right of inspection, and he suggested that that was because he could rely on the prosecution failing to prove its case, the prosecution in order to prove its case having to produce the necessary documents. In my opinion there is no reason to differentiate between an accused person and a respondent to an election petition. In an election petition too the petitioner would have to substantiate his charges.

The second purpose is the one that has given some difficulty. Mr. Jayasundere suggested that the sentence should not be read in its natural and grammatical sence but that it should read "for the purpose of an election petition". The learned Solicitor-General was inclined to support this view, though freely admitting that a natural and grammatical construction would be against it. The argument is that the word "instituting" is inappropriate when applied to an election petition and no reason can be seen why the wording of rule 40 of the English rules should not be adopted and the draftsman considered to have compressed his sentence. It may be true that the Order in Council and the rules speak of "presenting" a petition but I can see no objection to the use of the word "instituting". To institute is to set in operation, to begin. Both the Solicitor-General and Mr. Jayasundere referred to an election petition as if it were the same as an election action and an action is "instituted"—*vide* Chapter III. of the Civil Procedure Code, "action" itself being defined as "a proceeding for the prevention or redress of a wrong", and in that sense an election petition is an action. Besides, it is quite common to find in English composition a verb or an adjective attracted to the nearest substantive without the meaning of the sentence being affected. Both "prosecution" and "election petition" are qualified by the words "in connection with the election". These words are scarcely necessary with regard to the petition, for it must be in connection with an election, and they apply chiefly to the word "prosecution". With reference to the English rules, a departure therefrom has been made as the alternative in Rule 40 read "or for the purposes of a petition questioning an election or return". Even the English rule might possibly be construed as allowing inspection only for the purpose of the petition and not for all purposes connected with the trial thereof. It is

for this reason that I asked whether there was a single case in which an application had been made by a *respondent* and was informed that no such case could be found.

In the case of *Darwen* (*1886, 80 L. T. J. 153*) referred to at page 110 of Volume II. of *Rogers on Elections* (*20th ed.*), an application under rule 40 was refused where no petition was filed and it was doubted whether there was power to make an order in the absence of a petition. The report of the case, unfortunately, is not available locally. That decision would indicate that it was doubted whether the alternative clause applied to the instituting or presenting of an election petition. It may have been to remove this doubt that Article 45 (10) put an election petition on the footing of a prosecution and so indicated that the application might be made even prior to the presenting of a petition.

In my opinion the application may be made only for the purpose of instituting or maintaining an election petition. I note that in *Dias v. Amarasuriya*[1], Drieberg J. assumed that the word "maintaining" in Article 45 (10) applied to the election petition.

I refuse the application both on the construction of Article 45 (10) which I have just mentioned and also on the merits. I do not think an inspection should be allowed merely to fish for evidence. In *Stowe v. Joliffe*[2] Cockburn and Grove JJ. refused the first application partly at least on the ground that the nature of the information desired was not precisely stated. Mr. Jayasundere sought to amplify the affidavit by stating that it was desired to ascertain whether certain persons had voted or not and, where possible, to refute the allegation that certain specified persons had not voted. This would at once have led to an inquiry into various charges of personation and have unduly prolonged an inquiry which is not concerned with charges of personation.

Application refused.