

## KULARATNE

v.

## CHANDRANANDA DE SILVA AND ANOTHER

SUPREME COURT.

SHARVANANDA, C.J. COLIN-THOME, J. AND ATUKORALE, J.

S.C. REF. 1/85.

C.A. APPLICATION No. 112/85.

JUNE 10 AND 11, 1985.

*Election Law - Article 123 (1) of the Constitution - Person found guilty of corrupt practice of making false statement when acting as an agent of a candidate at a Parliamentary Election and with his knowledge and consent - Is candidate subject to disqualification? - Articles 88, 89(e) (iii) and 90 of the Constitution read with Section 82 D (b) (ii) of Ceylon Parliamentary Elections Order in Council - Report of Election Judge under Section 82 of the said Order-in-Council.*

A person was found guilty of the corrupt practice of making a false statement of fact under section 58 (1) (d) of the Ceylon (Parliamentary Elections) Order in Council 1946 at a Parliamentary Election as agent of a candidate at the said election and with his knowledge and consent. On the question of the disqualification which the candidate himself would suffer the Court of Appeal acting under section 123 (1) of the Constitution referred the following questions to the Supreme Court for its determination :

- (a) In view of the provisions of Articles 88, 89 (e) (iii) and 90 of the Constitution, does section 82D (b) (ii) of the Ceylon (Parliamentary Elections) Order in Council 1946 read with the Fifth Amendment to the Constitution now operate to impose on such a candidate as is referred to in section 82D (2) (b) (ii) of the said Order in Council the disqualification to being an elector at an election of Members of Parliament or of being elected as a Member of Parliament
- (b) Where the report made by an Election Judge finds that the corrupt practice of making a false statement of fact under section 58 (1) (d) of the Ceylon (Parliamentary Elections) Order in Council 1946, had been committed by a person acting as agent and with the knowledge and consent of a candidate at such election, is such candidate subject to the disqualification contained in Article 89 (e) (iii) of the Constitution ?

- (c) Do the words "... a report made by a Judge finding him guilty of any corrupt practice ..." in Article 89 (3) (iii) of the Constitution –

apply only to such a person who is set out in such report as having been proved himself to have been guilty (as provided in section 82 (b) of the said Order in Council) of the corrupt practice of making such false statement of fact

OR

apply also to the candidate (though not set out in such report as having been proved himself to have committed such corrupt practice), whose agent is set out in such report as having committed such practice with such candidate's knowledge and consent.

#### Determination –

The Supreme Court gave its determination on the questions referred as follows.

(a) No.

(b) No.

(c) The words "... a report made by a Judge finding him guilty of any corrupt practice. ..." in Article 89 (e) (iii) of the Constitution apply only to such a person who is set out in such report as having been proved himself to have been guilty (as provided in section 82 (b) of the said Order in Council) of the corrupt practice of making such false statement of fact and *does not* apply also to the candidate (though not set out in such report as having been proved himself to have committed such corrupt practice), whose agent is set out in such report as having committed such practice with such candidate's knowledge and consent.

The provisions of section 82D (2) (b) (ii) and 83D (3) of the Elections Order in Council ceased to be law with the coming into existence of the Constitution of 1972, and hence were not 'existing law' when the Constitution of 1978 came into operation. Being inconsistent with Article 89 (e) (iii) of the 1978 Constitution they were not revived by the Fifth Amendment. The question of petitioner's disqualification to be an elector has to be decided solely by reference to Article 89 (e) (iii) of the 1978 Constitution. For the reasons set out above this Article does not disqualify the petitioner from being an elector in terms of Articles 88 and 89 of the Constitution.

#### Case referred to :

(1) *Hack v. London Provident Building Society* [1833] 23 Ch. D. 103, 108.

REFERENCE by the Court of Appeal to the Supreme Court.

*K. N. Choksy, P.C., with Mark Fernando, P.C., Daya Pelpola, D. H. N. Jayamaha, Ronald Perera, and Lakshman Perera* for the Petitioner.

*M. S. Aziz, D. S. G. with Ananda Kastunarachchi, S.C.* for the 1st and 2nd Respondents

*Cur. adv. vult*

July 2, 1985.

**SHARVANANDA, C.J.**

In terms of Article 123(1) of the Constitution, the following questions relating to the interpretation of Article 89(e)(iii) of the 1978 Constitution have been referred by the Court of Appeal, to this court for determination :-

- (a) In view of the provisions of Articles 88, 89 (e) (iii) and 90 of the Constitution, does section 82 D (b) (ii) of the Ceylon (Parliamentary Elections) Order in Council 1946 read with the Fifth Amendment to the Constitution now operate to impose on such a candidate as is referred to in section 82 D (2) (b) (ii) of the said Order in Council the disqualification to being an elector at an election of Members of Parliament or of being elected as a Member of Parliament.
- (b) Where the report made by an Election Judge finds that the corrupt practice of making a false statement of fact under section 58 (1) (d) of the Ceylon (Parliamentary Elections) Order in Council 1946, had been committed by a person acting as agent and with the knowledge and consent of a candidate at such election, is such candidate subject to the disqualification contained in Article 89 (e) (iii) of the Constitution.
- (c) Do the words ". . . . . a report made by a Judge finding him guilty of any corrupt practice . . . ." in Article 89 (e) (iii) of the Constitution -

apply only to such a person who is set out in such report as having been proved himself to have been guilty (as provided in section 82 (b) of the said Order in Council) of the corrupt apply also to the candidate (though not set out in such report as having been proved himself to have committed such corrupt practice), whose agent is set out in such report as having committed such practice with such candidate's knowledge and consent."

The above reference has been made by the Court of Appeal in the course of hearing an application for a Writ of Certiorari and Mandamus on the Commissioner of Elections (1st respondent) and the Returning Officer for the Electoral District of Mulkirigala (2nd respondent).

The election of the petitioner, Ananda Kularatne, as Member of Parliament for the Electoral District of Mulkirigala at the by-election held on 18.5.83 was declared void by the Election Judge. The Election was challenged on the ground that a corrupt practice, to wit, a false statement of fact in relation to the personal character or conduct of the defeated candidate had been made by one Basil Rajapakse, acting as agent of the petitioner or with the knowledge and consent of the petitioner, in breach of section 58 (1) (d) of the Ceylon (Parliamentary Elections) Order in Council. This determination of the Election Judge was in appeal affirmed by the Supreme Court.

The Election Judge also made a report under section 82 of the said Order in Council. This report was published in the Gazette of 1.1.85 (P 3). It states that :-

"In terms of section 82 of the Ceylon (Parliamentary Elections) Order in Council, I do hereby report that in view of my findings in the Election Petition that the 2nd respondent to the said Election Petition, Mr. Basil Rajapakse of Medamulāna, Weeraketiya, is proved to have committed a corrupt practice of making and publishing a false statement affecting the personal character and conduct of the petitioner Nirupama Rajapakse who was a candidate in the said election for the purpose of affecting the return of the said candidate, acting as agent and with the knowledge and consent of the 1st respondent to the said petition, Mr. Ananda Kularatne."

Consequent to the aforesaid report the respondents claiming to act under section 82 D (3) read with section 82 (d) (2) (b) (ii) of the said Order in Council, deleted the name of the petitioner from the Register of electors. The petitioner in his application avers that the removal of his name from the Register of electors is in violation of his constitutional and civic rights, in particular, the right of franchise and accordingly seeks -

- (a) a Writ of Certiorari to quash the decision of the 1st and/or 2nd respondent to remove his name from the Register of electors and
- (b) a Writ of Mandamus to compel the 1st and/or 2nd respondent to restore his name in the Register of electors

Section 82D (2) (b) (i) reads :

“ . . . where the report referred to in paragraph (a) is to the effect that a corrupt or illegal practice has been committed by any person, that person shall be subject to the same incapacities as if at the date of the said report he had been convicted of that practice.”

The crucial question which arises is whether the disqualification created by section 82 D (2) (b) (ii) of the said Order in Council relied on by the respondents is countenanced by Article 89 (e) (iii) of the (1978) Constitution.

Section 82 D (2) (b) (ii) of the Election, Order-in Council reads as follows :

“Where the report referred to in paragraph (a) is to the effect that such corrupt . . . practice was committed with the knowledge and consent of the person. Who was a candidate at an election or by his agent, that person shall be subject to the same incapacities as aforesaid.”

Section 58(2) spells the incapacities to which a person convicted of corrupt practice is subject to, it states :-

“Every person who is convicted of a corrupt practice shall, by conviction, become incapable for a period of seven years from the date of his conviction of being registered as an elector or of voting at any election under this Order or of being elected as a Member of Parliament.”

Section 4(1) (f) of the Order in Council provides that -

“no person shall be qualified to have his name entered or retained in any register of electors in any year if such person is incapacitated of being registered as an elector by reason of his conviction of a corrupt or illegal practice or by reason of the report of an Election Judge in accordance with the said Order.”

Section 13(3) (h) of the Ceylon (Constitution) Order in Council 1946, Chap. 379 provides that a person shall be disqualified from being elected as a Member of the House of Representatives -

“if by reason of his conviction for a corrupt practice or *by reason of the report of the Election Judge* in accordance with the law for the time being in force relating to the election of Members of Parliament; he is incapable of being registered as an elector or of being elected as a Member of Parliament.”

Thus in terms of the 1946 Constitution, read with the (Parliamentary Elections) Order in Council, where a report of an Election Judge states that a candidate himself committed a corrupt practice or such corrupt practice was committed by another person with the candidate's knowledge and consent or such corrupt practice was committed by an agent of the candidates, the candidate in all the three circumstances, stood disqualified for a period of seven years from being registered on an electer or being elected to Parliament.

The Ceylon (Constitutional) Order in Council, 1946 was superseded by the Constitution of Sri Lanka, 1972. Section 12(1) of that Constitution provides –

“Unless the National State Assembly otherwise provides, all laws, written and unwritten, in force immediately before the commencement of the Constitution, except such as are specified in Schedule ‘A’ shall, *mutatis mutandis*, and *except as otherwise expressly provided in the Constitution*, continue in force.”

(Schedule ‘A’ referred to in this section includes the “Ceylon (Constitution and Independence) Order-in-Council, 1947 and 1947)”

Section 66 of the 1972 Constitution provides –

“Every citizen . . . . unless disqualified as hereinafter provided, is qualified to be an elector at elections to the National State Assembly.”

Section 68 of the Constitution enumerates the disqualifications to be an elector. Section 68(d) (iii) states that no person shall be qualified to be an elector at an election of members of the National State Assembly if a period of seven years has not elapsed since

“the last of the dates, if any, being a date after the commencement of the Constitution of *a report made by an Election Judge finding him guilty of any corrupt practice under the Ceylon (Parliamentary Elections) Order in Council – 1946 . . .*”

Section 69 provides that every person who is qualified to be an elector is qualified to be elected as a Member of the National State Assembly unless he is disqualified under the provisions of section 70.

Section 70 of the Constitution provides that –

“No person shall be qualified to be elected as a Member of the National State Assembly, *inter alia* (a) if he becomes subject to any of the disqualifications in section 68.”

From and after the promulgation of the Constitution viz : 22.5.1972, it is clear that the question whether a person is disqualified to be an elector or to be elected as a Member of Parliament has to be determined exclusively by reference to the provisions of sections 66 to 70 of the 1972 Constitution and not by reference to the (Parliamentary Elections) Order in Council, 1946.

It is significant that section 68(d) (iii) of the 1972 Constitution employs words different to the phrase used in section 4(1) (f) of the 1946 Election Order-in-Council and section 13(3) (h) of the Ceylon (Constitution) Order in Council. Prior to the enactment of 1972 Constitution a person was disqualified to be an elector or to be elected as a Member of Parliament, *inter alia*, if he was incapable of being registered as a elector or being elected as a Member of the House of Representatives, *by reason of the report of an Election Judge* in accordance with the Ceylon (Parliamentary Elections) Order in Council. However the 1972 Constitution altered it to provide that he will be so incapable only if *a report of an Election Judge finds him guilty of any corrupt practice under the (Parliamentary Elections) Order-in-Council 1946*

Section 82 of the Elections Order in Council (1946) mandates the Election Judge to report the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice.

Section 82D (2) (b) (i) and (ii) of the Elections Order in Council spells out the penal consequences of being reported to be guilty of any corrupt practice by the Election Judge – not only the offender shall suffer any incapacity but also the candidate himself if the report was to the effect such corrupt practice was committed with his knowledge and consent or by his agent. The candidate suffers this punishment not because he had been found guilty of corrupt practice but consequential to his agent or his supporter, with his knowledge and consent, having been found guilty of committing the corrupt practice. The candidate has by an express provision of the law, been made to suffer the incapacity for the fault of his agent or such supporter. Thus by reason of the report of the Election Judge not only the person

reported to be guilty of any corrupt practice by the Election Judge but also the candidate whose agent he is, or with whose knowledge and consent he committed it, is rendered incapable for a period of seven years from being registered as an elector or of being elected as a Member of Parliament. Section 68(d) (iii) of the 1972 Constitution replaced section 82D (e) (b) (i) and (ii) and provided that only the person found guilty of a corrupt practice is disqualified from being an elector. There is a material difference in the language employed in the relevant section of the Elections Order-in-Council and of the Constitution. The framers of the Constitution must have had some purpose in departing from the language of the Elections Order-in-Council. When the legislature, legislating "in pari materia" and substituting a new provision for those which existed in an earlier statute, changes the language of the enactment, it must be taken to have done so with some intention and motive. When the words in the later statute differ from those of the earlier statute it must be presumed that the legislature intended to alter the law and that the legislature had a specific purpose in doing so. As Jessel M. R., said in *Hack v. London Provident Building Society* (1) at p. 108 –

"It is the duty of the court first of all to find out what the Act of Parliament under consideration means and not to embarrass itself with previous decisions on former Acts, when considering the construction of a plain statute framed in different words from the former Act."

If the later Act can clearly have only one meaning we ought to give effect to it accordingly.

By virtue of Section 12 of the 1972 Constitution that part of the 1946 Elections Order-in-Council which is in conflict or is inconsistent with the express provision of section 68 of that Constitution cannot survive the Constitution and cannot be part of the 'existing law.'

The Constitution of Sri Lanka, 1972, was succeeded by the Constitution of the Democratic Socialist Republic of Sri Lanka 1978. Article 88 of the later Constitution provides that "every person shall, unless disqualified as hereinafter provided be qualified to be an elector at the election of the President and of the Members of Parliament and to vote at any Referendum."



Article 89 of the 1978 Constitution sets out the disqualification to be an elector –

No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to the disqualifications, inter alia ; if a period of seven years has not elapsed from the last of the dates, if any being a date after the commencement of the Constitution, of a report made by a Judge finding him guilty of any corrupt practice under the Ceylon (Parliamentary Elections) Order in Council, 1946 or under any law for the time being relating to the Referendum or to the election of the President or of Members of Parliament. (Art. 89 (e) (iii)).

Article 101 of the Constitution provides that –

“Parliament may by law make provision, inter alia for (a) the registration of electors :

Provided that no such law shall add to the disqualification specified in Articles 89 and 91.”

Article 91 recites the disqualifications for election as a Member of Parliament –

Article 101(2) provides that “until Parliament by law makes provision for such matters, the Ceylon (Parliamentary Elections) Order in Council, 1946, as amended from time to time, shall, subject to the provisions of the Constitution, mutatis mutandis, apply.”

Article 89 is the governing provision reciting the disqualification to be an elector. Article 91, is the governing provision specifying the disqualification for election as a Member of Parliament.

The Parliamentary Elections Act No. 1 of 1981, which came into operation on 16th February, 1981, repealed parts I and IV to VI (both inclusive) of the Ceylon (Parliamentary Elections) Order in Council, 1946. Section 4 of the Order-in-Council thus stood repealed. It was pointed out that section 107 of the (Parliamentary Elections) Act No. 1 of 1981 re-enacted word to word sections 82 and 82D(2)(b)(ii) of the Ceylon (Parliamentary Elections) Order-in-Council 1946 and that in terms of this provision, where an Election Judge reports that a corrupt practice was committed by any person with the knowledge and

consent of the candidate or by his agent, the candidate himself and that person will become incapable for a period of seven years from being registered as an elector or of being elected as a Member of Parliament. Certainly this provision in the Parliamentary Elections Act No. 1 of 1981, to the extent that it adds to the disqualifications specified in Article 89 of the 1978 Constitution, is violative of Article 101 of that Constitution. It is not necessary in this case to decide on the validity of this provision vis-a-vis : the Constitution of 1978, as it is common ground that the Parliamentary Elections Act No. 1 of 1981, does not govern the facts of this case.

It is not disputed that the eligibility of the petitioner to be an elector at an election of the Members of Parliament or to be elected as a Member of Parliament has to be determined according to provisions of Articles 88, 89(e)(iii) and 90 of the Constitution read with the Fifth Amendment to the Constitution which provides that "Parts I, IV to VI (both inclusive) of the Ceylon (Parliamentary Elections) Order in Council 1946, shall for the purpose of the election and notwithstanding the repeal of such Order in Council, be deemed to be in force, and shall mutatis mutandis except as otherwise expressly provided in the Constitution apply to such election." Hence in so far as section 82D(2)(b)(ii) is inconsistent with Article 89(e)(iii) of the 1978 Constitution, it will have to yield to that Article and any disqualification prescribed by that section, in so far as it is in conflict with Article 89 of the Constitution, will cease to be operative and cannot impose a disqualification to being an elector at the election of Members of Parliament or to being elected as a Member of Parliament.

On the facts in the case the issue whether the petitioner is disqualified from being an elector or from being elected as a Member of Parliament has to be determined solely by reference to Articles 89 and 91 of the Constitution. Hence the relevant question is whether in terms of Article 89(e)(iii) the petitioner has been reported by a Judge to have been found guilty of a corrupt practice under the (Parliamentary Elections) Order in Council, 1946 ; if not, the petitioner is qualified to be an elector and to be elected as a Member of Parliament.

Admittedly the relevant report of the Election Judge (P3) does not find the petitioner guilty of any corrupt practice. The report only finds that Basil Rajapakse acting as an agent and with the knowledge and consent of the petitioner was proved to have committed a corrupt practice.

The Deputy Solicitor-General submitted that in the English concept of election law a person can be guilty personally or by his agent and that accordingly when the petitioner's agent was found guilty of corrupt practice by the report of the Election Judge not only was the agent so guilty but the candidate himself was deemed to be guilty. He submitted that "guilty of" should be construed to mean "culpably responsible for." He urged that the candidate should be held culpably responsible for the corrupt practice committed by his agent or with his knowledge and consent. According to him, it was not sufficient that election law made the candidate answerable, in that, his election is declared void for the commission of the corrupt practice; he should also suffer the same incapacity as the offender. I cannot agree. Such punishment is a matter for the legislature. Unless statute law specifically so provides as by the aforesaid section 82D(2)(b)(ii), vicarious liability in common law does not extend to the deprivation of one's franchise to which the Constitution attaches the attribute or stamp of inalienability.

The corresponding English Law is set out in sections 138 and 139 of the Representation of the People Act 1949. Section 138(i) provides that—

"the report of an election court shall state whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election and the nature of the corrupt practice."

Section 138(ii) states —

"for the purpose of the next two following sections, if it is reported that a corrupt practice . . . was committed with the knowledge and consent of a candidate he shall be treated as having been reported personally guilty of that corrupt practice."

Section 138(iii) provides that the report shall also state —

"whether any of the candidates has been guilty by his agent of any corrupt practice in reference to the election. . . ."

Section 139(1) enacts that —

"if a candidate who has been elected is reported by an election court personally guilty or guilty by his agent of any corrupt practice his election shall be void."

Section 139(2) states that –

“a candidate at a parliamentary election shall also be incapable from the date of the report from being elected to and sitting in the House of Commons. . . .

- (a) if reported personally guilty of a corrupt practice, for ten years ;
- (b) if reported guilty by his agent of a corrupt practice, for seven years.”

It will be seen that for the purpose of the provision which imposes civil incapacity on a candidate personally guilty of a corrupt practice, if it is reported that a corrupt practice was committed with the candidate's knowledge and consent, he is to be treated as having been reported personally guilty of the corrupt practice. A candidate may also suffer civil incapacity if the report states that the candidate has been guilty by his agent of any corrupt practice in reference to the election.

According to English election laws, a candidate can be guilty personally not only for some corrupt practice actually committed by him, but also if it is reported that a corrupt practice was committed with the candidate's knowledge and consent. The candidate will also be guilty by his agents of a corrupt practice, if the report finds that his agent had committed a corrupt practice.

The aforesaid provisions do not lend support to the Deputy Solicitor General's submission that a report of an Election Judge finding that a corrupt practice had been committed by the candidate's agent or with his knowledge and consent, necessarily imports the idea that the candidate has been found guilty of a corrupt practice. It was expressly enacted that the guilt of the agent or of the person who committed the corrupt practice with the knowledge and consent of the candidate should be attributed to the candidate. The English draftsman has been careful to draw the distinction between “personal guilty” and “guilty by his agent” and when he makes provision for the case of a corrupt practice committed with the knowledge and consent of a candidate, he specifically invokes the aid of a deeming section by stating “he (the candidate) shall be treated as having been reported personally guilty of corrupt practice,” for the purpose of the avoidance of the election and of imposing incapacity on the candidate. There is no justification for superimposing the English statutory concept of “a

candidate being" guilty personally or by his agent of any corrupt practice" on the plain language of Article 89(e)(iii) which speaks only of a "report made by a Judge finding him guilty of any corrupt practice."

Article 89 of the 1978 Constitution provides for the disqualification of a person arising from a finding of an Election Judge that he is guilty of any corrupt practice under the Ceylon (Parliamentary Elections) Order in Council. This will cover only the case of the person found guilty of himself having committed a corrupt practice. If as in English Law this disqualification is to attach to any person found guilty by his agent of any corrupt practice or by any person committing with his knowledge and consent any corrupt practice, the draftsman could have adopted the parallel provisions of the English Representation of Peoples Act 1949 and specifically stated so. In the absence of such specific provisions as sections 138 and 139 of the English Representation of Peoples Act 1949, it is not open for this court to read into Article 89(e)(iii) of the Constitution words which are not there, words which would enlarge the ambit of the disqualification. There is no warrant for attributing to the words 'finding him guilty of any corrupt practice' in Article 89(e)(iii) the sense of "finding him guilty by his agent or by any person with his knowledge and consent of any corrupt practice."

On the basis of the aforesaid reasoning this court determines the question referred to it as follows :

Question -

(a) Answer - No.

(b) Answer - No.

(c) The words "... a report made by a Judge finding him guilty of any corrupt practice. ..." in Article 89(e)(iii) of the Constitution apply only to such a person who is set out in such report as having been proved himself to have been guilty (as provided in section 82 (b) of the said Order-in-Council) of the corrupt practice of making such false statement of fact and *does not* apply also to the candidate (though not set out in such report as having been proved himself to have committed such corrupt practice), whose agent is set out in such report as having committed such practice with such candidate's knowledge and consent.

The provisions of section 82D(2)(b)(ii) and 83D(3) of the Elections Order in Council ceased to be law with the coming into existence of the Constitution of 1972 and hence were not 'existing law' when the Constitution of 1978 came into operation. Being inconsistent with Article 89(e)(iii) of the 1978 Constitution they were not revived by the Fifth Amendment. The question of petitioner's disqualification to be an elector has to be decided solely by reference to Article 89(e)(iii) of the 1978 Constitution. For the reasons set out above this Article does not disqualify the petitioner from being an elector in terms of Articles 88 and 89 of the Constitution. The Court of Appeal is directed to make its order on the petitioner's application in the light of the answers given above, by this court.

**COLIN THOMÉ, J.** – I agree.

**ATUKORALE, J.** – I agree.

*Case sent back for order of the Court of Appeal.*

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