BANDARANAIKE
v.
PREMADASA

SUPREME COURT.
RANASINGHE, C. J.
TAMBIAH, J.
G. P. S. DE SILVA, J.
JAMEEL, J.
AMERASINGHE, J.
PRESIDENTIAL ELECTION
PETITION NO. 1 OF 1989
MARCH 13, 14, 15, 16, 17, 20, 22, 23, 27, 28, 29 and
MAY 2, 3, 4, 5, 8, and 9, 1989

Election Petition — Presidential Election — Preliminary objections — Dismissal in limine — Poll of over 50% of the registered voters as a legal bar to avoidance of election — Section 91(a) of the Presidential Elections Act No. 15 of 1981: General intimidation; Other circumstances in consequence of which the majority of electors were or may have been prevented from electing the candidate whom they preferred — Non-compliance with provisions of Presidential Elections Act as a ground for avoidance of election — Does such non-compliance fall also under 'other circumstances'? — Concise statement of material facts — Failure to identify or name candidate whom the majority preferred but were or may have been prevented from electing whom they preferred — Sufficiency of pleadings.

The petitioner one of the unsuccessful candidates at the Presidential Election of 1988 sought to have the election of the returned candidate the 1st respondent declared null and void on the grounds of general intimidation S. 91 (a) of the Presidential Elections Act No. 15 of 1981 (as amended), non-compliance with the provisions of the Presidential Elections Act No. 15 of 1981 (as amended) and the principles thereof (S. 91(b)) and other circumstances, to wit, failure of the Commissioner of Elections (2nd respondent) and/or his staff to conduct a free and fair election in accordance with the provisions of the Presidential Elections Act aforesaid.

To the charge of general intimidation the 1st respondent raised three preliminary objections:

1. There was a poll of 55.32% of the registered voters and therefore in law the election cannot be avoided under S. 91 (a) of the Presidential Elections Act;
2. The petitioner has failed to identify or name the candidate whom the majority preferred but were or may have been prevented from electing;
3. The petition does not contain a concise statement of material facts (S. 96(c)).

The 2nd respondent raised preliminary objections on the same lines as 1 and 3 above.

On the question of non-compliance with the provisions of the Presidential Elections Act both respondents raised the objection that the petitioner had failed to aver a material fact relating to an ingredient of the charge under section 91(b), namely how the acts of non-compliance with the provisions of the Act affected the result of the election.

On behalf of the petitioner it was submitted that the Supreme Court cannot dismiss an election petition in limine.

Held

1. The Court has power to dismiss an election petition in limine if there is a fundamental defect in the petition arising out of non-compliance with a mandatory provision. Although not so stated the power to dismiss the petition for such non-compliance is inbuilt in the mandatory provisions.

Public interest in the litigation does not postulate an order on a preliminary objection being made only at the conclusion of the trial of the petition. Just as much as the public have interests in the election petition there is also the principle that the election of a candidate should not be lightly interfered with.

2. Mere proof of the several instances or acts of general intimidation would not suffice to avoid an election. In addition the petitioner must prove that these several acts or instances had the result or consequence that the majority of electors were or may have been prevented from electing the candidate whom they preferred.

3. The case of the petitioner based on the ground of avoidance under section 91(a)—general intimidation and other circumstances—falls to be determined solely by a consideration of the provisions contained in section 91(a).

4. The petitioner's case is one of preventive intimidation and not coercive intimidation.

5. In a case of general intimidation the question that arises is—from the proved acts of intimidation of electors, is it reasonable to suppose that the result of the election may have been affected? This, it seems to us, to be the true meaning of the words "the majority may have been prevented from electing the candidate they prefer". But, it will be open to the returned candidate to show that the gross intimidation could not possibly have affected the result.

6. In a charge of general intimidation particulars need not be given. Only a concise statement of material facts is necessary. Only the nature and extent of the intimidation is. The nature of the alleged intimidation has been furnished, namely actual violence or threats of violence—bomb explosions, shootings and killings, posters threatening voters and announcing curfews etc. The extent of

the alleged intimidation has also been given, namely, that it was generally spread over 20 electoral districts. Therefore there has been sufficient compliance with section 95(c) of the Act.

7. The charge under section 91(b) postulates three ingredients:

1. Non-compliance with provisions of the Act:
2. Failure to conduct the election in accordance with the principles laid down in such provisions:
3. Such non-compliance affected the result of the election.

The petitioner has set specifically numerous acts of non-compliance with reference to the specific provisions of the law pertaining to these contraventions. The principles in accordance with which the election has to be conducted are those laid down in the provisions of the Act. What these principles are, is a matter for the Court.

8. A consideration of the totality of the averments in the petition makes it, in our opinion, quite clear that the petitioner's complaint is that the said acts of non-compliance did operate to adversely affect her. It does not seem to us to be open to the 1st respondent to urge that the petition does not, on the face of it, make it clear what the case is that he, the 1st respondent, has to meet. The petitioner has set out facts which are material and are necessary for the proof of her case. The facts and circumstances pleaded are sufficient to enable the 1st respondent to make the necessary inquiries and obtain information to defend himself.

9. The words "other circumstances" are wide enough to include instances of non-compliance with the law relating to the conduct of elections. The petitioner was entitled to plead instances of non-compliance to sustain a charge under section 91(a) of the Act. Section 91(a) and section 91(b) do not cover the same area nor are they in conflict or repugnant to each other.

Cases referred to:

1. *Rambukwelle v. Silva* 26 NLR 231, 251, 252.
2. *Saravanamuttu v. De Mel* 49 NLR 529, 532
3. *Wijewardena v. Senanayake* 80 CLW 1, 4, 5 affd in appeal: 74 NLR 97, 101
4. *Aron v. Senanayake* 40 NLR 257.
5. *Cooray v. Fernando* 54 NLR 400
6. *Nanayakkara v. Kiriella* 1985 2 Sri LR 391
7. *Kobbekaduwa v. Jayewardene* 1983 1 Sri LR 416

8. *Samar Singh v. Kedar Nath* 1987 SCC 663
9. *Arthur Hussain v. Rajiv Gandhi* 1986 SCC 313
10. *Guildford* (1869) 1 O'M & H 13, 15
11. *Bradford* (1869) 1 O'M & H 35, 40
12. *Dudley* (1874) 2 O'M & H 115, 119, 120, 121
13. *Nottingham* (1869) 1 O'M & H 245, 246
14. *North Durham Case* (1874) 2 O'M & H 152, 156, 157
15. *Gloucester* (1886) 4 O'M & H 65, 68
16. *South Meath Case* (1886) 4 O'M & H 130, 139, 141
17. *Illangaratne v. G. E. de Silva* 49 NLR 169
18. *Abeywardene v. Ariya Bulegoda* 1985 1 Sri LR 86
19. *Jayasinghe v. Jayakody* (1985) 2 Sri LR 77, 89
20. *Drogheda Case* (1869) 1 O'M & H 252, 255, 256
21. *Rutnam v. M. Dingiri Banda* 45 NLR 145
22. *Pelpola v. R. S. S. Gunawardene* 49 NLR 207
23. *Tarnolis Appuhamy v. Wilmot Perera* 49 NLR 361
24. *North Louth Case* (1911) 6 O'M & H 124
25. *Shiv Charan Singh v. Chandra Bhan Singh and others* 1988 2 SCC 12
26. *Hackney Case* (1872) 2 O'M & H 77
27. *Lichfield Case* (1869) 1 O'M & H 22, 24
28. *Morgan and others v. Simpson and another* 1974 3 All ER 722
29. *Munasinghe v. Corea* 55NLR 265
30. *Eastern Division of the County of Clare* (1886) 4 O'M & H 162
31. *Woodward v. Sarsons* (1875) LR 10 CP 733

Presidential Election Petition — Preliminary Objections.

H. L. de Silva P.C. with *R. K. W. Goonesekera, A. A. de Silva, Sidath Sri Nandalochana, Percy Wickremasekera, M. W. Amerasinghe,*

S. L. Gunasekera, Nihal Jayamanne, J. Yusuf, Champani Padmasekera & *Colin-Senerat Nandadeva* instructed by *Nimal Siripala de Silva* for petitioner.

K. N. Choksy PC with P. Nagendra PC, Sunil K. Rodrigo, S.C. Crossette-Tambiah, Kosala Wijayatileke, Naufel Abdul Rahman, Daya Pelpola, S. J. Mohideen, Raja Dep, D. H. N. Jayamaha, S. Mahentiran, Lakshman Perera, A. L. B. Brito Mutunayagam & M. Iliyas instructed by *S. Sunderalingam* for 1st respondent.

Sunil de Silva PC Attorney-General with *Tilak Marapona PC Additional Solicitor-General, Shibley Aziz PC Additional Solicitor-General, K.C. Kamalasabayson, Deputy Solicitor-General.*

29 May 1989
Ranasinghe C. J. read the following unanimous

ORDER OF THE COURT ON THE PRELIMINARY OBJECTIONS RAISED BY THE RESPONDENTS:

The election for the office of President of Sri Lanka was held on the 19th of December, 1988. There were three candidates, Sirimavo R. D. Bandaranaike of the Sri Lanka Freedom Party, Ranasinghe Premadasa of the United National Party and Oswin Abeygunasekera of the Sri Lanka Mahajana Party. The Commissioner of Elections declared the results as follows:—

Oswin Abeygunasekera	235719	04.6%
Sirimavo Bandaranaike	2289860	44.95%
R. Premadasa	2569199	50.43%
Valid Votes	5094778	
Rejected Votes	91445	
Total Polled	5186223	
Majority	279339	
Total Registered Votes	9375742	
Total Polled/Registered Votes		55.32%

On 9.1.1989, Sirimavo R. D. Bandaranaike filed this petition and has sought to have the election of Ranasinghe Premadasa declared null and void on the following grounds:—

Paragraph 6 (A) That by reason of the occurrence of the incidents hereinafter mentioned and the

commission of the acts hereinafter specified in paragraph 7 hereof, there was general intimidation of the electors at the aforesaid election in consequence of which the majority of the said electors were or may have been prevented from electing the candidate whom they preferred.

Paragraph 6 (B) That by reason of non-compliance with the provisions of the Presidential Elections Act No. 15 of 1981 (as amended) the aforesaid election was not conducted in accordance with the principles laid down in the said provisions and as hereinafter specified and as particularised in paragraph 8 hereof, which acts of non-compliance affected the result of the election and the said election is in consequence null and void.

Paragraph 6 (C) That by reason of other circumstances to wit, the failure of the Commissioner of Elections (the 2nd Respondent) and/or certain members of his staff to conduct a fair and free election, in accordance with the provisions of the Presidential Elections Act No. 15 of 1981, more particularly set out in paragraph 9 read with paragraph 8 hereof, the majority of the said electors were or may have been prevented from electing the candidate whom they preferred.

To this petition, the said Ranasinghe Premadasa, the successful candidate, has been made the 1st Respondent, and the Commissioner of Elections has been made the 2nd Respondent.

As regards the charge of general intimidation, the petitioner in her petition has enumerated 137 instances of acts of violence and intimidation spread over 22 Electoral Districts. In paragraph 7 of her petition, the petitioner states that these instances "which

occurred in various parts of the country either shortly before or on the day of the poll and which were of a widespread nature affected the freedom of election and prevented the free exercise of the franchise rendering the election of the First Respondent null and void, under paragraph (a) of section 91 of the said Act."

Preliminary objections have been filed by both the 1st and 2nd respondents and they have asked for a dismissal of the petition in limine. The objections of the 1st Respondent pertaining to the charge of general intimidation are as follows:—

(a) As 55.32% of the total registered voters have polled, the petitioner cannot in law, on the basis of the averments pleaded in the petition, seek to have the election declared void on the ground of avoidance set out in S. 91 (a) of the Presidential Elections Act No. 15 of 1981.

(b) The petitioner has failed, as required in terms of S. 91(a) and S. 96(c) of the said Act to identify or name in the petition, the candidate who the petitioner alleges the majority of the electors preferred but were or may have been prevented from electing. A mandatory provision of law has not been complied with and, therefore, the petitioner cannot rely on the ground of avoidance set out in S. 91(a) of the said Act.

(c) The petition does not contain a concise statement of material facts upon which the petitioner relies and, therefore, has failed to conform to the mandatory provisions of S. 96(c) of the Act.

The objections of the 2nd Respondent pertaining to the charge of general intimidation are as follows:—

(a) Since over 50% of the electors have exercised their right to elect a candidate whom they preferred, the allegation contained in paragraph 6 (a) cannot be maintained in law.

(b) The petition does not contain a concise statement of material facts as required by S. 96(c) of the Act, in that, the petition does not contain an averment that the acts of general intimidation affected any particular candidate. As a matter of law, it cannot be maintained that by reason of these acts, the majority of electors were or may have been prevented from electing the candidate whom they preferred.

S. 91 of the Acts states, inter alia:—

"The election of a candidate to the office of President shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Supreme Court, namely:—

(a) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred;

(b) non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election."

S. 91 (a) and (b) are in terms identical with S. 77 (a) and (b) of the Ceylon (Parliamentary Elections) Order in Council, 1946.

S. 96 of the Act states:

"An election petition—

(c) shall contain a concise statement of the material facts on which the petitioner relies;

(d) shall set forth full particulars of any corrupt or illegal practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice, and shall be accompanied by an affidavit in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice;

Provided, however, that nothing in the preceding provisions of this section shall be deemed or construed to require evidence to be stated in the petition."

This again is a reproduction of S. 80 B(c), (d) and the proviso of the 1946 Elections Order in Council.

At the argument before us, Mr. K. N. Choksy, P.C., for the 1st Respondent submitted:—

(1) The petitioner must prove that by reason of general intimidation, a certain result or consequence followed, namely, that "the majority of electors were or may have been prevented from electing the candidate whom they preferred." This is an important ingredient of the ground of avoidance in S. 91 (a) of the Act. If so, the petitioner must identify the candidate whom the majority of electors preferred, but were or may have been prevented from electing by reason of general intimidation.

This is a material fact which the petitioner must prove and if it is a material fact to be proved, then it must be pleaded. In a total of 137 instances of acts of violence and intimidation alleged in the petition, only in 30 instances has the petitioner averred that the violence was directed against SLFP supporters, thereby implying that the petitioner was the candidate whom the majority of electors preferred.

In three instances only has the petitioner alleged that the violence was directed against the SLMP supporters. The balance 104 incidents are "neutral" incidents and it is not stated whether the violence was directed against the supporters of any political party.

The petitioner must prove against whom the general intimidation was directed. If so, it must be pleaded.

(2) In addition, the petitioner must plead and prove how the majority of electors were or may have been prevented from electing the candidate whom they preferred. That is, the petitioner must plead and prove that the majority of electors who voted for the 1st respondent were or may have been compelled to vote for him by reason of general intimidation, or that the balance 45% of the electors abstained from voting because of general intimidation, and if they had voted, the reasonable probabilities are that they would have voted for her. This is a material fact which the petitioner must prove, and if so it must be pleaded.

(3) In three instances, it is alleged that the violence was directed against the SLMP candidate. The election was a three-cornered contest. The petitioner must further plead either that the SLMP candidate was the candidate whom the majority of electors preferred or that his supporters were induced to vote for the 1st respondent by reason of general intimidation. The 1st respondent must know whether it is the petitioner or the SLMP candidate whom the majority of electors preferred, otherwise the petitioner was free to change her position as the trial proceeds.

(4) In some of the instances of general intimidation set out in the petition, material facts such as the dates, times and places of the incidents, the names of persons intimidated and the nature of the intimidation have not been furnished. The petitioner has failed to conform to the mandatory provisions of S. 96(c) of the said Act.

(5) Rules 4 (which prescribed the form of petition) and 5 (which enabled the respondent to obtain particulars) in the 3rd Schedule to the Ceylon (Parliamentary Elections) Order in Council, 1946, were deleted and a new S. 80B was introduced. It is in terms identical with S. 96 of the Act. It is a mandatory provision. The petitioner cannot amend the petition after the period for the filing of a petition has elapsed. Failure to comply with S. 96 (c) has the result of dismissal of the petition.

The learned Attorney-General in support of the 2nd respondent's objections also submitted that the petition does not contain a concise statement of material facts, in that, the petitioner has not averred that the acts of general intimidation affected any particular candidate. That is, the petitioner has not averred the manner in which the majority were or may have been prevented from electing the candidate whom they preferred.

Mr. H. L. de Silva, P.C., for the petitioner, on the other hand, submitted as follows—

(1) The English Common Law of a "free and fair election" is what is embodied in S. 91(a). The expression "majority of electors

were or may have been prevented from electing the candidate whom they preferred "means" a majority of persons entitled to vote free of intimidation and other pressures, were prevented or may have been prevented from electing a candidate according to their preferences: The expression does not impose an additional burden on the petitioner. If general intimidation is established, the necessary consequence flows — that the majority were prevented from electing the candidate of their choice. All that the petitioner need establish is general intimidation; once general intimidation is established, free choice goes.

(2) In this view of the matter, it is not necessary to identify the candidate whom the majority of electors would or may have preferred. Moreover, how the voters would have voted under different circumstances is impossible of proof. Unlike in the case of the statutory offence of undue influence, where there must be an indentification of the individual affected by the intimidation, in the case of general intimidation, the identification of victims is difficult and is not necessary. Furthermore, it would violate the principle of secrecy of the ballot which is enshrined in Article 93 of the Constitution which enacts that "the voting for the election of the President of the Republic shall be free, equal and by secret ballot." A voter cannot be asked for whom he would have voted, if there was no general intimidation.

(3) Election must not only be "free" but also "equal", which means not only the majority of electors but also the minority of electors too must have the freedom of election. The minority in the constituency has as good a right without fear or intimidation to come to the polling booth as the majority of the constitutency.

(4) Articles 118(b) and 130(a) of the Constitution confer on the Supreme Court jurisdiction in respect of election petitions. Article 136(1) empowers the Supreme Court to make rules as to proceedings in the Supreme Court in the exercise of its several jurisdictions conferred by the Constitution including, inter alia, the dismissal of such matters for non-compliance

with such rules. The Supreme Court has up to now made no such rules. Rule 11(4) in the 4th Schedule to Act No. 15 of 1981 expressly provides for the dismissal of an election petition for non-payment of security. Apart from this, the Supreme Court cannot dismiss a petition in limine. Apart from this, once an election petition is presented, the matter ceases to be one exclusively between the petitioner and the respondent. It becomes a matter in which the whole electorate, not to say the whole country, has an interest.

We shall deal first with President's Counsel Mr. H. L. de Silva's submission that the Supreme Court cannot dismiss an Election Petition in limine.

Article 136 of the Constitution states:

(1) Subject to the provisions of the Constitution and of any law, the Chief Justice with any three Judges of the Supreme Court nominated by him, may, from time to time, make rules regulating generally the practice and procedure of the Court including —

(b) rules as to the proceedings in the Supreme Court and Court of Appeal in the exercise of the several jurisdictions conferred on such Courts by the Constitution or by any law, including the time within which such matters may be instituted or brought before such Courts and the dismissal of such matters for non-compliance with such rules.

It is not disputed that the Supreme Court has not made rules as to proceedings in the Supreme Court in the exercise of its jurisdiction in election petitions relating to the election of the President, conferred on it by Article 130(a) of the Constitution, including, inter alia, the dismissal of petitions for non-compliance with the rules. The only express provision for the dismissal of an election petition in limine is Rule 11(4) in the 4th Schedule to the Presidential Elections Act, No. 15 of 1981 for non-payment of security or inadequacy of security as

provided for in Rule 11(1). Therefore, Mr. H. L. de Silva, P.C., argued that, except for non-payment of security, the Supreme Court cannot dismiss an election petition at the preliminary stage.

Mr. H. L. de Silva, P.C., also submitted that our Courts have repeatedly said that an election petition inquiry is not merely a contest between two litigants. It is not an investigation in which the petitioner and the returned candidate alone are concerned, but the voters also have rights as well as the candidates. The electorate is entitled to have the results of the election declared according to law. (See *Rambukwelle v. Silva*, (1); *Sarvanamuttu v. de Mel* (2)).

Mr. H. L. de Silva, P.C. further submitted that S. 98 casts a duty on the Supreme Court, at the conclusion of the trial of an election petition, to make a determination whether the returned candidate has been duly elected or whether the election was void, and also to make a report as to corrupt or illegal practices; that Rule 20 in the 4th Schedule permits a withdrawal of an election petition only with the leave of Court and Rule 23 permits for substitution of any person as petitioner on withdrawal of the petition; and that even if before the trial of a petition, the President dies, resigns or does not oppose the petition, the petition does not abate but continues to be heard. These provisions, Mr. H. L. de Silva, P. C. contended, indicate that Parliament did not contemplate that the Supreme Court should assume a power to terminate election petition proceedings at the threshold of the inquiry, and that if an objection is taken that a concise statement of material facts as required by S. 96(c) of the Act has not been furnished by the petitioner, a decision on the objection should be made only after the conclusion of the trial. He also stated that, assuming that the petition does contain insufficient material, the Court has inherent power to permit amplification and correction, and that if particulars of any corrupt or illegal practice specified in the petition by S. 97 (1) of the Act can be amended or amplified, an insufficient statement of facts should not be treated differently.

Mr. Choksy, P.C., on the other hand, submitted that S. 96 (c) of the Act is a mandatory provision and our Courts have given effect to the mandatory rule, that failure to comply with a mandatory provision renders the proceedings a nullity. He quoted **Maxwell** (11the Edn. p. 364) — "An absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

Mr. Choksy, P.C., further argued that if a S. 96 (c) of the Act is imperative, there is inbuilt in that very provision, the power of the Court to dismiss the petition: that therefore it is unnecessary for the Supreme Court to make a rule under Article 136 (1) (b) for the dismissal of the petition, that Article 136 (1) states that "subject to any law, the Supreme Court make rules" and as the rule of interpretation is already there inbuilt in the provision, the necessity to make a rule does not arise; that this Court has no inherent power to permit an amendment of the petition and allow the petitioner a further opportunity of supplying the deficiency of material facts. The petition, he said, is one single petition and if material facts have not been given in respect of one charge in the petition, the whole petition is rendered a nullity.

We agree with Mr. Choksy that S. 96 (c) is an imperative provision and not merely directory (per Samerawickrame, J. in *Wijewardene v. Senanayake,* (3). Though the Ceylon (Parliamentary Elections) Order in Council, 1946 contained Rule 12(3), which is in terms identical with 11(4) of Act No. 15 of 1981, and it was the only express provision for the dismissal of the petitions, our Courts have dismissed election petitions for non-compliance with the mandatory provision in Rule 15 of the Rules which requires service of notice of the petition and a copy of the petition on the respondent within ten days of the presentation of the petition, though the consequences of non-compliance has not been stated. (See *Aron v. Senanayake* (4) *Cooray v. Fernando* (5), *Nanayakkara v. Kiriella* (6). So also, election petitions have been dismissed for non-joinder of necessary parties, though in both the 1946 Order in Council and in Act No. 15 of 1981, the consequence of the failure to comply with the mandatory provision regarding joinder has not been stated. (See *Wijewardene v. Senanayake,* (3) *Kobbekaduwa v. Jayewardene;* (7).

We agree with Mr. Choksy that non-compliance with the mandatory provisions of non-joinder of necessary parties, and non-service of the notice of presentation of the petition and a copy of the petition, are fundamental and fatal defects which render the whole petition bad and a nullity, and the power to dismiss the petition is inbuilt in those mandatory provisions themselves. The question whether in a petition consisting, say of three charges, as in this case, the failure to furnish material facts in respect of one charge only, renders that charge only bad and would preclude further evidence being led by the petitioner in respect of that charge only, or, whether it renders the whole petition a nullity and precludes further proceedings on it will only arise for decision if this Court decides that the petitioner has failed to furnish material facts in respect of any one of the charges.

As regards the submission of Mr. H. L. de Silva, P.C., based on public interest in the litigation and that an order on a preliminary objection could be made only at the conclusion of the trial of the petition, it is a contention we cannot accept. As Mr. Choksy pointed out, there are other mandatory provisions in Act No. 15 of 1981. Only a candidate at an election or a person who signed the nomination paper can present an election petition challenging the election of the President (S. 93). The petition has to be presented within 21 days of the date of publication of the result of the election [S. 102 (1)]. The petitioner shall join the returned candidate as respondent to the election petition (S. 95). The consequence of non-compliance with these provisions has not been set out. If a petition is presented, say by a voter, or the returned candidate has not been made a respondent or the petition is presented two months after the date of publication of the result, does that mean that this Court has to proceed with the trial on the charges in the petition, and at the conclusion of the trial dismiss the petition because the wrong person has presented the petition or because no adverse order can be made against the returned candidate without him being heard, or because the petition is out of time? For this is the consequence of Mr. H. L. de Silva's argument.

Just as much the public have interests in the election petition, there is also the principle that the election of a candidate should

not be lightly interfered with. In *Samar Singh v. Kedar Nath*(8), it was contended that the Court has no power to reject an election petition in limine on a preliminary objection but must proceed with the trial, record the evidence, and only after the trial of the petition is concluded, reject a defective petition. The Supreme Court in rejecting this argument observed that "it would be in the interests of the parties to the petition and to the constituency and in the public interest to dispose of preliminary objections and to reject an election petition if it does not disclose any cause of action."

In *Arthur Hussain v. Rajiv Gandhi* (9), when a similar submission was made, the Supreme Court rejected the argument as untenable and observed that the powers (to reject an election petition in limine) in this behalf are meant to be exercised to serve the purpose for which the same have been conferred on the competent Court so that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties. And so that they can adjust their affairs on the footing that the litigation will not make demands on their time or resources, will not impede their future work, and they are free to undertake and fulfil other commitments. So long as the sword of Damocles of the election petition remains hanging, an elected representative of the legislature would not feel sufficiently free to devote his whole-hearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the concerned constituency."

We take the view that the Court has the power to reject an election petition in limine, if there is a fundamental defect in an election petition arising out of non-compliance with a mandatory provision.

What is the English Common Law regarding the avoidance of elections? In *Guildford* (10) Willes, J. said :

"But do not be mistaken . . . . that general corruption quite apart from acts of the members or their agents would not

have the effect of vitiating an election. It clearly would, because it would show that there was no pure or free choice in the matter, that what occurred was a sham, and not a reality."

In *Bradford* (11) Baron Martin said :

"But it has been long held, before these Acts of Parliament passed at all, that by the common law of the land, that is, law not created by the enactments of Acts of Parliament, bribery, undue influence, and undue pressure vitiate an election. So that if it had been proved that there existed in this town generally, bribery to a large extent, and that it came from unknown quarters, that no one could tell where it had come from, but that people were bribed generally and indiscriminately; or if it could be proved that there was treating in all directions on purpose to influence voters, that houses were thrown open where people could drink without paying for it, — by the common law such an election would be void, because it would be carried on contrary to the principle of the law."

In *Dudley* (12) Grove, J. observed :

"The sole allegation in the petition although it is conveyed in a vast number of words is substantially that there was so much riot and intimidation by mobs that there was not a free election. I have a duty not only to these two parties, but the voters, to the public generally, to see that the franchise can be fairly exercised . . . . What I have to look at is whether there was such a substantial riot and tumult as prevented any large number of the electors from voting . . . . Assuming the facts to be so, and assuming also that there was such a state of things as really placed the whole town in a state in which reasonable men, who were not very zealous partisans, or men of extraordinary courage, had not a fair opportunity of voting, it is clearly laid down in the cases, that quite irrespective of any agency on the part of the candidates, intimidation that prevents free voting avoids an election . . . . I am of opinion that the tumultous

assemblages gathered together, and the acts of extreme violence committed at the polling places were such as were calculated to intimidate and deter, and did intimidate and deter a large number of voters from exercising the franchise, and that, very many voters were actually prevented from exercising it, that the election was not a free one, and that the constituency had not a fair opportunity of freely exercising the franchise, therefore this election is void."

In *Nottingham* (13) Baron Martin observed :

"No doubt if rioting takes place to such an extent that ordinary men, having the ordinary nerve and courage of men, and thereby prevented from recording their votes, the election is void by the common law, for the common law provides that an election should be free in the sense that all persons shall have an opportunity of coming to the poll and voting without fear or molestation. But for the purpose it must be a rioting to an extent certainly to deter a man of reasonable nerve from going to the poll."

In *North Durham* (14) Baron Bramwell said :

"First of all, there is the statutory intimidation that is contemplated by the statute, if one may use such an expression, that is, an intimidation contemplated by the statute which avoids the seat, where a candidate or his agent is guilty of it. But besides that there is another intimidation that has been called a common law intimidation and it applies to a case where the intimidation is of such a character, so general and extensive in its operation that it cannot be said that the polling was a fair representation of the opinion of the constituency in which the intimidation took place."

In *Gloucester* (15) Field, J. said :

"It seems to me that the question which I have to decide is whether all the electors of the other divisions of the

constituency are to be disenfranchised for what was done in the three divisions, and a fresh election held with all its turmoil and excitement. That will have to be done if I am satisfied that there has not been that free exercise of the franchise which everybody is entitled to have, and that the absence of that has been caused by intimidation and riot."

In the *South Meath Case* (16) Andrews, J. said :

"Freedom of election is at common law absolutely essential to the validity of an election, and if this freedom be prevented generally the election is void at common law, and in my opinion it matters not by what means the freedom of election may have been destroyed. This is wholly independent of statute law."

From the observations made in the said cases, it seems to us to be clear that at English Common Law, where it was proved that bribery, treating or intimidation were so general and so extensive in its operation that it prevented men of ordinary nerve and courage from going to the poll; whether or not the successful candidate or his agents were responsible for the corruption or violence; the election was set aside on the ground that it was not free.

Rogers *On Elections* (Vol. 2, 20th Edn., p. 341), succinctly states the common law as follows:

"Freedom of Election is at common law essential to the validity of an election. If this freedom be by any means prevented generally, the election is void at common law. Therefore general intimidation, although not brought home to the candidate or his agents will avoid an election."

In England, the common law has now been superseded by S. 142 of the Representation of the People Act, 1949, which enacts:

S. 142 (1) "Where on an election petition it is shown that corrupt or illegal practices or illegal payments,

employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, his election, if he has been elected, shall be void and he shall be incapable of being elected to fill the vacancy or any of the vacancies for which the election was held.

(2) An election shall not be liable to be avoided otherwise than under this section by reason of general corruption, bribery, treating or intimidation."

The English Law, therefore, now requires in order to avoid an election that in addition to corrupt or illegal practices etc. an additional requirement to be proved, namely, that the corrupt or illegal practices etc. were committed for the purpose of promoting or procuring the election of a candidate that they may be so reasonably supposed to have affected the result.

The question arises whether S. 91 (a) of the Act embodies what Mr. H. L. de Silva, P.C., described as the "pure and unadulterated English Common Law" prior to 1949, or, as Mr. Choksy submitted, that in addition to general intimidation etc. something more has to be proved by a petitioner to have an election avoided under S. 91(a).

In *Illangaratne v. G. E. de Silva* (17), the petitioner alleged, under S. 77 (a) of the Ceylon (Parliamentary Elections) Order in Council, 1946, that owing to circumstances arising from floods and the housing of the refugees in camps, "the majority of electors were or may have been prevented from electing the candidate whom they preferred." It was contended for the petitioner that (1) by reason of the circumstances attending the flood, the refugees were not in a mood for voting; (2) that the respondent as Minister of Health and his son as Mayor of Kandy, in seeing to the housing and comfort of the refugees, had an unfair electoral advantage over the petitioners, so that the electors voted or may have voted for the respondent who would otherwise have voted for another candidate. All these circumstances, it was argued, had the result that the "majority of

electors were or may have been prevented from electing the candidate whom they preferred." After considering the evidence on the first point Windham, J. held (p. 184)—

> "I cannot hold on the evidence that the majority of electorate were or may have been prevented from electing the candidate they preferred by reason of the circumstances having prevented them from voting for any candidate at all."

On the second point, after considering the evidence, Windham, J. held (p. 186) :

> "I do not think that the petitioner has proved his case upon this charge."

In *Abeywardene v. Ariya Bulegoda,* (18) it was held that "General intimidation is concerned not with the intention with which the acts are committed" as in the case of undue influence, but with the result. Did the acts taken cumulatively have the effect of preventing the electoral process?"

In *Jayasinghe v. Jayakody,* (19) Sharvananda, J. observed :

> "The petitioner has also stated that the election of the 1st respondent is void on the ground that by reason of general intimidation the majority of electors may have been prevented from electing the candidate whom they preferred . . . . In order to succeed in his petition, the *petitioner has got to prove a further ingredient,* viz., that the majority of electors may have been prevented from electing the candidate whom they preferred in order to succeed in his election petition. The corrupt practice referred to in S. 77 (c) has a consequence different from that of the corrupt practice that may be exhibited by general intimidation under S. 77 (a). If it is proved that a corrupt practice has been committed by the returned candidate or an election agent or by any other person with the knowledge or consent of the returned candidate, then the election judge has to declare the election void. But if the corrupt practice has been committed by a person other than

the persons mentioned in S. 77 (c), then *it must be further established that the majority of electors thereby were or may have been prevented from electing the candidate whom they preferred,* for the Election Judge to declare the election void." (The emphasis is ours).

We agree with Mr. Choksy that mere proof of the several instances or acts of general intimidation would not suffice to avoid an election. In addition, the petitioner has to prove that these several acts or instances had the result or consequence that "the majority of electors were or may have been prevented from electing the candidate whom they preferred."

Mr. H. L. de Silva relied on Article 93 of the Constitution which declares, "the voting for the election of the President of the Republic shall be free, equal and by secret ballot," and contended that the Constitution guarantees not only that election be free but also equal; that freedom of election is guaranteed not only to the majority but to the minority of electors as well. He relied on the observations made by Keogh, J. in the *Drogheda Case* (20) and submitted that what was said by Keogh, J. is a correct statement of the law. In this case it was argued that if the respondent has an actual majority of registered electors, however small, the election could not be declared void. Keogh, J. dealing with this argument said :

"Counsel for the respondent contended ... provided the respondent had an actual majority of registered electors be it ever so small, then no matter what happens outside, no matter how many electors are assaulted or driven from the polling booth, no matter how many voters are hunted through the fields and obliged to go by devious ways in order to get back to their homes, no matter how much blood is shed, no matter how much spiritual intimidation has been brought to bear upon the electors ; still, if the candidate is returned upon the polling day can say, There are 1000 electors in the borough, and I have polled, no matter how, 501 of them, his election cannot be declared void on the ground of general intimidation,

> although the unsuccessful candidate may, upon a scrutiny, by striking off individual votes on this ground, show that but for the general intimidation he would have had a majority. I deny that altogether. The humblest individual in the whole of the constituency has as good a right without fear or intimidation to come into the Court-house upon the day of the election as the richest man upon the register, and as good a right as the great majority of the constituency. Take it that a candidate has by the most legitimate means obtained the votes of nine-tenths of the constituency in his favour, yet it is of vital importance to the public weal that the remaining tenth should be able to record their votes and to express their opinions. If the majority are not only to send their own representative to Parliament, as of course the majority must do, but if they are to drive by terror the minority from the poll what becomes of freedom to this Country?"

It is unnecessary for us to decide whether what was stated by Keogh, J. is a correct statement of law or not except to quote Baron Bramwell in the *North Durham Case* (14) — "If one were told that partial intimidation would avoid an election, the consequence would be that a few mischievous persons might upset every election." The same Constitution which enacted Article 93 also enacted Article 31(6) (d) which states that as regards the election of the President, Parliament shall by law make provision for, inter alia, the grounds and manner of avoiding such election and of determining any disputed election. Parliament has enacted the Presidential Election Act, No. 35 of 1981, and in S. 91 sets out the grounds of avoidance of an election of the President. The case of the petitioner based on the ground of avoidance under S. 91(a) falls to be determined solely by a consideration and application of the provisions contained in S. 91(a).

We now proceed to deal with the submission that the petitioner has failed to plead in her petition two material facts, viz., (1) that the candidate, other than the 1st respondent, who would or may have been returned, has not been identified, (2) that the majority of electors were or may have been induced to

vote for the 1st respondent by general intimidation or that the balance 45% of electors who did not vote abstained from voting because of general intimidation and if they voted, they may have voted for the petitioner.

S. 96 (c) of the Act requires that the petition "shall contain a concise statement of the material facts on which the petitioner relies." In *Wijewardena v. Senanayake* (3) H. N. G. Fernando, C.J. observed that this requirement was "intended to secure that a respondent will know from the petition itself what facts the petitioner proposes to prove in order to avoid the election and will thus have a proper opportunity to prepare for the trial . . . . The term 'material facts' has a plain meaning in the context of requirements relating to pleadings, namely, facts material to establish a party's case." The object of the requirement is clearly to enable the opposite party to prepare his case for the trial so that he may not be taken by surprise. When the petitioner pleaded in paragraph 6 (A) of her petition that "there was general intimidation in consequence of which the majority of the said electors were or may have been prevented from electing the candidate whom they preferred," is there sufficient information given in the petition to enable the first respondent to identify the candidate whom the electors were or may have been prevented from electing ? In paragraph (1), the petitioner has stated that she was a candidate at the Presidential Election and "claims to have had a right to be returned or elected at the said election." The petitioner has set out in paragraph 5 the votes cast for each candidate and that she obtained the second largest number of votes. Could there be any doubt in the mind of the 1st respondent as to the identity of the candidate, who, the petitioner claims, would or may have been returned, but for the general intimidation ?

It is clear from the petition that the case of the petitioner is not what may be termed "coercive intimidation", that is to say, intimidation having for its object the use of force or threats to compel voters to vote for a particular candidate. A perusal of the concise statement of material facts relating to the charge of general intimidation shows that the incidents set out therein relate to bomb explosions, road-blocks, shootings and killings, posters warning people not to vote or announcing a curfew on

election day, attacks on polling stations, houses of party supporters and SLFP Branch offices and so on. It is, therefore, clear from the petition that the case of the petitioner is what may be termed "preventive intimidation", that is violence or threats of violence directed towards preventing voters from voting. This being the case for the petitioner, the argument of Mr. Choksy, P.C., that there is no averment in the petition that the majority of electors were or may have induced to vote for the 1st respondent by reason of general intimidation will have no relevance to the case we are called upon to decide.

Mr. H. L. de Silva, P.C., referred us to Article 93 of the Constitution which embodies the principle of the secrecy of the ballot, namely, that voting should be secret. Rogers On Elections (12th Edn. at 347) points out that the difficulties of proving a case of "coercive intimidation" are much greater than those of one of "preventive intimidation", because "a voter may not be asked for whom he voted, whereas he may be asked if he was prevented from voting by fear."

That brings us on to the submission of Mr. Choksy that the petitioner must plead and prove that the 45% of electors who did not vote, abstained from voting by reason of general intimidation, and if they had voted, the reasonable probabilities are that they would have voted for the petitioner.

What is the meaning of the expression "the majority of electors were or may have been prevented from electing the candidate whom they preferred"?

In *Rutnam v. M. Dingiri Banda* (21) the respondent won the election by a majority of 1559 votes. The petitioner, a candidate who polled the second highest number of votes, challenged the election of the respondent and in his petition laid the charges of general intimidation and undue influence. The petitioner led evidence that large sections of electors were prevented by the supporters of the respondent from recording their votes by threats of actual violence and force. The election was avoided on both grounds. Hearne, J. said (p. 155):

"I have been asked to consider certain statistics and to hold that, notwithstanding the intimidation that took place, *the result of the election could not have been affected by it.* In the *North Durham Case* (1874, 2 O'M & H at 157), Mr. Baron Bramwell said "where it (intimidation) is of such a general character that *the result may have been affected,* in my judgment it is no part of the duty of a Judge to enter into a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence, if that intimidation had not existed, *the result would have been different.* What the Judge has to do in that case is to say that the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shown that the gross amount of intimidation could not possibly have *affected the result* it ought to be declared void. I hold that there was *gross intimidation,* that it was widespread in the areas where Mr. Rutnam had good reason to count upon heavy voting in his favour, and that it *may well have prevented* the majority of the electors from returning the candidate whom they preferred." (The emphasis is ours).

In *Pelpola v. R. S. S. Gunawardene* (22) the respondent won the election by a margin of 387 votes and the petitioner, the other candidate, sought to avoid the election on two charges of general intimidation and undue influence. The particulars of the general charge stated "that on polling day, at a number of places in the electorate, but mainly at a place called Uduwella, certain groups of persons intimidated other groups from going to the polling station, by use and threats of force, with the result that the majority of electors were or may have been prevented from electing the candidate whom they preferred." The petitioner led evidence that of the 1,427 registered voters for the Uduwella polling station, only 511 voted. He also led the evidence of the President of the Ceylon Indian Congress Labour Union Committee of Mossville Estate, that on polling day, he went with a number of Indian Labourers to vote at the Uduwella polling station and on the way they were threatened

with assault by a group of 30 villagers; they were obliged to return to the estate; at about 4.30 p.m. with police protection, about 300 labourers from Mossville Estate and some labourers of the neighbouring Craighead Estate went to vote and eventually only 150 labourers cast their votes. He further testified that the Indian Congress Committee of Mossville Estate had decided to support the petitioner in the election and all the labourers had decided to vote for him. The evidence of intimidation was not challenged by the respondent's counsel. Windham, J. said (p. 209):

> "Before, however, finding in favour of the petitioner on the charge of general intimidation, it is necessary, notwithstanding the course taken by the respondent, to examine *whether the charge has been made out on the evidence and in law,* since no election can be declared void by mere consent of parties to the petition, the whole electorate being the persons concerned. In the present case, there can be no doubt to my mind that the petitioner, upon the uncontradicted evidence led by him, has established his case under S. 77 (a) of the Ceylon (Parliamentary Elections) Order in Council, 1946, namely, that by reason of general intimidation the majority of electors were or may have been prevented from electing the candidate whom they preferred. The respondent, it will be recalled was elected by a majority of only 387 votes. Counsel for the petitioner has stated in his opening address, and his statement is not challenged by the respondent, that of the 32,734 voters in the whole electorate, some 8,375 (over one quarter) were Indian labourers, against whom, as a body, the acts of intimidation in the electorate were clearly directed by certain misguided Sinhalese persons . . . Only 541 out of 1,427 voters recorded their votes of the Uduwella polling station - an unusually low proportion, and clearly attributable to the acts of intimidation, as is shown by the fact that more persons voted between the hours of 4 and 5 p.m. (when the police arrived and escorted labourers to the poll) than during the six hours from 10 a.m. to 4 p.m., when the intimidation had a free hand. *Had 400 more persons voted, and cast their votes for the petitioner, the*

latter would have won the election. These facts are amply sufficient to support a finding of general intimidation under S. 77 (a) of the Order in Council. To establish such a charge, where the general intimidation consists, as here, of local acts or threats of violence, it is only necessary for the petitioner to show, that, having regard to the majority obtained, and the strength of the polling, *the result may reasonably be supposed to have been affected.* On the figures and in the circumstances disclosed in the present case, it is at the very least *reasonable to suppose that the result of the election may have been affected, by the acts of intimidation* against the Indian estate labourers." (The emphasis is ours).

In *Tarnolis Appuhamy v. Wilmot Perera* (23) the petitioners furnished 45 instances of general intimidation. Evidence was given of 13 instances, 7 of which occurred before polling day and 6 on the day of polling. Nagalingam, J. said (at p. 362, 368):

> "Not only have the acts relied upon by the petitioner as constituting the basis for the charge of general intimidation not been proved, but even if full weight be attached to the testimony given in Court by the petitioners' witnesses to the extent of holding the charges established, it would be clear that the entirety of proof, thus assumed to have been given in favour of the petitioners cannot in law amount to proof of the charge of intimidation . . . What evidence was led was led to show that the electorate was subjected to preventive intimidation, that is to say intimidation which had for its object the prevention of the electors from going to the polls lest the rival candidate gets their votes. Having regard to the number polled and to the circumstance that this electoral area annexed to itself the credit of having polled the highest percentage of voters in any electoral area in the Island, it certainly would be difficult to convince anyone that voters in general were deterred by anything savouring of intimidation from going to the polls or recording their votes."

Nagalingam, J. cited the observations of Gibson, J. in the *North South Case* (24)—

"To upset an election for general intimidation it is necessary to show that there was such *general intimidation as might have affected the result of the election*", and went on to say:

"Local cases are not wanting which illustrate the principles upon which on the ground of general intimidation, Courts have interfered in elections. In both the *Nuwara Eliya Case (21) and the recent Gampola Case (22)* there was clear evidence that *large sections of electors were prevented from recording their votes by threats of actual violence and force used on them.* . . . The present case is one far removed from either of these . . . in these circumstances, there is only one conclusion possible with regard to this charge, and that is that it has not been made out." (The emphasis is ours).

In the *South Meath Case* (16) O'Brien, J. said :

"It is a mistake to suppose that where general undue influence exists, it must be further shown that the *result of the election was, in fact, affected thereby. It is enough to show such general undue influence as may reasonably believed to have affected the result.*" (The emphasis is ours).

S. 91(a) of the Act states that an election will be avoided if it is "proved to the satisfaction of the Supreme Court that by reason of general intimidation, the majority of electors were or may have been prevented from electing the candidate whom they preferred." It seems to us that it is for the petitioner to prove that there was widespread violence directed towards preventing electors from voting. But relief which the petitioner has asked for under S. 91(a) of the Act will be granted subject to a finding by the Supreme Court that the general intimidation had the effect, namely, that the "majority were or may have been prevented from electing the candidate whom they preferred." It is a conclusion which is placed in the hands of the Supreme Court upon a review of all the evidence. The petitioner has, in her petition pleaded that the general intimidation had this effect. In our opinion, how the majority were or may have been prevented from electing the candidate of their choice need not be specially pleaded.

The expression in S. 91 (a) is "were or may have been prevented". It seems to us that the term 'may' was designedly used because mathematical proof that the majority of electors were in fact prevented, in many a case, is impossible of attainment. The burden to prove that the majority of electors were in fact prevented is difficult and it is almost impossible to produce the requisite proof. In *Shiv Charan Singh v. Chandra Bhan Singh and others* (25), the appellant was declared elected. The difference between the votes polled by him and candidate 'R' who polled the third highest number of votes was 4497 votes. The respondents challenged the election under S. 100 (1) (4) (1) of the Representation of the People Act, 1951, which states that the election is avoided if the High Court is of opinion that the result of the election in so far as it concerns a returned candidate, has been materially affected by the improper acceptance of any nomination. Candidate 'K' whose nomination paper had been improperly accepted, polled the 2nd highest number of votes. The appellant pleaded, inter alia, that his election was not materially affected by the acceptance of 'K' 's' nomination paper. The respondents did not produce any evidence to show that the improper acceptance of the nomination paper of 'K' materially affected the result of the election of the returned candidate. The appellant, however, produced 21 witnesses who stated that, in the absence of 'K' in the election contest, the majority of voters who had voted for 'K' would have voted for the appellant. The High Court rejected this evidence but held that since the difference between the votes polled by the appellant and 'R' was only 4497 votes, it could reasonably be concluded that the result of the election was materially affected. In upholding the appellant's election, the Supreme Court observed :

> "The burden to prove this material effect (on the result of the election) is difficult and many times it is almost impossible to produce the requisite proof. Electors exercise their right of vote on various unpredictable considerations, and the Courts are ill-equipped to speculate, guess or forecast by proceeding on probabilities or drawing inferences regarding the conduct of thousands of voters . . . The statement of witnesses could not be taken at their word and it was surmise and anybody's guess as to how those people, who did not vote, would have actually voted."

As Grove J. observed in the *Hackney Case* (26) at 79—

> "I cannot see how the Tribunal can by any possibility say, what would or might have taken place under different circumstances. It seems to me to be a problem which the human mind has not yet been able to solve, namely, if things had been different at a certain period, what would have been the result of the concatenation of events upon the supposed change of circumstances. I am unable at all events to express an opinion upon what would have been the result, that is to say, who would have been elected provided certain matters have been complied with which were not complied with."

So, it seems to us that on the basis of instances or acts of general intimidation established by evidence, the Court may draw a reasonable inference therefrom that the majority of electors may have been prevented from electing the candidate of their choice. In a case of general intimidation, the question that arises is — from the proved acts of intimidation of electors, is it reasonable to suppose that the result of the election may have been affected? This, it seems to us, to be the true meaning of the words "the majority of electors may have been prevented from electing the candidate they preferred." But, it will be open to the returned candidate to show that the gross intimidation could not possibly have affected the result of the election.

We now come to Mr. Choksy's complaint that in certain instances of general intimidation, material facts have not been pleaded.

(i) Names of persons killed or intimidated, that is, the names of victims of intimidation have not been stated.

(ii) The time of the incident, the exact location or place of the incidents and the dates of the incidents have not been furnished.

(iii) The nature of the intimidation has not been given.

S. 96 (d) requires the petitioner to give full particulars of the corrupt practice or illegal practice, including as full a statement as possible of the names of persons alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice. On the other hand, in regard to a general charge, S. 96 (c) imposes a less stringent requirement namely, "a concise statement of material facts" is to be given. As Rogers (p. 192) pointed out, in a general charge the above particulars cannot, from the nature of the charge, be given. Prior to the Amendment in 1970, when the Rule as to obtaining particulars was in operation, with regard to specific charges of undue influence, the usual practice was for the Election Judge to order the name of the person alleged to have been unduly influenced, and by whom, with the address and number on the register, the time when and place where the act of undue influence is alleged to have been committed and the nature of the undue influence. As Willes, J. pointed out in the *Lichfield Case* (27) —

> "The proper definition of undue influence is using any violence or threatening any damage or resorting to any fraudulent contrivance to restrain the liberty of a voter so as either to compel or frighten him into voting or abstaining from voting otherwise than he freely wills."

And so, as Mr. Baron Bramwell pointed out in the *North Durham Case* (14) (supra, at p. 156) — individuals must be identified as the objects upon which it was practised, or to whom it was addressed by the candidate or by his agent, to constitute intimidation as defined by Statute. In *Tarnolis Appuhamy v. Wilmot Perera* (23) (supra) at p. 369 Nagalingam, J. too made the same observation.

> "While in order to sustain a charge of general intimidation, it is neither necessary to prove the agency of the intimidators in relation to the candidate on whose behalf the intimidation was exercised nor to establish that any particular voter or voters were in fact intimidated, it is essential, however, that before an election can be declared void on the ground of the exercise of undue influence, proof

must be adduced both of the agency of the person or persons guilty of undue influence and of the person or persons intimidated."

Halsbury in his Laws of England (4th Edn. at p. 478) states :

"Where a charge of general corruption is made, the particulars which are ordered are necessarily wider, and the names of particular persons alleged to have bribed or treated will not be ordered. A petitioner will, however, be ordered to specifiy the character and extent of the corruption alleged."

This observation goes for general intimidation as well. A concise statement of facts cannot be expected to contain any more information than what is stated above by Halsbury.

Furthermore, it appears to us that when a complaint is made that dates, times and the exact locations of the acts of intimidation have not been furnished, what in effect is being asked for, are "particulars" of the charge. The word "particulars" has not been defined in the Act. It appears to us to mean details of the case set up by a party.

As we observed earlier, the character and the nature of the general intimidation have been given in the concise statement of material facts. The case for the petitioner is one of "preventive intimidation". The nature of the alleged intimidation has also been furnished, namely actual violence or threats of violence — bomb explosions, shootings and killings, posters threatening voters and announcing curfews etc. The extent of the alleged intimidation has also been given, namely, that it was generally spread over 20 electoral districts. It seems to us, therefore, that there has been sufficient compliance with S. 96 (c) of the Act.

The second ground of avoidance relied on by the petitioner is based on section 91(b) of the Presidential Elections Act, No. 15 of 1981 the operative part of which reads thus :

"non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in

accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election":

The principal submission of Mr. Choksy for the 1st respondent and the learned Attorney-General for the 2nd respondent was that the petitioner had failed to aver a material fact relating to an ingredient of the charge under section 91(b), namely, how the acts of non-compliance with the provisions of the Act set out in paragraph B of the petition affected the result of the election. Mr. Choksy contended that paragraph 8 of the petition contained only the factual aspects of the non-compliance with the provisions of the Act, and that there was no averment that such non-compliance affected the petitioner adversely or enured to the benefit of the 1st respondent. It was also counsel's submission that, as the Commissioner of Elections could under sections 56 and 61 of the Act declare the results of the elections in one of the two ways set out therein, it was incumbent on the petitioner, in order to give the respondents adequate notice of the way in which she maintains that the result was affected, to state clearly in her petition in which one of these two ways the result could have been declared.

Mr. H. L. de Silva for the petitioner, on the other hand, maintained that proof that the result of the election was affected is not an essential ingredient of the ground of avoidance set out in sec. 91 (b). Counsel argued that the key to the interpretation of section 91(b) is in section 115. While section 91(b) sets out the ground of avoidance of the election, section 115 guarantees protection to the returned candidate, and both provisions must be read together and interpreted in a manner consistent with each other. The protection which section 115 affords to the returned candidate will hold only if two conditions are satisfied — (i) that the election was conducted according to the principles laid down in the provisions of the Act; (ii) that the failure to comply with the provisions of the Act did not affect the result of the election.

If any one of these two conditions is not satisfied, then the protection given by section 115 will not hold. Counsel argued

that section 115 is complementary to section 91(b) and that both provisions must necessarily cover the same ground. Accordingly, Mr. de Silva submitted, that the word 'and' appearing in section 91(b) was a mistake of the draftsman and that it should be read as 'or' in order to make the two sections harmonize with each other.

Mr. de Silva further contended that when section 91(b) speaks of the 'result of the election' it can only refer to a valid election. Where the non-compliance with the provisions of the Act is of such extent and magnitude as to render the election a sham and a nullity, than the result cannot remain unaffected. In short, where the election is void for non-compliance with the provisions of the Act, the result goes with it. In support of his submissions, Mr. de Silva relied strongly on the judgment of Lord Denning in *Morgan & others v. Simpson & another* (28).

On a consideration of the submissions of counsel outlined above, it seems to us that the governing provision is section 91(b) which is the basis upon which the petitioner has come into court seeking the avoidance of the election. On a plain reading of section 91 (b) it is clear that the charge set out therein postulates three ingredients: (i) non-compliance with the provisions of the Act; (ii) the failure to conduct the election in accordance with the principles laid down in such provisions; (iii) such non-compliance affected the result of the election.

The wording in section 91(b) of the Presidential Election Act No. 15 of 1981 is identical with the wording in section 77 (b) of the Ceylon (Parliamentary Elections) Order in Council 1946. Similarly section 115 of the Act is identical with section 51(1) of the said Order in Council 1946. Nagalingam, A.C.J. in *Munasinghe v. Corea* (29) considered both provisions appearing in the Ceylon (Parliamentary Elections) Order in Council 1946. That was a case where, one of the grounds of avoidance relied on by the petitioner-appeallant was non-compliance with the provisions relating to elections in the Order in Council 1946 [Section 77(b)]. The petitioner-appellant's case was based on two categories of ballot papers. Firstly, thirty two ballot papers,

admittedly genuine but issued without the official mark or perforation, and secondly, eight missing ballot papers. As regards the missing ballot papers, there was no evidence as to how they were lost and therefore there was no proof of non-compliance in terms of section 77 (b). However, the position as regards the thirty two ballot papers issued without the official mark was quite different. It was not disputed that these ballot papers were genuine ballot papers but the Returning Officer correctly rejected them in terms of section 49 as they did not bear the official mark. In these circumstances it was contended on behalf of the petitioner-appellant that all that he had to prove in terms of section 77 (b) was non-compliance with the provisions of the Order in Council. In rejecting this argument Nagalingam, A.C.J. said: "Every non-compliance with the provisions of the Order in Council does not afford a ground for declaring an election void, but it must further be established (apart from any other requirement) that the non-compliance with the provisions was of such a kind or character that it could be said that the election had not been conducted in accordance with the principles underlying those provisions. Are the 'principles laid down in the provisions' of the Order in Council different from the provisons themselves? Unless they were, no adequate reason can be assigned for the draftsman using the language he has used. The difference, I think, consists not so much in the nature of the non-compliance as in the degree of that non-compliance; it consists not in a bare non-compliance but in the magnitude or extent of the non-compliance . . . I would not put down the omission to perforate these ballot papers to carelessness, and much less to negligence, but rather to human fallibility, to the imperfection of the human machine, to what is sometimes termed the human element. The fact that out of 26,054 ballot papers thirty two had no perforations, in other words that over 26,000 had been duly perforated, is the most satisfying proof that the election had been conducted at the various polling booths in accordance with the principles laid down in that behalf in the provisions of the Order in Council. To hold otherwise would be not merely to set at naught elections in general but to render entirely unworkable the democratic machinery". (At pages 272 & 273). Furthermore, it was

'suggested' on behalf of the appellant-petitioner that the true test to determine whether the election was conducted in accordance with the principles laid down in the Order in Council 1946 was "to ascertain the number of ballot papers not bearing the official mark in relation to the margin of majority which the successful candidate has secured against the runner-up" which was only eight. This suggestion was rejected by Nagalingam, A.C.J. with the observation that it "bears more properly on the second limb of the provision of section 77 (b), *which requires that it should also be established that such non-compliance affected the result of the election*". (The emphasis is ours). Mr. H. L. de Silva submitted that this observation in the judgment was obiter, since the court held that the non-perforation of the thirty two ballot papers did not establish that the election had not been conducted in accordance with the principles of election laid down in the Order in Council. While this submission is correct, so far as it goes, yet the judgment clearly proceeds on the basis that under the provisions of section 77 (b), it is an essential requirement that the result of the election should be affected. As stated earlier, this view is in accord with the plain and ordinary meaning of the words used by the draftsman.

Mr. de Silva's submission that the use of the word 'and' in section 91 (b) is a mistake for the word 'or' made by the draftsman is not acceptable, having regard to the historical development of our election laws. The section corresponding to section 115 of the Presidential Election Act No. 15 of 1981 is found in section XL of the Ceylon (Legislative Council) Order in Council 1923 which reads thus:—

> "No election shall be invalid by reason of a non-compliance with the rules contained in Schedule II to this Order if it appears that the election was conducted in accordance with the principles laid down in such rules. **or** that such non-compliance did not affect the result of the election."

It is to be noted that the word used in the above section is 'or' as opposed to the word 'and'. There is no provision in the Order in Council of 1923 similar to section 91 (b) of Act No. 15 of 1981.

The next enactment relating to our election laws is the Ceylon (State Council) Order in Council 1931. Here we find section 74 which for the first time set out specific grounds for the avoidance of an election. A section similar to section 74 was not found in the Order in Council 1923. Section 74 (b) reads thus :

> "Non-compliance with the provisions of this Order relating to elections if it appears that the election was not conducted in accordance with the principles laid down in such provisions 'and' that such non-compliance affected the result of the election".

What is noteworthy here is the use of the word 'and'. The section which corresponds to section XL of the Ceylon (Legislative Council) Order in Council 1923 is section 48 of the Ceylon (State Council) Order in Council 1931 which reads as follows :

> "No election shall be invalid by reason of any failure to comply with the provisions contained in this Order relating to elections if it appears that the election was conducted in accordance with the principles laid down in such provisions 'and' that such failure did not affect the result of the election".

What is significant for present purposes is the use of the word 'and' in the above section. The term 'or' which occurred in section XL of the Ceylon (Legislative Council) Order in Council 1923 was changed to 'and' in the Ceylon (Legislative Council) Order in Council 1931. It was the submission of Mr. Choksy that the change of language was deliberate and that it was done with a view to avoiding any inconsistency between section 48 and section 74 (b) of the Ceylon (State Council) Order in Council 1931. With this submission we agree.

> The wording contained in sections 48 and 74 of the Ceylon (State Council) Order in Council 1931 was repeated in the corresponding provisions of the Ceylon (Parliamentary Elections) Order in Council 1946. The judgment in *Munasinghe v. Corea* (29) (supra), delivered in

December 1953, construed the provisions of the Order in Council of 1946. Despite the view expressed by Nagalingam, A.C.J., in his judgment, the legislature did not deem it necessary to include an amendment to the provisions of section 77 (b) when it enacted the Ceylon (Parliamentary Elections) (Amendment) Act, No. 9 of 1970. It is also to be noted that the legislature did not consider it necessary to effect any changes when it subsequently enacted the Parliamentary Elections Act, No. 1 of 1981. Thus the submission of Mr. de Silva that the change in the wording was a mistake on the part of the draftsman is unacceptable.

The foregoing shows clearly what the intention of the legislature has been.

Bindra, Interpretation of Statutes, 7th Edn. p. 537 states :

"The word 'and' in a statute may be read 'or' and vice versa, whenever the change is necessary to effectuate the obvious intention of the legislature. The Courts should, however, have recourse to this exceptional rule of construction only when the conversion of the words 'and' and 'or' one into the other, is necessary to carry into effect the meaning and the intention of the Legislature . . . ."

The case of *Morgan and others v. Simpson and another* (28) cited by Mr. de Silva is of little assistance on this question because it deals with the English law relating to elections which is different from our law.

We accordingly hold that Mr. Choksy's submission, that one of the essential ingredients of section 91(b) of the Presidential Election Act, No. 15 of 1981 is that the result of the election should be affected, is well-founded.

Mr. Choksy contended that, in regard to the third ingredient postulated by the provisions of Section 91(b), the petitioner has wholly failed to aver the material facts required to establish how the acts of non-compliance relied upon by the petitioner did in

fact affect the result of the election. He submitted that it was incumbent upon the petitioner to expressly aver that the acts of non-compliance relied upon operated either to confer a benefit on the 1st respondent or to adversely affect the petitioner. He also contended that the petitioner should have in addition expressly pleaded how such non-compliance would have affected the declaration of the result, whether the declaration of the result would have had to be made under the provisions of S. 56 or whether a declaration under section 61 would have become necessary.

The "result" contemplated in section 91(b), which, as set above, forms part of the third ingredient therein, is: "The return of the candidate and not the amount of the majority" — vide **Eastern Division of the Country of Clare,** (30). "The success of the one candidate over the other." (Vide *Woodward v. Sarsons* (31) and Rogers On Elections, 13 App. Vol. II, 18th Edn., 1906, p. 61.

The petitioner has, in the petition, set out specifically numerous acts of non-compliance, such as — failure to appoint such officers and servants as were necessary to the taking of the poll; failure to appoint adequate staff in certain polling stations; failure to maintain certain polling stations at the places specified in the notices published in the Gazette; failure to permit the polling agents at certain polling stations to be present at the sealing of the ballot boxes; failure to keep certain polling stations open at the hours specified in the Act; failure to specify as required by the Act 49 polling stations in the Moneragala District, in which the 2nd respondent declared the polling to be void; failure to comply with section 23 of the Act with regard to postal votes; failure to ensure that official poll cards were sent to all registered voters, as required by section 24 of the Act. The specific provisions of the law pertaining to these contraventions have been expressly stated in the petition. The principles in accordance with which the election has to be conducted are those laid down in the said provisions of the Act. What these principles are, is a matter for the Court.

There remains for consideration only the question whether the petitioner has pleaded what, according to the petitioner was the

effect of such acts of non-compliance. A consideration of the totality of the averments in the petition makes it, in our opinion, quite clear that the petitioner's complaint is that the said acts of non-compliance did operate to adversely affect her. It does not seem to us to be open to the 1st respondent to urge that the petition does not, on the face of it, make it clear what the case he, the 1st respondent, has to meet.

In this connection, it is important to note that, while setting out the factual matrix of the alleged non-compliance, the petitioner has proceeded expressly to set out the consequences of such non-compliance as being : "that a large number of persons were unable to vote"; "that some of the voters who supported the petitioner were unable to vote."

A consideration of the averments in the petition, in our opinion, makes it quite clear that the petitioner's complaint, in regard to the effect of such non-compliance in relation to the choice of the particular method of declaring the ultimate result, is confined to the declaration made in terms of section 56 of the Act. If the petitioner was seeking to make out that the consequences would even have entailed a declaration under section 61, then the petitioner would have had to plead more facts. In our opinion it is not open to the petitioner, upon the averments set out in the petition, to take up the position that the consequences entailed were such that the 2nd respondent would have been faced with the possibility of going beyond the stage of a declaration under section 56 (2) having to consider the making of a declaration under section 61.

We are of opinion: that the petitioner has set out in the petition facts which are material and are necessary for the proof of the petitioner's case; that the facts and circumstances pleaded in the petition are such that the 1st respondent will know, from the petition itself, not only what the petitioner proposes to prove as acts of non-compliance, but also the consequences which have flowed from such failure: that facts and circumstances have been pleaded which are sufficient to give the 1st respondent notice of the particular allegations which are being made by the petitioner and which will also enable the 1st respondent "to make the

necessary inquiries and obtain information to defend himself." (Vide *Wijewardene v. Senanayake*, (3). Having regard to the averments set out in the petition, the objection based upon the provisions of section 26 (2) of the Act, is, in our opinion, untenable.

In paragraphs 9 and 10 of the petition the petitioner seeks to rely on the instances enumerated under the head of non-compliance with the provisions of Election Law as "other circumstances" and pleads that by reason of their occurrence, the "majority of electors were or may have been prevented from electing the candidate whom they preferred." In other words, the petitioner is also seeking to avoid the election on the ground of avoidance set out in section 91 (a) of the Act, relying on non-compliance with the provisions of Election Law.

Both the learned Attorney-General and Mr. Choksy, P.C., contended that the legislature contemplated non-compliance as a ground of avoidance under section 91(b) and that facts and instances pleaded by the petitioner are in regard to non-compliance: hence the petitioner cannot resort to section 91(a) of the Act.

Mr. Choksy supported his argument by also relying on the rule of construction *Generalia specialibus non derogant* — special provisions will control general provisions. He contended that section 91 (b) is the special provision and section 91(a) is the general provision and the special provision prevails and is operative.

We are inclined to agree with Mr. H. L. de Silva, P.C., who stated that the rule of construction does not apply. Bindra on **The Interpretation of Statutes,** 6th Edn., p. 140 states as follows:

> "The following principles must be applied and exhausted before the rule is applied. First, the two provisions must cover the same area before one can be treated as an exception to another. Secondly, the two provisions must be so incompatible with each other that they cannot be reconciled."

In our view the two provisions do not cover the same area; nor can section 91(a) be said to be repugnant to or be in conflict with section 91(b). Though the relief granted on proof of the grounds set out in both sections is the same, namely, the avoidence of the election, the grounds of avoidance are not the same. Furthermore, the objectives sought to be achieved by the two provisions are different. In section 91(a), the objective is to ensure that the electors must be allowed to vote for the candidate of their choice, unhampered by intimidation, bribery, treating etc., while section 91(b) ensures that the election will be conducted in accordance with the subsisting Election Law.

It also seems to us that the answer to the submission of the learned Attorney-General and Mr. Choksy is contained in the words of section 91(a) — "that by reason of general bribery, general treating or general intimidation or other misconduct or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred." The "other circumstances" may be any circumstances whether similar to those enumerated or not. In other words, the legislature having referred to the occurrences which are common at elections, viz., intimidation, bribery, treating and misconduct, proceeded to refer to any circumstances whatsoever by reason of which the majority were prevented from voting for the candidate of their choice. The words "other circumstances" are wide enough to include instances of non-compliance with the law relating to the conduct of elections. The petitioner was, therefore, entitled to plead instances of non-compliance to sustain a charge under section 91(a) of the Act.

For the reasons set out above, we make order overruling all the preliminary objections raised on behalf of the respondents and direct that this petition be set down for trial.

The costs of this inquiry will be costs in the cause, but the respondents will not in any event be entitled to the costs of this inquiry.

Objections overruled.