

YASARATNE AND ANOTHER
v.
PREMARATNE AND OTHERS

SUPREME COURT

SAMARAWICKRAME, J., THAMOTHERAM, J.,

ISMAIL, J., AND SHARVANANDA, J.

S.C. APPEALS 2/78 & 3/78

COURT OF APPEAL No. 1044/77

ELECTION PETITION No. 10/77

ELECTORAL DISTRICT No. 24 — AVISSAWELLA

16, 17, 18, & 21 JANUARY 1980

Election Petition — Computation of security based on the number of charges — Distinction between 'charge' and 'ground' — Corrupt practice of undue influence — intimidation — Jurisdiction.

Appeal — Decision of Court of Appeal in the exercise of appellate or writ jurisdiction in respect of Order of Election Judge — Does appeal lie to Supreme Court.

A ground does not mean the same thing as a 'charge' in the new Rule 12(2) in the Third Schedule. One distinct ground could involve several charges and each charge attracts security. The first charge in respect of any one of the distinct grounds set out in section 77 of the Parliamentary Elections Order in Council 1946 attracts Rs. 5000/- as security and each additional charge in respect of the same ground attracts Rs. 2500/-.

Where two respondents were alleged to have committed the corrupt practice of undue influence there are two charges of undue influence and of intimidation.

The concept of 'common intention' which occurs in Criminal Law is entirely foreign to Election Law.

Every allegation which, if proved, would suffice to avoid an election on any one of the grounds of avoidance contained in section 77 should be treated as a charge within the meaning of Rule 12 in the Third Schedule to the Parliamentary Elections Order in Council 1946.

One act of the corrupt practice of undue influence can affect a number of persons. That does not mean that more than one charge, according to the number of persons affected can be framed.

Though the impact may be on a number of persons, yet if there was only one act of intimidating only one charge can be based on such act.

The Supreme Court in the exercise of its appellate jurisdiction is competent to entertain an appeal from an order of the Election Judge made in terms of the law that prevailed before the new Constitution.

Cases referred to :—

- (1) *Perera v. Samarasinghe* 68 NLR 241, 252
- (2) *Dissanayake v. Abeysinghe* 75 NLR 12
- (3) *Perera v. Samarasinghe* 67 NLR 530, 533
- (4) *Senanayake v. Navaratne* 56 NLR 5
- (5) *De Silva v. Senanayake* 75 NLR 265

APPEAL from order of the Court of Appeal.

K. Shinya with *K. Shanmugalingam* and *R. A. K. Perera* for petitioners-respondents-appellants.

Mark Fernando with *Ben Eliyathamby* for the 1st respondent—petitioner-respondent.

Cur. adv. vult

February 11, 1980
SHARVANANDA, J.

The Appellants filed Election Petition No. 10 of 1977 on 15th August 1977 challenging the election of the Respondent — Petitioner-Respondent (hereinafter referred to as the 1st Respondent) as Member of the National State Assembly for Electoral District No. 24, Avissawella, on the following grounds set out in paragraphs 5 to 8 of their Election Petition. (The averments in paragraph 5 are reproduced here fully as this appeal appears to turn on their legal effect.)

"5. Your Petitioners state that the election of the 1st Respondent as a Member at the said election was null and void on the ground of the commission of the corrupt practice of 'undue influence' within the meaning of section 56 read with section 77(c) of the Ceylon Parliamentary Elections Order-in-Council, in that the 1st Respondent, in the company of the 8th Respondent and with other supporters of the 1st Respondent, came in two vehicles and intercepted S. A. Leelawathie and R. G. Wimalawathie on 18.7.77 at Suduwella, Kaluaggala, when the aforesaid Leelawathie and Wimalawathie, along with others who were voters, were returning home from a meeting held at Hanwella in support of the candidature of the 5th Respondent. The 1st Respondent, who was carrying a firearm, along with the 8th Respondent, challenged, abused and threatened the aforesaid persons using the following words: "කවුද දිනේෂ්වරේ ගණන් කරගෙද, දුටුපියව් අතින් එවුන් විකන් අපිට මිනෑ — " The 1st Respondent, with the firearm in his hand, along with

the 8th Respondent, chased after the others who ran in different directions. The aforesaid acts were done by the 1st and 8th Respondents in order to induce and/or compel the said Wimalawathie and Leelawathie and the persons who were with them to vote for the 1st Respondent or to refrain from voting for the 5th Respondent. The Petitioners further state that the 8th Respondent was acting as the agent and/or with the knowledge or consent of the 1st Respondent in the course of the above transaction."

Para 6 — That on 16. 7. 77, the 8th Respondent, as agent of the 1st Respondent, committed the corrupt practice of 'undue influence' by intimidating L. Kariyawasam and L. Bandulasena for the same purpose.

Para 7 — That on 15. 7. 77, the 9th Respondent, as agent of the 1st Respondent, committed the corrupt practice of 'undue influence' by intimidating S. P. Lalitha Perera for the same purpose.

Para 8 — Non-compliance with the provisions of section 77(b) of the Order-in-Council relating to elections." (Three instances of non-compliance are set out)

The Petitioners deposited a sum of Rs. 15,000/- as security for costs.

At the hearing of the Petition, the 1st Respondent took a preliminary objection that the security furnished by the Appellants was inadequate and moved that the Petition be dismissed on that ground.

After examining the averments contained in the several paragraphs, the Election Judge who heard the objection held that the security furnished was adequate. In the course of his order dismissing the objection, he held that paragraph 5 of the Petition disclosed two distinct charges against each of the 1st and 8th Respondents constituting one distinct ground of the corrupt practice of 'undue influence' and that the security they should have deposited was a sum of Rs. 7,500/-, made up of Rs. 5,000/- for the 1st charge and Rs. 2,500/- for the additional charge. In reaching this conclusion, he adopted the definition of the word 'charge' given by the Divisional Bench of the Supreme Court in *Perera v. Samarasinghe* (1) as "an allegation of some fact or omission, the proof of which must necessarily entail a judicial

order imposing the penalty or the consequence which a statute attaches to an act or omission". He held also that paragraphs 6 and 7 contained two additional charges constituting the same ground of the corrupt practice of 'undue influence' and that each of them thereby attracted a sum of Rs. 2,500/-. In respect of the charge in paragraph 8, following the judgment of Justice G. P. A. Silva in the case of *Dissanayake v. Abeysinghe* (2), he held that though it constituted a distinct ground of non-compliance within the meaning of section 77(b) of the Ceylon Parliamentary Elections Order-in-Council (1946), Cap. 281, the charge attracted security in a sum of Rs. 2,500/- only.

The 1st Respondent filed Application No. 1044/77 by way of Writs of Certiorari and Mandamus seeking to quash the said order of the Election Judge and another Application No. 1045/77 seeking to revise the said order of the Election Judge and to have his order set aside.

On the question whether the order of the Election Judge could be revised, a Bench of five Judges of the then Supreme Court, by its judgment (S.C Minutes of 21.2.78), held that an Application in Revision would lie in the circumstances of the case in respect of the order made by the Election Judge.

Thereafter, both applications — S.C. 1044/77 and S.C. 1045/77 — were heard together by the Court of Appeal, and by its order of 17th November 1978, it allowed both Applications and set aside the order of the Election Judge and dismissed Election Petition No. 10 of 1977 with costs. In his judgment, with which Vythialingam J. agreed, Wimalaratne, J. took the view that the Election Judge was right in his computation of the security required under paragraphs 5, 6, and 7 but wrong in regard to paragraph 8. He held that the charge preferred in paragraph 8 was a first charge on a ground distinct from the ground set out in the earlier paragraphs 5, 6, and 7 and thus required the higher security of Rs. 5,000/-. He held that the total security required was Rs. 17,500/-. In a separate judgment, Colin Thome J. while agreeing with Wimalaratne J.'s computation of security in respect of the charges in paragraphs 6, 7, and 8, was of the view that paragraph 5 contained four distinct charges constituting the distinct ground of the corrupt practice of 'undue influence'. He stated that "paragraph 5 disclosed two charges against the 1st Respondent for intimidating S. A. Leelawathie and R. G. Wimalawathie, and two charges against the 8th Respondent for intimidating the said Leelawathie and Wimalawathie. The 1st

charge attracts Rs. 5,000/-, the three additional charges Rs. 2,500/- each, totalling Rs. 7,500/-. The security required, therefore, for the four charges under paragraph 5 is Rs. 12,500/-. According to the computation of Colin Thome J, the total security that should have been furnished was a sum of Rs. 22,500/-.

At the argument before this Court, Counsel for the Appellants did not dispute that the charge of non-compliance with the provisions of the Election Order-in-Council referred to in section 77(b) of the Parliamentary Elections Order-in-Council constituted a ground distinct from the ground of the corrupt practice referred to in section 77(c) of the said Order-in-Council.

As against Thamotheram J, the majority of the four Judges who heard the Election Appeals in S.C. 1, 2 and 3 of 1977 distinguished between 'charge' and 'ground' in the new Rule 12(2) in the Third Schedule to the Ceylon Parliamentary Elections Order-in-Council (1946) and held that a 'ground' did not mean the same thing as a 'charge' and that one distinct ground could involve several charges and that each charge attracted security. They held that the first charge in respect of any one of the distinct grounds set out in section 77 attracted Rs. 5,000/- as security and that each additional charge in respect of the same ground attracted Rs. 2,500/-. I agree with this view of the majority Judges. This conclusion was arrived at after a review of the earlier judgments of the Supreme Court in relation to the original Rule 12(2) in the Third Schedule to the Ceylon Parliamentary Elections Order-in-Council (1946), which reads as follows :

“(2) The security shall be to an amount of not less than Rs. 5,000/-. If the number of charges in any Petition shall exceed three, additional security to an amount of Rs. 2,000/- shall be given in respect of each charge in respect of the first three” ;

and of the new Rule 12(2), as substituted by section 33 of Act No. 9 of 1970, which reads as follows :

“(2) The security shall be an amount of not less than Rs. 5,000/- in respect of the 1st charge constituting a distinct ground on which the petitioner relies, and a further amount of not less than Rs. 2,500/- in respect of each additional charge constituting any such ground.....”

Since I agree with their analysis and distinction, it is not necessary for me to re-examine the said judgments. I also agree that the new Rule 12(2) introduced by section 33 of Act No. 9 of

1970 effected a fundamental change in the mode of computation of the amount of security on the basis of the distinction between a 'charge' and a 'ground' propounded by T. S. Fernando J. in *Perera v. Samarasinghe* (3) : "A ground does not mean the same thing as a charge and that a single ground may sometimes involve several charges". I agree with the Court of Appeal that the averments in paragraph 8 of the Election Petition constitute a first charge on a ground distinct from the ground of corrupt practice based on the charges in paragraphs 5, 6 and 7 of the Petition and that security in a sum of Rs. 5,000/- should have been furnished in respect of that charge.

The real controversy before this Court was in respect of the averments in paragraph 5 of the Petition. While the Appellants contend that paragraph 5 contained only one charge, the 1st Respondent submits that it contained a minimum of two charges — one against the 1st Respondent and the other against the 8th Respondent. Counsel for the Appellants stated that the Respondent's submission was misconceived and that what the Appellants had alleged in paragraph 5 was that the 1st and the 8th Respondents were involved in one charge of 'undue influence'. According to Mr. Shinya, the real issue was whether a single allegation of corrupt practice made against a multiplicity of respondents constituted only one charge for the purposes of security, or it amounted to as many charges as the number of respondents involved. He stated that a charge cannot be split into a number of charges because of the multiplicity of the respondents involved in the charge and that this principle could be culled from the judgment of the three Judges who constituted the majority of the Divisional Bench which heard the Election Appeals S.C. 1, 2 and 3. I agree with the Court of Appeal that no such principle that a single allegation of a corrupt practice made against a multiplicity of persons constituted only one charge for the purpose of security was enunciated by the Judges in their judgments. In my view, no such general principle can be formulated. The Appellants' reply is based on a misconception of the 1st Respondent's contention. The 1st Respondent's submission was that, by their averments in paragraph 5 of the Petition, the Appellants alleged that the 1st Respondent had by his action committed an act of 'undue influence' on Leelawathie and Wimalawathie and that the 8th Respondent had by his own act committed a similar corrupt practice of 'undue influence' on the said Leelawathie and Wimalawathie and that thereby both the 1st and 8th Respondents intimidated Leelawathie and Wimalawathie. Counsel for the Respondent contended that, in terms of paragraph 5 of the Petition, the 1st and 8th Respondents, each by his own distinct acts, committed intimidation on the said Leelawathie and

Wimalawathie in order to "induce and/or compel the said Wimalawathie and Leelawathie to vote for the 1st Respondent or to refrain from voting for the 5th Respondent". An analysis of the averments in paragraph 5 of the Petition tends to support the contention of the Respondent that the 1st and 8th Respondents had each a distinct part to play in the incidents referred to in paragraph 5 and that the part so played by each of them by itself amounted to the corrupt practice of 'undue influence'. The Appellants' averments in the concluding part of paragraph 5 is significant in this context. They say that "the *aforsaid acts* were done by the 1st and 8th Respondents in order to induce and/or compel the said Wimalawathie and Leelawathie and the persons who were with them to vote for the 1st Respondent or to refrain from voting for the 5th Respondent". They further state that the 8th Respondent was "acting as agent and/or with the knowledge or consent of the 1st Respondent in the course of the above transaction". The Appellants are herein attributing certain positive conduct to the 8th Respondent, which by itself was sufficient to invalidate the 1st Respondent's election. According to them, the 8th Respondent was not a mere non-active participant supporting the action of the 1st Respondent but was actively participating in the incidents of that day by committing specific acts amounting to intimidation apart from and in addition to the acts of the 1st Respondent.

According to Counsel for the Appellants, the transaction referred to in paragraph 5 consisted of only one joint act of intimidation indulged in by the 1st Respondent and the 8th Respondent, his agent, and that the averments in paragraph 5 constitute only a single allegation of the corrupt practice of 'undue influence' made against the 1st and 8th Respondents for the purpose of security. I cannot read any such limitation in the said paragraph 5. By the averments in paragraph 5, the Appellants are alleging that each of the 1st and 8th Respondents "challenged, abused and threatened" the said Leelawathie and Wimalawathie and chased after the others who were returning home along with the said Leelawathie and Wimalawathie in order to induce and/or compel the said Leelawathie and Wimalawathie and the persons who were with them to vote for the 1st Respondent or to refrain from voting for the 5th Respondent. The Appellants have charged each of the 1st and 8th Respondents with having committed the corrupt practice of 'undue influence' and further have sought to hold the 1st Respondent liable not only for his act of corrupt practice, but also for the act of corrupt practice committed by the 8th Respondent as his agent. In terms of section

77 of the Elections Order-in-Council, the election of the 1st Respondent can be declared void not only for his own acts but also for the acts of his agent. The averments relating to the 8th Respondent have purpose and relevance only in the context of the Appellant's charge that the 1st Respondent's election should be declared void on the ground of the corrupt practice committed by his agent [section 77(c)]. In my view, the Appellants are, in paragraph 5 of their Petition, ascribing to each of the 1st and 8th Respondents distinct acts of intimidation alleged to have been committed by them in the general melee of 18th July 1977 with the common purpose of inducing or compelling the victims to vote for the 1st Respondent or to refrain from voting for the 5th Respondent. The concept of 'common intention' which occurs in Criminal Law is entirely foreign to Election Law and hence only the positive acts of the 8th Respondent can implicate the 1st Respondent. In my view, the part alleged to have been played by each of the 1st and 8th Respondents in the incidents of the 18th of July 1977 as stated in paragraph 5 of the Petition was sufficient to bring it within the pale of the 'corrupt practice' of undue influence (section 56(1) of the Parliamentary Elections Order-in-Council) and render void the election of the 1st Respondent.

I agree with the observation made by Wimalaratne J. in the course of his judgment in the Divisional Bench case in Election Petition Appeals 1, 2 and 3 that "every allegation which, if proved, would suffice to avoid an election on any one of the grounds of avoidance contained in section 77 should be treated as a 'charge' within the meaning of Rule 12 and each such 'charge' attracts security". In my opinion, a 'charge' consists of any allegation, the proof of which will by itself constitute a sufficient ground to invalidate the election. I agree with Samarawickrame J. as stated in his judgment in the above-mentioned Election Appeals that "the word 'charge' has been applied to any allegation against the validity of an election". In paragraph 5 it is quite apparent that the Appellants are seeking to make out two charges — one charge of 'undue influence' against the 1st Respondent and another charge of 'undue influence' against his agent, the 8th Respondent. If they succeed in establishing either of the said charges, they will succeed in having the election of the 1st Respondent avoided and have him reported under section 82 with consequences under section 82D(2). The obvious purpose of the Appellants in pleading the alleged transgression of the 8th Respondent and in specifically stating that he was acting as the agent of and/or with the knowledge or consent of the 1st Respondent was to make the 1st Respondent liable for the misconduct of the 8th Respondent. The 1st Respondent had thus to meet not only the charge that he had

personally committed the corrupt practice of 'undue influence' on Leelawathie and Wimalawathie, but also the charge that the 8th Respondent, his agent, had committed the corrupt practice of 'undue influence' on the said persons. On the allegation made in paragraph 5 of the Petition, the 8th Respondent also ran the risk of being found guilty of 'corrupt practice' by the Election Judge and of being reported by him with the attendant consequences in terms of section 82 and 82D(2) of the Elections Order-in-Council.

In the circumstances, I agree with Wimalaratne J. Vythialingam J. and the Election Judge that the averments in paragraph 5 exhibit not one charge but two charges and that a total of Rs. 7,500/- had to be provided as security in relation to them.

Colin Thome J. has held that paragraph 5 contains four distinct charges constituting the distinct ground of the corrupt practice of 'undue influence' — two charges against the 1st Respondent for intimidating Leelawathie and Wimalawathie, and two charges against the 8th Respondent for intimidating Leelawathie and Wimalawathie. I find it difficult to agree with this part of his judgment. On the averments in paragraph 5, it would appear that the 1st Respondent did not indulge in different sets of acts of intimidation — one directed against Leelawathie and the other against Wimalawathie. Similarly, the 8th Respondent also did not commit different acts of intimidation in relation to Leelawathie and Wimalawathie. The act of each of them was directed against both Leelawathie and Wimalawathie together and had its impact on these two persons. By the same act, both were intimidated. It is not a case of threatening Leelawathie independently of Wimalawathie at a different time or place or by a separate act. In the circumstances, in my view the 1st Respondent committed, in relation to the said Leelawathie and Wimalawathie, only one act of 'undue influence' ; similarly, the 8th Respondent, in relation to the said Leelawathie and Wimalawathie, committed another act of 'undue influence'. One act of the corrupt practice of 'undue influence' can affect a number of persons. That does not mean that more than one charge, according to the number of persons affected, can be framed. Though the impact may be on a number of persons, yet there was only one act of intimidation and only one charge can be based on such act. If a candidate gets on to a platform and threatens an audience of one thousand persons collectively as one unit, that threat can form the foundation of one charge only and not of thousand charges, according to the number composing the audience. Hence, in my view Colin Thome J. was in error in concluding that paragraph 5 disclosed four charges.

Counsel for the 1st Respondent stated that the Court of Appeal was in error in holding that paragraph 8 contained only one charge constituting a distinct ground of non-compliance with the provisions of the Elections Order-in-Council. He pointed out that paragraph 8 referred to three instances of such non-compliance. He stated that the Divisional Bench in Election Petition Appeals 1, 2 and 3 of 1977 had disagreed with the decision in *Perera v. Samarasinghe (supra)* that the limb in section 77(a) of the Parliamentary Elections Order-in-Council that "the majority of the electors were, or may have been, prevented from electing the candidate whom they preferred by reason of general bribery, general treating, or general intimidation or other misconduct or other circumstances" constituted only one 'charge' for the purpose of Rule 12 and held that general bribery, general treating and general intimidation, etc. constituted separate grounds of avoidance. He submitted that by parity of reasoning any instance of non-compliance with the provisions of the Elections Order-in-Council which is alleged to have affected the result of the election would constitute a separate 'charge' and that, accordingly, the allegations in paragraph 8 disclosed three charges and the total security required was Rs. 10,000/- on account of the three charges. I cannot agree with this submission. What the Petitioners complain of in paragraph 8 is that "the conduct of the election with particular reference to the instances aforesaid were not in accordance with the principles laid down by the provisions of the Elections Order-in-Council and such non-compliance affected the result of the election". The burden of the allegation in paragraph 8 was not that each individual instance of non-compliance affected the result of the election, but that the cumulative effect of the three instances of non-compliance affected the result of the election. The Appellants are referring to the total effect of the various acts of non-compliance.

Counsel for the 1st Respondent took objection that no appeal to the Supreme Court lay from the decision of the Court of Appeal quashing the order of the Election Judge. He cited in support of his submission the case of *Senanayake v. Navaratne* (4) and *De Silva v. Senanayake* (5). He contended that no appeal lay to the Supreme Court under the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka from a decision of the Court of Appeal given in the exercise of its appellate powers or writ jurisdiction in respect of a judgment or order of an Election Judge. He referred to Article 130 of the Constitution and stated that the present appeal would not be covered by the said Article as the said Article referred to an order or judgment of the Court of Appeal hearing an Election Petition in terms of Article 144 of the Constitution. He submitted that the present appeal of the

Appellants was from a determination relating to a Parliamentary Election held under the Elections Order-in-Council and that unless a special right of appeal for such a determination was provided, it was not competent for the present Supreme Court to entertain the present appeal. I cannot agree with this submission. This is an appeal preferred under Article 128 of the Constitution. Article 118(c) and 118(e) confer final appellate jurisdiction and jurisdiction in Election Petitions on the Supreme Court. Article 140 of the Constitution confers on the Court of Appeal jurisdiction to grant and issue, according to law, orders in the nature of Writs of Certiorari and Mandamus, and Article 127(1) provides that the Supreme Court would be the final Court of civil and criminal appellate jurisdiction for the correction of all errors which may be committed by the Court of Appeal. Article 128(1) provides that an appeal shall lie to the Supreme Court from any final order or judgment of the Court of Appeal in any matter or proceeding, whether civil or criminal.....if the Court of Appeal grants leave to appeal to the Supreme Court. It is to be noted that the present appeals have reached this Court on leave granted by the Court of Appeal.

True, the matters involved in this appeal relate to an Election Petition. But it is to be noted that the order appealed from is an order made by the Court of Appeal in the exercise of its jurisdiction under Article 140 of the Constitution. The Court of Appeal was, in this instance, not sitting as an Election Court but was exercising special writ jurisdiction. In these circumstances, I hold that the Supreme Court, in the exercise of its appellate jurisdiction, is competent to entertain this appeal. I accordingly overrule the preliminary objection.

In view of the fact that I agree with the Court of Appeal that the Appellants had not furnished sufficient security as prescribed by Rule 12(2) of the Parliamentary Elections Order-in-Council, I dismiss both the appeals of the Appellants with costs fixed in one sum Rs. 1,500/- payable to the 1st Respondent — Petitioner-Respondent, M. D. Premaratne.

SAMARAWICKRAME, J. — I agree.

THAMOTHERAM, J. — I agree.

ISMAIL, J. — I agree.

WEERARATNE, J. — I agree.

Appeals dismissed