

AMARASINGHE
v
AZATH SALLY AND OTHERS

COURT OF APPEAL
WIJAYARATNE, J.,
C.A. 1074/2002
SEPTEMBER 15,
NOVEMBER 24 AND
DECEMBER 19, 2003

Local Authorities Elections Ordinance, sections 8, and 66(2), as amended by Act, No. 1 of 2002 – Sections 82p(2) and 82q – Remedy by way of election petition – Does the amendment take away writ jurisdiction of the Court of Appeal? – Misjoinder of parties – Delay and acquiescence – Qualified for election? – Constitution, Article 140 – Necessary parties – Does a statutory remedy exclude ordinary remedy.

The petitioner sought a *quo warranto* declaring that the election of the 1st respondent as a member of the Council null and void and further that the 1st respondent was not qualified for election in terms of section 8(6) by reason of his not having ordinary residence in his electoral area.

The respondent contended that as the Amending Act, No. 1 of 2002, provided for the avoidance of election by way of an election petition and with the Returning Officer and the Party Secretary who are interested parties not been made parties, the application should be dismissed.

HELD

- (i) Act No. 1 of 2002, provides for a new remedy of an election petition, but it does not exclude or take away the right of a citizen to invoke the writ jurisdiction of the Court of Appeal.
- (ii) The Returning Officer and the Party Secretary need not be parties.
Preliminary objection – as to the maintainability of the application.

Cases referred to:

1. *R v Martin* – (1892) 1 QB 39
2. *Biman Chandra v Mukherjee* – AIR (1952) – Cal. 79
3. *Pyxgranite Estate Ltd. v Ministry of Housing and Local Government* – (1960) AC 260

S.L. Gunasekera with Chandimal de Mel for petitioner.

D.S. Wijesinghe, P.C., with Sanjeewa Jayawardena and Priyantha Fernando for 1st respondent.

Janak de Silva, State Counsel, for 2nd and 3rd respondents.

Cur.adv.vult

May 07, 2004

WIJEYARATNE, J.

This is an application presented by the petitioner seeking the grant of a mandate in the nature of a writ of *quo warranto* declaring that the election of the first respondent as a member of the Colombo Municipal Council which was declared by the second respondent by gazette notification marked P3, is null and void and of no force or effect in law and/or that the first respondent is not a member of the Colombo Municipal Council and for interim relief as prayed in the petition. The application was made on the basis that the petitioner is a voter registered in the electoral registers of the Colombo District and ordinarily resident in the Colombo Municipal area at the time of the election of members of Colombo Municipal Council and a candidate for election as a member of the Colombo Municipal Council; and the first respondent who was elected as a member of Colombo Municipal Council at the election held on 20th May 2002 and currently functioning as the Deputy Mayor of Colombo. The petitioner seek the grant of a mandate of writ of *quo warranto* on the premise that the first respondent was not qualified for election to the Colombo Municipal Council in terms of section 8 (6) of the Local Authorities Elections Ordinance as amended, by reason of his not having been ordinarily resident in the electoral area of Colombo Municipal Council on the relevant date.

The first respondent filing statement of objection refuted the claim of the petitioner that he is not a voter registered in the electoral registers of Colombo Municipal Area and that he is not ordinarily resident in such area. He further raised objections to the petition on the ground that since the Local Authorities Elections Ordinance as amended by Act No. 1 of 2002 by section 82p(2) provided for the avoidance of election of a candidate by way of elec-

tion petition and that the petitioner has invoked the jurisdiction of the Provincial High Court Holden in Colombo in terms of section 30 82q of the said Ordinance, the petitioner is not entitled to maintain this application for discretionary remedy granted by this court. Also raised objection on the ground that the returning officer and the party secretary who are interested parties were not made party respondents to this application. And the delay on the part of the petitioner in presenting this application.

At the hearing of the application the parties urged that the several objections raised by the first respondent be taken up and decided as preliminary objections and made submissions both orally and in writing. Such argument and submissions were made 40 before Ms Shiranee Tilakawardane, J. (P/CA) as she then was, and myself sitting together and consisting a divisional bench. However the elevation of Justice Tilakawardane to the Supreme Court, before the parties could tender their written submissions, avoided a decision being given by the panel of judges who heard the arguments. The parties then agreed that the decision should be made by me alone as a single judge who heard the arguments, as this is a writ application only. Accordingly I proceeded to decide the matter of preliminary objections as set out below.

ELECTION PETITION PRESENTED TO THE HIGH COURT OF COLOMBO. 50

The first respondent contends that the Local Authorities Elections Ordinance as amended by Act, No. 1 of 2002 has by section 82p(2) provided for the avoidance of an election of a candidate, which provisions the petitioner has invoked in proceedings before the High Court Holden in Colombo in case No. HCD/1/2002 challenging the election of the first respondent and seeking the same relief as sought in these proceedings. The first respondent urge that when there is statutory remedy provided, discretionary remedy by way of writs will not be granted and that the two cases may produce conflicting decisions, which should be avoided. In other words 60 the first respondent argues that availability of an alternative remedy should exclude discretionary remedy of a writ granted by this court. The parties concede that the provisions of Act, No. 1 of 2002 does not exclude other remedies and specially the remedy by way

of writ granted by this court in terms of article 140 of the Constitution existing at the time of enactment of amending Act, No. 1 of 2002 which was certified on 13.03.2002.

The first respondent also argued that “by the time the petitioner presented his application i.e.; 18.06.2002, the legislature had 70 already vested the powers of reviewing the validity of any such election, in the High Court, in order to achieve the objective of circumscribing and regulating the situation in which local elections are challenged. As such, the petitioner could not have circumvented the limitations imposed by the amendment Act; by invoking Article 140 of the Constitution and as such the present application is misconceived.

The learned counsel for the first respondent, however, does not refer this court to any such limitations imposed by any provisions of Act, No. 1 of 2002. Provisions for some specific statutory remedy 80 cannot be considered as a limitation of other remedies, provided by law, especially in the absence of any specific provisions excluding such remedies. In any event, the learned counsel for the first respondent has not referred this court to any authority affirming such a proposition to the effect that one provision for a statutory remedy amounts to an exclusion of other remedies available in law. However, he refers this court to the theses of J.A.L. COORAY on ‘CONSTITUTIONAL AND ADMINISTRATIVE LAW OF SRI LANKA’ at pages 426 and 427 which states.

“.....court will not grant these writs where an alternative equally 90 convenient remedy is available.”

Quoting the two cases of *R v Martin*⁽¹⁾ and *Biman Chandra v Mukherjee*⁽²⁾ referred to by J.A.L.Cooray in his theses, the counsel submits that “no writ of *quo warranto* can be sought when there is provisions for an election petition. “This statement however, is not supported by any reference to any decision to such effect in the local jurisprudence of writ jurisdiction.

Reference to English jurisprudence on the subject thus becomes relevant, for even J.A.L.Cooray has relied on the English case law for his statement on the subject. More recent decisions of 100 English courts hold otherwise. As referred to by Professor WADE in “ADMINISTRATIVE LAW” (Eighth Edition page 697) Lord

SIMONDS in *Pyx Granite Estate Ltd. v Ministry of Housing and Local Government*⁽³⁾ dealing with the question 'does a statutory remedy exclude ordinary remedies? Said;

"It is a principle not by any means to be whittled down that the subjects recourse to Her Majesty's Courts for determination of his rights is not to be excluded except by clear words. That is.....a fundamental rule from which I would not for my part, sanction any departure. It must be asked, then, what is 110 there in the act of 1947, which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an alternative or an exclusive remedy? There is nothing in the Act to suggest that while a new remedy, perhaps cheap and expeditious is given, the old and as we like to call it, the inalienable remedy of Her Majesty's subject to seek redress in her courts is taken away."

The situation with regard to the provisions of Act, No. 1 of 2002 is no different. It provides for a new remedy of an election petition, but does not exclude or take away the right of a citizen to invoke 120 the writ jurisdiction of this court.

Accordingly, in my opinion the existence of provisions for an election petition to be presented to the provincial High Court nor the fact that such a petition is already presented, does not exclude the writ jurisdiction of this court invoked in an application for a writ of *quo warranto*; nor does it affect the maintainability of such an application.

The efficacy of the alternative statutory remedy provided by the Act, No. 1 of 2002 is in serious doubt by reason of the fact that the election petition presented to the Provincial High Court, has not 130 reached any finality even after a period of nearly two years.

NON-JOINDER OF PARTIES

The Returning Officer not being made a party is referred to as a ground that affect maintainability of the application of the petitioner. In terms of P3 the authority that made the declaration in terms of section 66(2) of the Local Authorities Elections Ordinance, is made party respondent. The first defendant functions as the Deputy Mayor of Colombo by reason of his election and nomination

declared in terms of section 66(2) and it is sufficient to make the authority who made such declaration, a party respondent. The first respondent however does not refer to any provisions requiring that the Returning Officer who acted under the authority of the Election Commissioner, being made a party respondent. 140

With regard to the party secretary, the first contends that he is an interested party that should have been made a party respondent. However, he does not take up the position that he is an affected party. There is no requirement of law, the first respondent refers this court to, that every party likely to be interested in the result of a case be made party to the same. According to the scheme of the Local Authorities Elections Ordinance as amended, 150 the party secretary comes in to the scene only in the event of the Election Commissioner calling upon him to act in terms of the provisions of law and not in the manner of determination of the validity of an election. The first respondent has not established any requirement of the two parties referred to in his objections being essential parties in the determination of the present application.

THE DELAY AND ACQUIESCENCE

The petitioner only challenges the election and nomination as Deputy Mayor of the first respondent in the year 2002. Accordingly any election or nomination prior is irrelevant and immaterial to the present application. The fact of the first respondent having been a member of Colombo Municipal Council prior to 2002 election is immaterial because the disqualification based on residence can occur even subsequent to such election but at the time material to the election challenged. However the petitioner has specifically pleaded that he became aware of such disqualifications of the first respondent only after the declaration of the results of the relevant general election and the application is presented within one month of the election. There is no delay that can affect the maintainability of the application. 160

For the reasons given above, the three preliminary objections raised by the first respondent are over ruled. And order is made that the application be proceeded with on the substantial matter presented for determination. 170

The first respondent to pay the petitioner costs of this inquiry at Rs. 5,000/-

Preliminary objection overruled; matter set down for argument.