

THIRANAGAMA AND 10 OTHERS
V.
AMARASIRI DODANGODA AND 25 OTHERS

COURT OF APPEAL.

YAPA, J.

C. A. 01/94

(Election Petition)

**14.12.94, 12.1.95, 10.2.95,
10.3.95, 5.4.95, 21.4.95,
5.5.95, 9.6.95, 21.6.95,
4.7.95, 19.7.95, 26.7.95,
4.8.95, 30.8.95, 6.9.95,
13.9.95, 22.11.95, 28.11.95,
12.12.95, 15.12.95, 27.12.95,
23.1.96.**

*Provincial Councils Elections Act, 2 of 1988 - (Part VII) S51(7) 53(H)58
S92(1)(b) 115 Counting of preferences Manual Processing of Results -
checked by computer. Evidence Ordinance S58.*

The 1st - 11th Petitioners who were the unsuccessful candidates of the U.N.P. at the election held on 24.3.94 for the Southern Province, Provincial Council for the administrative District of Galle had filed an Election Petition in terms of part VII of Act 2 of 1988.

The main allegations were:

- (1) No proper counting was done; and at most counting centres arbitrary figures were inserted,
- (2) The statements of the counting officers prepared under S51(7) were not delivered in sealed packets to the Returning Officer as required by S53(14).
- (3) When statements under S51(7) were delivered to the Returning Officer, he merely sent them to the Computer Room without any scrutiny,
- (4) The Computer Room was a prohibited area for the candidates/agents and the Returning Officer himself was outside the Computer Room and he had no knowledge, control, supervision or direction over the data that was fed to the Computer by the Computer Programmers.

(5) The results released by the Computer were incorrect and materially different from what it should have been if a proper manual count was taken under the supervision and direction of the Returning Officer and under the observation of the agents of political parties or groups.

It was the position of the petitioners that the said election was not conducted in accordance with the principles laid down in Act, 2 of 1988, and that the non-compliance has materially affected the results of the said election.

Held:

(1) The 1st Petitioner admitted that when mistakes were pointed out, they were corrected. Although there was a journal maintained at the counting centre and he knew that he had a right to record any objections, he had not done so. His evidence does not show any specific allegation of the errors made; further in the affidavit filed by him he has not made any allegations with regard to any error being committed at the counting centre. The omission therefore creates a doubt with regard to the truth of this allegation.

(2) There was no protest and complain to the Returning Officer. If that was done action could have been taken under S58 1(a) to suspect the seals.

However this allegation must be considered subject to S115 of the Elections Act.

(3) On the evidence it is unacceptable to state that the Returning Officer did not make arrangements to have the election results manually processed and that he decided to depend entirely on the computer for the processing of the results, when even the Elections Act had not made any provision for it. If that had happened it is very strange that, no objections were taken to this procedure by the agents.

(4) The evidence shows that the Computer Room was adjoining the Room occupied by the Returning Officer and it was separated by a door. There was also evidence that there was communication between this Room and the Returning Officer. Therefore it is not possible to accept the position that there was no supervision or control by the Returning Officer over this room.

Per Yapa, J.

"It is very clear from the evidence presented that despite various allegations made, no action was taken to protest or taken any objection or complain in writing.

Was this failure on their part due to the fact that there was no reason to complain at that stage, since whatever errors or mistakes at the recording of the results as seen from the documents produced were corrected when pointed out - Therefore these allegations remain as mere allegations without sufficient weight to move the Court to exercise its jurisdiction”.

In the matter of an Election Petition in terms of Part VII of Act 2 of 1988 in respect of the election to the Administrative District of Galle in the Southern Province Provincial Council.

Case referred to:

1. *Weerasinghe v. Chandrananda de Silva*, 1992 - 1 S.L.R. 76 at 92.

W. P. Gunatilaka with D.R. Samaranayake & U. Sooriyarachchi for the Petitioners.

Somapala Gunadheera for 1st Respondent.

Asoka de Silva, D. S. G., with S. Sriskandarajah, S. S. C., R. M. R. B. Navinna, S. C. and S. Rajakaruna, S. C. for the 25th & 26th Respondents.

Cur. adv. vult.

April 02, 1996.

YAPA, J.

The 1st to 11th Petitioners who were the unsuccessful candidates of the United National Party at the Elections held on 24th March 1994 for the Southern Province, Provincial Council, for the Administrative District of Galle, have filed this Election Petition in terms of part VII of the Provincial Councils Elections Act No. 2 of 1988. The Petitioners have made the candidates who were declared elected as members of the said Provincial Council, as 1st to 24th Respondents, the Commissioner of Elections as the 25th Respondent and the Returning Officer at the said election as the 26th Respondent.

The main complaint of the Petitioners was that the said election held on 24th March 1994 was not conducted in accordance with the principles laid down in the Provincial Councils Elections Act No. 2 of 1988 and the said non compliance has materially affected the results of the election.

Briefly the main allegations of the Petitioners regard to the conduct of the election were as follows.

(i) When the counting of the preferences of the United National Party candidates commenced on 25.03.94, most of the counting officers, had left the counting centres and only a skeleton staff remained.

(ii) At the stage of the said counting no proper counting was done, and at most counting centres arbitrary figures were inserted in stating the preferences, according to the whims and fancies of the counting staff.

(iii) The statements of the counting officers prepared in accordance with Section 51 (7) were not delivered in sealed packets to the Returning Officer as required by Section 53 (H) of the said Act No. 2 of 1988.

(iv) When the statements under Section 51 (7) were delivered to the Returning Officer, he merely sent them to the computer room without any scrutiny.

(v) The computer room was a prohibited area for the candidates and the agents and the Returning Officer himself was outside the computer room and he had no knowledge, control, supervision or direction over the data that was fed to the computer by the computer programmers.

(vi) The results of the election released by the computer were incorrect and materially different from what it should have been if a proper manual count was taken under the supervision and direction of the Returning Officer and under the observation of the agents of political parties or groups.

In view of the allegations referred to above the Petitioner alleged that the said election was not conducted in accordance with the principles laid down in the Provincial Councils Elections Act No. 2 of 1988 and that if the said preferences were duly counted according to the provisions laid down in the said act, all the petitioners or some of

them would have been declared elected and therefore such non-compliance has materially affected the results of the said election.

Thus the Petitioners in their petition which was accompanied by documents marked P1 to P11 pleaded as part and parcel of the petition, stated that they were entitled to a declaration that the election in respect of the administrative District of Galle, in the Southern Province, Provincial Council held on 24th March 1994 is void.

The 1st Respondent in his statement of objections denied all the allegations of the petitioners as baseless and self serving statements and stated that the election was conducted in accordance with the provisions of the Act No. 2 of 1988.

The 26th Respondent who was the Returning Officer, in his affidavit also denied the allegations of the Petitioners and stated that the results were counted, computed and processed manually in the results room and the computer was used only for the purpose of checking the manually processed final results. He further stated that while manual processing was done in the results room a duplicate copy of the results sheet was sent to the Assistant Returning Officer in charge of the computer room to enable him to have the data entered and processed separately for the purpose of verification and analysis and confirmation to ensure accuracy. In his affidavit he referred to the following matters to show that the allegations made by the petitioners were baseless and misconceived in law.

- (i) no complaint was received from any person as to any irregularity, at the counting centres or the results centre with regard to the counting procedure and the computation of the results.
- (ii) no complaint was received from any person with regard to any laxity on the part of the staff or that there was a shortage of staff at the time the preference votes were being counted.
- (iii) no complaint has been received with regard to counting officers refusing to record or uphold an objection.
- (iv) no persons other than accredited counting agents were permitted to remain or had access to the results room.

(v) no reasons have been given for the Petitioners' failure to avail themselves of the redress available for their grievances either directly or through their counting agents at the time the grievances arose.

In support of the allegations made by the Petitioners in their petition, the evidence of the following witnesses were led before the Court, namely Tiranagama, Siriwardane, Ranasinghe, and Pushpa Kumara. Briefly their evidence is as follows. Tiranagama one of the Petitioners, gave evidence and stated that the Petitioners were candidates at the Southern Province Provincial Council Elections held on 24.03.94. He said that Galle Administrative District consisted of ten electoral districts and there were 62 counting centres. He said he was a candidate for the Habaraduwa electorate and was present at the counting centre No. 57 as a counting agent of the United National Party. He stated that the counting started at about 8.00 or 8.30 p.m., and by 12.00 midnight counting of votes received by each political party was concluded and the results were announced. Thereafter he said the preference votes of the winning party namely that of the People's Alliance were counted first and then the counting of the preference votes of the United National Party started at about 4.00 a.m. on 25.03.94. At that time he said there were about 50 counting officers attending to the counting and later the number of officers were about 30 and when counting was concluded there were about 20 counting officers. This witness said that there were five counting agents from his electorate and when he raised objection, complaining that counting officers marked some of his preferences to another candidate his complaint was not recorded. He admitted filing his affidavit marked P5 and proceeded to state that he was present when ballot papers and other documents were despatched by the counting officers and his position was that they were not sealed and packeted. He then said that, when an officer brought the result sheet to the Returning Officer, he did not take it, but directed the officer to the computer room to hand it over there. He also said that when he was there, many officers came with the results which were not in seal covers and the Returning Officer did not check them but ordered the officers to take them to the computer room. His position was that the computer room was the adjoining room and it was not possible to see what was happening in this room, except that, periodically there was communication between the computer room and

the Returning Officer. He said that when errors were pointed out at the counting, they were corrected, and that he verbally objected to the counting being done using the computer counting system but his objection was not recorded. In cross examination also he admitted that when mistakes made at the counting were pointed out they were corrected, and further that the officers at the counting centre maintained a journal and he knew that he had the right to record the objections in the journal.

He finally said that he complained about the irregularities to the Returning Officer and also to M. S. Amarasiri who was the Chief Minister at the time.

Witness Siriwardena in his evidence stated that he had been earlier a Provincial Councillor of the United National Party and at the 1994 March Provincial Council Elections he was present as an agent of the U.N.P. at the counting centre No. 2 of the Balapitiya Electorate and the counting of preference votes of the U.N. P. commenced at about 3.00 a.m. on 25.03.94 and was concluded at about 7.00 a.m. He stated that after the counting of ballot papers a summary was prepared and that summary was taken into a journal and at that stage the votes given to him were entered in favour of some other candidate. He specifically referred to the instance of entering 768 votes cast in favour of his No. 10, being entered in favour of the candidate No. 9, and the 50 odd votes which the candidate No. 9 had received being entered in favour of his No.10. He said when he complained about it to the chief counting officer he rectified it. The reasons for this according to the witness was that the counting officers were tired and sleepy and therefore counting was not correctly done and on several occasions he had to point out the errors. The witness further said that counting was done by officers who were voters from the Galle District and therefore they were favouring the candidates of their choice. He even attributed the recording of his 768 votes in favour of the candidate No. 9 due to this reason. He said after the counting of preference votes the document where the results were entered, were not packeted and sealed. He said when the final summary was prepared he signed the summary and thereafter he was in the Returning Officer's room when the result sheets were brought from Habaraduwa, Hiniduma and some other electorates and that they were not brought in seal packets. He said when these results were

brought, the Returning Officer directed the results to the computer room over which the Returning Officer had no supervision. He stated that at this time there were officials and many other including Laksman Ranasinghe, from the U.N. P. This witness further said that an officer brought the results from the computer room and gave it over to the Returning Officer who announced them. The witness in cross examination said that in his affidavit he had not stated everything relating to the election, and that the affidavit was prepared after a discussion that was held in Galle two weeks after the election, where the defeated U.N.P. candidates took part and decided to come to Court. He admitted that whatever errors that were pointed out at the counting centre were corrected. He further said that he did not make a complaint to the Returning Officer since he had no complaint to make, and that it was at the said discussion they realized that the Returning Officer should have been in the computer room.

Witness Ranasinghe, gave evidence and stated that he was attached to the political office of the Chief Minister M. S. Amarasiri on the day of the election and that he was in charge of the U.N.P. election campaign to decide on any issue that arose during the election. He said he had access to the office of the Returning Officer as he was issued with a permit which was marked in the case as X6 and he entered the room of the Returning Officer around 7.00 p.m. on 24.03.94 and the results arrived at frequent intervals and they were brought by the officials. He stated that the results were brought in large envelopes and he could not say whether these envelopes were sealed as he did not examine them. Later he said that he was seated with M.S. Amarasiri a little distance away from the Returning Officer and saw the Returning Officer opening the envelopes where he did not see any sealing wax on them, and he even said that he saw results coming in open envelopes and these documents that came were computerized documents. The witness said that when the Returning Officer received the results he read the results to them, initialled them, and then announced the results over the microphone. He said the room supposed to be the computer room was a few feet away and he could not see what was happening inside the room since only the officers coming under the control of the Returning Officer had access to this room. The witness further said that he and M. S. Amarasiri placed their signatures on the document that was submitted to them by the Returning Officer indicating that

they were satisfied with the results. In the course of his evidence the witness stated that he saw Tiranagama and Wimalaratne at the gate as they were not allowed to stay inside and that they stayed for about five minutes and moved out. In cross examination also the witness said that he left the Returning Officer's room after signing the document to say that he was satisfied with the counting of the results.

Pushpa Kumara gave evidence and stated that he was a counting agent for the U.N.P. at the Balapitiya counting centre No. 4 in the said election and stated that when the preferences of the U.N.P. were counted and when the numbers were read out for recording the results they were entered in favour of the wrong candidates and he noticed 15 or 20 such mistakes taking place, and further that when he complained about them to the officers they got angry. In cross examination the witness said that when these mistakes took place some were corrected but not all and said that when he complained to the officer concerned, they did not record his complaint. When the witness was asked whether he made a note of these mistakes, he said there was no paper to record it, and further that he was not aware that the counting officers were maintaining a journal. He also admitted that in the affidavit filed by him he did not state that there were 15 mistakes done by the officers.

When the case for the Petitioners was closed the learned counsel for the 25th and 26th Respondents led the evidence of witness Hewawasam and Leelaratne. Hewawasam gave evidence and stated that he functioned as the Returning Officer Galle District in the said election and as the Returning Officer he was asked to receive nominations and then on the instructions of the Commissioner of Elections, he conducted the election. He said he detailed about 5000 public servants for the election, after giving them written and oral instructions according to their grades. He stated that he had given instructions to the chief counting officers that when results were ready to send the original and a duplicate of the results to him, to give one copy to the agent and to display another copy on the notice board of the counting centre. He said in the Galle District there were 62 counting centres and 7 postal ballot counting centres; and the results from these centres came in sealed packets which contained the result sheet and a duplicate. The witness stated that at the time the counting took place there were several assistant Returning Officers in his room and there

were 30 officers attending to the processing of the results. He said the results processing room was the adjoining room which was separated by a door, and in his room apart from officers assisting him there were two agents from each political party and said that he remembered Laxman Ranasighe, M. S. Amarasiri, Richard Pathirana, and Wijesinghe. He stated that when the results came he noted the time of arrival, and opened the packets in front of the agents and announced what was in the result sheet for agents to know and passed the original to the processing room and the duplicate to the computer room, which was down stairs. He said results were processed manually on the instructions of the Commissioner of Elections and the duplicate results sheet was sent to the computer room for the purpose of analyzing and finding out whether there were any mistakes before final results were given out. He stated that on the day of elections nobody complained to him with regard to the manner in which the election was conducted and the counting was done. He further said that before announcing the party results he got the agents to sign the statement, which was marked in the case as R1 and that they signed it as they were satisfied with the results. He said the results of the preferential vote also came in sealed packets and that he adopted the same procedure that he adopted in regard to party votes before announcing the results. His position was that no one objected to the procedure that was adopted and that if any objection was taken he would have recorded it in the journal or any person taking such objection would have written it in the journal which he had officially maintained for such purpose. This witness produced the preferential summary of the Balapitiya counting centre No. 1 and centre No. 4 marked R2 and R3 where the counting agents of the U.N.P. had signed them. In cross examination the witness admitted that the adding and processing of results were done in the adjoining room and said that before announcing the results he compared the manually added results with the computer added results and if they tallied only, he announced them. He said that the computer processing was an additional safeguard and that the computer room was situated down stairs and that was actually the Kachcheri computer room. This witness in detail explained the manner of preparing the tally sheets, the 1st summary and the second summary. He marked the 1st summary as R5, R6 1, R7 1 & R8 1 and the connected Tally Sheets as R5(A) to R5(T), R6(2) to R6(21), R7(2) to R7(21) and R8(2) to R8 (15). All these documents he said related to the counting centre No. 1 Balapitiya. He

further said that if the result sheets were not brought in sealed packets it was possible to raise objections regard to the matter and his position was that the result sheets were brought in sealed packets.

Witness Leelaratne in his evidence stated that he served as the Chief counting officer in the counting centre No. 4 of the Balapitiya electorate, and when the U.N.P. preferences were counted the U.N.P. counting agents were present and that at the time no one complained or objected to the manner of counting. He also said that when the second summary marked as R3 was prepared, the U.N.P. counting agents signed it. His position was that if any error was made at the time of counting it was possible to make a complain to one of the Assistant Returning Officers on duty and finally to make a complaint to the Chief counting officer who would enter the complaint in the journal. He also said that according to his knowledge no counting agent by the name of Pushpa Kumara made any complaint regarding wrong recording of preferences and he rejected the suggestion that a lot of mistakes were made at the counting. Finally he said that after the count, he took the results in sealed envelopes, and the results were prepared in three copies and one copy was given to the agent and further that it was not possible for the counting officers to manipulate the results as they were cross checked.

In this case the Petitioners came to Court under section 92(1) (b) of the Provincial Councils Elections Act No. 2 of 1988. The relevant provisions read as follows:

92. (1) The election in respect of any administrative district shall be declared to be void on an election petition on the following grounds which may be proved to the satisfaction of the Election Judge, namely -

(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 materially affected the result of the election.

Therefore it becomes necessary for the Petitioner to prove to the

satisfaction of the Court that there was non-compliance with the provisions of the elections Act by the failure to conduct the election in accordance with the principles laid down in such provisions and further that such non-compliance materially affected the result of the election.

The paragraph 29 of the petition (Paragraph 30 of the affidavit) sets out the grounds for setting aside the election by stating that there was non-compliance with the provisions of the act in relation to the following matters:-

- (i) As regards to the counting of preferences at the counting centres.
- (ii) The procedure followed in the delivery of the statements by the counting officers and receiving the same by Returning Officer, and
- (iii). The method followed in feeding relevant data to the computer in the computer room without supervision and directions of the Returning Officer.

The first ground of non-compliance related to the counting of preferences. Here the main allegation was that counting officers made mistakes and errors in recording the preferences. In other words preference votes given in favour of one candidate was marked in favour of another candidate. According to witnesses this happened due to two reasons. One reason being that the counting officers were tired and sleepy and therefore they made these errors and the other reason was that most counting officers were from the Galle District and therefore with a view to favour the candidates of their choice they purposely committed these errors.

On this matter the witnesses who gave evidence were Tiranagama, Siriwardena and Puspa Kumara. According to Tiranagama, he has admitted that when mistakes made were pointed out, they were corrected. He has also taken up the position that when he complained about, these errors, his complaint was not recorded. He further said that there was a journal maintained at the counting centre and he knew that he had a right to record any objections in the journal. Further it is

seen from his evidence that there are no specific allegations of the errors made. He had said errors made were corrected when they were pointed out. This may have been the reason why he did not take steps to record his complaint. In addition when one examines the affidavit filed by him marked P5, he has not made any allegation regard to any error being committed at the counting centre. If the position taken up by this witness in Court was true one cannot understand why he omitted to refer to it in the affidavit and further it was one of the grounds on which he came to Court. Therefore this omission creates a doubt with regard to the truth of this allegation.

The evidence of Siriwardena on this matter related to the 768 votes obtained in his favour, being entered in favour of the candidate No. 9. However he admitted that this error was rectified after it was pointed out. His position was that on several occasions he had to point out various errors and therefore he thought similar errors could have taken place. However it is to be seen that according to his evidence when the final summary was prepared by the counting officers he signed it as one of the counting agents of the U.N.P. This shows that he was satisfied with the counting, otherwise he could very well have protested and refused to sign it. Further this witness has taken up the position that errors were committed by counting officers due to two reasons. First reason was that the counting officers were sleepy and tired. The second reason was that most of the counting officers were from Galle district and therefore they were favouring the candidates of their choice. This is indeed a very serious allegation to make against the counting officers. It has the effect of challenging the honesty and integrity of those officials responsible for the counting of preference votes. If that was the true position, one would have expected this allegation to be made in his affidavit in clear terms, since he filed the affidavit after the discussion he had with the defeated U.N.P. candidates. However when one examines his affidavit filed by him marked P4, it is observed that all what he has stated there with regard to this allegation and the other is in paragraph 10 of his affidavit where he states . . . " I strongly believe that many mistakes would have occurred innocently or by deliberate acts of the officers to favour candidates of their liking". Therefore it appears that what he has stated in the affidavit is only a belief he has entertained and not what has really taken place, otherwise having regard to the seriousness of the allegation made one would

have expected him to refer to it not vaguely as he has done but in very clear language. This only shows that these allegations are without substance. Further this position finds support from his failure to protest and make a complaint and his conduct of signing the final summary as a counting agent of the U.N.P.

The other witness was counting agent Pushpa Kumara, who has not stated in his affidavit filed, marked P2 that there were 15 to 20 mistakes committed and that all these mistakes were not corrected. The failure to refer to them in the affidavit filed on 15.04.94, when these facts were more fresh in his mind than when he gave evidence one year later and the failure to protest or complain and to keep a note of these mistakes in view of the fact that there were 15 to 20 mistakes which one could not remember easily has weakened the trustworthiness of his evidence.

The second ground of non compliance was the procedure followed in the delivery of the statements by the counting officers and receiving the same by the returning Officer. The main issue here is whether the statements sent under section 51(7) of the Provincial Councils Elections Act by the counting officers were delivered to the Returning Officer in sealed packets as required by section 53 (H) of the said act. On this matter witnesses Tiranagama and Siriwardena has stated that the statements were not sent and received in sealed packets. The U.N.P. legal representative Ranasinghe at first said that he could not say whether these envelopes were sealed as he did not examine them. But later said that he did not see any sealing wax on them. On this matter the evidence of Hewawasam the Returning Officer and Leelaratne the chief counting officer supports the proposition that the results came in sealed packets. Therefore what was the true position? Can the evidence of witness Tiranagama, Siriwardena and Ranasinghe be accepted, as against the evidence of Hewawasam and Leelaratne. Then the question that arises would be as counting agents why did Tiranagama and Siriwardena fail to protest and complain to the Returning Officer. According to them they said they saw Ranasinghe, the legal representative of the U.N.P. and M. S. Amarasiri, Chief minister with the Returning Officer and therefore they could have even brought it to their notice. If that was done action could have been taken under section 58 (1) (A) to inspect the seals. The latter part of section 58 (1)(A) states thus. . .

"The Returning Officer shall before he opens a sealed packet referred to in paragraph (h) of section 53 upon a request made by an agent appointed under section 56, permit such agent to inspect the seals on such packet". Further this request could have been made either by witness Ranasinghe or M. S. Amarasiri who were the two U.N.P. agents appointed under section 56 of the Provincial Council Elections Act. In respect of this matter the position earlier taken up by witness Ranasinghe was that he could not say whether these envelopes were sealed as he did not examine them and later he said he did not see any sealing wax on them. Then the question can be raised, as to why did witness Ranasinghe or M. S. Amarasiri fail to protest to the Returning Officer about this irregularity. Further they even had the right to inspect the packets to see whether there were sealed on them. Therefore is it unreasonable to assume that no such protest or inspection was done since the results came in sealed packets. Further this allegation must be considered subject to the provisions contained in section 115 of the Elections Act which states "No election held under this act shall be invalid by reason of any failure to comply with the provisions of this act 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".

The third ground of complaint related to the feeding of relevant data to the computer, without supervision and directions of the Returning Officer. It was even pointed out that the Elections Act made no provision for the processing of election results using the computer. This allegation was made on the basis that no manual processing of results was done. On this matter what was the evidence available to prove that only the computer was used to process the results and that there was no manual processing of the results. Witnesses Tiranagama and Siriwardena stated in their evidence that when the result sheets were brought, the Returning Officer did not take them but directed the officers to the computer room. They said the computer room was the adjoining room and that there was communication between the computer room and the Returning Officer. Witness Ranasinghe stated that the room supposed to be the computer room was a few feet away from him and he could not see what was happening inside the room and stated further that only the officers coming under the control of the Returning Officer had access to this room. The evidence of the Returning Officer Hewawasam was

that the results processing room was the adjoining room separated by a door and the computer room was down stairs and it was actually the Kachcheri computer room.

It is to be seen that the room referred to as the computer room by witnesses Tiranagama, Siriwardena and Ranasinghe was infact the results processing room. That was the evidene of the Returning Officer Hewawasam according to whom the computer room was down stairs. Further there was no evidence from Tiranagama, Siriwardena and Ranasinghe that they ever saw any computer in this room. They only said that they had no access to this room and further that only the officers coming under the control of the Returning Officer had access to the room. Siriwardena further said that the officers brought the results from the computer room and handed over them to the Returning Officer who announced them. Therefore it appears that the witnesses Tiranagama, Siriwardena and Ranasinghe had given evidence assuming that the adjoining room was the computer room. However there was no material placed by them before this Court even to suggest that it was in fact the computer room. On the contrary there was evidence before this Court from the Returning Officer Hewawasam that the adjoining room was the result processing room. Unfortunately witnesses Tiranagama, Siriwardena and Ranasinghe were not cross examined by the learned Counsel for the 25th and 26th Respondents suggesting to them that what they referred to as the computer room was infact the result processing room. Similarly when the Returning Officer, Hewawasam gave evidence stating that this room in question was the results processing room and the computer room was down stairs, the learned counsel for the Petitioner did not suggest to him that it was not so. Therefore it is difficult to believe the position taken up by the witnesses who gave evidence for the Petitioner and disbelieve the evidence given by the Returning Officer Hewawasam. Further it is unacceptable to state that the Returning Officer did not make arrangements to have the election results manually processed and that he decided to depend entirely on the computer for the processing of the results, when even the Elections Act had not made any provision for it. If that had happened it is very strange that no objection was taken to this procedure by the agents. On the contrary it is the evidence of witness Ranasinghe that he with M. S. Amarasiri signed the Returning Officer's statement, as they were satisfied with the election results. In

addition it was alleged that the Returning Officer had no supervision or control, over this room which the witnesses of the Petitioners had referred to as the computer room. This room was adjoining the room occupied by the Returning Officer and it was separated by a door. There was also evidence that there was communication between this room and the Returning Officer. Therefore it is not possible to accept the position that there was no supervision or control by the Returning Officer over this room. Further in regard to this matter it would be relevant to note the provisions of section 59 of the Elections Act which states as follows: "Any power, duty or function of a Returning Officer under section 58 may be exercised, performed or discharged for and on his behalf by any of his assistants or clerks acting under the supervision and direction of such officer."

In this case having regard to the various allegations made, it is very difficult to understand the conduct of the counting agents appointed under section 49 of the Elections Act who had to attend at the counting of the votes, and the agents appointed under section 56 of the said Act who had to attend at the declaration of the result. It is very clear from the evidence presented that despite various allegations made, no action was taken to protest, or take any objection, or complain in writing. Under the Elections Act there are provisions made to ensure that a proper and fair election is conducted and therefore it is important that the counting agents and the agents who attend at the declaration of result, should perform their duties diligently and with responsibility. In this case the counting agents could have protested in writing, they could have refused to sign the summary of preferences made, and also they could have even made an application for a recount. In this case it appears that none of these steps were taken by them.

Bandaranayake, J. in the case of *Weerasinghe v. Chandrananda de Silva*⁽¹⁾ referred to the role of the counting agent in the following terms. "The counting agent is not a helpless passive spectator merely gazing at ballot papers. He has a role to play; he represents the candidate contesting the election and he is there to ensure as far as possible a proper and fair election to the satisfaction of candidates. If he is dissatisfied with any matter he has a clear duty to point it out and have an objection or opinion recorded and he has the right to report the matter to a higher authority if still dissatisfied and that too recorded.

Thus there appears to be a clear duty on his part to take an objection and have it journalised if anything improper is done during the count."

Therefore it is clear that the counting agents and agents who attended at the declaration of the result failed to take any remedial action they were entitled to take under the Elections Act. Was this failure on their part due to the fact that there was no reason to complain at that stage, since what ever errors or mistakes at the recording of the results, as seen from the documents produced were corrected when pointed out, that the statements prepared under section 51(7) were sent in sealed packets and also that the processing of results were correctly and manually done. Therefore these allegations remain as mere allegations without sufficient weight to move the court to exercise its jurisdiction.

A question was raised by the learned Counsel for the Petitioner when he made submissions in regard to the effect of the objections tendered by the 26th Respondent. He submitted that in the affidavit filed by the 26th Respondent, he has admitted paragraphs 29 and 30 of the affidavit filed by the Petitioners. He submitted that they are the key paragraphs of the petition namely paragraphs 28 and 30. He therefore submitted that these paragraphs in the affidavit have not been answered and that they are admissions within the meaning of section 58 of the Evidence Ordinance and thus the 26th Respondent is estopped or that he cannot be allowed at a later stage to repudiate these admissions. In support of this submission he cited several authorities. However a close examination of the affidavit filed by the 26th Respondent reveals that the admissions in paragraphs 29 and 30 of the affidavit have been due to an oversight or due to inadvertence since in the contents of the affidavit, the 26th Respondent has taken up the position that the provisions of the Provincial Councils Elections Act No. 2 of 1988 were complied with in conducting the election. It is observed that in paragraphs 8, 19, and 24 of the affidavit filed by the Petitioners, they alleged that the said election was not conducted in accordance with the principles laid down in the Provincial Councils Elections Act No. 2 of 1988, that the counting officers did not carry out a proper count in most counting centres and instead arbitrary figures were inserted and further that the statements prepared by the counting officers in accordance with section 51(7) were not delivered in sealed