

1950

Present : Nagalingam J.

DON AMARASEKERA, Petitioner, and RASIAH, Respondent

*S. C.—96 Application for a Writ of Mandamus on E. Rasiah**Local Option Rules—Rule 21—Manner in which ballot paper should be marked—Construction of words “ in the space provided ”.*

Where a poll is held for the closure of taverns, a cross made on the reverse side of the ballot paper and not on the face of it cannot be held to comply with Rule 21 of the Local Option Rules. A ballot paper marked in this manner will, therefore, be rejected, although in the ballot paper itself there is a direction to the voter to mark the cross “ below ”.

APPPLICATION for a writ of *mandamus* in respect of a poll for the closure of a tavern.

L. G. Weeramantry, for the petitioner.

Cur. adv. vult.

June 1, 1950. NAGALINGAM J.—

The question for determination in this case is whether the Presiding Officer was correct in rejecting certain ballot papers which were marked with a cross not on the face of the ballot paper but on its reverse. It has been contended that it is immaterial where the mark appears on the ballot paper so long as the intention of the voter can be gathered from the mark put by him. This contention is advanced based on dicta of English Judges in relation to Parliamentary and Municipal elections. In fact, assistance was even sought by calling to aid a decision of this Court in regard to Parliamentary Elections. I imagine, however, that the correct approach to a decision of the question is to look at the provisions of our law and construe those provisions, and if those provisions are plain, I do not think there is any necessity to have recourse to English or other precedents, unless the identical language of our law has been the foundation for the views expressed in other cases.

The provision of the law that needs to be construed is Rule 21 of the Local Option Rules¹. This Rule prescribes the manner in which the

¹ 1938, Vol. 1, Sub. Leg. 309.

voter should record his vote and requires the voter in a case where a poll is held for the closure of taverns to make a cross "in the space provided" in the ballot paper if he wishes to vote for the closure and then fold the paper and place it in the ballot box. It will be seen that the Rule requires the cross mark to be placed "in the space provided". The form of the ballot paper itself is to be found at the end of the Rules and on the ballot paper there is a direction to the voter as to what he should do in slightly different words and it runs as follows: "If you wish to vote for closure, mark a cross *below*." The words in the Rule, "In the space provided" have been substituted by the word "below", in the direction contained in the ballot paper.

It has been argued that the direction to make the cross mark *below* means not only in the space that appears below the cage carrying the instruction in the three languages but also extends to the reverse of the ballot paper, which could also be regarded as a continuation of the space designated "below". First of all, if one has to construe the words, "in the space provided" to be found in the Rule itself no argument would be possible that any place outside the space provided can be regarded as the space wherein the mark is to be made. In other words, it cannot be contended that where the mark appears outside the space provided it is a sufficient compliance with the requirements of the Rule. But then, can it be said that merely because in the ballot paper itself the words "in the space provided" have been substituted by the word "below" a different construction is to be placed in regard to the direction contained in the ballot paper itself? I do not think so. The directions are in reference to the actual ballot paper itself, and we find that the ballot paper contains a space completely enclosed by four lines immediately under the instructions, so that in reference to the ballot paper the term "below" can only mean the space below the printed instructions and enclosed by four lines. I do not think that the word "below" can in the present context at any rate be regarded as having any meaning other than that it is the direct opposite of the term "above", not the opposite of the term "obverse" or "the face". It is true, however, that where persons are called upon to affix their signatures below some legend written on the top of a sheet of paper and where the entire space below is exhausted by a certain number of the signatures, the remaining signatures may happen to be carried on to the reverse of the sheet. But this is an instance where convenience dictates that the signature should be placed on the reverse rather than that it is in compliance with the requirement that the signature should be placed below. But on the other hand I do not think it can be seriously argued that where the whole space below the legend remains blank and the first signature is placed on the reverse of the document that the signature so placed or any other subsequent signatures can be said to have been placed below the writing on the paper.

In any event, in construing a statute one cannot take liberties by assigning to a word a loose practice or vague idea that may be entertained by lay people in regard to it. Counsel has not been able to cite either a definition or an authority where the term "below" has been held to include in a context such as this the reverse or the back of a sheet of

paper. It is necessary to bear in mind that the form given of the ballot paper does not form part of the substantive provision of the law, and it is the substantive provision, namely, Rule 21, that should be looked at in order to determine whether the ballot paper is properly marked or not. The Rules themselves have the same force of law as fully as if they had been enacted in the Ordinance. See section 14 (1) (d) (iii) of the Interpretation Ordinance. There can be little doubt that the reverse of the ballot paper can in no sense be regarded as the "space provided" for the placing of the mark as required by the Rule.

The Rule further says, "Ballot papers which do not comply with this Rule shall not be considered in recording the votes." The only question that the Presiding Officer had to determine was whether the ballot paper had been marked as required by the Rule. From what has been said already, it will be manifest that a cross made on the reverse of the ballot paper cannot be held to be a cross placed in the "space provided" on the face of the ballot paper and therefore obviously a ballot paper marked on the reverse cannot be held to comply with the Rule. The ballot paper, therefore, so far as the obverse of it is concerned, is one on which there is no mark, and therefore would properly be entitled to be counted as a vote recorded against the closure. The Presiding Officer was therefore right in not counting the ballot papers which had no mark in the face of them but marks on the reverse and treating them as non-effective votes in the closure of the taverns. This disposes of the application.

I should like, however, to say a word or two in regard to the English authorities cited. Counsel relied very strongly upon a passage in Baker¹ which runs as follows:—

The form of directions which is placarded in the polling station directs the voter to "place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus, x."

Counsel also referred to various instances given therein at pages 372 to 378, where ballot papers containing various types of markings were all held to be good, for instance, where instead of one cross mark two cross marks had been placed and where in addition to a cross mark another x had been rubbed with a damp finger or where one cross mark appears in the space opposite the name while another appears outside the space or where the mark is placed on the left of the name or where the mark consists of a straight line or a *. It certainly would appear to be preposterous that a cross placed on the left of the printed name of the candidate should be regarded as a sufficient compliance with the requirement that the mark should be placed on the right side of the name, but the Judges decided nothing so preposterous. It is only necessary to quote the language of the judgment in the case of *Woodward v. Sarsons*² where Lord Coleridge C.J. said:—

"by s. 28, 'the schedules and the notes thereto and directions therein shall be construed³ and have effect as part of this Act.' The

¹ *Law of Parliamentary Elections, 1940 ed., p. 368.* ² (1875) L. R. 10, C. P. 746.

rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing 'directions'. Comparing the sections and the rules, it will be seen that for the most part, if not invariably, the rules point out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states that 'the forms contained in this schedule, or forms as nearly resembling the same as circumstances will admit shall be used'. And on the ballot paper, as given in the schedule, is, 'Directions as to printing ballot paper', and 'Form of directions for the guidance of voters in voting', &c. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second, are directory enactments, as distinguished from absolute enactments in the sections in the body of the Act the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. The 2nd section enacts, as to what the voter shall do, that 'the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in an inclosed box'. This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is that the voter shall mark his paper *secretly*. How he shall mark it, is in the directory part of the Statute."

In the light of these observations, it is quite clear that the passage cited from Baker has reference to *what was held to be the directory part* of the enactment and not to the absolute; and hence what the Judges did in those cases was to find out what the intention of the voter was.

The English Law on the point is correctly summarized in section 49 of the Ceylon Parliamentary Elections Order in Council, 1946; which says in sub-section 2 thereof:

"Where the returning officer is satisfied that any mark made on a ballot paper clearly indicates the intention of the voter and the candidate for whom he gives his vote, the returning officer shall not reject the ballot paper on the ground solely that it has not been marked in all respects in accordance with the directions given for the guidance of voters under this Order."

An instance of the application of the English principle and of this provision is to be found in the case of *Kuruppu v. Hettiarachchi et al.*¹.

It will thus be seen that while under the English Law of Parliamentary Elections the directions have been held not to have the same effect as absolute law, and while under our Parliamentary Elections Order-in-Council non-compliance with directions is expressly regarded as being not sufficient ground upon which to reject the votes, under the Local Option Rules which, as observed earlier, have the force of law, non-compliance with the Rule in regard to the marking of the ballot paper is especially declared to be a ground for rejecting the vote. The view

¹ *Election Petition No. 6 of 1947 (Nivittigala) 49 N. L. R. 320.*

expressed by Lord Coleridge C.J. in regard to the directory character of the Act would apply to the form of the ballot paper as given in the Local Option Rules, but no further.

I therefore refuse notice and dismiss the application.

Application dismissed.

