1967 *Present:* G. P. A. Silva, J.

E. S. PEIRIS and another, Petitioners, *and* W. P. SAMARAWEERA, Respondent

Election Petition No. 1 of 1967—Welimada (Electoral District No. 126)

Election petition—Disqualification of candidate who polled the largest number of votes—Notoriety of such disqualification—Prayer for declaration that the candidate who polled the second largest number of votes was duly elected—Ground or grounds relied on must be specified—Votes given to a disqualified candidate—Whether they can be regarded as not given at all—Votes can be struck off only at a scrutiny—Ceylon (Constitution) Order in Council, s. 13 (3) (f)—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), Rule 4 (1) (b) of Schedule III, ss. 80 (a) to (d), 85 (a) to (f), 86 (2).

The petitioners sought a declaration that the respondent's election as a Member of Parliament was void on the ground that he was, by virtue of section 13 (3) (*f*) of the Ceylon (Constitution) Order in Council, disqualified for election

because, during the period of seven years immediately preceding the election, he had completed the serving of a sentence of imprisonment of more than three months for an offence punishable for a term exceeding twelve months. The fact of this disqualification could not be denied by the respondent in view of the result of another election petition filed against him previously after the General Election held in March, 1965. It was therefore inevitable that the present election petition too had to succeed. The petitioners, however, sought a further declaration, namely, that one Jamis Silva, who was one of the three candidates at the election and who polled the second largest number of votes, was duly elected as a member of the House of Representatives. It was contended on their behalf that a scrutiny of votes was not necessary because the fact of the disqualification of the respondent was so notorious prior to the election that every vote cast in favour of the respondent must, according to the English law applicable in such a case under section 86 (2) of the Ceylon (Parliamentary Elections) Order in Council, be deemed to have been thrown away and not given at all.

Held, (i) that the prayer for the declaration that the candidate who polled the second largest number of votes was duly elected could not be granted because the ground or grounds relied on to sustain the prayer were not specified in the election petition in compliance with the provisions of Rule 4 (1) (*b*) of the Third Schedule to the Ceylon (Parliamentary Elections) Order in Council.

(ii) that in our law, a declaration of a defeated candidate as being duly elected can only be obtained from a court on the ground that he had a majority of lawful votes; this result can be achieved only after a scrutiny at which certain votes cast in favour of the successful candidate have been struck off in one or more of the ways set out in (*a*) to (*f*) of section 85 of the Parliamentary Elections Order in Council. Such scrutiny is therefore imperative whenever the relief set out in section 80 (c) of the Parliamentary Elections Order in Council is claimed on the ground of voters having cast their votes for a candidate whose disqualification was notorious.

ELECTION petition No. 1 of 1967—Welimada (Electoral District No. 126).

D. T. P. Rajapakse, with *W. George Perera*, for the petitioners.

M. Izadeen Mohamed, with *H. D. Thambiah*, for the respondent.

H. L. de Silva, Crown Counsel, for the Attorney-General, on notice.

Cur. adv. vult.

October 6, 1967. SILVA, J.—

The petitioners in this case challenge the election of the respondent, Wemullawatte Percy Samaraweera, to the Welimada seat in the House of Representatives. The said election at which two other candidates

Kanakka Hewage Jamis Silva and Ratnayake Punchibanda, contested the respondent, took place on the 11th of February, 1967, consequent on the respondent's election as a member of the House of Repr. sentatives at the General Election held in March, 1965 being declared void by an Election Court. The ground on which such declaration was made was that the respondent was, by virtue of Section 13 (3) of the Ceylon (Constitution) Order in Council (which I shall hereafter refer to as the Order), disqualified for election because, during the period of seven years immediately preceding the election he had completed the serving of a sentence of impr sonment of more than three months for an offence punishable for a term exceeding twelve months. Despite this finding by an Election Court being affirmed by the Supreme Court on appeal on the 5th November, 1966, the respondent contested the consequent by-election held three months later although the serving of the sentence referred to was completed on the 7th October, 1960, well within the seven years immediately preceding the said by-election The evidence led by the petitioner to prove the fact of the conviction of the respondent, the offences in respect of which he was convicted and the dates of commitment to and release from prison were not in dispute. Nor was the legal position that the conviction resulted in a disqualification of the respondent from being elected a member of the House of Representatives, in terms of Section 13 (3) (*f*) of the Order, seriously contested. Apart from the submission by the respondent's counsel that the dissenting judgment of Sirimane, J. in the case of *Samaraweera v. Jayawardena*[1] was the more correct view, no effort was made by counsel to canvass this judgment. It being common ground therefore that the respondent in the instant case is the same person in respect of whom that decision was reached by the Supreme Court on appeal, as the period of disqualification contemplated by the Order-in-Council still continues to run against the respondent, the first allegation in the petition that the respondent was, at the time of the election, a person disqualified for election as a member of the House of Representatives must succeed.

Counsel for the petitioner informed this court at an early stage that he was not pursuing the other grounds set out in the petition and it is not necessary for me to deal with them.

The issue that is contested very strongly by counsel on both sides is that which relates to the prayer (*b*), namely, that it might be determined that Kananke Hewage Jamis Silva, the candidate who polled the second largest number of votes at the election, was duly elected as a member of the House of Representatives. Counsel for the respondent in the first instance raises the objection that on the grounds contained in the petition as presented this prayer does not arise and that it is improper, irregular and cannot be considered. Rule 4 (1) (*b*) of the Third Schedule to the Order provides that an election petition shall state *inter alia* the facts and grounds relied on to sustain the prayer. An examination of the petition filed in this case shows that it does not state such grounds

[1] *(1966) 69 N. L. R 241.*

so far as the prayer (*b*) is concerned. There can conceivably be one of two grounds on which this prayer can be sustained by any petitioner. The first is that the candidate whose return as a member is asked for had a majority of lawful votes and the second is that every single vote cast in favour of a respondent must be deemed to have been cast away. The defences that would be open to the respondent to these two situations would indeed be different. Among other things it is possible for any respondent in those circumstances to point out to court on a scrutiny that the candidate, whose return is sought on the ground of having a lawful majority, also obtained some votes which were unlawful and that the number of votes he himself polled would be diminished thereby. If on the other hand the return of another candidate is sought on the ground that the fact of the disqualification was so notorious that every single vote cast on behalf of the respondent must be deemed to have been thrown away, the defence may well be that such disqualification was not so well known in the electorate as to result in every single vote being considered as cast away. These defences are so different in character. The main reason for the requirement in Rule 4 (1) (*b*) is that a respondent should have notice of the grounds for sustaining the prayer which would always be against him in order that he may put forward and prepare his defences. If there is no proper compliance with this provision the respondent is not obliged to ask for such grounds and assist the petitioner to present a proper petition duly complying with the rules. He is entitled to say that the prayer or any part of it, as in the instant case, cannot be sustained in the absence of proper grounds. The contention of counsel for the respondent in this regard is therefore sound.

The second argument of counsel for the respondent is that the only ground on which this prayer can succeed is that the said Jamis Silva had a majority of lawful votes and that the only manner in which the question whether a particular candidate had a majority of lawful votes can be determined is by means of a scrutiny and that the petitioner should in a case of this nature claim this relief. His further argument is that, not having claimed the relief of a scrutiny, the petitioner cannot succeed in his prayer (*b*) which can only be achieved through a scrutiny of the ballot papers. Having regard to the provisions of Sections 80 (*d*) and 85 of the Order, it appears to me that there is force in this contention.

The answer of counsel for the petitioner is that his prayer (*b*) is not grounded on the existence of a majority of lawful votes. His contention is that the fact of the disqualification of the respondent being so notorious, every vote cast in favour of the respondent must be deemed to have been cast away. He therefore submits that the question of a scrutiny of those votes does not arise and that it is open to the court to declare the candidate who polled the next highest number of votes as being duly elected. He relies for his argument on English Law and cites Halsbury's Laws of England (3rd Edition) Volume 14 at page 305 where it is stated :— "Votes given for a candidate who is disqualified may in certain circumstances be regarded as not given at all or thrown away and for so deciding a scrutiny is not necessary". Counsel's contention is that this is a

situation which is not provided for in our law and that the procedure and practice followed in England on the same matter can be followed by our courts in terms of Section 86 of the Order.

I shall now proceed to examine these two arguments in relation to the Order-in-Council. For this purpose it is necessary to consider the provisions of Sections 80 and 85 of the Order together as the later section deals specially and only with one aspect of relief referred to in the earlier section, namely, the scrutiny referred to in Section 80 (*d*). The contention of counsel for the petitioner is that he is relying not on Section 80 (*d*) but on Section 80 (*c*) for the declaration he seeks on the ground hat the disqualification of the respondent is a disqualification *ab initio*, that is to say, a disqualification that existed prior to the election, which disqualification was so notorious that every vote for him must be considered as cast away. In his submission, Section 80 (*c*) is applicable to various instances when a court can declare as duly elected a candidate other than the one who was declared by the returning officer to have been elected after the counting of votes while Section 80 (*d*) deals with only that species of cases where a declaration of court is sought for a candidate on the ground that he had a majority of lawful votes and further that the question of a scrutiny arises only in such cases. If Section 80 is considered in isolation this construction is one which appears reasonable. Crown Counsel, however, for whose assistance in this matter I am deeply obliged, has invited me to consider the provisions of Section 85 which has an important bearing on this aspect. When one considers Section 80 along with Section 85 with which, in my view, it is inextricably interwoven, the construction contended for by counsel for the petitioner would not seem justified. If the argument of counsel is correct and Section 80 (*c*) refers to a declaration of a defeated candidate as duly elected on the ground that, consequent on the notoriety of the disqualification, all the votes cast for the winning candidate are considered to have been cast away, the question of a scrutiny will not arise at all. This is indeed the reasoning behind the principle applicable in England as revealed in the citation from Halsbury referred to earlier. An examination of Section 85 (*f*) however shows that any votes cast for a candidate can be struck off only after a scrutiny even if the ground for striking them off is that the disqualification or the facts causing it were notorious. To my mind this is a definite departure of our law from the law in England relative to this matter where a scrutiny is inappropriate in similar circumstances. It follows as a necessary corollary that the concept of votes given to a disqualified candidate being considered as cast away or not given at all is not recognised in our law. In that view of the matter which I am inclined to take, I would not consider the situation arising in this case as a question of procedure or practice which is not provided for by the Order and in respect of which we can have recourse to the procedure or practice followed in England in terms of the provisions of Section 86 (2). In the result I hold that the petitioners can obtain their prayer (*b*) only through the procedure of a scrutiny which should also have formed part of their

prayer. These reasons also compel me to give to the words of Section 80 (*d*) a meaning different from the one which I was invited by the counsel for the petitioners to consider and which at first sight did seem reasonable. I think these words are partly in amplification of the circumstances in which a declaration under Section 80 (*c*) can be asked by way of relief, namely that the candidate on whose behalf the declaration is sought had a majority of lawful votes, and partly an expression of the necessity to claim the relief of a scrutiny in such circumstances. There is a further consideration that persuades me to this view. This section, as confirmed by the side note, prescribes the relief that may be claimed by an election petition. It is to be observed however that, as a relief, (*a*), (*b*), and (*c*) on the one hand are different in character from (*d*). While (*a*), (*b*) and (*c*) each consists of a definite relief by itself either in having a person who should not have been elected unseated or securing a seat for an unsuccessful candidate, the relief set out in (*d*), namely a scrutiny, does not by itself afford any actual re' f but only serves as a means to that end, that end being the relief contemplated in (*c*) alone ; for it has no relevancy to the reliefs contemplated in (*a*) or (*b*). I am also fortified in this view, even though in a very small measure, by the position of (*d*) which immediately follows the relief contemplated in (*c*), thus indicating a possible explanatory relation between the two. When I consider the two Sections 80 and 85 of the Order in association, therefore, for the purpose of deciding the present question, I cannot escape the conclusion that in our law a declaration of a defeated candidate as being duly elected can only be obtained from a court on the ground that he had a majority of lawful votes and that this resu't can be achieved only after a scrutiny at which certain votes cast in favour of the successful candidate may be struck off in one or more of the ways set out in (*a*) to (*f*) of Section 85. I am therefore of the view that, far from a fai!ure to provide in our law for the situation which seems to obtain in England, of votes cast in favour of a disqualified candidate having to be regarded as thrown away or not given at all when the disqualification is so notorious, a provision has been included on purpose requiring as a *sine qua non* a scrutiny whenever the relief set out in Section 80 (*c*) is claimed on the ground of voters having cast their votes for a disqualified candidate whose disqualification or the facts causing it were notorious.

For the above reasons, both the objections of counsel for the respondent in regard to the prayer (*b*) are entitled to succeed.

In accordance with the findings I have reached I declare the election of the respondent Wemullawatte Percy Samaraweera to the Welimada seat void. The prayer for a declaration that Kanakke Hewage Jamis Silva was duly elected to the Welimada seat is refused. The petitioners are entitled to their taxed costs.

Election declared void.