1953 *Present:* **Nagalingam A.C.J., Pulle J. and K. D. de Silva J.**

J. C. W. MUNASINGHE, Appellant, *and* S. C. S. COREA, Respondent

ELECTION PETITION APPEAL

Election Petition No. 11 of 1952 (Chilaw)

Election Petition—Impersonated and tendered votes—Scrutiny—Addition of tendered votes—Striking out of corresponding impersonated votes necessary first—"Particular elector"—Missing ballot papers—Absence of evidence as to how they were lost—Non-compliance with the provisions of the Order in Council relating to elections—Effect on validity of election—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 45, 49, 51 (1), 77 (b), 85 (1) (c) and (3).

Sub-paragraph (c) of paragraph (1) of section 85 of the Parliamentary Elections Order in Council of 1946 should be construed as the complement of paragraph (3) of the same section. On a scrutiny, therefore, at the trial of an election petition, the election judge is not entitled to add a tendered vote unless he is in a position to strike out the corresponding impersonated vote.

Before a person can be issued a tendered ballot paper under section 45 of the Order in Council, that person must show that he is "a particular elector named in the register". Where there are two or more voters with identical names in the register and the address given is not distinctive enough to identify any one of such voters with one or other of the entries, it is not possible for any one of them to prove that he is a "particular elector" within the meaning of the section.

Where certain ballot papers that had been issued are found missing and there is no evidence as to how they were lost, it is not possible to attribute to any officer charged with the conduct of elections non-compliance with the provisions of the Order in Council within the meaning of section 77 (*b*).

Thirty-two out of 26,054 ballot papers that had been issued were not taken into account in counting the votes cast in favour of any of the candidates, the Returning Officer having rejected them in terms of section 49 as they were not stamped or perforated with the official mark. The failure to perforate was due to the omission on the part of the election officers, but the omission was not due to any deliberate fraud or dishonesty on their part. The successful candidate defeated the runner-up by a majority of eight votes only.

Held, that the omission of the officers entrusted with the conduct of the election to perforate duly the 32 ballot papers was not a non-compliance with the provisions of the Parliamentary Elections Order in Council within the meaning of section 77 (*b*). To invalidate an election under section 77 (*b*), there should be a violation of the *principles* underlying the conduct of the election; the non-compliance should be of such degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice. The fact that out of 26,054 ballot papers, only 32 had no perforations, was the most satisfying proof that the election had been conducted in accordance with the principles laid down in that behalf in the provisions of the Order in Council. To ascertain whether or not the election was conducted in accordance with the principles laid down in the Order in Council it was entirely unjustifiable to take into consideration whether the number of ballot papers unperforated was greater than the majority by which the successful candidate was declared duly elected.

2——J. N. B 32805–1,592 (1/54)

APPEAL from the order of the Election Judge in Chilaw Election Petition No. 11 of 1952.

S. J. V. Chelvanayakam, Q.C., with *A. C. Nadarajah, S. Thangarajah, C. V. Munasinghe* and *A. Mututantri*, for the petitioner appellant.

S. Nadesan, with *A. H. C. de Silva, A. B. Perera, G. T. Samarawickreme* and *A. K. Premadasa*, for the respondent.

Cur. adv. vult.

December 18, 1953. NAGALINGAM A.C.J.—

Upon an election petition presented by the appellant who was himself one of the candidates seeking election, the appellant sought to have the respondent unseated upon various grounds, two of which only need be noticed for the purposes of this appeal, firstly that there had been a non-compliance with the provisions relating to elections of the Order-in-Council within the meaning of section 77 (*b*) thereof, secondly that the return of the respondent was undue. I think it would be more convenient to take up the second ground first.

The learned Judge after scrutiny reduced the majority of the respondent over the petitioner from fifty-four to eight. That majority was arrived at on a hypothetical basis, namely, that every vote which the learned Judge held had been impersonated and every tendered vote which he regarded as a valid vote were assumed to have been cast against the respondent without making an inspection however to ascertain how the voting on those ballot papers went.

On behalf of the appellant, although objections were raised in appeal to several other cases of of impersonations which had not been upheld by the Election Judge, ultimately the argument was confined to eleven cases. In each of these eleven cases there were at least two voters bearing identical names and who had been registered as electors entitled to vote at one and the same polling booth. It is common ground that in these cases two or more persons had voted under those identical names and so completely exhausted the votes of all such persons. To take one case, the register of voters entitled to vote at a particular polling booth contained the name of Weerasinghe Mudiyanselage Menikhamy twice over. Two persons each of whom claimed to be Weerasinghe Mudiyanselage Menikhamy had appeared at the polling booth, obtained ballot papers and cast their votes; their names had been ticked off on the register, showing that the two voters bearing the name of Weerasinghe Mudiyanselage Menikhamy had been issued ballot papers. Thereafter a person claiming to be one of the voters registered under the name of Weerasinghe Mudiyanselage Menikhamy, whom I shall hereinafter refer to as the third Menikhamy, appeared before the Presiding Officer and claimed a ballot paper. The Presiding Officer having ascertained that two Menikhamys had already voted in that name took proceedings to have a declaration signed by the third Menikhamy and then issued to him a tendered ballot paper.

At the election inquiry the third Menikhamy appeared and gave evidence to the effect that he bore the name of Weerasinghe Mudiyanselage Menikhamy and that he lived at Maiyawa, that he went to vote but that he was told that some other person had already been issued a ballot paper, that thereupon he signed a declaration which contained a reference to the number on the register, which had been arbitrarily placed by the Presiding Officer, and that thereafter he voted on a tendered ballot paper.

Counsel for the petitioner contends that as the learned Election Judge has held that the third Menikhamy who appeared before him is one of the two voters registered under that name the finding of the learned Judge amounted to a declaration that the tendered vote on which the third Menikhamy had voted was a valid vote and that it had to be added to the poll in terms of paragraph (3) of section 85 of the Order-in-Council. It is conceded, however, by the petitioner's counsel that the Judge could not possibly have struck out the impersonated vote in terms of sub-paragraph (*c*) of paragraph (1) of the same section, for he admits it is not possible to identify which of the two persons who had earlier voted under the name of Weerasinghe Mudiyanselage Menikhamy had in fact impersonated the third Menikhamy. The view the learned Judge took, however, was that before he could add a tendered vote he must be in a position to strike out the corresponding impersonated vote. Mr. Chelvanayakam, however, submits that the addition of a tendered vote to the poll is not dependent upon striking out any or an alleged corresponding impersonated vote.

The true solution to this problem is to be found in section 45 of the Order-in-Council which prescribes the limitations subject to which a tendered ballot paper could be issued to a voter. The section expressly enacts that before a person could be issued a tendered ballot paper that person must represent himself to be "*a particular elector named in the register*". Mr. Chelvanayakam would read these words as meaning "a voter whose name appears on the register". I think to attach such a meaning to the words is not to give full effect to each and every one of the words used in the phrase. What is the significance of using the qualifying epithet "particular" in regard to the elector? If no special meaning is to be attached then that word may have been omitted and the section could have merely referred to a person representing himself to be a person whose name appears in the register. But that does not appear to have been the intention, for some meaning has to be given to the term "particular elector". The meaning to be attached to it becomes plain if one takes the generality of cases where the name of an elector in a city or town is placed on the register. Not only would the name of the elector appear but also his address, the address giving reference to the street and assessment or rating number assigned to the dwelling house of the voter. If there were two voters having the same name, if one excepts the very exceptional case of two persons bearing identical names living at the same premises, their separate addresses will determine whether he is the one voter or the other though the names of the two be the same. Even in the exceptional case referred to, if father and son bore the same name, then it may be possible to identify the

earlier entry as that relating to the father and the latter as that of the son, if there is evidence that the names were given in that order at the time of the compilation of the registers. Now, if one of the two persons or both bearing the identical names but having different addresses had been impersonated, it would be possible on the real voter appearing at the polling booth and giving his address, and if that address tallied with one of the addresses given in the register, then to conclude that it was the elector whose name was registered at that address that had been impersonated. In such a case, there cannot be the least difficulty in the case of the voter who had been impersonated, from establishing that he was the particular elector named in the register and bearing a particular number who had been impersonated. The number itself, there can be little doubt, is assigned to the name for the sake of convenience and to facilitate reference to the particular voter, but nevertheless when once a number has been assigned to an entry relating to a particular elector, the number, to all intents and purposes, becomes a special or distinguishing mark of the particular elector whose name has been registered against that number, and one might almost say that the number is a compendious description of the name and residence of the particular elector.

It is to be observed in this connection that the mode of identification of the voter to whom a ballot paper has been issued with the voter whose name has been placed on the register is by means of the number, for it is the number alone that is marked on the counterfoil of the ballot paper that is issued. It is manifest therefore that although two or more names may be identical, where the addresses are different the identification of any particular entry as that relating to a particular elector is simple enough. Of course, the difficulty that has arisen in all the eleven cases that have been challenged arises from the circumstance that the addresses are not in themselves distinctive and are devoid of any special feature enabling the identification of one entry in the register as that relating to one elector and the other entry as that of the other elector. The reason for this is that the voters all hail from the same village where there are neither street names nor assessment or other numbers assigned to the houses, and therefore the address is merely that of the village and that address applies equally to all the persons bearing identical names and living in that village. But does it follow from this that the mere circumstance that a perusal of the register does not enable one to identify any particular entry as that relating to any one of several persons bearing the identical name, even when section 45 requires that a person claiming to have been impersonated should expressly represent himself to be a *particular elector*, that the provision is not to apply to him solely because it is not possible to identify him with any one of the several identical names on the register?

Mr. Chelvanayakam contended that because of this difficulty and what is more, according to him, it would not even be possible in view of the manner in which the registers are prepared to show which of several individuals bearing the same name and having a colourless address (so far as they are collectively concerned) had his name registered against a particular number, that section 45 should be so construed as to give

it what he called a workable interpretation so that it should only be regarded as incumbent on a voter in such circumstances to prove that he is a voter whose name appears on the register without being called upon at the same time to establish his identity with a particular entry in the register. I do not think a statute which is perfectly plain and clear in regard to its language should receive a mutilated interpretation for the reason that in a particular case the ordinary meaning of the language places a party at a disadvantage as the nature of proof required of relevant facts under the meaning so placed becomes difficult or even impossible in the circumstances.

It is true that by so holding impersonation of one or more voters who bear the same name cannot be righted although it may be obvious that the true voters have not voted ; it is said further it will open the door wide to fraudulent impersonations because such impersonations cannot be remedied thereafter. That, no doubt, is a serious consequence that flows from the proper interpretation to be placed on the section, but that problem is one for the legislature to direct and require that when two or more identical names appear in the register relating to a particular village, and where the address is not distinctive enough to identify the voters with one or other of the entries, then a description either by way of occupation or by reference to name of the father or other special feature should be set out against the names in the registers with a view to identify the particular voter registered against a particular entry.

Mr. Chelvanayakam, however, conceded that neither he nor any of the eleven persons who claimed to be the true voters and who gave evidence could say which entry in the registers related to any one of them. In these circumstances it must follow that there was no proof that the person who has been termed the true voter is a *particular voter named in the register.*

Besides, in the absence of proof that a person is a particular elector he is not entitled to receive a tendered ballot paper, for a tendered ballot paper is issued to him because the ballot paper which had been issued to the impersonator does not record an effective vote. But where the voter who has been impersonated can identify the entry relating to him in the register, then it is obvious that the impersonated vote can be struck out of the poll, for the ballot paper voted on by the impersonator can be identified ; but where the person impersonated cannot identify his name with a particular entry in the Register, then the non-effective vote cannot be struck out, and if one permitted the addition of the tendered ballot paper the result would be to increase artificially the poll and unreal situations can arise. It has, however, been said that the unsatisfactory state of the poll that would arise after addition of the tendered votes without striking out corresponding impersonated voters would be due not to the addition of the tendered votes but in reality to the fact that impersonated votes have already been included in the poll. This, no doubt, in a sense is true, but this much may be said that the impersonated votes do not artificially increase the number of electors who polled, but on the other

hand the addition of tendered votes without striking out a corresponding number would be to give an unreal picture of the number of voters who had gone to the polls.

I think, therefore, that the learned Judge was correct in construing sub-paragraph (c) of paragraph (1) of section 85 as the complement of paragraph (3) of the same section.

It is true that there were three tendered votes which were added without any corresponding votes being struck out. These were cases where although no person had previously voted in the names of three voters they were issued, due, no doubt, to what must be regarded as carelessness on the part of the election officers, tendered ballot papers on the supposition that other persons had in fact been issued the relative ballot papers, while in truth not one had been issued a ballot paper. At the argument Mr. Nadesan for the respondent in justification of the order directing the three new votes to be added to the poll referred to section 86 of the Order-in-Council and conceded that the three tendered votes were valid ones, and I shall therefore say nothing further about them. I should, however, wish to observe that I reserve my opinion on this point till I have heard argument on it.

I am therefore of opinion that the learned Election Judge was right in refusing to add to the poll the eleven votes complained of, and I shall assume that the majority of the respondent has in the light of the learned Judge's findings been reduced to eight.

I next proceed to consider the first ground, namely, that there has been a non-compliance with the provisions relating to elections in the Order-in-Council. The appellant's case under this head is said to be based on and to relate to two categories of ballot papers—(*a*) thirty two ballot papers admitted to be genuine but issued without an official mark or perforation thereon, and (*b*) eight missing ballot papers.

The assertion that eight ballot papers, although issued, were missing, is dependent upon, according to the petitioner, a simple arithmetical process, namely by a count of the number of counterfoils left in the books of ballot papers, which would indicate the number of foils or ballot papers that had been issued, and deducting from the number so found the number of ballot papers deposited in the ballot boxes found by counting them. For the respondent it has been contended that this process is unwarranted, for it is said that ballot papers spoilt either in the process of issuing or in the marking thereof by a voter would all be bundled and kept separately, and unless these were taken into the reckoning the difference arrived at by adopting the petitioner's method would not be a true indication of whether any, and if so the number of, ballot papers which were missing.

Besides, it is contended that there is no evidence as to how the eight or any smaller number of ballot papers have been lost. It is common ground that nothing improper can be said to have been done by the officers connected with the election to which the loss could be attributed. The Returning Officer who gave evidence, however, expressed the opinion that possibly some of the voters to whom ballot papers had been issued

had surreptitiously removed them without putting them into the ballot boxes. This is purely a matter of conjecture. On the assumption that the opinion expressed by the Returning Officer is the only explanation for the papers missing, it has been urged that such loss reveals non-compliance on the part of the election officers with the provisions of the Order-in-Council which require that the ballot paper should, after being marked by a voter, be then folded up so as to show the official mark on it, and the voter should after showing the official mark to the Presiding Officer put the ballot paper into the box.

It is further pointed out that the removal of a ballot paper from the polling booth is in itself an offence apart from other offences of a like nature created in regard to similar matters in relation to ballot papers found outside the polling booth. Assuming that the loss of eight ballot papers was due to the circumstance alleged by the petitioner, I do not think it follows that the ground enunciated in section 77 (*b*) is established for the reasons I shall set out when I deal with the argument in regard to the unperforated thirty-two ballot papers. But I think, so far as the eight missing ballot papers are concerned, the true position appears to be that there is no evidence of any kind whatsoever as to how they were lost, and in the absence of any evidence it is not possible to attribute to any officer charged with the conduct of elections non-compliance with the provisions of the Order-in-Council, nor even to charge a voter with having carried away a ballot paper in contravention of the provisions of the Order-in-Council.

I do not therefore think that the basis upon which the loss of eight ballot papers was sought to be made a ground for the non-compliance alleged under section 77 (*b*) has been established.

The thirty-two ballot papers stand on a different footing. The case was presented on the uncontroverted allegation that the thirty-two ballot papers were genuine ballot papers in the sense that they had come from the books from which ballot papers had been issued by the election officers at the time of the poll. It is agreed that the thirty-two ballot papers were not taken into account in counting the votes cast in favour of any of the candidates and that the Returning Officer properly, in terms of section 49, rejected them as they were not stamped or perforated with the official mark. That the non-perforation was due to the omission on the part of the election officers is not disputed, but such omission, however, has not been characterised as being the outcome of any deliberate fraud or dishonesty on their part. It is, however, contended on behalf of the petitioner that it is sufficient if he proves a non-compliance with the provisions of the Order-in-Council, which requires that the election officers should before issuing a ballot paper duly perforate it so as to make it an effective ballot paper at the count, and that if a ballot becomes non-effective by reason of the lack of the official mark, that result is due entirely to a non-compliance with the provisions of the Order-in-Council by the officers entrusted with the conduct of the election.

If the matter stood there, there can be little doubt that the petitioner can be said to have established his case ; but paragraph (*b*) of section 77

requires something more. It provides that the non-compliance with the provisions of the Order-in-Council would be a ground for declaring an election void " if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election ". Much to the same effect but viewing the provision from the opposite angle is paragraph (1) of section 51, which runs as follows :—

> " No election shall be invalid by reason of any failure to comply with any provision of this Order 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. "

This language, to my mind, draws a sharp distinction between a failure to comply with the provisions of the Order-in-Council in regard to elections and a failure to conduct an election *in accordance with the principles laid down in such provisions.*

Every non-compliance with the provisions of the Order-in-Council does not afford a ground for declaring an election void, but it must further be established (apart from any other requirement) that the non-compliance with the provisions was of such a kind or character that it could be said that the election had not been conducted in accordance with the *principles* underlying those provisions. Are the " principles laid down in the provisions " of the Order-in-Council different from the provisions themselves ? Unless they were, no adequate reason can be assigned for the draftsman using the language he has used. The difference, I think, consists not so much in the nature of the non-compliance as in the degree of that non-compliance ; it consists not in a bare non-compliance but in the magnitude or extent of the non-compliance.

If, for instance, instead of there being thirty-two, there were five thousand unperforated ballot papers, I should take the view in those circumstances that not only was there a non-compliance with the provisions of the Order-in-Council but that the election itself had not been conducted in accordance with the principles laid down in such provisions, because in such a case the principle underlying elections that would be violated would be that by the non-observance by the officers conducting the elections the votes of a large section of the electors had been rendered ineffective and such large scale non-compliance would lead to the inference that there had not been a fair election. In such a case it may be suggested that election officers had taken sides by issuing unperforated ballot papers to persons who they had reason to believe were voting on the side of the candidate whose candidature they did not favour. But in this case the facts are that there are thirty-two ballot papers that have not been perforated. It is admitted that there were twenty polling booths. Striking out an average, it may be said that less than two ballot papers had been issued at each of the polling stations without perforation marks. The total number of ballot papers issued was a little more than twenty six thousand. Again, working out an average, one thousand three hundred ballot papers could be assumed to have been issued from each of the

polling stations, so that two ballot papers out of every one thousand three hundred have escaped the attention or passed the vigilance of the issuing officers, resulting in their not being perforated. Can it be said that there has been a violation of the principles underlying the conduct of the election ? However careful, however diligent the officers may have been, nevertheless it is impossible to prevent an occasional slip, especially during what has been termed the rush periods of voting. I would not put down the omission to perforate these ballot papers to carelessness, and much less to negligence, but rather to human fallibility, to the imperfection of the human machine, to what is sometimes termed the human element. The fact that out of 26,054 ballot papers thirty-two had no perforations, in other words that over 26,000 had been duly perforated, is the most satisfying proof that the election had been conducted at the various polling booths in accordance with the principles laid down in that behalf in the provisions of the Order-in-Council. To hold otherwise would be not merely to set at naught elections in general but to render entirely unworkable the democratic machinery. It is impossible to avoid an occasional slip or two taking place when such large numbers of ballot papers are issued, and to say that every trivial transgression is a ground of non-compliance for setting aside an election is a proposition I find difficult to accede to. The non-compliance should be of such degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice.

It was, however, urged that the test determining the proportion of the number of unperforated ballot papers to the perforated ones is a fallacious one ; it was suggested that the true test was to ascertain the number of ballot papers not bearing the official mark in relation to the margin of majority which the successful candidate has secured against the runner up. I think this suggestion bears more properly on the second limb of the provision of section 77 (*b*), which requires that it should also be established that such non-compliance affected the result of the election. On this question I can quite see it has an all important bearing. But to find out whether the election was or was not conducted in accordance with the principles laid down in the Order-in-Council it seems to me entirely unjustifiable to take into consideration whether the number of ballot papers unperforated was greater than the majority by which the successful candidate was declared duly elected.

It is true that if the thirty-two ballot papers had been taken intof computation and if the majority of those ballot papers were in favour of the petitioner, the ultimate result of the election may have been that the petitioner would have been declared duly elected. But that will only mean that the non-compliance with the provisions of the Order-in-Council has affected the result of the election ; it does not help to solve the question whether the non-compliance was such as to lead to the inference that the election had not been conducted in accordance with the principles laid down in the Order-in-Council. It is important, in this connection, to guard against the fallacy of arguing that the degree or magnitude of non-compliance is to be gauged by the effect a particular non-compliance has

on the result of the election. The degree and magnitude of non-compliance has to be determined, as I see it, not by reference to its incidence on the candidates as on the electorate.

I am of opinion that the non-perforation of thirty two ballot papers out of 26,000 odd does not in the slightest degree establish that the election had not been conducted in accordance with the principles of election laid down in the Order-in-Council.

Having regard to these reasons I reached the conclusion that the appeal should be dismissed with costs.

PULLE J.—I agree.

K. D. DE SILVA J.—I agree.

Appeal dismissed.