

1944

Present: de Kretser J.

MIHULAR *v.* NALLIAH *et al.*IN THE MATTER OF THE BY-ELECTION FOR TRINCOMALEE-BATTICALOA  
ELECTORAL DISTRICT.

*Election petition—Colour allotted to candidate need not be displayed in notice—Election not conducted in accordance with the provisions of Order-in-Council—Reasonable doubt whether irregularity affected the result of election—Ceylon (State Council Elections) Order in Council, 1931, Articles 37 (3) and 74 (b).*

The requirement of section 37 (3) of the Ceylon (State Council Elections) Order in Council that outside each polling booth there shall be fixed in a conspicuous place the name of each candidate and the colour with which his ballot box is coloured does not mean that the notice should show the colour by reproducing it.

Where it is contended that an election has not been conducted in accordance with the provisions of the Order in Council, the Court is bound to declare the election void only if it is open to reasonable doubt whether the transgression may not have affected the result of the election, and it is uncertain whether the candidate, who has been returned had been really elected by the majority of persons voting in accordance with the laws in force relating to elections.

**T**HIS was an election petition to set aside the return of the respondent to the Electoral District of Trincomalee-Batticaloa at an election held on November 20, 1943.

*J. E. M. Obeyesekere* (with him *Dodwell Gunawardana* and *E. P. Wijetunge*), for petitioner.

*C. S. Barr Kumarakulasingham* (with him *T. D. L. Aponso* and *J. G. T. Weeraratne*), for first respondent.

*R. K. Crossette-Thambiah, C.C.*, for second respondent.

*Cur. adv. vult.*

June 5, 1944. DE KRETZER J.—

Two objections remain to be answered, viz., Nos. 2 and 3 in the election petition which has been filed. Objection No. 3 is easily disposed of. The petitioner's Counsel mentioned it in his opening address and made no further reference to it although I invited him to address me on the law with particular reference to objection No. 3.

The objection is taken under Article 37 (3) of the Order in Council which requires that outside each polling station there shall be fixed in a conspicuous place a notice "showing the name of each candidate in English, Sinhalese and Tamil and the colour with which his ballot box is coloured". The objection is that the notice should show the colour by reproducing it. It is based on the use of the word "showing". This word governs the whole clause and clearly means "stating" for it is inconceivable that the name of the candidate could be shown in the three languages mentioned in any other way. There is no reason why the same meaning should not be given to it throughout the clause. If it was intended it should have a different meaning with reference to colour, then at least a difference would have been made in the phrasing. It was stated that a subsequent election in Bibile colours were displayed. This only shows how anxious those who administer this order are to gratify all possible views. I think, however, the change is not without its dangers, for it might be quite a difficult thing to have the colour of the ballot box reproduced on another substance, and possibly by another process. The provision in Article 37 (3) is one of many precautions provided. Quite clearly this particular provision cannot help those who cannot read, for the ignorant voter merely seeing a range of colours would be no wiser as to which was the colour of the candidate he desired to vote for. It might help others to indicate to him the colour and nothing more. A specimen of the notice was produced and in my opinion it amply satisfies the requirements of the Article, which carefully refrains from stating details. In the notice produced the names of the candidates were arranged horizontally, as their ballot boxes would be, the colour of the candidate was stated within a cage and underneath was the statement that the ballot boxes would be arranged in the order indicated above.

I now pass on to the second objection which is based on Article 37 (2). The contention is that the ballot box which should have been painted blue did not carry that colour but had painted on it a colour resembling green, which led some of the voters of the petitioner, whose colour was green, to cast their votes into the wrong box, so affecting the result of the election.

The petitioner moves this Court under the provisions of Article 74 (b). Article 46 provides that "No election shall be invalid by reason of any failure to comply with the provisions contained in this Order relating

to the 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 effect the result of the election." Article 74 is worded somewhat differently. The petitioner's case was confined to the consideration of the terms of Article 74 (b). Both Articles contemplate—

- (a) a non-compliance with the provisions of this Order.
- (b) violation of the principles of the Order.
- (c) That the result of the election shall have been affected.

There was much argument regarding the last requirement, Counsel for both respondents arguing that there should be affirmative proof that the result of the election had been affected, while petitioner's Counsel contended that though the burden was on him to prove that the election had been affected it was enough if he proved that it may have been affected.

In the view I take of the facts it is unnecessary for me to dwell on these contentions. I had formulated for myself the view that it would not be enough for the petitioner to prove only a bare possibility that the election may have been affected, or even a slightly higher degree of proof, which for want of better terms I may describe as proof establishing a bare probability, but that if there were a degree of proof establishing such a degree of probability that a substantial doubt arose in my mind, then, I should hold that the election had been affected. Mr. Obeyesekere emphasized and read more than once a passage in the judgment of the Court in the Islington case (5 O. and H. 120 at page 125) where the Court declared as follows: "If the Court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt where these transgressions may not have affected the result and it is uncertain whether the candidate who had been returned has been really elected by the majority of persons voting in accordance with the laws in force relating to elections, the Court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised and acted upon by the tribunals which have dealt with election matters." I do not think that the view which I had formulated is different from this. There must be a "reasonable doubt" and I called it a "substantial doubt".

The Hackney case (2 O. and H. 77) does not help the petitioner for the facts are of a different character entirely. In that case Graves J. said: "The objection must be something substantial, something calculated really to affect the result of the election . . . . The Judge has to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect on the decision."

In the Islington case there is quoted with approval the remarks of Mr. Baron Martin, himself approving what Mr. Justice Willies had said that "a Judge to upset an election ought to be satisfied beyond all doubt that the election was void; and that the return of a member is a serious matter, and not lightly to be set aside".

What are the principles underlying the Order? The object of the Order is to see that the voters are *FREE* to exercise their choice un-influenced by corruption, coercion, undue influence or deceit. In order

to effect this end the Order has provided a number of safeguards and I venture to think that ingenuity could not have provided more. Faced with the situation that a large number of the voters in this Island would be illiterate, it was sought to help them by providing a scheme of colours. It was stated by the petitioner's Counsel that this provision was unique in the world. It probably is. If the opinion of Mr. Somasegeram who gave evidence for the petitioner be correct, then ignorant voters faced with a number of colours would only be confused. He based his opinion mainly on his experience of school children and I venture to think that there is a considerable difference between children and adults, however ignorant. The Legislature proceeded on the footing that the average voter would have a sense of colour. After all it must be remembered that the provision as to colour is meant as an aid and that there is a limit to the assistance that can be given to voters.

In Article 39 (3) there is a provision which enables a voter to have explained to him just before he casts his vote the method of voting. It is impossible to legislate for those who have no sense of colour, or who are grossly careless or grossly silly, or extremely nervous and confused when they find themselves in strange surroundings.

Article 32 throws on the Returning Officer the duty of allotting colours to the candidates. There are only three primary colours and there are only seven in the spectrum. If there be a larger number of candidates the colours would have to be modified. The principle underlying colour is stated in the Article to be, and it must be, that the colours allotted to each candidate shall be distinct and distinguishable at the poll.

The petitioner's Counsel argued that the colour which had been allotted as blue to another candidate was not blue, and on that ground alone the election should be declared void, even though the petitioner had his boxes painted with a green with which he stated at the inquiry he was quite satisfied. No objection had been taken during the election or after it by the candidate who chose blue and I do not think if that candidate had been allotted black that would have entitled the petitioner to have the election set aside. This contention, however, fails on the facts, for, in the petition itself, it is stated that the colour was blue, but a blue resembling green. The question, therefore, is whether the colour on ballot box No. 2, which was supposed to be blue had such a greenish hue that the voters wishing to vote for the petitioner, whose box was No. 4, were misled into casting their votes into box No. 2. If so, then the language of the Article that the colours should be distinguished had been observed only in the letter and not in the spirit and a principle would, in my opinion, have been violated.

The boxes produced before me as being originally blue are now undoubtedly green. Some of them are a bright green, some of them a yellowish green, some have a bluish tinge of varying degrees and some have been bleached and have a whitish appearance. On one red box was attached some fragments of brilliant blue which had come apparently from contact with the next box, the blue box. 2 R 3 is the best specimen that could have been produced by the petitioner himself. I was willing to proceed on the assumption that the majority of the boxes were of that colour. At the start of the inquiry Mr. Obeyesekere stated that he

had been allowed summons for the production of all the ballot boxes and what had been produced were two sets of boxes. I intimated that I would consider the matter later and on the fourth day when Counsel was addressing me, the inquiry itself having been concluded early on the third day, Counsel pressed for the production of all the blue and green boxes, in spite of the evidence in the case that the colour on the boxes was not the colour on polling day. Counsel eventually came down to the position that possibly some of the boxes had not been given the fresh coat of paint which the Returning Officer had promised at the rehearsal to have put on. I allowed the application because I did not wish to shut out any evidence which the petitioner desired to lead, even if it be of the slightest possible value. It now transpires, however, that no such application was made or allowed and the petitioner's Proctor could refer me to none, but what had happened was, that summons on a list of witnesses having been allowed, there was inserted into the summons an unauthorised direction to the Returning Officer to produce all the ballot boxes, a direction which he interpreted with the assistance of Crown Counsel to be that he should produce a complete set. He produced two sets. It was quite clear at the inspection that a fresh coat of paint had been put on. In fact it was the petitioner's Counsel who emphasized this fact. It was also clear that the underlying colour was a blue and that an excess of linseed oil had been used, still leaving the paint sticky, and causing it in some cases to peel off. It was also clear that more than one painter had been employed. That must naturally have been the case when some 540 boxes had to be painted. Each painter would be mixing his paints many times and would vary in the quantity of linseed oil he used and a number of painters would produce a number of variations. The rehearsal took place exactly a week before the polling date, and a fresh coat of paint had to be applied thereafter on the 90 blue boxes which, of course, would have to be sent to the different polling stations scattered over a district in which admittedly travelling was difficult. The petitioner's witness, Mr. Hussain, who was the petitioner's agent to convey a letter (P 3) from the petitioner to the Returning Officer on the day after the election stated that the Returning Officer had told him that paints were difficult to get owing to the conditions prevailing at present; that he had applied as many as four applications of blue paint in an effort to get a colour which would satisfy critics and he showed him a tin in which blue had been mixed, and it contained traces of white paint and of blue paint and a large quantity of oil was floating on the surface. So on the day after the election this agent, who is a member of the Urban Council of Weligama, of which the petitioner is Vice-Chairman, saw a blue in the tin. It was no doubt the admixture of white which toned the blue down to the light-blue which Mr. Somasegeram saw on the polling day, and it is likely that it was the excess of linseed oil working its way upwards which produced the sticky surface and converted the blue into the green of the present day. Crude linseed oil has yellow colouring, and green is a combination of blue and yellow. In the boxes which have now a yellowish tinge the yellow has asserted itself strongly, in those having a bluish tinge less strongly. Whatever be the cause of the change, the

colour has changed and what we need to know is the colour on polling day. The colour a week before may be of some assistance for the colour on polling day was the result of an improvement. On both points I accept without hesitation the evidence of Mr. Somasegeram, the one perfectly disinterested witness and the one possessing most intelligence and the best memory. I remarked on the value of his evidence and this led to an unworthy attempt on Counsel's part to attack his credit covertly: he would not attack him, he said, but one could not forget that communal feeling was strong and that the witness had been an unwilling witness. Regarding communal feeling, the remark might with some justice have been applied nearer home, more specially in view of the evidence that in obedience to an injunction by the Prophet, Muslims support each other.

This witness was suffering from a skin eruption on his arm and on the 19th he had procured a medical certificate stating that he would not be able to be present in Court till the 29th, which was well within the period fixed by the Registrar for this inquiry. On the second day of inquiry Mr. Obeyesekere, realizing that his evidence would conclude that day desired very strongly to have the evidence of this witness and after consulting Dr. Abdul Cader as to what the medical certificate meant, I caused a telegram to be sent to the witness that he should attend on the next day. He attended and I can quite understand his reluctance to appear in Court with his arm in that condition. He showed no unwillingness to give evidence and was most helpful as a witness.

Before passing to the evidence regarding the colour at the rehearsal, one may consider the evidence as to what had transpired earlier. The polling had been fixed for a date almost two months after nomination. In the interval the ballot boxes had to be got ready. The Returning Officer indented for the paint required from the Government Stores in Colombo. The Government Stores had sent him a paint which that department considered to be blue. On receipt apparently no one cavilled at the colour. At the rehearsal the blue box was displayed as blue, and during the course of the discussion that followed the Returning Officer at one stage had stated that he thought the colour was all right. There is, therefore, an antecedent probability that the colour was not as unsatisfactory as the petitioner now seeks to make out. Of the three witnesses who saw it at that stage, Mr. Somasegeram stated that it was somewhat like the colour within the patch on 2 R 3 but was bluer. The other witness stated that it was "more like the patch", "something like the patch". The patch consisted of an underlayer of paint which has dried and set, and just below it the wooden surface showed suggesting that the paint had been taken off in the course of handling. Like the paint on all the boxes it had some dirt on it, but in spite of this it was blue. I tested it in my Chambers, where on the brightest day I am obliged to work by lamp light, and I tested it on a particularly wet day. I tested it also in different parts of the Chambers and by artificial light as well. I had seen it in Court quite closely and for the greater part of the time at a distance of about two yards. It was a blue, somewhat darkened by dirt and having a green tinge about it, but still a blue. If then it was more blue at the rehearsal one can quite understand what occurred at the rehearsal.

Now, with regard to what had happened at the rehearsal, the fullest and most probable account is that given by Mr. Somasegeram. It is not true that the Returning Officer did not invite discussion, Nor is it true that Mr. Somasegeram protested that the blue was not blue and the green was too dark. The other witnesses did not have as good memories as Mr. Somasegeram, and they probably did not take as great an interest in the discussion as he did. They drew a distorted picture of the attitude of the Returning Officer and did not recall the fact that he had promised to try the effect of a new coat of paint. Nor were they aware that a fresh coat had been applied. What had happened was that the Returning Officer called for observations and, to set discussion going, invited Mr. Somasegeram to express his views. Mr. Somasegeram remarked that the blue might have been darker, that children and ignorant people often could not distinguish blue from green and that the other colours were "dark" while the blue was "light". Considering that among the other colours was a white, a bright yellow and a red, he probably meant that the blue radiated most light or, to use the word used by the witness Kuruneru, was "attractive". One can visualise how something like a blue of a blue turquoise would show in that array of colour. The Returning Officer directed his assistants to check the colour, he invited their opinions and finally he promised to have a new coat of paint put on. There was nothing in his behaviour which should have led Mr. Azeez, himself a member of the Civil Service, to fear to express an opinion lest the Returning Officer should be rude to him. Probably all present felt, as indeed the two witnesses said they did, that there was nothing more to be said.

Now, what was the opinion of Mr. Azeez as to the colour and what was his recollection of the rehearsal? According to him Mr. Somasegeram said that the "green was too dark and the blue was not blue", or words to that effect. He was next asked: "was it suggested that there might be confusion"? And he replied "he definitely said that Mr. Canagasingham's ballot box was not painted blue".

"Q. What happened to that question raised by Mr. Somasegeram?

A. There was some discussion and the Returning Officer said it was the correct colour."

I intervened and asked him the direct question "What colour did you think it was"? and he said: "I thought it was blue but not sufficiently blue". Asked by Counsel how he would describe the colour, he said: "a bluish green or a greenish blue or something like that". Mr. Somasegeram too was asked how the colour might be described and he said: "one person might describe it as a blue with a yellow creeping into it and another as blue with a green creeping into it". Mr. Azeez and Dr. Abdul Cader said that Mr. Somasegeram did not say that there might be confusion. Mr. Somasegeram was asked whether he thought there might be confusion and he replied that a child or an ignorant person would be confused on seeing an array of colours. He was asked whether the question of the confusion between the blue and the green boxes was considered and he replied: "Oh yes. At one stage I placed the two boxes side by side." Mr. Somasegeram has as strong a partiality for the

school boy as Macaulay had and he fancies that ignorant people are like children, a generalisation which in my opinion is only true to a limited extent. In his view, village folk would be most familiar with the navy blue of the shorts which school boys wore, the blue of the Inspector's pencil and the blue used in washing. Curiously enough the petitioner has much the same view, and would not admit that the perfectly true blue of a shirt which was being worn by a spectator was a blue. The purplish blue of Hammond's "Election Cases in India" and of the blackout paper used on the door were his idea of blue. Dr. Abdul Cader said: "the colour was not exactly blue. If I had to give it a name, I would call it bluish green". The witnesses had talked about the discussion they said.

The evidence, therefore, amounts to this:—That Mr. Somasegeram was satisfied with the green, as indeed the petitioner was, but Mr. Somasegeram would have preferred a darker blue. It was blue. The two boxes were placed side by side. The Returning Officer expressed himself as satisfied but, to meet the objection raised, promised to try a fresh coat of paint, which was applied during the limited time left and which did produce on polling day a different colour, viz., a distinct blue but a light blue.

Passing on to polling day, and omitting the evidence of totally unreliable witnesses who say that they saw on that day the brilliant green of the present time, we have only the evidence of the petitioner and of Mr. Somasegeram as to the colour on that day, and I have no hesitation in accepting the evidence of Mr. Somasegeram. The petitioner struck me as being a simple and sincere man, somewhat quixotic and considerably bigoted, who made a good effort to be truthful. He started by saying that the colour on polling day was that of 2 R 2. The patch had been earlier mentioned by Crown Counsel, but Mr. Obeyesekere put it himself to the petitioner, who looked long and hard at it and then said that some of the boxes had that colour also. In cross-examination, however, he admitted that all the boxes he saw were more or less of that colour. He even agreed that it was nearly blue but at once said it was not blue and perhaps his first answer should not be taken as being a considered one. On polling day Mr. Canagasingham raised no objection to the colour blue. None of his voters seem to have complained that they took it for green, and he has made no complaint up to the present time. Neither the petitioner nor his agents complained at the principal centres but it is alleged that a complaint was made at one station, which I shall deal with later. The boxes must, according to the order, be opened by each presiding officer in the presence of the agents and of all the persons who happen to be present before polling begins (Article 37 (5)). This was done and we have evidence that the agents were aware of the order in which the boxes were placed. They and the voters had the notices to guide them. The Presiding Officers of the chief Muslim centres in the Batticaloa District were most obliging and were themselves Muslims. And the petitioner who inspected the polling stations expressed himself as satisfied with the arrangements and did not make even a conversational remark regarding the colour of the blue box. He gave conflicting explanations as to his conduct but his final answer was that he did not



think it was serious at the time. He would not think it serious if there was no risk of confusion except in the case of those who would be confused in any case.

When the results were announced he was quite taken aback, and, to use his own words "because I did not win, I thought something had gone wrong somewhere". In P 3, a letter which he addressed to the Returning Officer on the day after the election, he gave no concrete facts but said that he had a "feeling" that the colour of the blue box may have affected his chances. He decided at once on an election petition and by the time it came to be drafted he had discovered that bribery and corruption had also figured in the election. He came late into the field, a stranger in the District. Other candidates with considerable influence were not only ahead of him but had influential Muslim support. He made no attempt to canvass the votes of the Tamils, but raised the religious banner, chose the colour of the Prophet, and proclaimed his advent in Mosques. He had no proper organization and provided no means of transport but just trusted that all Muslims would vote for him, even those already committed to other candidates, and he does not seem to have realized that all these defects might well have contributed to his failure and that the success he did attain was remarkable. I am satisfied that the colour on the polling day was blue, and that consequently the whole foundation for this application collapses.

One witness, a young Arabic teacher from Alutgama, alleged that he had raised a protest before the Presiding Officer at a certain station. I do not believe him. Mr. Obeysekere contended that I should, because they had desired the Journal to be produced and that had not been done, nor had the Returning Officer been called. Now, what had happened was this:—The first respondent moved for an order on the Returning Officer to issue certified copies of *all* the journals and *all* the complaints made to him regarding the election. This was as far back as March 30. I refused this application stating that I did not see how the journals would assist or how complaints of a general nature would help. Besides, the journals would be under seal. Quite clearly the first respondent hoped to prove that no complaints had been made, as he had sworn in the affidavit supporting the objections filed by him. On May 12, an exactly similar application was made on behalf of the petitioner and was refused. No attempt was made to specify any particular journal or any particular complaint, and while other Presiding Officers were summoned as witnesses by the petitioner, the one to whom Alavi made his complaint was not.

It is unnecessary to go into the question as to what the position might have been if I had held that the colour of the blue box had been unsatisfactory, but I think it fair to all parties concerned that I should state my views. If the colour of the blue box had been really misleading the Court would strongly incline to the belief that the result of the election had been affected, but the evidence to confirm that inclination would be inadequate, even assuming the witnesses to be reliable. To call two voters who made mistakes in spite of express directions to vote in the fourth box and in spite of their ability to read the names on the boxes, and two others who voted correctly but were attracted by the second

box, is quite inadequate. The position is made worse by the fact that all the witnesses were strong partisans. All the witnesses depose to apathy on the part of the voters, they themselves going to the station, voting and hurriedly departing. They speak to voting about 8, 8.30 or 9 A.M., which is only a guess on their part, for the Alim who led the voting at Eraur speaks of voting immediately the polling began and of meeting the Mawlana on coming out. They were prominent supporters of the petitioner and lived close to the stations and probably were among the earliest to vote. The petitioner says he learned of the position about 8 A.M., and at once took steps, instructing his agents to tell voters in addition to vote in the box next to the yellow box, *i.e.*, the fourth box and himself instructing voters. So well had the voters been instructed both at Eraur and at Moodur that they jeered at the two voters who had made mistakes, thus further emphasizing the position of the correct box. The Alim could only speak to having misled two or three voters and these it is assumed surrendered their own judgment and the express instructions previously given them. At the main stronghold at Batticaloa, therefore, only two or three might have been misled, and not by the colour but by the Alim. No incident is deposed to at Vallachenai, the next stronghold, and here as elsewhere the agents saw the order of the boxes and were instructing the voters. In Batticaloa town Kuruneru, who had volunteered to support the petitioner's cause and was his chief agent there, took no trouble to direct voters after nearly making a mistake himself. In Batticaloa town the leading Muslims were not supporting the petitioner, as also in Eravur. Kuruneru stated that the petitioner came into the field too late and the voters were few in number. At Moodur, the petitioner's stronghold in the Trincomalee District, the Hadjar's mistake was discovered quite early and the people jeered at him. No evidence was led regarding any other centre except the town of Trincomalee and here we get the most impudent piece of falsehood in the whole inquiry. The petitioner's agent alleges that between 10 and 10.30 he decided to find out the position of the boxes in order to expedite voting. It had been extremely slack and needed no speeding up. He sent in a mythical voter, whose name he does not know but whom he could recognise, to find out the position. No attempt was made to get at this man whose face was known and who could easily be traced in the small electorate of Trincomalee town. The witness made no attempt to get his information from the agents who were present earlier directing voters. No complaint had been made. Presumably the man he sent was a man of prudence and would be careful to get accurate information. What that man reported was not evidence and accordingly here, as in other cases, one had a sample of skilful examination, which only showed up the witness. It took time to elicit what was required and meanwhile the witness gave the evidence that he had asked people in his office to instruct voters to vote "as this man had done". This was unsatisfactory and the second attempt elicited the answer "I told them to look carefully at the boxes before voting" and finally came the answer "I told them to vote in the second box". Again assuming this evidence to be true, the direction not only came late but was later countermanded on the witness reading the notice, and it meant that if the voters had made mistakes,

of which there is no evidence, they had been misled not by the colour but by wrong instructions.

The petitioner estimated the whole voting strength of the Muslims in the Trincomalee District at about 9,000, of whom 4,000 were in Moodur and Thoppur and 5,000 in Keniya while scattered over the district were about 1,000-1,500. In Nilavali, his agent said, there were 3-400 and at Kutchcheveli about 4-500. That leaves about 700 for the other places, including the town of Trincomalee, for which place name cards were prepared in English, indicating an educated electorate. The evidence is absurdly false. I do not believe the other four witnesses too and this only makes the petitioner's position worse.

I have no doubt at all in my mind, much less a reasonable doubt. The petition will accordingly be dismissed. In this case there is no redeeming feature and costs must follow the event. I propose to nominate the costs as has been done in recent cases. I think Rs. 2,000 for 1st respondent and Rs. 1,500 for 2nd respondent is reasonable.

*Petition dismissed.*

