1956 *Present :* **Pulle, J.**

DR. M. C. M. KALEEL, Petitioner, *and* M. S. THEMIS *et al.*, Respondents

Election Petition No. 2 of 1956

IN THE MATTER OF THE CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCIL, 1946, ELECTION FOR ELECTORAL DISTRICT NO. 2—COLOMBO CENTRAL—HOLDEN ON THE 5TH DAY OF APRIL, 1956

Election petition—Miscount of ballot papers alleged by unsuccessful candidate—Validity of such ground—Discretion of Court—Multiple member electoral district—Necessary parties—Amendment of petition by supplementary affidavits—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 48 (7) (8), 49 (1) (5), 80 (b) (c), 83, 86 (2)—Parliamentary Election Petition Rules, 1946, rules 4 (1) (b), 5.

Miscount of ballot papers is a valid ground on which an election judge may grant relief under section 80 (*b*) and (*c*) of the Ceylon (Parliamentary Elections) Order in Council, 1946. The provisions of sub-sections 1 and 5 of section 49 and of sub-sections 7 and 8 of section 48 do not necessarily point to the non-existence of a jurisdiction to order a recount of ballot papers.

Where an unsuccessful candidate presents an election petition against a successful candidate on the ground that as between them there was a miscount of votes, the other candidates who were returned at the same time to the same electoral district and who received a greater number of votes than the respondent need not be made parties to the petition. In such a case, the averment in the petition that " there has been a miscount of the votes cast at the said election " cannot be said to be vague and entirely devoid of content when the petitioner seeks relief under section 80 (*b*) and (*c*) of the Parliamentary Elections Order in Council.

It is not requisite to a valid election petition based on a miscount of votes that it should set out how and why such miscount occurred. The word " miscount " in the context of an election petition presented by a candidate on the ground that he had a majority of votes and should be declared to be duly elected bears a restricted meaning.

Where a candidate or his election agent failed to make an application to the returning officer for a recount of the ballot papers under the proviso to sub-section 7 of section 48 of the Order in Council, it would, generally speaking, be undesirable for an election court in its discretion to order a recount.

Obiter : If an election petition is bad on the date it is presented, it cannot be retrospectively made good by any affidavit filed after the time limit prescribed by section 83 of the Order in Council.

ELECTION petition No. 2 of 1956, Colombo Central.

Izadeen Mohamed, with *Carl Jayasinghe*, for the petitioner.

G. E. Chitty, Q.C., with *G. T. Samerawickreme*, *Prins Gunasekera* and *K. D. P. Wickremasinghe*, for the 1st respondent.

M. Rafeek, with *L. G. Weeramantry*, for the 2nd respondent.

A. C. Nadarajah, with *S. Ponniah*, for the 3rd respondent.

M. Tiruchelvam, Acting Solicitor-General, with *V. Tennekoon*, Senior Crown Counsel, and *M. Kanagasundaram*, Crown Counsel, for the 4th respondent.

Cur. adv. vult.

October 24, 1956. PULLE, J.—

The petitioner was one of the seven candidates at the last general election who sought to be elected for the Electoral District No. 2—Colombo Central—which has to return three members to serve in the House of Representatives. There are four respondents to the petition of whom the 4th is the returning officer who made a return under section 50 of the Ceylon (Parliamentary Elections) Order in Council, 1946, that the 2nd, 3rd and the 1st respondents, in that order, received the majority of votes lawfully given.

The petition states that the returning officer declared that the 2nd respondent received 45,296 votes, the 3rd respondent 26,522, the 1st respondent 20,375 and the petitioner 20,338. It further states in paragraph 5 " that there has been a miscount of the votes cast at the said election " and in paragraph 6 that the petitioner had a majority of valid and lawful votes as against the 1st respondent. While no relief is claimed against the 2nd, 3rd and 4th respondents the petitioner prays, *inter alia*,

(*a*) that a recount be allowed of the votes given and counted at the election ;

(*b*) that a declaration be made that the 1st respondent was not duly elected or returned ;

and

(*c*) that it be declared that the petitioner was duly elected and ought to have been returned as the third member to represent the Colombo Central electorate.

On the 27th September, 1956, three affidavits were filed on behalf of the petitioner, one made by him, a second from his counting agent and the third from one of the defeated candidates. It is not necessary to examine at any length at this stage the contents of these affidavits. It is sufficient to state that the deponents alleged that the counting took place under such circumstances that errors were almost inevitable.

When the hearing of the petition was taken up on the 1st October, learned counsel for the petitioner, in pursuance of a motion filed on the 28th September, moved to have the 2nd, 3rd and 4th respondents discharged from the proceedings. The 2nd and 3rd respondents had no objection provided their costs were paid. The 1st respondent also had no objection, subject to the right being reserved to him to submit that upon the discharge of the 2nd and 3rd respondents the petition had to fail for want of necessary parties. The learned acting Solicitor-General

opposed the discharge of the 4th respondent, the returning officer, on the ground that the affidavits in effect alleged a failure of duty on his part to make a proper count of the votes. Although Mr. Izadeen Mohamed for the petitioner repeatedly assured that he did not impute either misconduct or negligence to the returning officer and his assistants and clerks I declined to discharge the 4th respondent. The 2nd and 3rd respondents were discharged with costs agreed on at Rs. 1,050 to each.

It would be convenient at this stage to set out the grounds on which the petition is resisted. An examination of the submissions made thereon will also cover the grounds on which the petition was supported.

Learned counsel for the 1st respondent submitted that the petition ought to fail for one or more of the following reasons :

(*a*) There is no provision in the Order in Council enabling an election judge to make declarations under section 80 (*b*) and (*c*) solely on the ground of miscount of ballot papers.

(*b*) The petition is bad because it has failed to state in conformity with the requirements of the Parliamentary Election Petition Rules, 1946, " the facts and grounds relied on to sustain the prayer "—rule 4 (1) (*b*).

(*c*) If the facts and grounds required by rule 4 (1) (*b*) are not stated in the petition, it is not permissible to sustain it by stating such facts and grounds in affidavits filed after the time prescribed for filing the petition had expired.

(*d*) The discharge of the 2nd and 3rd respondents on the invitation of the petitioner has resulted in the petition being improperly constituted for want of necessary parties whose rights might be adversely affected, if a recount is allowed and the petitioner granted declarations under section 80 sub-sections (*b*) and (*c*).

(*e*) The affidavits do not disclose facts on which an election judge would be justified, in the exercise of his discretion, in ordering a recount of the ballot papers.

Save in regard to jurisdiction and the contention that by reason of the discharge of the 2nd and 3rd respondents the petition fails for want of necessary parties the acting Solicitor-General supported the submissions made on behalf of the 1st respondent.

In regard to jurisdiction it is urged that while in England a petition may be presented claiming a seat on the ground of miscount of ballot papers the framers of the Ceylon (Parliamentary Elections) Order in Council, 1946, did not intend to confer a similar right and have by implication provided that a count made by the returning officer is final and cannot be challenged on an election petition. The basis on which relief is granted in England is section 5 of the Parliamentary Elections Act, 1868, which entitles a person claiming to have had a right to be returned at an election to present a petition complaining of an " undue return ". Section 80 (*b*) of the Order in Council is clear that a petitioner is entitled to ask for a declaration that the return of the person elected was undue.

It is, however, argued that the petitioner cannot call in aid section 80 (*b*) because having regard to other provisions in the Order in Council he has no right to claim a recount.

Reliance is first placed on section 49 (1) which I shall quote in full:

"The returning officer shall reject as invalid the following ballot papers only, namely, any ballot paper—

(*a*) which is not stamped or perforated with the official mark;

(*b*) on which votes are given for more than one candidate;

(*c*) on which anything is written or marked by which the voter can be identified except the printed number on the back;

(*d*) which is unmarked;

(*e*) which is void for uncertainty."

Section 2 of the Ballot Act, 1872, read with rule 36 in the First Schedule (Part I) to the Act, enabled a returning officer in England to reject ballot papers for reasons identical with those set out in section 49 quoted above. Sub-section 5 of section 49 provides that the decision of the returning officer whether or not any ballot paper shall be rejected shall be final and *shall not be questioned on an election petition.* It is pointed out that both under the Ballot Act, 1872, and the recent Representation of the People Act, 1949, while an election court in England has, on a petition questioning an election or return, the power to reverse the decision of a returning officer rejecting a ballot paper, a specific provision to the contrary is embodied in the Order in Council. The question then is asked whether any purpose can be served in a mechanical count under the supervision of the court of what has already been counted, when what has been wrongfully rejected cannot be restored to either candidate. Undoubtedly, if the court has the power to order a recount the field of inquiry is confined to much narrower limits than in England. Does section 49 (1) and (5), therefore, point to the non-existence of a jurisdiction to order a recount? I do not think so. It is possible to visualize a situation when, leaving the rejected ballot papers out of reckoning, a recount would reveal in the plainest manner and beyond contest that a petitioner had a majority of votes. I cannot believe that the Legislature contemplated that in those circumstances it would not be within the power of the court to make a declaration under section 80 (*c*) that the petitioner was duly elected and ought to have been returned. The acting Solicitor-General gave as an instance a case in which a petitioner satisfies the court that a number of counting assistants by reason of their association with the candidate who was returned were so biassed against the petitioner that they purposely counted the votes cast for a petitioner in favour of his opponent. He conceded, and in my opinion rightly, that upon proof of those allegations and having regard, perhaps, to a narrow majority, the court would have the power to order a recount. At the argument I put to counsel a yet simpler case of a returning officer in perfect good faith but owing, admittedly, to an oversight making a return under section 50 that candidate A received the majority of votes whereas in

fact his opponent B received the majority. Surely in such a case the court ought to have the power to order a recount for the purpose of making a declaration in favour of B under section 80 (*c*).

A great deal of stress was laid on the proviso to sub-section 7 of section 48 which requires the returning officer to make a recount upon the application of any candidate or his counting agent. It is pointed out that no such compulsion is enjoined on a returning officer in England who has a discretion whether to make a recount or not. This is relied on as an additional reason for the submission that it was the intention of the framers of the Order in Council that the result of the counting by the returning officer must be regarded as final and conclusive and not open to challenge on an election petition. In my opinion the additional right given to a candidate in Ceylon by section 48 (7) to compel a recount cannot be regarded as part of a scheme to deny him the right, in appropriate circumstances, to petition for a recount by the election court. In England the right to a recount has been recognized since the case of *Renfrew* [1] in 1874. The basic principles of our election law are borrowed from the English counterpart and where it is the intention to depart therefrom one finds express provision in the Order in Council. If it was the intention not to give the right of asking for a recount on an election petition, a short section could easily have been written into the Order in Council.

Towards the close of Mr. Chitty's reply on behalf of the 1st respondent he drew my attention to section 48 (8) which provides for a procedure to determine which of two candidates found by the returning officer to have received an equality of votes is to be declared elected. The Order in Council is silent as to what an election court should do if, upon a recount ordered by it, there results an equality of votes. On the other hand the Representation of the People Act, 1949, section 122 (6) (*b*) lays down that upon an equality of votes being found to exist the court shall decide by lot which of the candidates should receive an additional vote. The absence of a provision in our law analogous to section 122 (6) is urged as an additional reason pointing to the absence of any jurisdiction to order a recount. In spite of the fact that I have not had the advantage of hearing a reply to this argument, I am satisfied that it has no merit. It is not my intention to pronounce on what the procedure ought to be if an equality of votes results on a recount. It may be that the answer to the difficulty is found in section 86 (2) which reads :

> " If any matter of procedure or practice on an election petition shall arise which is not provided for by this Order or by such rules or by any Act of Parliament, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with this Order or any such rules or Act of Parliament and is suitable for application to the Island, be followed and shall have effect. "

Section 122 of the Representation of the People Act, 1949, it may be noted, occurs under the heading " *Procedure on all Election Trials* ". I have not been able to find the counterpart of section 122 in any English legislation prior to 1949. If, as I believe, there was none, the argument put

[1] *(1874) 2 O'M. & H. 213.*

forward on behalf of the 1st respondent is weakened in the face of the question how prior to 1949 the election courts in Britain consistently exercised the jurisdiction which the petitioner seeks to invoke in the present case. It is interesting to note that in 1893 in the case of *Cirencester Division* [1] the court held the election void on the ground that the votes given for the respondent and petitioner and allowed by the court were equal.

In the *Nivitigala* [2] case where a recount was ordered the jurisdiction of the court does not appear to have been canvassed but the learned Judge who tried the case did give his mind to the question and he acted on the statement at p. 171 of *Rogers on Elections* (20th edition) as setting out the law applicable to Ceylon. I respectfully agree and hold that in the present case the petition does not fail for want of jurisdiction.

Before I deal with the objection taken on behalf of the 1st and 4th respondents that the petition is on the face of it bad I think I ought to say at once that the proposition is unexceptionable that, if the petition was bad at the time it was presented, it cannot retrospectively be made good by any affidavit filed after the time limit prescribed by section 83. A consideration of public policy that a contest on an election petition is not to be regarded purely as a proceeding *inter partes* and that the court owes a duty to the voters and to the public to see that those duly elected should be declared to have been returned cannot arrest the consequences of a failure to comply with a mandatory provision of the statute.

The principal argument adduced against the petition is that it does not contain allegations on which claims for relief under section 80 (*b*) and (*c*) can be based. In other words, borrowing the language of pleadings in civil cases, it is said that the petition does not disclose a cause of action. Criticism has been specially directed to paragraph 5 of the petition which reads,

> "And your petitioner further states that there has been a miscount of the votes cast at the said election."

The objection to this paragraph is that it is vague and entirely devoid of content relevant to the reliefs claimed. The resulting position is that if the petition is to be read without paragraph 5, it must necessarily fail, and so it would. When paragraph 5 is closely analysed there is implied in it much that is irrelevant or even harmful to the case that the petitioner is seeking to make out. Among the diversity of meanings that could be extracted from paragraph 5 one certainly is that votes cast for the 3rd respondent were counted in favour of the 2nd and *vice versa*. That would have no relevance in a case where the return of either of those respondents is not challenged. Another possible meaning is that votes cast for the 1st respondent were counted in favour of the petitioner which would be a singularly damaging admission. Mr. Izadeen Mohamed frankly stated that he could not by any means claim for paragraph 5 the merit of precision but submitted that if the petition is read as a whole, in the background of the law on which a recount is claimed and granted, there are

[1] *(1893) 4 O'M. & H. 194.* [2] *(1948) 49 N. L. R. 201.*

sufficient averments to sustain the petition and that the preliminary objection must fail.

The answer to the preliminary objection was somewhat on the following lines. According to the petition the returning officer, after the counting of the votes, declared that the 1st respondent had received 20,375 votes and the petitioner 20,338. The ground on which the petitioner claims to have been elected is that as against the 1st respondent he had the majority of votes and the fact on which he relies is that there was a "miscount" of the votes. The reasonable construction of paragraph 5, when read with the allegation in paragraph 6 that the petitioner had a majority of votes as against the 1st respondent, is that the word "miscount" amounts to a statement that votes cast for the petitioner had been counted as votes for the 1st respondent or for one or more of the other opposing candidates. Reliance was again placed on the *Nivitigala* case in which a recount was allowed. There were four candidates who contested one seat. All that the petitioner said in that case in support of a recount which was granted (there was also a claim for scrutiny) was :

> "Your petitioner states that there has been a miscount of the votes by the returning officer, the 2nd respondent, and that the return of the 1st respondent was undue."

I must confess that in the process of weighing the contentions of either side my opinion has fluctuated considerably. I do not think it would be fair to throw out a petition because an examination of its language, as strictly as one would examine the penal provisions of a statute, reveals matters which have no bearing on the reliefs claimed. There is implicit in paragraph 5 much that is irrelevant but there is also a small residuum of what is germane to the reliefs claimed, namely, that votes that should have been counted for the petitioner were counted for his rivals.

In regard to another part of the objection I should state that it is not requisite to a valid petition based on a miscount that it should set out how and why it occurred. One is familiar with election petitions in Ceylon where following the form in *Rogers on Elections* (20th edition, Vol. II, p. 523) the substance of the allegation is set out succinctly as, for example, that the respondent was by himself and his agents guilty of the corrupt practices of bribery, treating, etc. The Order in Council has expressly put a curb on prolixity by requiring in rule 4 (1) (*b*) of the Parliamentary Election Petition Rules, 1946, that a petition shall state *briefly* the facts and grounds relied. The allegation that there was a miscount is an allegation of fact, the proof of which is a matter of evidence which under rule 5 need not be stated in the petition. It is true that the word "miscount" is not defined like "personation", "treating" and "bribery" but I think it has passed into the dictionary of election law and bears a restricted meaning and not a multitude of meanings in the context of a claim by a candidate, who was not returned, that he had a majority of votes and should be declared to be duly elected. I have come to the conclusion, though with some hesitation, that the petition should not be thrown out on the ground that it does not disclose

any cause for relief or that it has failed to conform to the requirements of the Order in Council.

The next objection is based on the order discharging the 2nd and 3rd respondents. It is contended only by Mr. Chitty that without these respondents the petition is improperly constituted because persons who might be adversely affected if the petition succeeds are not before court. It is said that if upon a recount it is found that either the 2nd or 3rd respondent or both were not entitled to be returned they may be in peril of losing their seats. I must say that these respondents did not take the same pessimistic view. Almost before a word of argument was spoken in the case they departed willingly with an order for costs in their favour.

It would be helpful if in the first instance I deal with some authorities cited at the argument. In *Line v. Warren*[1] an election petition was presented under the Municipal Corporations Act, 1882, against only three out of four persons who were elected to fill vacancies in the town council of a borough. It was common ground that three candidates were wrongully refused nomination and were thereby prevented from going to the poll with the result that the whole election might have been declared void had the fourth member, one Thomas Harris, been a party to the petition.

Mathew, J., in giving judgment for the petitioners and holding that the respondents had not been duly elected stated,

> " The first question raised is whether the election of the respondents can be questioned by petition in the absence of Thomas Harris, who was elected at the said election and who has not been made a party to these proceedings . . . . The argument is that, inasmuch as the same objection might have been made to Harris's election, the court cannot do anything in the absence of Harris, because it cannot in such a case declare the election void as to three of the persons elected without doing so to the fourth also. I cannot see any foundation whatever for that contention. It seems to me that the scope of the legislation on the subject is to enable the election of particular persons to be challenged by petition. It is the duty of the court to pronounce on the prayer of such petition, but it can only deal with the case of the persons whose election is objected to. Harris's election was not objected to by the petition and it is clear that he must now be treated as duly elected, because there has been no petition presented against him within the time limited for that purpose. "

Day, J., concurred in this judgment which was upheld in the Court of Appeal before a bench consisting of Brett, M.R., Cotton, L.J., and Lindley, L.J.

The case of *Lord Monkswell and others v. Thompson*[2] was also one under the Municipal Corporation Act, 1882. Eight candidates contested five seats. A petition was presented against Thompson who had polled

[1] *(1884–5) 14 Q. B. D. 548.* [2] *(1898) 1 Q. B. D. 479.*

13, 221 votes and his seat was claimed for one Johnson who had polled 13,218 votes on the ground that he was duly elected and ought to have been returned. On a recount the court in declaring that Johnson was elected in place of Thompson held it was enough for the former to establish that he had more votes than Thompson and that it was unnecessary for him to recount the votes given for the first four candidates. Channell, J., says in his judgment,

> " Then if you start with the returning officer's figures, who is it who says they are wrong ? The petitioners do not. They say that the figures of the first four are right and that it is only those of the fifth and sixth that are wrong. But he has given no evidence in support of that suggestion. If, indeed, he had shown that those figures were wrong—subject to the question as to the way in which he must have shown it, whether in this petition or in another petition—and that any one of those four had a less number of votes than he has now been ascertained to have, then I think that he could not be unseated. "

A clear principle emerges from these authorities that once the period of twenty-one days prescribed by section 83 (1) had elapsed the 2nd or 3rd respondent was not in peril of being unseated on an election petition claiming a recount of the votes. That being so I hold that the objection that the petition is not properly constituted by reason of the discharge of the 2nd and 3rd respondent fails.

Is the present case one in which it would be proper for me to order that a recount of the ballot papers be taken ? The only material before me consists of the three affidavits which are almost to the same effect. I have to bear in mind the following points :

(*a*) I am entitled to presume that as between the petitioner and the 1st respondent and the other candidates the votes were correctly counted. The burden was on the petitioner to prove that an error of a magnitude sufficient to turn the scales in his favour might reasonably have occurred.

(*b*) The honesty, care and competence of those responsible for the counting are not challenged.

(*c*) There is no evidence that any of the seven candidates or the fourteen counting agents detected a single case of miscounting or even alleged that there was a miscount.

(*d*) It is not suggested that having regard to the number of ballot papers the returning officer did not have an adequate staff of assistants and clerks or that the counting was required to be done at a rate which multiplied the ordinary chances of error.

(*e*) Although the petitioner was aware of the comparatively narrow majority in favour of the 1st respondent, he did not avail himself of the right of asking for a recount under section 48 (7), from which I am entitled to presume that he was not then dissatisfied with the counting.

The affidavits say that the conditions under which the counting took place were such that "it was impossible for the candidates or their agents to keep an eye on the count or by any means have an effective check". It is surprising that no protest was registered at the time and that this allegation should be made as late as six months after the counting. In two paragraphs the petitioner states "to the best of my knowledge and belief" there was a miscount of votes and error in the rapid sorting out of the votes. There is no material before the court for testing the grounds of the petitioner's belief nor is there evidence of the facts which constitute his knowledge nor any evidence of the sources from which he gathered those facts.

In paragraph 10, read with paragraph 9 of the petitioner's affidavit, there is a reference to a discrepancy of 97 votes according to certain figures said to have been announced by the returning officer but no submission on this matter was made by any of the learned counsel who addressed me. At one stage of the argument I had the impression that neither the 1st nor the 4th respondent accepted the correctness of the statements in paragraphs 9 and 10. Even if I accept them as correct, they do not, in the light of the other considerations, afford any ground for believing that the votes cast for the petitioner were not *counted* for him.

Both in his opening address and reply Mr. Izadeen Mohamed referred me to a passage in *Fraser on Parliamentary Elections* (3rd edition, p. 222) to the effect that an application should be supported by affidavit showing the grounds for supposing that there has been a miscount and that where the majority is a very small one the application is, as a rule, allowed almost as of course. Before following this practice I have to caution myself on the difference between the English law and ours on two fundamental points, namely, that under the Order in Council rejected ballot papers cannot be called in question on an election petition and that no discretion is given to a returning officer to refuse a recount if asked for by any candidate.

It is stated in *Halsbury's Laws of England* (3rd edition), Volume 14, page 310,

> "A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer."

The authority relied on is the case of the *Stepney Division* [1]. As I have said before the provision in section 49 (5) is peculiar to our law and has the effect of reducing a recount ordered by court to a mechanical process. I ought to have good ground for believing that what has already been done under proper supervision did not yield an accurate result. In paragraph 12 of the affidavit the petitioner states,

> "The count of so large a number of votes was a long and wearying process and any attempt at a renewal of the process at that juncture would have been abortive."

[1] *(1886) 4 O'M. & H. 34.*

I cannot accept this as an excuse for the petitioner not applying for a recount. Had there been an application for a recount it is more likely that the returning officer, knowing that the majority of the 1st respondent over the petitioner was only 37 votes, would have, in collaboration with the counting agents, taken stringent precautions against errors in the recount. While I do not say that, if a petitioner fails to make an application to the returning officer under the proviso to sub-section 7 of section 48, he would be precluded from petitioning the court for a recount, it would, generally speaking, be undesirable for an election court in its discretion to provide a petitioner with a remedy where he could have insisted on an analogous remedy elsewhere as a matter of right.

Had there been a recount by the returning officer the figures ascertained thereby would have been of invaluable assistance to this court in judging whether a *prima facie* case has been made out for the exercise of what Mr. Izadeen Mohamed always referred to as the discretionary power of the court to order a recount. If that material is not available, the petitioner is alone to blame.

I refuse on the affidavits relied on by the petitioner to order a recount of the ballot papers. In the result the petition fails and is dismissed with the declaration that the 1st respondent has been duly returned. The petitioner will pay to each of the contesting respondents a sum of Rs. 3,000 as costs.

Petition dismissed.