

1967 Present : H. N. G. Fernando, C.J., and Sirimane, J.

B. D. BANDIYA, Plaintiff, and R. R. W. RAJAPAKSA, Defendant

APN/GEN/5/67—D. C. Colombo, 66775/M

Election petition—Determination of Election Judge that candidate committed corrupt practice—Appeal therefrom to Supreme Court—Point of time when the report of the Election Judge becomes effective—Penalty for sitting or voting in Parliament—Date of commencement of liability—Ceylon (Constitution) Order in Council, 1946, ss. 13 (3) (h), 14, 24—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 58 (2), 82, 82 C, 82 D (2).

Where, in consequence of an election petition, the election of a person as a Member of Parliament is declared void on the ground that he committed a corrupt practice, the combined effect of sections 13 and 14 of the Constitution Order in Council, and of sections 58 (2) and 82D 2 of the Parliamentary Elections Order in Council is that he becomes disqualified from sitting or voting in Parliament for a period of seven years from the date of the report of the Election Judge. Accordingly, he is not liable to pay any penalty under section 14 (b) of the Constitution Order in Council for the days upon which he sat or voted in Parliament before he becomes disqualified by reason of the report made by the Election Judge.

A report is made in terms of section 82D (2) (b) of the Parliamentary Elections Order in Council, only when it is transmitted to the Governor-General. The "date of the report" for the purposes of section 82D (2) (b) means the date of transmission, and not the date which the report may bear on its face.

In an election petition filed against the defendant, his election as a Member of Parliament was declared void on the ground that he had committed a corrupt practice. The determination of the Election Judge was given on 6th April 1966, and the report of the Judge in terms of section 82 of the Parliamentary Elections Order in Council was dated 30th May 1966. An appeal filed by the defendant against the determination of the Election Judge was dismissed by the Supreme Court on 26th September 1966, and the report of the Election Judge was transmitted to the Governor-General only thereafter.

Held, that the defendant was entitled to sit or vote in Parliament not only until 30th May 1966 but also until the date when the report of the Election Judge was transmitted to the Governor-General. He, therefore, incurred no penalties under section 14 (b) of the Constitution until the latter date.

REVISION of a decree *nisi* entered by the District Court, Colombo.

Nimal Senanayake, with *Miss A. P. Abeyratne*, for the plaintiff.

Colvin R. de Silva, with *Nihal Jayawickrema* and *Dharmasiri Senanayake*, for the defendant.

H. L. de Silva, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

July 1, 1967. H. N. G. FERNANDO, C.J.—

The defendant to this action was elected the Member of Parliament for Dodangaslanda at the General Election held in March 1965. On an Election Petition filed in respect of the election, the election of the defendant was declared void on the ground that the defendant had committed a corrupt practice.

The determination of the Election Judge was given on 6th April 1966, and the report of the Judge in terms of s. 82 of the Ceylon Parliamentary Elections Order in Council was dated 30th May, 1966. An appeal filed by the defendant against that determination was dismissed by the Supreme Court on 26th September, 1966.

In this action, the plaintiff sued the defendant for penalties to which the defendant was alleged to have become liable in terms of s. 14 of the Constitution for having sat and voted in Parliament on 51 days. The defendant did not appear in answer to the summons, and after an *ex parte* trial the District Judge made order for the entry of a decree *Nisi* ordering the defendant to pay Rs. 25,500 as penalties. On reading a newspaper report of these matters, I called for the record and directed notice to issue on the parties to show cause why the order of the District Judge should not be set aside. I thought fit to take this unusual course because the case appeared to be of public importance for two reasons—firstly on the question whether any penalty attaches in a case where a person has sat and voted in Parliament before he becomes disqualified by reason of the report of an Election Judge, and secondly because of the *prima facie* appearance that the action was collusive. In view, however, of the conclusion we have reached on the first question, it is not necessary now to refer to the second matter.

Section 14 (1) of the Constitution reads as follows :—

(1) Any person who—

(a) having been appointed or elected a Member of the Senate or House of Representatives, but not having been, at the time of such appointment or election, qualified to be so appointed or elected, shall sit or vote in the Senate or House of Representatives, or

- (b) shall sit or vote in the Senate or House of Representatives after his seat therein has become vacant or he has become disqualified from sitting or voting therein, knowing, or having reasonable grounds for knowing, that he was so disqualified, or that his seat has become vacant, as the case may be, shall be liable to a penalty of five hundred rupees for every day upon which he so sits or votes.

Paragraph (a) of the sub-section applies only in a case where a person is not, at the time of his election, qualified for such election. That paragraph has no application in the present case, for there is no allegation that the defendant was not fully qualified on 22nd March 1965, the date of the Parliamentary General Election, to be elected a Member of Parliament.

Paragraph (b) of the sub-section applies when a person sits or votes in Parliament "after his seat has become vacant, or after he has become disqualified". Crown Counsel has pointed out that there appears to be some doubt whether, in terms of this paragraph, the seat of the defendant became vacant by reason of the determination of the Election Judge. Section 24 of the Constitution, unlike s. 15 of the Ceylon (State Council) Order in Council, does not provide that a seat becomes vacant when the election of a member is declared void on an Election Petition. But for present purposes it suffices to consider whether the defendant did sit or vote in Parliament after he had become disqualified from sitting or voting therein.

Section 13 of the Constitution is the provision which defines the circumstances which disqualify a person from sitting or voting in Parliament, and the circumstances relevant in the present case are set out in paragraph (h) of sub-section (3) of s. 13 :—

"if by reason of his conviction for a corrupt or illegal practice or by reason of the report of an Election Judge in accordance with the law for the time being in force relating to the election of Senators or Members of Parliament, he is incapable of being registered as an elector or of being elected or appointed as a Senator or Member, as the case may be ;"

The particular ground of disqualification applicable in the case of the defendant is that "by reason of the report of an Election Judge he is incapable of being registered as an elector or of being elected as a Member of Parliament". The incapacity here mentioned is that which is declared by s. 82D (2) of the Parliamentary Elections Order in Council 1946 :—

"(a) The Governor-General shall, upon receipt of the report of the Election Judge or of the Supreme Court transmitted to him under section 82 C, cause a copy of the report to be published in the Gazette.

- (b) (i) Where the report referred to in paragraph (a) is to the effect that a corrupt or illegal practice has been committed by any person, that person shall be subject to the same incapacities as if at the date of the said report he had been convicted of that practice.
- (ii) Where the report referred to in paragraph (a) is to the effect that such corrupt or illegal practice was committed with the knowledge and consent of a person who was a candidate at an election or by his agent, that person shall be subject to the same incapacities as aforesaid.

The paragraph (b) just cited equates the report of the commission of a corrupt practice to a conviction of a corrupt practice. The effect of such a conviction is declared by s. 58 (2) of the Parliamentary Elections Order in Council :—

“ Every person who is convicted of a corrupt practice shall, by conviction, become incapable for a period of seven years from the date of his conviction of being registered as an elector or of voting at any election under this Order or of being elected or appointed as a Senator or Member of Parliament, and if at that date he has been elected or appointed as a Senator or Member of Parliament, his election or appointment shall be vacated from the date of such conviction.”

The combined effect of sections 13 and 14 of the Constitution, and of sections 58 (2) and 82D (2) of the Parliamentary Elections Order in Council, in the present case, is that the defendant became disqualified from sitting or voting in Parliament for a period of seven years from the date of the report of the Election Judge.

The report of the Election Judge in the instant case bears the date 30th May, 1966. So it is quite certain that the defendant was free and indeed entitled to sit and vote in Parliament at least until that date. It was that certainty which prompted me to exercise in this case the power of intervention conferred on the Supreme Court to correct apparent errors of Courts of first instance. Counsel are now all agreed that, of the 51 occasions on which the defendant did sit or vote in Parliament, 40 or more were occasions prior to 30th May, 1966, and that the defendant incurred no penalties for sitting or voting before that date.

There remains for consideration the question whether any penalty attached because the defendant sat on some 8 or 9 occasions after 30th May, 1966, the last such occasion being (according to the evidence) 16th August, 1966. This question depends on the construction which must be placed on the expression “ at the date of the report ” in s. 82D (2) (b) of the Parliamentary Elections Order in Council. Crown Counsel has put forward the argument that this expression must be given its plain meaning, and that the date which the report bears on its face is “ the date of the report ”. If so, the defendant is liable to penalties for sitting or voting after 30th May, 1966.

Section 82D is a new provision which was inserted in the Order in Council as one of the series of amendments designed to allow an appeal on a question of law to be preferred to the Supreme Court against the determination of an Election Judge. Prior to these amendments there was no possibility of such an appeal. When, therefore, an Election Judge found that a corrupt practice had been committed at a particular election, s. 82 of the Order-in-Council (in its original form) required the Judge "to report in writing to the Governor-General" whether or not a corrupt practice had been committed. In such a context the question whether the report, and the incapacities arising therefrom, took effect when the report was signed by the Judge or else only when it was received by the Governor-General, was not material. A candidate who would be disqualified because of the report would have known, no sooner the determination of the Election Judge was given, whether or not there would be a report against him, and thus whether or not he would be entitled to continue to sit in Parliament.

But the question as to the time when the report of an Election Judge becomes effective is of vital importance under the amended provisions of the Order-in-Council which conferred a right of appeal from the determination of the Election Judge.

One amendment made in this connection (in s. 82) is that the section now provides, not that the Judge shall report to the Governor-General, but that he shall "make a report under his hand" and that this report must be kept in the custody of the Registrar of the Supreme Court pending an appeal. Then there is an entirely new provision in s. 82C having this effect :—

- (a) If there is no appeal within the appealable period of one month the Supreme Court is required to transmit to the Governor-General the report of the Election Judge at the end of that period ;
- (b) If the determination of the Election Judge is confirmed in appeal, the Court must transmit the report of the Election Judge to the Governor-General after the appeal is decided ;
- (c) If the determination of the Election Judge is reversed in appeal, the Supreme Court will then transmit the report of the Election Judge if that report is not affected by the decision in appeal, and the Supreme Court itself may make a report as to the commission of a corrupt practice if the Court considers it necessary.

What is just stated in paragraph (c) above shows that the report made by an Election Judge can become ineffective, and will then not be transmitted to the Governor-General, in the event of the determination of the Election Judge being reversed in appeal. There is here a clear indication that the mere signing of a report by an Election Judge will not disqualify a member from sitting or voting in Parliament, and that the report can become a dead letter if the determination is reversed in appeal.

What is stated in paragraph (a) above shows that even in a case in which the report of the Election Judge must be transmitted to the Governor-General, it will not be transmitted until the appealable time expires.

The progress of the report, from the Judge making it, to the Governor-General who will or may ultimately receive it, is thus arrested by the requirement that it be kept in the custody of the Supreme Court. It might appear, *prima facie*, that an instrument signed by a Judge must be regarded as having been made on the date of signature. But where a Judge has to report a matter to the Governor-General, it is at least equally reasonable to regard the date of the transmission of the report to the Governor-General as being "the date of the report". If A has to report a matter to B, the matter can fairly be said to be reported to B only when B receives the report. This construction avoids the possibility that penal consequences flow from a report during a period when it is yet uncertain whether or not it will ultimately be transmitted to the Governor-General. The construction also avoids the manifest inconsistency that, by reason of the report of an Election Judge, a Member might be disqualified during the period when an appeal is pending, but might yet cease to be disqualified when the appeal is decided.

I would hold accordingly that a report is made, in terms of s. 82D (2) (b), only when it is transmitted to the Governor-General, and that the "date of the report" for the purposes of that section means the date of transmission, and not the date which the report may bear on its face.

In the present case the defendant's appeal was dismissed by the Supreme Court on 26th September, 1966; and the report of the Election Judge was transmitted to the Governor-General only thereafter. The defendant became disqualified only on or after 26th September, 1966. There being no evidence that the defendant sat or voted in Parliament after that date, he did not become liable to any penalty under s. 14 of the Constitution.

In exercise of the powers of revision of this Court, the decree nisi entered by the District Judge is set aside, and the plaintiff's action is dismissed.

SIRIMANE, J.—I agree.

Decree nisi set aside.