1953 *Present :* **Swan J.**

H. ABRAHAM SINGHO, Petitioner, *and* MRS. KUSUMASIRI GUNAWARDENA, Respondent

Election Petition No. 15 of 1952 (Avissawella)

Election Petition—Particulars of charges not furnished—Duty of election judge under such circumstances—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 86 (1) and Schedule III, Rules 21 to 26.

Where, in an election petition, the petitioner stated that he was unable to furnish particulars of the charges and to proceed with the petition—

Held, that under the Parliamentary Elections Order in Council the functions of an election judge are purely judicial. So, when at the trial, no evidence is led on the charges, the judge is not bound to proceed any further. He must dismiss the petition.

Per Swan J.—" There is no reason for me to suspect that the abandonment of the petition is collusive, dishonest or fraudulent. But even if there is room for suspicion I do not think there is anything I can do in the matter."

ELECTION petition No. 15 of 1952 (Avissawella).

C. S. Barr Kumarakulasinghe, with *Ivan Perera,* for the petitioner.

S. Nadesan, with *A. B. Perera,* for the respondent.

V. Tennekoon, Crown Counsel, as *amicus curiae.*

Cur. adv. vult.

June 22, 1953. Swan J.—

The Election for the Avissawella Electoral District No. 15 was held on 30.5.52. There were two candidates, Mrs. Clodagh Jayasuriya and the respondent. The respondent was elected. The result was published in the *Government Gazette* of 2.6.52.

The petitioner claiming to be a registered voter in the district filed this petition on 21.6.52 in which he seeks to have the respondent unseated on the ground that she and her agents were guilty of the corrupt

practice of undue influence. He also seeks to have the election declared void on the ground that by reason of general intimidation the majority of the electors were prevented from electing the candidate they preferred.

When notice of presentation of the petition was duly served on the respondent she entered an appearance and appointed an agent to represen her. On 20.10.52 I was appointed Election Judge and on 15.1.53 I fixed the trial of the petition for 23.3.53 which date was subsequently altered to 9.6.53.

On 4. 5. 53 the respondent's agent moved for an order on the petitioner to deliver to him on or before 12.5.53, particulars of the charges. On 13.5.53 counsel saw me in Chambers and the petitioner's proctor agreed to furnish the particulars asked for on or before 25.5.53. The case was called the following day and, as no particulars were furnished and no application was made for further time, I directed that the trial date should stand.

On 9.6.53 the petitioner and respondent were present. Mr. Ivan Perera appearing for the petitioner stated that the petitioner was unable to furnish the particulars asked for. Mr. A. B. Perera thereupon moved that the charges be struck out and the petition dismissed. As the Rules made no provision for a situation like this, I adjourned the hearing for 12.6.53 and requested the Attorney-General to send a representative of his Department to be present as amicus curiæ.

On 12.6.53 the petitioner was represented by Mr. C. S. Barr Kumarakulasinghe with Mr. Ivan Perera, and the respondent by Mr. S. Nadesan with Mr. A. B. Perera. Mr. V. Tennekoon, C.C., appeared as amicus curiæ. Mr. Barr Kumarakulasinghe repeated what Mr. Ivan Perera had stated on 9.6.53 but explained at length why the petitioner could not proceed with the matter. Mr. Nadesan thereupon moved that the petition be dismissed with costs. Having heard Crown Counsel I said I would like to consider the matter further and I accordingly reserved my order for 22.6.53.

Rules 21 to 26 deal with an application to withdraw a petition and lay down the procedure to be followed when such an application is made. But this is not an application to withdraw and I cannot treat it as such, nor can I compel the petitioner to make an application to withdraw so that I may follow the procedure laid down in these rules. What then are the duties and powers of the Court when a petitioner says he is unable to furnish particulars and proceed with the petition ?

Before the Corrupt and Illegal Practices Prevention Act of 1883 Election Judges in England considered their functions to be judicial rather than inquisitorial. Thus in *Windsor* [1], when the petitioner expressed a desire not to go on with the charges and the respondent seemed reluctant to proceed with the recriminatory case Willes J. did not seem to think it incumbent on him to pursue the matter any further. In *Taunton* [2], Grove J. said :—

" It must be borne in mind in these cases, that although the object of the statute by which these election tribunals were created was to prevent corrupt practices, still, the tribunal is a judicial and not an

[1] *(1869) O'M & H. 6.*

[2] *(1874) 2 O'M & H. 74.*

inquisitorial one ; it is a court to hear and determine according to law, and not a commission armed with powers to inquire into and suppress corruption."

In *Canterbury*[1], where the petition charged corrupt practices, and the respondent stated that he could not answer the case, the Court (Denman & Lopes JJ.) intimated that their functions were judicial, not inquisitorial, and pointed out that while they were ready to hear any evidence which the petitioner might desire to bring forward, such evidence would have to be produced at the sole cost of the petitioner, and would be given without being subject to cross-examination. The petitioner thereupon intimated that he did not feel called upon to prosecute the petition at his own expense, and Denman J. said :—

"This is the most satisfactory course because after carefully considering the provisions of the Act, I have been quite unable to see how we could have proceeded either satisfactorily or usefully without any protection for the witnesses."

After the Act of 1883, however, Judges took a different view. It will be noted that this Act required the judges to report whether corrupt and illegal practices had extensively prevailed and also provided that the Director of Public Prosecutions should attend the trial and obey any directions given by Court with regard to the summoning and examination of witnesses and the prosecution of offenders, and should cause anyone who he thought was able to give material evidence to attend. There was no such requirement or provision in the Parliamentary Elections Act of 1868.

Thereafter the Judges felt it their duty to probe allegations of corrupt and illegal practices very fully. Thus in *Ipswich* [2] Denman J. said :—

"In this Act there are provisions which render it impossible, if there be any indications of impurity in the election, to shorten the case by concessions between the parties, and which really compel the judges to sit as long as there is anything which can be brought before them not only by the parties themselves but by the officer sitting here in the interest of the public, whose duty it is not to let anything drop which may tell in favour of the theory that there has been improper conduct, so that it may not escape or go unpunished, and still more, perhaps, in order that there may not be that which was an intolerable burden upon a place, namely, commissioners coming down to hold a further inquiry."

Rodgers in his Treatise on Parliamentary Elections and Petitions (20th Ed. Vol. II, pp. 243–245) cites several cases where the judges took this view. I need refer only to one of them, namely, *North Louth*[3]. In this case two corrupt practices were proved to have been committed by an agent of the respondent. Counsel for the respondent thereupon stated that he was prepared to submit to an order that the election was void. The Court, however, decided to go on, and Madden J. said :—

"I entirely adopt the language of Mr. Justice Denman, referring to the Corrupt and Illegal Practices Prevention Act, 1883, that there

[1] *(1880) 3 O'M & H. 103.* [2] *(1886) 4 O'M & H. 71.*

[3] *(1911) 6 O'M & H. 103.*

are provisions in that Act which render it impossible, if there be any indication of impurity in the election, to shorten the case by a concession between the parties."

The *Parliamentary Elections Act of 1868*, the *Ballot Act of 1872* as amended by the Representation of the People Acts of 1918, 1920 and 1948, and the *Corrupt Illegal Practices Prevention Act of 1883* remained the law in England till they, and all other statutes affecting Parliamentary and Local Government Elections, were replaced by a consolidating measure—namely, the *Representations of the People Act of 1949*. So when our Order in Council was prepared it is reasonable to presume that it was based on the English Law and Procedure as it existed in 1946, the draftsman having before him as a model and guide *The Ceylon (State Council Elections) Order in Council, 1931.*

The point I wish to stress is that neither in that Order nor in the present Order was any provision made for an official of Government to perform a duty corresponding to that of the Director of Public Prosecutions in England at an election trial.

I should also mention that in the *Representation of the People Act of 1949* the rights and duties of the Director of Public Prosecutions have not been altered to any great extent. He is no longer required to be present at the trial but still has to " obey any direction given him by the election court with respect to the summoning and examination of any witness to give evidence at the trial" (Sec. 123 (5)), and " without any direction from the Court cause any person appearing to him to be able to give material evidence as to the subject of the trial to attend the trial and with the leave of the court examine him as a witness " (Sec. 123 (6)). The Act also makes it necessary for the court to report " whether corrupt and illegal practices have, or whether there is reason to believe that corrupt or illegal practices have, extensively prevailed at the election " (Sec. 124 (2)).

Under our Order in Council an election judge has at the conclusion of the trial to determine whether the member whose return or election is complained of or any other and what person was duly returned or elected, or whether the election was void ; and certify such determination to the Governor. He has also to report in writing to the Governor—

(*a*) whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and

(*b*) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice.

In my opinion under our Order in Council the functions of an election judge are purely judicial. So when at the trial no evidence is led on the charges the judge is not bound to proceed any further. He must dismiss the petition.

With the Order in Council certain rules have been published. Section 86 (1) sets out :—

> " Subject to the provisions of this Section the procedure and practice on election petitions shall, until Parliament otherwise provides, be regulated by the rules contained in the Third Schedule to this Order."

If Parliament thinks it necessary or desirable to add to or amend those rules in order to meet a situation like the one that confronts me in this case, it is open to it to do so.

There is no reason for me to suspect that the abandonment of the petition is collusive, dishonest or fraudulent. But even if there is room for suspicion I do not think there is anything I can do in the matter.

The charges are struck out and the petition dismissed. The petitioner will pay the respondent Rs. 1,000 by way of costs. I think this sum is sufficient in view of the stage at which this petition is dismissed. But I do think it desirable that a scale of costs should be prepared and added to the rules.

Petition dismissed.