

G.K.T.R. 2

21, 1954

No. 17 of 1954.

37681

In the Privy Council.

UNIVERSITY OF LONDON
 W.C. 1
 24 FEB 1955
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

ON APPEAL
 FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

EDWARD LIONEL SENANAYAKE *Appellant*

AND

1. HERATH MUDIYANSELAGE NAVARATNE
2. HERBERT SYDNEY MOLAGODA *Respondents.*

Case for the Respondents

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RECORD.

1. This is an appeal from a judgment of the Supreme Court of Ceylon dated 18th December 1953 affirming by a majority (Nagalingam A.C.J. and Pulle P.J., Gratiaen S.P.J. dissenting) an Order of the election judge (de Silva P.J.) dated 13th February 1953 determining that the appellant's election to the House of Representatives, Ceylon, as the Member for the Kandy Electoral District was void.

Vol. 3, pp. 1-16.
 Vol. 3, pp. 59-66.
 Vol. 3, pp. 18-58.
 Vol. 2, pp. 314-315.

20 2. The issue for determination in this appeal is whether the Supreme Court were right in holding that an election judge had jurisdiction to entertain an election petition questioning an election upon the ground of a corrupt practice which was committed more than 21 days after the date of the publication of the result of the election in the *Government Gazette*.

3. The law relating to elections in Ceylon is contained in the Ceylon (Parliamentary Elections) Order in Council 1946 as amended by the Parliamentary Elections (Amendment) Act No. 19 of 1948, the Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949, the Ceylon (Parliamentary Elections) Amendment Act No. 38 of 1950, the Ceylon (Parliamentary Elections) Amendment Act No. 7 of 1952 and the Ceylon (Parliamentary Elections) Amendment Acts No. 19 and No. 26 of 1953.

30 4. The provisions of the Ceylon Parliamentary Elections Order in Council as amended by the subsequent Acts (herein called "the Order in Council") which are relevant to this appeal are referred to or reproduced in the following paragraphs of this statement.

5. The Commissioner of Parliamentary Elections is required by Section 50 of the Order in Council to cause the name of the member elected to be published in the *Government Gazette*. The time for presentation of an election petition commences to run from the date of such publication.

6. Sections 55, 56 and 57 of the Order in Council define the offences of treating, undue influence and bribery respectively. The definitions indicate that these offences may be committed before during and AFTER an election.

7. Every person who commits the offence of treating undue, influence or bribery or who being a candidate or election agent knowingly makes the declaration as to election expenses falsely is guilty of a corrupt practice under Section 58 (1) of the Order in Council and shall on conviction before a District Court be liable to the punishment specified in the section. 10

Section 57 (2) provides that every person who is convicted of a corrupt practice shall be disqualified for a period of seven years from being registered as a voter or from being elected as a Member of Parliament. It also provides that if a person is a Member of Parliament at the date of such conviction he shall vacate his seat from such date.

Section 58 (3) provides that a prosecution for a corrupt practice shall not be instituted without the sanction of the Attorney General. 20

8. Sections 62 (2), 63 (2), 63 (4), 66 (2), 67 (2), 67 (3), 67 (4), 68 (2) and 70 (6) of the Order in Council deal with illegal practices. The payment of any election expenses before, during or AFTER an election otherwise than through an election agent; the payment of a claim in respect of election expenses which had been made AFTER the expiry of 14 days from the date of the declaration of the election result; the payment of election expenses AFTER the expiry of 28 days from the date of the declaration of the election result; the payment of any sum of money knowingly before, during or AFTER an election in excess of the amount prescribed by the Order in Council; the making of any payment before, during or AFTER an election on account of the conveyance of voters to the polls or on account of the use of any building for the exhibition of any address; the letting, lending or employing of vehicles which are kept, for the purpose of letting out for hire, for the conveyance of voters to and from the polls, and, the borrowing, hiring or using of such vehicles for the conveyance of voters; the employment of more than the number of persons allowed by the Order in Council or the employment of any person for a purpose other than that permitted by the Order in Council whether before, during or AFTER an election; and the failure to comply with the provisions of Section 70 (1) and 70 (2) regarding the return and declaration of election expenses are made illegal practices by the above-mentioned sections. 30 40

9. The illegal practices dealt with in Sections 62 (2), 66 (2), 67 (2) and 68 (2) of the Order in Council may be committed AFTER an election or before or during an election while the illegal practices dealt with in Sections 63 (2), 63 (4) and 70 (6) can be committed only AFTER an

election and the illegal practices referred to in Sections 67 (3) and 67 (4) can be committed only during an election. Thus except for the illegal practices of letting, lending or employing vehicles kept for letting out for hire or the borrowing, hiring or using of such vehicles for the conveyance of voters to and from the polls, all other illegal practices may be committed at any time AFTER an election while some of them may also be committed before or during an election. Most of these illegal practices consist in the doing of certain prohibited acts or the making of certain prohibited payments. Promises to do such prohibited acts or to make such prohibited
 10 payments have not been made illegal practices.

10. Section 72 provides that every person who commits an illegal practice shall, on conviction by the District Court, be liable to pay a fine and shall be disqualified for a period of three years from being registered as a voter or from being elected as a Member of Parliament. It also provides that if a person is a Member of Parliament on the date of such conviction he shall vacate his seat from such date. A prosecution for an illegal practice shall not be instituted without the sanction of the Attorney General.

20 11. The election agent of every candidate is required by Section 70 to transmit the return respecting election expenses within 31 days of the date of publication of the result of the election in the *Government Gazette*. Such return should be accompanied by declarations on oath by the candidate and his election agent in the specified form. On receipt of the return, the returning officer is required by Section 71 to cause a notice of the date on which the return was received by him to be published in the *Government Gazette*.

12. The grounds on which the election of a candidate shall be declared void on an election petition are set out in Section 77 of the Order in Council which is in the following terms :—

30 “ 77. The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the election judge, namely :—

- (a) that by reason of general bribery, general treating or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred ;
- 40 (b) non-compliance with the provisions of this Order relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election ;
- (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by any agent of the candidate ;

- (d) that the candidate personally engaged as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been found guilty of a corrupt practice by a District Court or by the report of an election judge ;
- (e) that the candidate was at the time of his election a person disqualified for election as a Member.”

13. Section 83, upon the construction of which the question of the jurisdiction of the learned election judge raised in this appeal depends, is in the following terms :— 10

“ 83.—(1) Every election petition shall be presented within 21 days of the date of publication of the result of the election in the *Government Gazette* :

Provided that—

- (a) *an election petition* questioning the return or the election upon the ground of a corrupt practice and *specifically alleging a payment of money or other act to have been made or done since the date aforesaid* by the member whose election is questioned or by an agent of the member or with the privity of the member or his election agent *in pursuance or in furtherance of such corrupt practice may*, so far as respects such corrupt practice, be presented at any time within twenty-eight days after the date of such payment or act ; 20
- (b) *an election petition* questioning the return or the election upon an allegation of an illegal practice may, so far as respects such illegal practice, be presented within the time following, that is to say :—

- (i) At any time before the expiration of fourteen days after the day of the publication in the *Government Gazette* of the notice required by Section 71 as to the election expenses of the Member whose election is questioned ; 30

- (ii) *if the election petition specifically alleges a payment of money or other act to have been made or done since the said day by the Member whose election is questioned or by an agent of the Member or with the privity of the Member or of his election agent in pursuance or in furtherance of the illegal practice alleged in the petition*, the petition may be presented at any time within twenty-eight days after the date of such payment or other act. 40

(2) An election petition presented in due time may, for the purpose of questioning the return or the election upon an allegation of a corrupt or illegal practice, be amended with the leave of a judge of the Supreme Court within the time within which an election petition questioning the return or the election upon that ground may be presented.

(3) For the purposes of this section, where there is an authorised excuse for failing to make and transmit the return and declarations respecting election expenses, the date of the allowance of the excuse or, if there was a failure in two or more particulars and the excuse was allowed at different times, the date of the allowance of the last excuse shall be substituted for the date of the publication in the *Government Gazette* of the notice mentioned in paragraph (B) of the proviso to subsection (1) of this Section.”

10 14. Section 83 (1) of the Order in Council corresponds to Section 6 (2) of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) and to Section 88 (4) of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), and Section 83 (1) (b) corresponds to Section 40 (1) of the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict. c. 51) and to Section 25 (2) of the Municipal Elections and Corrupt Practices Prevention Act 1884 (47 & 48 Vict. c. 70).

15. At an election held in the Kandy Electoral District on the 24th May 1952 the Appellant was declared by the returning officer to be duly elected and the result of the Appellant's election was published in the *Government Gazette* on the 28th May 1952.

20 16. An election petition praying for a declaration that the election of the Appellant as a Member for the Kandy Electoral District was void was duly presented by the Respondents on the 16th June 1952. Vol. 1, pp. 1, 2, 3.

17. The Appellant who was his own election agent transmitted to the returning officer on the 27th June 1952, a return respecting his election expenses, accompanied by a declaration in terms of Section 70 of the Order in Council.

30 18. On the 24th July 1952 the Respondents applied to the Supreme Court for leave to amend their petition under Section 83 (2) of the Order in Council by adding a charge that the Appellant had knowingly made the declaration as to election expenses required by Section 70 of the Order in Council falsely, and the application was allowed with liberty to the Appellant to move to have the Order permitting the amendment vacated at a later date. The Appellant however made no application to have the said Order of the Supreme Court vacated. Vol. 1, pp. 5-9. Vol. 1, p. 10.

19. The petition as amended came up for trial before the learned election judge (de Silva P.J.) on the 10th day of November 1952 and subsequent dates. At the commencement of the trial two of the charges in the petition were withdrawn and in the course of the trial another charge was abandoned and the hearing was confined ultimately to two charges only viz. :— Vol. 1, pp. 11-13. Vol. 2, pp. 1-267. Vol. 2, p. 1. Vol. 2, p. 215.

(A) that the Appellant had committed the corrupt practice of publishing certain handbills and posters relating to the election which did not bear upon their face the names and addresses of their publishers. Vol. 1, p. 12.

Vol. 1, p. 13.

(B) that the Appellant had committed the corrupt practice of knowingly making the declaration as to his election expenses falsely.

No objection was taken by the Appellant at the hearing to the jurisdiction of the election judge to entertain charge (B) above.

Vol. 2, pp. 313-314.

20. The learned election judge held that charge 19 (A) above was established as he was of the view that proof that the handbills and posters were published with a corrupt intent was not necessary to sustain the said charge.

Vol. 2, p. 314.

21. With regard to charge 19 (B) above the learned election judge 10 found that the Appellant had incurred an expenditure of Rs.500/- in obtaining badges for the use of his workers on polling day, and of Rs.606/- in getting handbills and posters printed and had spent several small sums of money in hiring grounds for election meetings etc. and in purchasing cloth for making flags and that the Appellant had in respect of all these items of expenditure paid his own moneys through his agents.

The learned election judge also found that the Appellant had not disclosed these items of expenditure in his return of election expenses and that he was guilty of the said charge.

Vol. 2, pp. 268-315.

22. By his judgment dated 13th February 1953 the learned election 20 judge determined that the election of the Appellant was void on the ground that he was guilty of both the charges 19 (A) and 19 (B) above.

Vol. 1, pp. 30-35.

23. On 18th February 1953 the Appellant appealed to the Supreme Court under Section 82A of the Order in Council against the said determination of the election judge.

Vol. 1, pp. 34-35.

24. The appellant submitted in appeal that the charge of publishing handbills and posters which did not bear upon their face the names and addresses of the publishers had not been established as there was no proof of any corrupt intent and the Supreme Court by a majority upheld this submission.

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25. With regard to the charge of knowingly making the declaration as to election expenses falsely the appellant contended in appeal that the decision of the learned election judge was wrong on the following grounds :—

Vol. 1, p. 33.

(i) That there was no evidence to support the finding that the Appellant had committed the corrupt practice of knowingly making the declaration as to election expenses falsely.

(ii) That in any event the learned election judge had no jurisdiction to entertain an election petition based on a corrupt practice committed more than 21 days after the publication of the 40 result of the election in the *Government Gazette*.

On the first of these grounds the Supreme Court unanimously held against the Appellant, Nagalingam A.C.J. holding that a narration of the facts accepted by the learned election judge established most conclusively that his finding that the appellant was guilty of knowingly having made the declaration in regard to election expenses falsely was unassailable, Gratiaen S.P.J. holding that in his opinion the strictly appellate functions of the Supreme Court would make it impossible for them to hold, as a matter of law, that the learned election judge's decision on the facts ought to be disturbed, and Pulle P.J. holding that the learned election judge came to a finding against the Appellant, which he was entitled to, on the evidence placed before him and that their appellate functions limited to correcting errors in law precluded them from disturbing that finding.

Vol. 3, p. 16.

Vol. 3, pp. 57, 58.

Vol. 3, pp. 65, 66.

26. The Appellant submitted in appeal with regard to the second ground above that Section 83 (1) proviso (a) of the Order in Council applied only to corrupt practices previously committed but implemented subsequently by a payment of money or by the doing of some similar act ; and that the proviso had no application to corrupt practices committed exclusively after the closing of the poll.

27. Nagalingam A.C.J. after considering the various sections of the Order in Council and the corresponding provisions of the English Law held that the learned election judge had jurisdiction. With regard to the words " A payment of money or other act . . . made or done since the date aforesaid . . . in pursuance or in furtherance of such corrupt practice " Nagalingam A.C.J. held that the true construction was that the phrase " in pursuance or in furtherance of such corrupt practice " merely referred to the carrying out of the act which constituted a corrupt practice and not that there should be a link or connection between the corrupt practice, as an isolated act, and the payment of money or other act, as another isolated act.

Vol. 1, pp. 8-9.

Vol. 3, p. 13.

The learned judge also considered that the following language used by Lord Coleridge C.J. in *Maude v. Lowley* (1874) L.R. 9 ; C.P. 165 in dealing with a similar provision established what was the proper meaning to be attached to the words " in pursuance or in furtherance of a corrupt practice " :—

Vol. 3, pp. 10-11.

" The enactment is distinct that the petition must be presented within 21 days except in the one specified case of an offence not discovered since the election but which has taken place since the election ; and in such case the petition may be presented at any time within twenty-eight days not after the discovery of the offence but from the taking place of that which constitutes the offence."

In the learned judge's opinion the only difference between a petition presented within 21 days after the publication of the result of the election in the *Government Gazette* and a petition presented within the extended period of 28 days under the proviso (a) to Section 83 (1) was that while a petition presented within 21 days need set out only a general allegation

Vol. 3, p. 11.

of corrupt practice a petition presented within the extended period should set out not only the general allegation of corrupt practice but also specifically allege the payment or other act which constitutes such corrupt practice. The learned judge's observations on this point are as follows :—

Vol. 3, p. 12.

“ Section 77 expressly states that the election of a member shall be declared void on proof of the commission of a corrupt practice in connection with the election. The words ‘ in connection with ’ are plain in themselves, and mean ‘ in relation to.’ Section 58 specifically declares that the making of a false declaration as to election expenses knowingly is a corrupt practice. That such a declaration is made in connection with the election no one will gainsay. Under paragraphs (a) and (b) of the proviso to section 83 (1), the ground for avoiding an election remains a corrupt or illegal practice even as under a petition presented within twenty-one days under the main provision. But what is further required to be set out under the proviso is the specific act which constitutes the corrupt or illegal practice but which in the case of a petition presented within twenty-one days need not so be set out. It seems to me that the object of the legislature in requiring the specific act to be set out is that there should be an averment in the petition presented under the proviso showing that the petition is presented within the time allowed thereunder.”

28. Palle P.J. agreeing with Nagalingam A.C.J. on the issue of jurisdiction observed with regard to the meaning of the expressions “ in pursuance ” and “ in furtherance ” as follows :—

Vol. 3, pp. 64, 65.

“ In the absence of authority defining comprehensively the expressions ‘ in pursuance ’ and ‘ in furtherance ’ one is entitled to give to them one of the dictionary meanings sensible in the context. One of the simplest meanings of either expression would be the ‘ prosecution ’ or the ‘ promotion ’ of the thing. Referring to a person acting ‘ in furtherance of a strike,’ the Court of Criminal Appeal in England said in *Rex v. Tearse* [1945] 1 K.B. 1 (at p. 5) : ‘ If these words fell to be construed apart from the consideration of previous legislation and pronouncements on that legislation, it might be difficult to suggest that any restriction should be placed on the meaning of the word “ furtherance.” In English literature it is found applied equally to mean the advancement of things before they come into existence and after they have been begun, but the words “ in furtherance of a trade dispute ” have a history.’ In *Tearse's* case a restricted meaning was given to the phrase ‘ in furtherance of ’ because in an earlier case, *Conway v. Wade*, which went up to the House of Lords where the words ‘ an act done in contemplation of or furtherance of a trade dispute ’ had to be construed, two of their Lordships stated in the particular context in which the words occurred that ‘ an act done in contemplation ’ meant an act done before the dispute arose and ‘ an act done in furtherance ’ meant an act done when the dispute had come into existence. It would thus be seen that the phrase ‘ in furtherance ’ was given a restricted meaning because it was associated with and

preceded by the words 'in contemplation.' I have not been convinced that the phrases in Section 83 (1) (a) or, for that matter, the same phrases in Section 83 (1) (b) (ii), should be given a restricted meaning."

29. Gratiaen S.P.J. upheld the objection to the jurisdiction of the learned election judge in a dissenting judgment in the course of which he made the following observations :—

10 " An act may be done ' in pursuance of ' an executory contract or agreement ; it may also be done ' in furtherance of ' a scheme or plan which (though it involves even in its inchoate form the commission of an election offence) nevertheless requires (as a scheme) further implementation to achieve complete fulfilment. But, with respect, I do not see how an act can ' further ' something which, regarded as an offence already completely committed, needs nothing more to further its execution. . . . Vol. 3, p. 50.

20 I appreciate that, in the English language the phrase ' in furtherance of ' may ' apply equally to mean the advancement of things before they come into existence and after they have begun ' (*R. v. Tearse* [1945] 1 K.B. 1). But as Wrottesley J. pointed out, the meaning of a phrase, in a particular statutory context, may be controlled by its ' history.' The Court of Criminal Appeal in England accordingly decided that, in legal enactments relating to trade disputes, the words ' acts in furtherance of a strike ' presuppose the existence of a strike. For precisely the same reason, I would say that the language of Section 83 (1) (a) presupposes the prior commission of a corrupt practice which was intended to be advanced or further implemented by a later ' payment ' or ' act.' In any event, it is manifest to my mind that the words cannot be applied to an ' act ' which is identifiable with the offence itself (whether already committed or not). If that had been the intention of the legislature, I see no reason at all why the proviso should not have been enacted so as to read :— Vol. 3, pp. 50, 51.

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Provided that—

40 (A) an election petition questioning the return upon the ground of a corrupt practice alleged to have been committed after the date of such return or election by the member whose election is questioned or by an agent of the member or with the privity of the member or his election agent may, so far as respects such corrupt practice, be presented at any time within 28 days after the date of the commission of such corrupt practice.

The complicated concept of an act which is done in pursuance or in furtherance of itself (or of something that at least includes itself) introduces problems to which I have tried in vain to accommodate my mind."

30. The Supreme Court held by a majority (Nagalingam A.C.J. and Pille P.J., Gratiaen S.P.J. dissenting) against the Appellant on the issue of jurisdiction and affirmed the determination of the learned election judge.

31. The Appellant being dissatisfied with the said decision of the Supreme Court of the Island of Ceylon has preferred this appeal therefrom to Her Majesty in Council.

32. The Respondents humbly submit that this appeal should be dismissed with costs for the following amongst other

REASONS

- (1) BECAUSE the phrase "in pursuance of such corrupt practice" in Section 83 (1) proviso (a) of the Order in Council means in prosecution of or in carrying out of such corrupt practice. 10
- (2) BECAUSE the phrase "in furtherance of such corrupt practice" in Section 83 (1) proviso (a) of the Order in Council means in advancement of such corrupt practice before it comes into existence.
- (3) BECAUSE a payment of money or other act made or done in pursuance or in furtherance of a corrupt or illegal practice is a payment or act which is an element of the offence and not a subsequent payment made or act done after the offence is committed.
- (4) BECAUSE if a corrupt or illegal practice is committed 20 it cannot be "pursued" or "furthered" or "implemented" by any subsequent payment or act.
- (5) BECAUSE the only distinction between a petition presented within 21 days and one presented within the extended period of 28 days under Section 83 (1) proviso (a) lies in the contents of the petition, in that in the former case a general allegation of corrupt practice is sufficient, while in the latter case there should be a specific allegation of a payment or act which constitutes the corrupt practice in addition to 30 the general allegation.
- (6) BECAUSE the judgments of the majority of the Supreme Court were right in their conclusion and generally in their reasoning and the dissenting judgment of Gratiaen S.P.J. was wrong.

S. NADESAN.

SIRIMEVAN AMERASINGHE.

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