CENTRE FOR POLICY ALTERNATIVES (GUARANTEE) LIMITED AND ANOTHER

v

DAYANANDA DISSANAYAKE, COMMISSIONER OF ELECTIONS AND OTHERS

SUPREME COURT
FERNANDO, J.
GUNASEKERA, J. AND
WIGNESWARAN, J.
SC APPEAL No. 26/2002
CA APPLICATION No. 487/99
WITH SC APPEAL No. 27/2002
CA APPLICATION No. 488/99
17TH MARCH, 2003

Writs of Ceriorari and Mandamus – Validity of the nomination of a person to fill a vacancy of a Provincial Council member – Provincial Councils Elections Act, section 65(1) – The right of secretary of recognized political party or leader of

independent group to nominate a person whose name was not in the original nomination paper – Sections 65(2) and 65(3)of the Provincial Councils Election Act

The 1st respondent was the Commissioner of Elections, the 2nd respondent was a Member of Parliament and the 3rd respondent was the Secretary of the Peoples' Alliance ("the PA") during the 1999 Provincial Councils Election.

Being a Member of Parliament, the 2nd respondent was not qualified for election as a member of the Provincial Council. Hence his name was not included in the PA nomination paper in either of the Districts of the Uva Provincial Council. His wife was a candidate who was elected and thereafter she was appointed Chief Minister of the Uva Provincial Council. Shortly thereafter, one of the Provincial Councillors elected to that Provincial Council resigned and the 1st respondent called upon the 3rd respondent to nominate an eligible person to fill that vacancy in terms of section 65(2) of the Provincial Councils Elections Act ("The Act").

The 3rd respondent nominated the 2nd respondent who had earlier resigned his seat in Parliament. On the same day the 2nd respondent's wife resigned from the office of Chief Minister, Uva Provincial Council and the 2nd respondent was appointed Chief Minister.

The petitioner challenged the appointment of the 2nd respondent as a Member of the Uva Provincial Council on the ground that he had no right to be declared elected by the 1st respondent as he was not a person whose name appeared in the PA nomination paper at the election.

Held:

1. The provisions of the Act relating to the result of the election (sections 58(1), 58(1)(e), (f) and 61A(2)) including bonus seats establish that only persons who can be declared elected to a Provincial Council immediately after an election are persons who were candidates whose names appear on the nomination paper, on the basis of which the voters cast their votes and expressed their preferences.

2. Filling of vacancies in the membership of a Provincial Council is provided for in sections 65(1)(2) and (3) of the Act. The 1st limb of section 65(2) permits the secretary of the recognized political party or the leader of the independent group to nominate a person eligible under the Act for election to fill the vacancy. The 2nd limb provides that where such secretary or leader fails to make such nomination., the Commissioner shall appoint the candidate from the nomination list who had secured the highest number of preferences next to the last member elected to that Provincial Council from that party or group.

3. Accordingly section 65(2) must be interpreted on the basis that *ex-facie* it authorizes the secretary to nominate a person qualified under section 9 at the time of such nomination.

4. Section 65(3), however, creates a doubt as to whether the right of the secretary of the political party or the group leader under section 65(2) to nominate a person qualified under section 9 at the time of such nomination is unrestricted, because in terms of section 65(3) where a person in the nomination list is not available e.g. when all the candidates have been elected or no candidate has received any preferences the Commissioner is required to forthwith inform the President who may by order direct the Commissioner to hold an election to fill such vacancy. The doubt in respect of section 65(2) which is a general provision should be resolved without rendering the special provision of section 65(3) nugatory. viz., preserving the power of the President to order an election; and consistently with democratic principles enshrined in elections where according to the general scheme of the Act the electorate votes for a party indicating voter preferences for candidates.

5. In the circumstances, despite the general words used in section 65(2), the power to nominate is confined to candidates whose names appeared in the original nomination paper and who secured some preferences at the election.

6. In view of the great public importance of the matter involved and the fact that no objection of futility was initially taken and that it is the laws delays that has given rise to the objection and as the principles applicable to futility are not applicable, the objection by the respondent on the ground of futility (based on the cessation of office of the 2nd respondent) fails.

Cases referred to:

1. *Karunathilake v. Dissanayake* (1999)1 SRI LR 157
2. *Karunathileka v. Dissanayake* (No.2) (1999) 1 SRI LR 183
3. *Punchi Singho v. Perera* (1950) 53 NLR 143
4. *Ramasamy v. Moregoda* (1961) 63 NLR 115
5. *Suudakaran v. Bharathi* (1989) 1 SRI LR 46

APPEALS from the judgments of the Court of Appeal.

Dr. Jayantha de Almeida Gunaratne with *K. Pinto Jayawardena* for appellants in SC 26/2002

Viran Corea for appellant in SC 27/2002

Saleem Marsoof. P.C. Additional Solicitor General with *A. Gnanthasan*, Deputy Solicitor General for 1st and 4th respondents.

Dr. Jayampathy Wickremaratne, P.C. with *P. Wickremaratne* for 3rd respondent.

Cur.adv.vult

May 27, 2003

FERNANDO, J.

These two appeals were taken up together as the same question of law arose, relating to the nature and extent of the right of the secretary of a recognized political party (or leader of an independent group), under section 65 of the Provincial Councils Elections Act, No. 2 of 1988 ("the Act"), to nominate a person to fill a vacancy caused by the resignation of a member of a Provincial Council: to be precise, whether he was entitled to nominate a person whose name was not on the original nomination paper.

FACTS

The five-year term of office of five Provincial Councils (including the Uva Provincial Council to which these appeals relate) came to an end in June 1998. The respective returning officers, by notices under section 22 of the Act, duly fixed the date of poll for the election to the new Councils for 28.8.1998. Nominations were duly submitted.

The 2nd Respondent had been a Member of Parliament of the People's Alliance during the nomination period, and it is common ground that because he was a Member of Parliament he was not *then* qualified for election as a member of a Provincial Council. His name was not included in the People's Alliance nomination paper for either of the districts of the Uva Province. His wife's name was included.

On 4.8.1998, the President by a Proclamation under section 2 of the Public Security Ordinance brought the provisions of Part II of that Ordinance into operation throughout Sri Lanka, and made an emergency regulation under section 5 deeming all the notices under section 22 of the Act to be, for all purposes, of no effect. No fresh date of poll was fixed. The poll was thereby effectively postponed, and postponed *sine die*. The Commissioner of Elections, the 1st Respondent, took no steps to fix a new date of poll in the exercise of his powers under section 22(6) of the Act. The postponement of the poll and the failure to fix a new date were successfully challenged in an application to this Court under Article 126 (*Karunathilaka v Dissanayake*). On 27.1.99 this Court directed the Commissioner to fix a new date of poll.

While that application was pending, the Provincial Councils Elections (Special Provisions) Bill was placed on the Order Paper of Parliament in November 1998. The provisions of that Bill purported to empower the Commissioner to appoint a date of poll for those five Councils and to empower the secretary of a recognized political party (or leader of an independent group) to substitute in the place of any candidate whose name appeared in any nomination paper any other person, even without the consent of, or notice to, the original candidate. In its Determination in respect of that Bill (SC SD Nos. 9-14/98, 30.11.98), this Court held that those provisions were unconstitutional. That Bill was not enacted into law.

Immediately after the decision in *Karunathilaka v Dissanayake,* the Commissioner fixed a new date of poll. That date was objected to on several grounds, the validity of which the Commissioner accepted. Upon his application to this Court made on 3.3.99, this Court directed him to fix a new date (*Karunathilaka v Dissanayake (No 2)*. The Commissioner thereupon fixed the poll for 6.4.99.

At the election for the Uva Provincial Council held on 6.4.99, the 2nd Responder's wife was elected. She was later appointed Chief Minister of the Province. On 19.5.99 the 2nd Respondent resigned his seat in Parliament. On 21.5.99 one of the People's Alliance members elected to the Uva Provincial Council resigned; the Commissioner called upon the 3rd Respondent, the secretary of the People's Alliance, to nominate an eligible person to fill that

vacancy; and the 3rd Respondent nominated the 2nd Respondent. On 24.5.99 the Commissioner declared the 2nd Respondent to be elected, and on the same day his wife resigned from the office of Chief Minister. On 27.5.99 the 2nd Respondent was appointed Chief Minister.

On 1.6.99 the Petitioners-Appellants ("the Petitioners") in these two appeals filed two applications in the Court of Appeal, praying *inter alia* for *certiorari* to quash the Commissioner's declaration that the 2nd Respondent was elected as a member of the Uva Provincial Council, and for *quo warranto* to declare that he was not entitled to hold the office of Chief Minister. Among the Respondents to those applications were another three Members of Parliament, who resigned and became Chief Ministers (of the Sabaragamuwa, North-central and Central Provincial Councils) in similar circumstances. However, the Petitioners informed the Court of Appeal that they did not wish to proceed against them, and they were discharged from the proceedings.

On 6.11.2001 the Court of Appeal held that whenever a vacancy arises in the membership of a Provincial Council, section 65(2) of the Act empowers the secretary of the recognized political party (hereinafter referred to as "the secretary"), which had nominated the member vacating office, to nominate *any* eligible person to fill that vacancy even though his name had not appeared in the original nomination paper submitted by that party and even though he had not been eligible for election at the time that nomination paper was submitted.

The Petitioners applied to this Court for special leave to appeal, which was granted on 28.5.2002, upon the following questions:

"(1) Did the Court of Appeal err in holding that a person, whose name did not appear on the nomination list submitted by the relevant political party at the Provincial Council election, could thereafter be nominated by the secretary of the relevant political party to fill a vacancy which arises in the said Council?

(2) Did the Court fail to consider the implications of section 65(3) of the Act for the interpretation of section 65(2)?"

The 2nd Respondent was represented by President's

Counsel in the Court of Appeal. According to the journal entries, although notice of the Petitioners' applications for special leave to appeal had been given by registered post to the 2nd Respondent, he was absent and unrepresented on 28.5.2002. On that day this Court directed that notice of the appeals be given to him, and notice was given by registered post. Nevertheless, he was absent and unrepresented at the hearing of the appeals on 17.3.2003.

STATUTORY PROVISIONS

Each Provincial Council consists of two or more administrative districts, and elections are held in respect of each district on the basis of proportional representation. Such elections can be contested by recognised political parties and independent groups. Any such party or group may contest one or more districts, by submitting a nomination paper in respect of such district (section 13 (1) of the Act). Section 9 of the Act provides that no person is *qualified* to be elected as a member of a Provincial Council if he is subject to any of the disqualifications specified in section 3 of the Provincial Councils Act, No. 42 of 1987. A nomination paper must contain the names of as many candidates as there are members to be elected for that district, increased by three (section 13(1)), and the written consent of every candidate must be endorsed on it – if not, it must be rejected (section 17(1)(b) and (d)). The Act makes no provision for the substitution of candidates, even upon death or withdrawal (sections 23 and 116). The ballot paper for a district is designed to enable a voter to *vote* for a particular party or group, and to indicate also his *preference* for up to three candidates nominated from that district by that party or group (section 30). A voter must indicate the party or group of his choice, and if he does not his vote would be invalid (section 51). However, he is not obliged to indicate any preference for individual candidates.

The *number* of candidates elected from each party or group from a district is directly proportional to the number of valid votes polled by the party or group (section 58(1)). The *particular* candidates elected from each party or group are determined according to the preferences received by the candidates of that party or group (section 58(1)(e) and (f)). Thus in a district entitled to ten members, a party receiving 20% of the valid votes polled would be entitled to have two of its candidates declared elected, and those two would

be the candidates receiving the highest and second highest number of preferences.

There is one departure from proportionality which has a bearing on the decision in these appeals. Section 61A(2) of the Act provides that the votes cast for each party or group in the several districts of the Province shall be aggregated; that the party or group which polled the highest number of votes in the Province shall be entitled to have two more of its candidates declared elected as members of the Provincial Council ("bonus seats"); and that the Commissioner shall call upon the secretary or group leader to nominate two persons from among the *unsuccessful* candidates nominated by that party or group for that election - *i.e.* from among the candidates nominated for *any* district in that Province.

The provisions relating to the result of the election, including the bonus seats, establish that the only persons who can be declared elected *immediately after the poll* are persons who were candidates whose names appeared on a nomination paper, on the basis of which the voters cast their votes and expressed their preferences.

The Petitioners relied heavily on section 65(3), to which the Court of Appeal made no reference. Section 65 provides:

"(1) Where the office of a member of a Provincial Council becomes vacant..... the secretary of the Provincial Council shall inform the Commissioner of the fact of the occurrence of such vacancy. The Commissioner shall fill such vacancy in the manner hereinafter provided.

(2) If the office of a member falls vacant due to death, resignation or for any other cause, the Commissioner shall call upon the secretary of the recognized political party or the group leader of the independent group to which the member vacating office belonged, to nominate within a period to be specified by the Commissioner, a person eligible under this Act for election as a member of that Provincial Council, to fill such vacancy. If such secretary or group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation [by him in the prescribed form] the

Commissioner shall declare such person elected. If on the other hand such secretary or group leader fails to make a nomination within the specified period, the Commissioner shall declare elected as member, from the nomination paper submitted by that party or group for the administrative district in respect of which the vacancy occurred, the candidate who has secured the highest number of preferences at the election of members to that Provincial Council, next to the last of the members declared elected to that Provincial Council from that party or group...

(3) Where all the candidates whose names were on such nomination paper have been declared elected or where none of the candidates whose names remain on such nomination paper have secured any preferences, or where the member vacating office was not elected from an administrative district, the Commissioner shall forthwith inform the President who may, on receipt by him of such information and at any stage when he considers it expedient to do so, by Order.... direct the Commissioner to hold an election to fill such vacancy..."

JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal noted that section 65(2) has two limbs - the first authorizing nomination by the secretary when called upon to do so by the Commissioner, and the second requiring nomination by the Commissioner upon default by the secretary. The first limb empowers the nomination of "a *person eligible* under the Act for election" (whom the Commissioner must then declare elected), while the second limb requires the Commissioner, upon default, to declare elected "*from the nomination paper* submitted by that party" the candidate who had secured the highest number of preferences next to the last of the members already declared elected. The Court observed that if it had been the intention of Parliament that the secretary's choice should be confined to candidates whose names were on the nomination paper, the first limb would have made reference to the nomination paper in the same way as the second limb did. Parliament had deliberately used different and wider language, manifesting an intention not to restrict the secretary's choice in that

way. Likewise, Parliament did not restrict the secretary's choice to persons who had been eligible at the time of nomination, and it was not open to add such a restriction by way of interpretation.

Further the requirement – in the first limb, but not in the second – of an oath or affirmation by the nominee was significant. The Act required that the original nomination paper be accompanied by an oath or affirmation by every candidate; accordingly, since the Commissioner's choice under the second limb was confined to candidates on the nomination paper, it was unnecessary to insist upon a further oath or affirmation; but as the secretary's choice under the first limb extended to persons *outside* the nomination paper, an oath or affirmation was required.

The Court of Appeal also dealt with the Petitioner's contention that there were two possible interpretations of section 65(2), and that therefore that interpretation should be preferred which was in harmony with Article 12(1), with the franchise guaranteed by Article 4(e), with the freedom of expression under Article 14(1)(a), and with the ideals of a democratic system of government by the elected representatives of the people. The Court concluded that section 65(2) was clear, plain and unambiguous, and that the Court could not "put its own gloss on the plain words of the section to squeeze out a meaning not borne out by the language of the section".

Reference was also made to two other matters. "According to Article 99(13)(b) of the Constitution when the seat of a Member of Parliament becomes vacant, the candidate from the relevant political party..... who had secured the next highest number of preferences shall be declared elected", and section 65(2) of the Act was a deliberate departure from that procedure."Section 64(5) of the Parliamentary Elections Act, No. 1 of 1981.....[as amended by Act, No. 35 of 1988] provides that..... when there is a vacancy of a Member of Parliament, the secretary of the political party to which the Member vacating his seat belonged can nominate a person to fill the vacancy.... [there being]....no requirement to nominate such person from the list submitted to the Commissioner or from the nomination paper", and that provisions, like section 65(2), recognize "the supremacy given to the party above the individual candidates".

Unfortunately, the carefully reasoned judgment of the Court of Appeal made no reference to section 65(3) of the Act and the submissions which the Petitioners made in relation to that provision.

INTERPRETATION OF SECTION 65

Section 65(1) directs the Commissioner to fill any vacancy "in the manner *hereinafter* provided", and that confirms that sub-section (3) cannot be ignored. Mr Marsoof, PC, ASG, on behalf of the 1st and 4th Respondents submitted that sub-sections (2) and (3) provide for three alternative methods by which a vacancy could be filled – the first is set out in the first limb of section 65(2), the second is set out in the second limb, and the third is set out in section 65(3); and that these three alternative methods "are set out in a sequential and a logical order". Dr Wickramaratne, PC, on behalf of the 3rd Respondent (the secretary of the People's Alliance), submitted that section 65(3) is applicable only when the secretary has not made a nomination under section 65(2). Under section 65(2) the secretary can nominate a person who did not obtain a single preference. If the secretary can nominate a person who had been so decisively rejected by the people, it is futile to argue that a person who did not contest cannot be nominated - "such a person has, at least, not been expressly rejected by the people". He further contended that the words "a person eligible under this Act for election" in section 65(2) are wider than, and are not limited to, an unsuccessful candidate: "eligibility" refers to section 3 of the Provincial Councils Act.

The essence of those submissions is that a vacancy should be filled initially by nomination by the secretary; that the secretary could nominate any person qualified under the Act; that failing such nomination, by the Commissioner; and that if the Commissioner was unable to nominate, then only recourse may be had to section 65(3), resulting in a by-election. That interpretation reduces sub-section (3) to a proviso to the second limb of section 65(2) – although it is certainly not drafted as a proviso.

The Act does not make any express provision regarding the "eligibility" of persons for election. Section 9 of the Act provides that a person shall be *qualified* to be elected, if he is not subject to any

of the *disqualifications* specified in section 3 of the Provincial Councils Act. If section 65(2) was intended to empower the secretary to nominate any person *qualified* under the Act, or not *disqualified* under the Act, it should have authorized the secretary to nominate "any person qualified under the Act".The Petitioners' contention is that different language was used because a different result was intended, and that a person *qualified* for election becomes a person *eligible* for election only if and when he is duly nominated. However, on examining the Sinhala text of the Act after judgment was reserved, I found that the same Sinhala word is used in both sections. Accordingly, section 65(2) must be interpreted on the basis that, *ex facie*, it authorizes the secretary to nominate a person *qualified* under section 9 at the time of such nomination.

Why, then, did the first limb refer to the nomination of a "person eligible" while the second limb referred to a candidate "from the nomination paper"? I think there is good reason for the difference in language. It is obviously desirable that a vacancy be filled by a then qualified – and not a disqualified – person, for otherwise litigation would inevitably result. However, the Commissioner has no means of knowing (and cannot reasonably be expected to launch an inquiry into the question) whether a candidate on the nomination paper had subsequently become subject to a disqualification. Accordingly, the second limb requires the Commissioner to go by the nomination paper alone. It is not reasonable, however, to allow the same leeway to the secretary who would know, or could quite easily ascertain, whether his candidates are no longer qualified. The burden of verifying eligibility is therefore cast on him alone. It is probably for that reason that section 65(2) permits the secretary to nominate only a "person *eligible*".

Furthermore, if a "person eligible" is held to include a candidate whose name was not on the original nomination paper, that would allow the secretary to nominate even a person who had not given his consent to such nomination, and the Commissioner would nevertheless be obliged to declare him elected. As a matter of principle, a statutory provision should not generally be interpreted as requiring a person to be declared elected to an office without his prior consent. However, if the first limb is restrictively interpreted to include only candidates, their written consent and signatures will be

found on the original nomination paper. There is thus some basis for the contention that the secretary's power of nomination is restricted to qualified candidates from the original nomination paper whose consent had been expressed therein.

On the other hand, the first limb requires the secretary to submit an oath or affirmation from his nominee. That is superfluous if his choice is restricted to persons on the original nomination paper. That is a circumstance which supports the Respondents' contention that the secretary can nominate *any* qualified person. Undoubtedly, section 65(2) is not without ambiguity.

It is therefore necessary to examine section 65 as a whole in the context of the entire Act. The Respondents contended that section 65(3) applies only if the secretary fails to nominate. However, scrutiny of section 65(3) reveals that it imposes an imperative duty on the Commissioner "*forthwith*" to inform the President in three situations -

(i) Where all the candidates whose names were on the (original) nomination paper have been declared elected, or

(ii) Where none of the candidates whose names remain on such nomination paper have secured any preferences, or

(iii) Where the member vacating office was not elected from a district.

The third situation needs some clarification: the only members "not elected from a district" would be the two candidates declared elected to bonus seats.

The correctness of the Respondents' interpretation can best be tested by reference to those three situation. In any of those situations, what is the Commissioner's duty? Should he follow the "sequential and logical order", and first call upon the secretary to nominate a person? Or should he *forthwith* inform the President? Although sub-section (2) and sub-section (3) appear to create irreconcilable contemporaneous obligations – to call upon the secretary to nominate a successor, and also to *forthwith* inform the President, who may or may not decide to order a by-election – that conflict can be resolved without much difficulty.

The first limb is a *general* provision seemingly applicable to *all* vacancies, while section 65(3) is a *special* provision applicable to vacancies in *three* specific situations. First, as a rule, a special provision prevails over a general provision (which will, to that extent, be reduced in scope). Second, the Commissioner is faced with a choice between *calling upon* the secretary and *forthwith informing* the President. "Forthwith" generally means "at once", "without delay", or "immediately", and in the present context it cannot possibly mean, "if the secretary, upon being called upon to do so, fails to make a nomination". The word "forthwith" is thus a strong indication that sub-section (3) takes precedence over sub-section (2). Third, section 65 must be given an interpretation, if reasonably possible, which gives meaning and effect to every part, rather an interpretation which renders one sub-section nugatory. To hold that the Commissioner must first act under sub-section (2) would mean that even in any of the three given situations the secretary could nominate a successor before the President is informed; and that would make sub-section (3) wholly inoperative – because it would be futile thereafter to inform the President, as by then he would be unable to exercise the discretionary power to order a by-election.

I therefore hold that sub-section (3) takes precedence over sub-section (2), and that the three methods of filling vacancies are not sequential. Where any of the three situations referred to in sub-section (3) arise, the Commissioner must inform the President,"who may ...*at any stage* when he considers it expedient to do so" order the holding of a by-election. There is no provision that the President must act within a specified time, or that if the President does not order a by-election, the Commissioner shall call upon the secretary to nominate a successor. Thus the President may decide to wait until several vacancies have occurred before ordering a by-election.This provision ensures that vacancies will be filled, if at all, by persons *elected* by the people.

I have now to consider the case of a vacancy arising at a time when there is on the relevant nomination paper the name of at least one candidate who has secured some preferences (whom I will refer to hereafter as a "qualified candidate"). It is clear that sub-section (3) would not apply, and that the Commissioner must call upon

the secretary to nominate. In the light of the provisions of sub-section (3), does the first limb of sub-section (2) empower the secretary to nominate a person from outside the nomination paper ("an outsider")?

If he can nominate an outsider, an anomaly immediately arises. Where there is *no* qualified candidate remaining on the nomination paper, sub-section (3) applies, and there is no possibility of an outsider being nominated; and the vacancy will be filled, if at all, by a person *elected* by the people. If so, where there *is* a qualified candidate it would be illogical and inconsistent for an outsider to be nominated. Can such an anomaly be justified on the basis of "the supremacy of the party" (or its secretary) over members and candidates? In my view it cannot, for this is not a domestic question pertaining to the party, party discipline, and/or party officials, members and candidates. What is involved is the right of the electorate to be represented by persons who have faced the voters and obtained their support, and that in my view is the general scheme of the Act. That is wholly consistent with Article 25 of the *International Covenant on Economic, Social and Cultural Rights,* which recognizes that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or *through freely chosen representatives.*

In reply to the submissions of both learned Counsel for the Petitioners that section 65 should be interpreted in consonance with democratic ideals, constitutional norms and the overriding principles of representative democracy, Dr Wickramaratne submitted that some of the constitutional norms, prevalent at the time the Act was enacted, were undemocratic and unprincipled: thus Article 99 (prior to its amendment in 1988) provided for the nomination paper of a political party, contesting a Parliamentary election, to have the names of candidates arranged in order of priority as determined by the secretary, thus denying the voter any choice as between candidates; even after its amendment, Article 99 continues to treat the party as supreme, and a voter cannot vote for one party and mark preferences for candidates of another; Article 99A provides for 29 seats to be filled from the "National List", but a candidate rejected by the people at that election may nevertheless be nominated at the very outset although his name was not on that list; and to fill a

subsequent vacancy, the secretary could nominate a person who had not even contested that election. He contended that "in view of the constitutional provisions relating to elections to Parliament there is nothing unusual about the P.C. Elections Act".

When constitutional or statutory provisions have to be interpreted, and it is found that there are two possible interpretations, a Court is not justified in adopting that interpretation which has undemocratic consequences in preference to an alternative more consistent with democratic principles, simply because there are other provisions, whether in the Constitution or in another statute, which appear to be undemocratic. Indeed, in the three previous decisions relating to the Uva Provincial Council election, this Court upheld the effective exercise of the right to vote at a fair election. In the first decision, this Court held in favour of the contention that the election should be held, rather than postponed; in the second, that there should be no statutory interference with the Commissioner's power to fix the date of election and with the contents of nomination papers already accepted; and finally, that the date of the election should be fixed so as to facilitate, rather than hinder, the exercise of the right to vote. Now that that election has been held, I do not think that this Court should – in the absence of plain and compelling language – stray into a different path, by preferring an interpretation which allows the expressed wishes of the electorate at that election to be superseded. The Judiciary is part of the "State", and as such is pledged to play its part in establishing a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all people; and it is mandated to strengthen and broaden the democratic structure of government [see Articles 27(2)(a) and 27(4) read with Article 4(d).]

To sum up, section 65(2) is not plain and unambiguous; section 65(3) takes precedence over section 65(2); section 63(3) manifests a legislative intention that vacancies should be filled either by qualified candidates or by election; if section 65(2) is interpreted to mean that the secretary may nominate *any* person who is qualified at the time of such nomination, that gives rise to an anomaly or inconsistency; the general scheme of the Act, from nomination up to the declaration of the result of the poll is that the electorate should be represented by persons who have contested the election; the fact that the nomination paper is required to have three

candidates more than the number of members to be elected and cannot be altered indicates that the nomination paper is the pool from which subsequent vacancies should be filled. Accordingly, the wide language of the first limb of section 65(2) must be restrictively interpreted, in the context of section 65(3) as well as the general scheme of the Act and basic democratic principles. I hold that, despite the general words used, the secretary's power to nominate is confined to candidates whose names appeared in the original nomination paper and who secured some preferences at the election.

FUTILITY

At the commencement of the hearing both learned President's Counsel for the Respondents submitted that the 2nd Respondent had ceased to hold office as Chief Minister and that it would be futile to hear and determine the appeals. Both learned Counsel for the Petitioners contended that the 2nd Respondent had ceased to hold office even prior to the grant of special leave to appeal, but that no objection was taken at that stage; and that special leave to appeal had been granted on a matter of great public importance. If the objection of futility is now upheld, the Court of Appeal judgement will be regarded as authoritative and binding, in respect of all future vacancies in any Provincial Council, and the Commissioner would be bound to act on the basis of that judgment, thereby giving rise to fresh litigation.

In this case we are not faced with a situation in which the impugned decision or declaration had ceased to be operative before the litigation commenced (as in *Punchi Singho v Perera,*) or where an order for relief might be futile because the official to whom it was directed had lawful authority to revoke it (as in *Ramaswamy v Moregoda*). On the contrary, it is the law's delays which have given rise to the objection of futility. In *Sundarkaran v Bharathi*, the petitioner prayed for *certiorari* to quash the refusal to issue him a liquor licence for 1987 and for *mandamus* to grant him that licence. In September 1987 the Court of Appeal dismissed the application. In November 1988 – long after the end of the relevant year – this Court set aside the judgment of the Court of Appeal, quashed the decisions of the respondents, and ordered that the Respondents

should make due inquiry upon its merits in regard to any *future* application which the Petitioner might make for a liqour licence. Amerasinghe, J, observed that the Court would not be acting in vain, and that quashing the decision not to issue him a licence for 1987 and requiring that he be fully and fairly heard before a decision is arrived at with regard to any future application would not be a useless formality.

I hold that the Court of Appeal erred in law in its interpretation of section 65, and that this Court would not be acting in vain in setting aside the judgment of the Court of Appeal, as it is in the public interest that the Commissioner, political parties, independent groups, candidates and voters should know with certainty the procedure for the filling of vacancies in Provincial Councils.

ORDER

I allow the appeals, set aside the judgments of the Court of Appeal, and grant *certiorari* to quash the Commissioners' declaration dated 24.5.99 that the 2nd Respondent was elected a member of the Uva Provincial Council. The parties will bear their own costs.

GUNASEKERA, J. – I agree

WIGNESWARAN, J. – I agree

Appeal allowed.