IN THE SUPREME COURT OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for

Special Leave to Appeal in respect of

A Judgment of the Court of Appeal dated

10th November 2009.

ArattanaGederaSusiripala,

No.96, Senarathgama ,

Katugastota.

PETITIONER

SC Appeal No. 75/2010 **Vs**

S.C Special .L.A. Application No. 288/2009

C.A. (Writ) Application No. 985/2007

SC Appeal 55/2011

SC (Spl) Leave to Appeal application No. 298/2009

SC (Writ) Application No. 985/2007

1. Commissioner of Elections,

Election Commission Department

Kotte Road,

Rajagiriya.

2. U.Amaradasa,

Returning Officer,

HarispattuwaPradeshiyaSabhawa

Secretariat

Kandy.

3. NalinSanjiwaKurunduwatte

HarispattuwaPradeshiyaSabha

Tittapajjala,

Werallagama.

4. SusilPremajayantha

Secretary,

United People's Freedom Alliance

No. 301, T.B. Jaya Mawatha,

Colombo 10

RESPONDENTS

AND NOW BETWEEN

1. Commissioner of Elections

Election Commission Department

Kotte Road ,

Rajagiriya

1st Respondent- Petitioner

2. U.Amaradasa

Returning Officer,

HarispattuwaPradeshiyaSabhawa

Secretariat , Kandy

2nd Respondent –Petitioner

Vs

1. ArattanaGederaSusiripala,
   No. 96, Senarathgama,

Katugastota.

Petitioner- Respondent.

2. NalinSanjeewaKurunduwatte,
HarispatuwaPradeshiyaSabha,
Tittapajjala,
Werallagama.

3rd Respondent-Respondent.

3. SusilPremajayantha,
Secretary,
United People's Independent
Alliance,
No. 301, T.B. JayahMawatha,
Colombo-10.

4th Respondent-Respondent.

BEFORE: **MOHAN PIERIS,PC. CJ**

SATHYAA HETTIGE, PC. J

PRIYASATH DEP,PC. J

COUNSEL: Janak de Silva, DSG with Ms. RuwanthiHerathGunaratne, SC for

the 1st and 2nd Appellants (In SC Appeal No. 75/2010)

Kushan D' Alwis, PC with Chanaka Fernando for the 3rd and 4th Respondent-Petitioners. (In SC Appeal No. 55/2011).

Kushan D' Alwis, PC with Chanaka Fernando for the 3rd Respondent-Respondent. (In SC Appeal No. 75/2010)

UpulRanjanHewage for the Petitioner –Respondent.

(In SC Appeal No. 55/2011 and SC Appeal No. 75/2010)

Janak De Silva, DSG with Ms. RuwanthiHerathGunaratne, SC for the 1st and 2nd Respondents- Respondents (In SC Appeal No. 55/2011)

ARGUED ON: 09TH September, 2013.

Written Submissions: Tendered by the petitioners on 26th August 2010

Tendered by the respondent on 29th Oct. 2013

(out of time)

DECIDED ON: 12TH February, 2014

SATHYAA HETTIGE P.C. J

The petitioner-respondent (hereinafter referred to as the respondent) sought a writ of Certiorari and a writ of Mandamus in the Court of Appeal to quash the declaration published in the government gazette No. 1510/2 dated 13th August 2007 and to compel the second respondent-petitioner to declare the petitioner respondent as an elected member of the HarispaththuwaPradeshiyaSabhawa who contested on the nominations list of the United Peoples Freedom Alliance at the Local Government Elections held on 30th March 2006.

On 10.11.2009 the Court of Appeal allowed the application and issued a writ of Certiorari and quashed the decision contained in Extra Ordinary Gazette dated 13th August 2007 marked P 3 and issued a Writ of Mandamus on the 2nd respondent –petitioner directing to appoint the respondent as a member of the HarispattuwaPradeshiyaSabha as prayed for in prayer "C" of the petition filed in the Court of Appeal with costs.

The 1st respondent - petitioner (hereinafter referred to as the 1st petitioner) and the 2nd respondent- petitioner (hereinafter referred to as the 2nd petitioner) filed the Special Leave to Appeal application in this court challenging the decision of the Court of Appeal dated 10th November 2009 on the following grounds:

(a) Did the Court of Appeal err in law in failing to consider that the 2nd petitioner was performing a ministerial act under section 65A(2) of the Act.
(b) Did the Court of Appeal err in law and in fact in failing to consider that the declaration made by the 2ndpetitioner was not amenable to a writ of certiorari
(c) Did the Court of Appeal err in law in finding that the act of the 4th respondent – respondent be construed as an act amenable to a writ of certiorari.

(d) Did the Court of Appeal err in law in construing section 65(A (2) of the Act to mean that the term "eligible" includes a consideration of the highest number of preferences .

(e) If any of the above questions is answered in the affirmative , did the Court of Appeal err in law and in fact in issuing a writ of Mandamus directing the 2nd respondent to appoint the respondent as a member of the HarispattuwaPradeshiyaSabhawa.

On 29th June 2010 this court having heard the counsel, granted Special Leave to Appeal on the questions set out in paragraphs 9 (a) , (b) (c) (d) and (e) of the petition dated 11th December 2011.

When this matter was taken up for hearing on 9th September 2013 along with SC Appeal no. 55 of 2011 counsel in both matters informed court that they will abide by the decision of this case in SC Appeal 55/2011 as well. Accordingly this appeal was heard and was set down for Judgment.The written submissions have been filed by the State (appellants) and the respondents as directed by court.

Brief Outline of facts

The second petitioner who was the returning officer appointed for HarispattuwaPradeshiyaSabhawa acting in terms of section 65 (A) of the Local Authorities Ordinance No 53 of 1946 as amended (hereinafter referred to as the "said Act") informed the General Secretary of the United People's Freedom Alliance , the 4th respondent –respondent by the letter dated 13th June 2007 that a vacancy in the membership of the HarispattuwaPradeshiyaSabhawa has occurred as UpatissaSenaratne, member of the HarispattuwaPradeshiyaSabhawa had passed away consequent to being elected a member thereof in April 2007.

Further the 2nd respondent petitioner requested the General Secretary of the United People's Freedom Alliance to nominate a person to fill the vacancy occurred consequent to the passing away of the member above referred to.

The 4th respondent, the General Secretary of the United People's freedom Alliance accordingly by the letter dated 6th July 2007 nominated the 3rd respondent , NalinSanjivaKurunduwatteto fill the said vacancy in terms of the provisions in section 65A(2) of the Act.

The second petitioner thereafter declared the 3rd respondent- respondent as elected member of the HarispattuwaPradeshiyaSabghawa by a notice published in the Government ExtraordinaryGazette No. 1510/2 dated 13th August 2007.
The petitioner-respondent challenged the said declaration published in the Gazette dated 13th August 2007 in the Court of Appeal and obtaineda writ of Certiorari and a writ of Mandamus on the 2nd petitioner with costs in a sum of Rs. 25000.00 on 10th November 2009.

This court when granting Special Leave To Appeal 29/06/2010 considered the questions of law set out in the petition which were fit for review by this court.

The questions to be determined before this court areas to whether the act of the 4th respondent –respondent was amenable to a writ of certiorari and whether the act of the 2nd petitioner is a ministerial act under section 65 A (2) of the said Act and therefore whether the Court of Appeal by granting reliefs sought by the respondent, made an error of law in erroneously construing the provisions contained in section 65 A(2) of the said Act.
It is important to consider the provisions carefully encapsulated in section 65A(2) of the Act for the purpose of determining this matter as the whole issue is based on interpretation of this section.

Interpretation ofSection 65A(2)

Section 65A(2) of the Local Authorities Elections Amendment Act No 24 of 1987 reads as follows:
" If the office of a member falls vacant due to death, resignation or for any other cause , the returning officer of the district shall call upon the secretary of the recognized political Party or the group leader of the Independent Group to which the member vacating officer belonged , to nominate within a period to be specified by the returning officer , a person "eligible" under this Ordinance for election as a member of the Local Authority, to fill such vacancy. If such secretary or the group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation, as the case may be, in the form set out in the seventh schedule to the Constitution , taken and subscribed , as the case may be, by the person nominated to fill such vacancy, the returning officer shall declare such person elected as a member of that local authority. If on the other hand, such secretary or group leader fails to make a nomination within the prescribed period, the returning officer shall declare elected as member from nomination paper submitted the candidate who has the highest number of preferences at the election of members to that Local Authority next to

the last of the members declared elected to that local authority from that party or group."(emphasis added)

I also find a similar provision in section 65 (1) and section 65 (2) of the Provincial Councils Act No. 2 of 1988 which provide as follows:

Section 65 (1) reads

"*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*."

Section 65(2) reads:

" *If the office of a member of a Provincial Council becomes vacant due to death , resignation or 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 the Provincial Council, to fill such vacancy. If such secretary or the 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 the 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 time, next to the last of the members declared to that Provincial Council from that party or group.." (emphasis added)*.

On a careful reading of the above provisions of section 65 A (2) of the Local Government Elections Act it can be seen that there are two limbs reflected in the section . The first limb is the secretary of the recognized political party or the group leader of the independent group has been authorized to nominate a person "eligible" for election under the Act when called upon to do so by the Returning Officer.

Secondly If the secretary of the recognized political party or the group leader when required to nominate within the time specified defaults to nominate the Returning Officer has been authorized to declare elected as member from the nomination paper submitted by the candidate who has secured the highest number of preferences at the election of members to that Local Authority.

Furthermore it appears that the above provisions in section 65A (2) of the Act do not refer to the candidates on the nomination paper but it refers to "eligible person" for election under the Act (whom the returning officer shall declare elected) to be nominated by the secretary of the recognized political party or the group leader according to his choice. I do not think that the intention of the Legislature was to restrict the Secretary's choice to "eligible persons" on the nomination paper since it has shown a wider interpretation . However, it can be inferred from the interpretation of the words "eligible person" that the Secretary's choice is confined to the persons referred to at the time of the nomination paper.
It is important to note that the first limb of the section does refer only to the persons " eligible" and not the persons who had obtained the highest number of preferences at the election.

Eligibility

I do not find any express provision in the Act which defines the word "eligibility". However, the section 9 of the Act provides that a person shall be qualified to be elected if he is not subject to any disqualifications specified in section 3 of the Provincial Councils Act.
Section 3 of the Provincial Councils Act No. 42 of 1987 provides for disqualifications of a person to be elected as follows:

> " No person shall be qualified to be elected as a member of a Provincial Council or to sit and vote as a member of such Council-
>
> (a) if such person is subject to any of the disqualifications specified in
>
> paragraphs (a), (c),)d, (e), (f) and (g) of Article 91(1) of the Constitution;
>
> (b) If such person is under any law, disqualified from voting at an election of members to a local authority;
>
> © if he is a Member of Parliament;
>
> (d) if he is a member of any other Provincial Council or stands nominated asa candidate for election for more than one Provincial Council;
>
> (e) if he stands nominated as a candidate for election to a Provincial Council, by more than one recognized political party or independent group.

Therefore it can be seen that all the candidates whose names appear in the nomination paper were eligible persons to be elected as members to the HarispattuwaPradeshiyaSabhawa.

Court of Appeal

The question of law raised by the appellant in this appeal is that " Did the Court of Appeal err in failing to consider that section 65A(2) of the Local Authorities Elections Amendment Act No 24 of 1987 vested the Secretary of a recognized political party with a discretion which had been properly exercised by the 4th respondent in the circumstances of this case and as such the nomination of the 3rd respondent had been duly made?

I will now reproduce the section 65A(2) of the Act as stated in the Court of Appeal Judgment at page 5 .

"If the office of a member falls vacant due to death, resignation or for other cause , the returning Officer of the district shall call upon the secretary of the recognized political party or the group leader of the Independent group to which the member vacating officer belonged to nominate within a period to be specified by the returning officer , a person "eligible" under this Ordinance for election as a member of that local authority , to fill such vacancy and ……..on the other hand if such secretary or group leader fails to make a nomination within the prescribed period, the returning officer shall declare elected as member from the nomination paper submitted by that party or group, the candidate who has secured the highest number of preferences at the election of members to that local authority……."

It appears that the Court of Appeal erroneously has dropped the important part of the section 65A(2) of the Act which I reproduce below.

"***If such secretary or the 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" (Emphasis added)***

The Court of Appeal has specifically stated in the judgment that in the instant case both the petitioner-respondent and the 3rd respondent were eligible to be nominated and the party secretary has nominated the 3rd respondent on the basis of youth representation. The Court of Appeal has considered that youth representation is a criterion that should have been considered at the time of nomination only. I do not agree with the proposition of the Court of Appealthat youth representation criterion should be considered only at the time of nomination.

It is also to be noted that the nomination of the 3rd respondent on the basis of youth representation isreferable to an intelligible rationale as the new nomination is to fill the vacancy of a member (nominated on the basis of youth representation) falling vacant due to the death of that youth member . This rationale too satisfied the eligibility criteria set out in section 65A(2) of the Act. Therefore, we observe that the concept of "youth for youth" representing the youth category as envisaged in the Statute has been preserved and satisfied.

It is obviously clear that the Party Secretary has exercised his right or his discretion in nominating the "eligible" person as a party choice from the same nomination paper having being required to do so. The 2nd petitioner accordingly declared the 3rd respondent elected as member of the HarispattuwaPradeshiyaSabha. The 2ndpetitioner has no power to examine or inquire into the nomination made by the Party Secretary . The 2nd respondent had no choice or discretion but to declare elected the nominated member. The returning officer has the power to nominate only if the Party Secretary of the recognized political party or independent group defaults nomination within the specified period.

The learned Deputy Solicitor General strongly contended that the 2nd petitioner by giving effect to the statutory provisions contained in section 65A(2) of the Act exercised only a ministerial act and that the declaration made by the returning officer is not a decision or determination and cannot be challenged by way of a writ application. The law does not contemplate any inquiry or investigation when making the declaration under the statutory provisions in section 65A (2) of the Act. The section 65A(2) only mandates the declaration of the name having communicated by the secretary of the recognized political party.

In the case of **GaminiAthukorale** v **DayanandaDissanayake, Commissioner of Elections**(1998) 3 SLR 207WijetungaJ held that

" *As regards the question whether in any event a Writ of Certiorari would lie to quash the declaration of the result of an election by the returning Officer in terms of section 65 of the Ordinance , one must necessarily examine the nature of the Returning officer's functions in respect thereof*. The Returning Officer does not have to exercise a discretion or make decision at that stage , in that he has merely to declare the result on the basis of the total number of valid votes cast for each political party or independent group , as reflected in the returns sent by the relevant officers of each polling station. This is no more than a ministerial act and by its very nature does not attract the jurisdiction exercisable by way of a Writ of Certiorari" (Emphasis Added)

It is to be emphasized that the section 65A(2) of the Act specifically states that the "Commissioner (returning officer) **shall declareelected** such person" and therefore that the

returning officer has no discretion in the exercise of his statutory function but to declare the nomination.

The learned Deputy Solicitor General invited our attention to the case of **Abeygunasekere** v **Local Government Service Commissions**51 NLR 8 wherein His Lordship Justice Nagalingam, when discussing the writ jurisdiction on of the Court on ministerial acts as to whethersuch acts are amenable to writ,held that ,

"*The test however, seems to be that , where a statutory body is called upon to exercise its functions according to principles lad down in the statute , if it does not act in consonance with those provisions , any order made by it may be liable to be questioned on certiorari, as for instance, where the Commission , without framing charges , without affording an opportunity to the employee to exculpate himself and without holding an inquiry, purports to dismiss him , I do not think it can be gainsaid that such an order would, as being one made without jurisdiction , be liable to be quashed in certiorari; but where it has performed its duties in accordance with the statutory provision, the soundness of the conclusions reached or the decision arrived at cannot form the subject of review by means of a writ of certiorari.*"(emphasis is mine)

Now I would like to consider as to whether the Court of Appeal erred when interpreting the statutory provisions contemplated in section 65A(2) of the Local Authorities Elections (Amendment) Act No. 24 of 1987 .

I think that It is necessary to consider the intention of the legislature when enacting the new amendment in 1987 when filling vacancies to the Local Authorities .

Maxwell on the **Interpretation of Statutes (12th Edi.) 1969 P.1** says that " *Statute law is the will of the Legislature.." (emphasis added)*

It can be seen that In line of authorities it has been decided that the function of the court is to find out and declare the intention of the legislature and not to add words to a statute. It is also not the function of the court to drop the vital part of the statutory provisions in the section but to obey the statutory provisions. It has to be given the true meaning intended by the legislature.

In **R**. **vWimbletonJusticesEX.P.Derwent** (1953) 1 QB 380 **Lord Goddard CJ** at 384 observed that

" *A court cannot add words to a statute or read words into it which are not there*."

(emphasis added)

It was decided in an earlier case in the case of **R.v City of London Court Judge(1892)1 QB 273Lopes LJ** at page 310 said *" I have always understood that If the words of an Act are unambiguous and clear, you must obey those words however absurd the result may appear.."*

N.R.Bindra's Interpretation of Statutes (Tenth Edition 2007) at page 279 states that "*The golden rule of interpretation is that we must first try to ascertain the intention of the Legislature from the words used , by attaching the ordinary meaning of the word on the grammatical construction adding nothing and omitting nothing and give effect to the intention thus ascertained if the language is unambiguous, and no absurdity results…."*

To my mind the language used in the section is crystal clear and the procedure and the statutory process laid down in the statute must be strictly followed and there is no ambiguity or uncertainty in the statutory provisions in section 65A(2) of the Act. The 1st petitioner or 2nd petitioner in the instant case are public functionaries who are required to discharge the public duties vested in them and the those public functionaries have no discretion or choice but to declare the nomination.

Sarath Silva J (as he then was) in **Y.P de Silva , General Secretary, S.L.M.P.** and **Another** v **Raja Collure Secretary USA** (United Socialist Alliance) and two others (1991) 2 Sri. L.R.at page 328 carefully examined the provisions contained in section 65 of the Provincial Councils Elections Act and said that there are several stages in the process of filling a vacancy in a Provincial Council as follows:

(1) The Secretary of the Provincial Council informs the Commissioner of Elections of the fact of the occurrence of the vacancy (section 65(1);
(2) The Commissioner calls 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 specified by the Commissioner a person eligible to be elected as a member to fill such vacancy (section 65(2);
(3) A nomination made by the Secretary of the recognized political party or the group leader accompanied by the requisite oath or affirmation and the Commissioner declares that person elected to the Council (section 65(2);
(4) If the Secretary or the group leader fails to make such a nomination within the period specified , the Commissioner declares as elected the candidate who secured the highest number of preferences at the election of members next to the last member declared elected from the relevant party or group(section 65(2);
(5) Where there are no names remaining in the nomination list of the relevant party or group , the Commissioner informs the President who may direct the Commissioner to hold an election to fill such vacancy Section 65(3);

As in the present case the stages 1,2,3, referred to above are the same and identical provisions . The Court of Appeal in the above case further proceeded to hold that though there is considerable public interest in the activities of the political parties the political parties are voluntary organizations of its members regulated by its Constitution. As the learned Deputy Solicitor General submitted that the Secretary of a

recognized political party or the group leader of an independent group are not subject to the norms of Administrative Law.

It is useful to refer to the earlier provisions contained in section 65A ((3) of the Local Authorities Elections Law of 1977 which provided that when filling vacancies in the Local Authorities , the elections officer shall declare as member the candidate whose names appear next after the last of the elected members in the nomination paper of the recognized political party or independent group to which the member who vacated office belonged. However, the law was amended by the Local Authorities Elections (Amendment) Act no. 24 of 1987 by which the Secretary of a recognized political party or the group leader of an independent group will be called upon to nominate within a specified period "an eligible person" to fill such vacancy. The learned Deputy Solicitor General strongly contended that the effect of the Court of Appeal judgment by taking way the right and the choice given to the Secretary of a recognized political party or group leader of an independent group to nominate an eligible person, the second limb of the section 65A(2) of the Act will be redundant.

CONCLUSION

I am in agreement with the submissions of the learned Deputy Solicitor General on that point, whose the essence of the contention is that the vacancy should be initially filled by the nomination by the Secretary of the recognized political party or the group leader of an independent group and the returning officer shall declare elected such person to fill such vacancy. The right and choice given to the Secretary to the recognized political party and the group leader of the independent group to nominate an "eligible person" to fill such vacancy in the Local Authority by the statute cannot be taken away or disregarded by the returning officer and the returning officer has no discretion but to give effect to such nomination and declare as elected such person as member.

Furthermore, it is to be noted that that 3rd respondent nominated by the 4th respondent is a "person eligible" from the nomination paper itself and therefore the nominated 3rd respondent is not an outsider. I also hold that the 3rd respondent's nomination is a valid and lawful nomination as declared by the returning officer.

For the reasons stated above and having considered the written submissions of all the parties , I hold that the judgment of the Court of Appeal dated 10th November,2009 was erroneously decided and should be set aside.

Accordingly, I set aside the judgment of the Court of Appeal dated 10th November, 2009.

Appeal allowed .

No costs.

Parties in the SC Appeal No. 55 /2011 will abide by the decision in this Appeal.

JUDGE OF THE SUPREME COURT.

Mohan Peiris, PC. CJ
I agree.

JUDGE OF THE SUPREME COURT.

PriyasathDep, P.C. J
I agree

JUDGE OF THE SUPREME COURT.