

**IN THE COURT OF APPEAL OF THE DEMOCRATIC**

**SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for a mandate in the nature of a writ of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Thissa Attanayake

Secretart

United National Party,

'Sirikotha'

No. 400, Pita Kotte Road,

Pita Kotte.

**C.A. (Writ) Application No.326/2011**

**PETITIONER**

**Vs**

1. Commissioner General of Election  
Election Secretariat  
Rajagiriya.
2. H.W. Gunadasa  
Returning Officer for Ratnapura  
District,  
Election Office  
New Town, Ratnapura.
3. P.A.S. Senarathne  
Returning Officer for Kolonne  
Pradeshiya Saba,

Senior Assistant Commissioner of  
Elections for Ratnapura District,  
Election Office, New Town,  
Ratnapura.

4. Susil Premajayantha,  
Secretary,  
United People's Freedom Alliance,  
T.B. Jaya Mawatha, Colombo 10.

**And 5 Others**

**RESPONDENTS**

**BEFORE**

: Deepali Wijesundera J.

**COUNSEL**

: Wijedasa Rajapakshe PC with  
Dasun Nagashena for the  
Petitioner.

Anusha Samaranayake SSC with  
A. Fernando SC for the 1<sup>st</sup> to 3<sup>rd</sup>  
and 9<sup>th</sup> Respondents.

Kushan D. Alwis PC with  
Chamath Fernando and  
Jayaruwan Wijayalath Arachchi  
for the 4<sup>th</sup> Respondent.

**ARGUED ON**

: 07<sup>th</sup> March, 2014

**DECIDED ON**

: 27<sup>th</sup> June, 2014

**Deepali Wijesundera J.**

A writ of certiorari to quash the results of the Kolonna Pradeshiya Sabha Election published by the 1<sup>st</sup> respondent on 18/03/2011 and marked as **P9** is sought by the petitioner in his petition. A writ of Mandamus is sought to direct the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to recount the votes polled at the same election held on 17/03/2011.

The petitioner has marked and produced documents **P1 to P8** with the petition and oral submissions were made before this court in support of his application. Election for the said Pradeshiya Sabha was declared by **P1** on 06/01/2011 and the counting agents were appointed by **P4**. Election was held on 17/03/2011. Votes were counted in rooms 42, 43 and 44 in Sumana Balika Vidyalaya in Ratnapura. The dispute arose in room No. 44. The petitioner submitted that the result given orally after the 1<sup>st</sup> count of the United Peoples' Freedom Alliance was later altered from 3136 to 3156 by the Chief Counting Officer of room No. 44 which the counting agent of the United National Party Gurusinghege Thilina Priyankara observed when asked to place his signature in the carbon copy of the results sheet. Thilina priyankara and

other counting agents namely R.P. Anura, W.A. Dayananda and P. Rajendran of the United National Party had raised their objections orally and thereafter P.Anura has forwarded a written objection against the said alternation to the Chief Counting Officer. Their affidavits are marked as **P8 (a) to P8 (e)**. A recount has not been done due to the objections taken by the United Peoples' Freedom Alliance agents. The petitioner submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted illegally and unlawfully and violated the Election Laws and therefore the document marked **P9** is against all principals of natural justice and should be quashed. He also submitted that he is entitled by law to obtain a writ of Mandamus to direct the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to recount the votes polled at the said election. The counsel who made submissions on behalf of the petitioner on 07/03/2014 in reply to the respondent's submissions admitted that the counting agents did not know the laws relating to the said election hence they are bound by any order given by this court.

The respondent's argument was that the petitioner's application was filed without naming the necessary parties as respondents and suppressing and misrepresenting material facts and that the petitioner has failed to act with *uberrima fidei* towards this court.

The respondents stated that the petitioner and his agents failed to utilize their statutory rights in terms of Sec. 63 (6) and (7) of the Local Authorities Election Ordinance No. 53 of 1946. The respondents submitted that the said Thilina Priyankara failed to act according to the said Ordinance and request for a recount before he placed his signature on the results sheet.

The election was held on the 17<sup>th</sup> of March 2011 and the results were declared on 18/03/2011. The petition of the petitioner dated 26<sup>th</sup> April 2011 has been filed one whole month and a week after the results were declared. A recount of the ballot papers can not be ordered now since there is a time limit for that. A recount has not been done under section 63 (7) of the said act.

**Sec 63 (7) reads thus:-**

***“Before the counting officer makes a written statement referred to in subsection (6), such number of recounts may be made as the counting officer deems necessary; and a recount or recounts shall be made upon the application of a counting agent so however that the maximum number of recounts that shall be so made, on the application of any counting agent or all the counting agents, shall not exceed two.”***

The counting agent has signed the sheet without asking for a recount and later made a complaint to the Chief Counting Officer. ***The petitioner in paragraph 29 of his petition states;***

***The Petitioner states that according to the original announcement, which was made orally at the first instance, of the result of the Kolonna Pradeshiya Sabha, was as follows.***

This shows that the said numbers of votes were never put in writing for the counting officer to alter. The counting agent Thilina Priyankara when placing his signature to the results sheet has noticed the result was different to what he heard earlier. Thereafter they have objected orally to the Chief Counting Officer. They have not even asked for a recount. The petitioner's counsel admitted in court that the counting agent did not know the law, relating to the said elections.

The petitioner has not made any of these persons parties to this action. The Chief Counting Officer is a necessary party to this action. Apart from the Counting Officer the parties who benefited from the election have to be made parties for an application of writ of certiorari since the petitioner is asking to quash their election.

The failure to join the said Chief Counting Officer of Room 44 and the parties who benefitted from the election is a blatant violation of principals of natural justice. The counsel for the 4<sup>th</sup> respondent cited the following cases in support of his argument on necessary parties not being made respondents in the petition. ***Gnanasambanthan Vs. Rear Admiral Perera and others (1998) 3 SLR 169, Rawaya Publishers and others Vs. Wijedasa Rajapaksha, Chairman Sri Lanka Press Council and others (2001) 3 SLR 213, Farook Vs. Siriwardena (1997) 1 SLR 145.***

It is decided in all the above cases that failure to make necessary parties respondents is fatal to a petitioner's application.

A writ of Mandamus can not be granted against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to make a recount for the reasons stated earlier in this judgment. For the afore stated reasons the application of the petitioner is dismissed without costs.

**JUDGE OF THE COURT OF APPEAL.**