Privy Council Appeal No. 43 of 1993

(1) Fakeemeeah Cehl Mohammad also called Cehl Meeah and
(2) Mohumudally Khalil *Appellants*

v.

(1) Essouf Amanoullah Ahmad
(2) Sir Bhinod Bacha
(3) Electoral Supervisory Commission
(4) The Electoral Commissioner
(5) The Returning Officer and
(6) The Public Service Commission *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MARCH 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD LANE
LORD SLYNN OF HADLEY
LORD WOOLF
LORD LLOYD OF BERWICK

*[Delivered by **Lord Slynn of Hadley**]*

On 18th October 1992 a by-election was held in the constituency of Port-Louis Maritime and Port-Louis East (No. 3). The first appellant was one of the unsuccessful candidates, the second appellant a registered elector in the constituency, at that by-election. The first respondent was the successful candidate.

Pursuant to section 45 of the Representation of the People Act (RL4/483 - 16th August 1958 as amended), the appellants petitioned the Supreme Court of Mauritius for a declaration that the first respondent's election was null and void.

Two grounds were relied on. In the first place it was said that the returning officer at the election (the third co-respondent), his deputy and other staff including the presiding officers at the polling stations were appointed by the second respondent, the Head of the Civil Service,

under powers delegated by the Public Service Commission (the fourth co-respondent), whereas, it is contended, they should have been appointed by the Electoral Supervisory Commission, the first co-respondent. The Electoral Commissioner appointed under the Constitution is the second co-respondent.

In the second place it was contended that the election was not free and fair in that it was conducted by an officer of the Prime Minister's office and that the appointments referred to were restricted to public officers more prone to pressure and influence from the Prime Minister, though in the further and better particulars served it was stated that such pressure and influence were not alleged to have been exercised in fact.

It should be said at once that this second contention was rejected by the Supreme Court and very properly not pursued by Mr. Cox, on behalf of the appellants, before the Judicial Committee. Moreover it was fully accepted that, if there was any defect in the appointment of the returning officer and his staff, this had no effect whatever on the outcome of the election.

The remaining and principal question arises in this way.

By section 38 of the Constitution of Mauritius of 12th March 1968 an Electoral Supervisory Commission is established and by section 41(1) thereof it is provided that that Commission:-

> "... shall have general responsibility for, and shall supervise, the registration of electors for the election of members of the Assembly and the conduct of elections of such members and the Commission shall have such powers and other functions relating to such registration and such elections as may be prescribed."

Section 40 of the Constitution creates the office of Electoral Commissioner "whose office shall be a public office and who shall be appointed by the Judicial and Legal Service Commission". By section 3 of the Representation of the People Act (RL4/483 - 16th August 1958) as amended, the Electoral Commissioner is given "all the powers of the registration officer and of the returning officer in an electoral area" and it is provided that there may be appointed a barrister-at-law to be Deputy Electoral Commissioner for an electoral area.

The Legislative Assembly Elections Regulations 1968 set out the detailed rules for the holding of such elections. They are contained in the fourth schedule to the Representation of the People (Amendment) Act No. 12/68. By regulation 3(1) thereof it is provided that the Electoral Supervisory Commission "may from time to time appoint a fit and proper person to be returning officer and some other fit and proper person to be deputy returning officer for each constituency". By regulation 20 the returning officer is

required to provide the necessary equipment for the election and shall, subject to the approval of that Commission, "appoint a senior presiding officer to preside at each polling station and a presiding officer to preside at each voting room therein" and "also appoint such poll and other clerks and other persons to assist in the taking of the poll".

Between 1968 and 1976 it was considered appropriate for the returning officer and other staff to be appointed in accordance with these provisions; but in 1976 in view of difficulties which had arisen in the conduct of the elections the legal position was reconsidered and the view taken that these regulations, although part of a statute, were *ultra vires* in that they conflicted with section 89 of the Constitution. That provides:-

"**89. Appointment of public officers.**

(1) Subject to this Constitution, power to appoint persons to hold or act in any offices in the public service (including power to confirm appointments), to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the Public Service Commission.

(2) The Public Service Commission may, subject to such conditions as it thinks fit, delegate any of its powers under this section by directions in writing to any member of the Commission or to any public officer.

(3) This section shall not apply to -

(a) the office of Chief Justice or Senior Puisne Judge;

(b) except for the purpose of making appointments thereto or to act therein, the office of Director of Audit;

(c) the office of Ombudsman;

(d) any office, appointments to which are within the functions of the Judicial and Legal Service Commission or the Police Service Commission;

(e) any office to which section 87 applies;

(f) any ecclesiastical office;

(g) any office prescribed by the Public Service Commission acting with the concurrence of a Minister, being an office the emoluments attaching to which are paid at daily rates; or

(h) any office of a temporary nature, the duties attaching to which are mainly advisory and which is to be filled by a person serving under a contract on non-pensionable terms.

...

(6) Before the Public Service Commission appoints to or to act in any public office any person holding or acting in any office the power to make appointments to which is vested in the Judicial and Legal Service Commission or the Police Service Commission, the Public Service Commission shall consult that Commission.

(7) Before making any appointment to any office on the staff of the Ombudsman, the Public Service Commission shall consult the Ombudsman."

Sub-sections (4) and (8) provide for the approval of the Prime Minister or the Governor-General to be obtained before certain appointments are made. For the purposes of these provisions section 111 provides:-

"**111. Interpretation.**

(1) In this Constitution -

...

'public office' means, subject to section 112, an office of emolument in the public service;

'public officer' means the holder of any public office and includes a person appointed to act in any public office;

'public service' means the service of the Crown in a civil capacity in respect of the Government of Mauritius;"

In this regard it is to be noted that in Government Notice No. 54 of 1968 setting out the Mauritius Independence Order 1968 section 111 of the Constitution of Mauritius set out in the schedule to the Order provides that "'the public service' means the service of the Crown in a civil capacity in respect of the government of Mauritius;" (emphasis added).

Since 1976 the practice has been, as was done on this occasion, for the Electoral Commissioner to recommend a candidate for appointment as returning officer and as deputy returning officer after he had obtained the approval of the Electoral Supervisory Commission. The names as approved, however formally, by the Electoral Supervisory Commission were then sent to the Head of the Civil Service (as delegate of the Public Service Commission) for appointment. Appointments to other offices for the purposes of the election are suggested by the returning

officer, and, if approved by the Electoral Supervisory Commission and the Electoral Commissioner, are sent to the Head of the Civil Service for appointment. With the approval of the Electoral Supervisory Commission only civil servants have been appointed for posts at elections. The reason for this is that it is considered that civil servants have the requisite sense of responsibility, training and discipline; they can be appointed quickly without the need for advertisement, interview and assessment which would be difficult since something approaching 12,000 appointments are involved, and impracticable if an election were called on the minimum notice period provided. It is accepted that since 1976 the system has worked efficiently during five general elections without the problems which occurred prior to the change-over.

The question at issue can shortly be stated thus:-

Was it lawful for the Electoral Supervisory Commission to be given these powers to appoint a returning officer or must the appointment be made by the Public Service Commission established under section 88 of the Constitution?

The Supreme Court of Mauritius took the view that it was:-

> "... clear that persons appointed to an office of emolument paid from public funds in the service of the State in a civil capacity in respect of the Government of the country, as electoral staff patently are, must, since they do not fall within either of the categories catered for in the section 89(3)(g) or (h), hold that appointment from the Public Service Commission or from a person to whom the power to appoint has been validly delegated."

The provisions of sections 40 and 41 of the Constitution and of section 3 of the Legislative Assembly Elections Regulations 1968 could not properly be read so as to override the provisions of sections 89 and 111 of the Constitution in matters of the appointment of electoral staff. "If the framers of the Constitution had intended to give the power of appointment to the [Electoral Supervisory Commission] they would have so stated expressly".

The appellants, with the leave of the Chief Justice of Mauritius, now appeal to the Judicial Committee. Mr. Guthrie Q.C., on behalf of the second respondent and of the second, third and fourth co-respondents, accepts that although no appeal would have lain to the Judicial Committee prior to independence, after independence, pursuant to the Mauritius Independence Order 1968 and, since Mauritius became a Republic by virtue of section 81 of the Constitution, the Mauritius Republic Act 1992 and the Mauritius Appeals to Judicial Committee Order 1992 (SI 1992 No. 1716), an appeal lies to the Judicial

Committee from a decision of the Supreme Court on an election petition by virtue of section 48A of the Representation of the People Act.

He submits, however, firstly, that no sufficient complaint was made that the election in this case was avoided. Their Lordships are satisfied that the complaint made in the petition is that the election was avoided for "irregularity" or "any reason" within the meaning of section 45(1)(a) of the Representation of the People Act.

He further submits that as a matter of principle their Lordships should not interfere in election matters save in exceptional circumstances, which are not present in this case. In the first place it is said that it is very unusual for there to be an appeal in election matters (see *Théberge v. Laudry* (1876) 2 App.Cas. 102; *Kennedy v. Purcell* (1888) 59 L.T. 279); these matters are peculiarly within the competence of the local court and are likely to require a speedy decision (*Senanayake v. Navaratne* [1954] A.C. 640, 651). He draws attention to the case of *Buxoo v. The Queen* [1988] 1 W.L.R. 820 in which the Judicial Committee declined to apply different criteria to criminal appeals from Mauritius after legislation provided for an appeal as of right.

Their Lordships accept that election petitions may raise issues which are peculiarly within the knowledge of the courts of the country from which the petition comes and that, in such cases, they should not readily interfere with the decision of the court, or the last court, dealing with those issues. This, however, is not such a case. The issue here is purely one of statutory construction which does not depend on local knowledge or local practice. If the existence of an appeal procedure is to have any meaning it must be capable of use in such a case as the present.

Mr. Guthrie Q.C. then stresses that their Lordships have not had the advantage of the views of the Supreme Court on some of the arguments presented to them by the appellants' counsel. That is right and in cases where local knowledge or practice might affect the outcome of the appeal their Lordships would be reluctant to interfere. As already stated this is not such a case, and, although their Lordships would have preferred to have the benefit of the views of the Supreme Court on these arguments, they are satisfied that on an appeal involving a question of statutory construction and no more, it is appropriate that they should give a ruling on the issues raised in this appeal. This is so not least since the matter could have come to their Lordships as an appeal from a decision following an application for a declaration as to the proper construction of the relevant constitutional and other legislative provisions. That would not have been an election petition but the arguments may have arisen before their Lordships for the first time on the appeal to the Judicial Committee as they did in this appeal.

The essential question of construction in the appeal concerns the relationship between section 41 and section 89 of the Constitution.

The appellants contend that the Electoral Supervisory Commission was intended to be an "impartial, independent, and apolitic body" (*Vallet v. Ramgoolam* [1973] M.R. 29, 38) outside the control of the executive. For that reason it was provided in section 41 that it should have "general responsibility for, and shall supervise, the registration of electors ... and the conduct of elections ... and ... shall have such powers and other functions relating to such registration and such elections as may be prescribed". "General responsibility" is wide enough to include the making of appointments and it makes every sense that the body having the conduct of elections should also appoint the people needed to carry out the tasks required for the proper and fair conduct of such elections. The provisions of the Legislative Assembly Elections Regulations 1968 did not go beyond the power conferred by section 41 of the Constitution. It should be presumed, until the contrary is established clearly, that the legislation adopted by Parliament is valid and within the Constitution.

The interpretation contended for by the appellants, they say, is supported both by the history of the legislation and the fact that the Regulations were adopted within a few weeks of the adoption of the Constitution. As to the history, the power to appoint returning officers was, before independence, vested in the Governor and the returning officer's appointment of other staff was subject to the approval of the Governor (regulations 2 and 14 of the Second Schedule to the Representation of the People Ordinance 1958). By section 35 of the Constitution, scheduled to the Mauritius Constitution Order, 1966, the Election Supervisory Commission was given the same powers as those subsequently conferred in section 41 of the 1968 Constitution. By regulation 3 of the Legislative Assembly Elections Regulations 1967, made under section 8 of the Mauritius Constitution Order 1966, it was provided that in relation to a general election or a by-election, the functions of the Electoral Supervisory Commission should be generally performed by the Governor, though the power to appoint a returning officer was, by regulation 8, expressly vested in the Governor himself. It is, therefore, said not to be arguable that the power to appoint a returning officer was vested in the Public Service Commission when the powers were expressly conferred upon the Governor.

The appellants further argue that by the Mauritius Independence Order 1968 the Governor was replaced by the Governor-General but no provision was made that the returning officer should be appointed by the Governor-General. Section 41 of the 1968 Constitution re-enacted section 35 of the 1966 Constitution and the 1968 Constitution was followed by the 1968 Regulations. In

view of the history Parliament cannot have intended that the power to appoint should be transferred from the Governor to the Public Service Commission.

There is clearly force in many of the appellants' submissions. The history of the legislation is, however, perhaps more debatable than the appellants contend. Clearly as they say the power to appoint a returning officer did not go to the Governor-General and no less clearly the 1968 Regulations do confer the power to appoint a returning officer on the Electoral Supervisory Commission. It is not, however, to be overlooked that section 35 of the 1966 Constitution was in the same terms as section 41 of the 1968 Constitution, yet the power to appoint a returning officer was expressly vested in the Governor. It was not regarded as a power of the Electoral Supervisory Commission which the Governor should exercise on their behalf, nor was it thought appropriate at that time, to adopt a regulation vesting such power in the Electoral Supervisory Commission.

Whatever deductions are to be made from the history the essential question remains as to whether section 41 of the Constitution validly made it possible to confer that power by statute on the Electoral Supervisory Commission. If section 41 of the Constitution stood alone its terms are wide enough to be read as giving Parliament the power to authorise the Electoral Supervisory Commission to appoint a returning officer, as part of its general responsibility for the conduct of elections; the provisions of regulation 3(1) of the Legislative Assembly Elections Regulations 1968 are clearly within the ambit of "such powers and other functions relating to such registration and such elections as may be prescribed" in section 41 of the Constitution.

Section 41, however, does not stand alone. It has to be read with, *inter alia*, section 89 of the Constitution. By that section "Subject to this Constitution, power to appoint persons to hold or act in any offices in the public service ... shall vest in the Public Service Commission". The appellants contend that returning officers and other staff appointed for the purposes of elections are not persons holding or acting in "offices in the public service". They could not, therefore, be appointed by the Public Service Commission and could only be appointed by the Electoral Supervisory Commission. The reason section 89 does not apply, it is said, is that it is limited to the appointment of persons to hold or to act in any offices in the public service. Section 89 did not provide for the creation of offices, but only for appointments to fill them once they have been created. They can only be created pursuant to section 74 of the Constitution which is headed "Constitution of Offices" and which provided:-

> "Subject to this Constitution and any other law, the Governor-General [now the President] may constitute offices for Mauritius, make appointments to any such office and terminate any such appointment."

The office of returning officer has never been created by the Governor-General or the President, nor was it ever created by the Governor in Council by order made pursuant to The Civil Establishment Ordinance 1954, which authorised the Governor to establish offices in the public service, being service in a civil capacity under the Government of Mauritius. Moreover, it is said a returning officer cannot be a public officer since he does not hold an office in the public service, that is to say the service of the State in a civil capacity in respect of the Government of Mauritius.

The essential question on this part of the argument is whether a returning officer is one of those persons appointed "to hold or act in any offices in the public service" within the meaning of section 89. In their Lordships' view that does not mean that in order to be such a person there has to be an order of the kind contemplated by the Civil Establishment Ordinance Act despite what was said by the Supreme Court in a wholly different context in *Government Teachers Union v. Roman Catholic Education Authority* (1987) M.R. 88 at page 93. It is largely a question of fact. Nor does it mean that the person so appointed has to be serving the "Government" of the day as is contended. It is sufficient that a person should be acting in the service of the Crown (now the State) in a civil capacity in respect of the government of Mauritius, as the Government Notice referred to provides.

In a democracy the holding of elections is an essential function of the State and persons appointed (and, as here, paid) by the State, for the conduct of those elections are clearly persons acting in the service of the State in a civil capacity in respect of the government (or Government) of Mauritius.

Their Lordships agree with the Supreme Court that such persons are "patently" within the category of "persons" referred to in section 89(1) of the Constitution. The category is a much wider one than that contended for by the appellants. This is borne out by section 89(3)(h) of the Constitution which excludes from the provisions of the section "any office of a temporary nature" only if the holder performs duties which are mainly advisory and which is to be filled by a person serving under a contract on non-pensionable terms. A person holding an office of a temporary nature, the duties of which are not mainly advisory, is clearly regarded as being a person holding or acting in an office in the public service.

Section 89 of the Constitution is in their Lordships' view the overriding provision in relation to appointments to offices in the public service and should be given a broad interpretation. It is only when offices are specifically excluded, as they are in sub-sections (3)(a) to (h) or under section 112 that section 89 does not

apply. Many of the exclusions in section 89 are special cases, the reason for whose exclusion is clearly intelligible - as for example where appointments are otherwise to be made by the Judicial and Legal Service Commission or by the Police Service Commission, or where diplomats are to be appointed under section 87 or where there are to be appointments to an ecclesiastical office. The returning officer and other election staff, although appointed to an office of a temporary nature (as referred to in (h)), are not treated as a special category to be excluded from the provisions of the section.

Moreover the omission of the Electoral Supervisory Commission from the requirements in section 89(6), that the Public Service Commission shall consult the two Commissions mentioned before appointing officers already appointed by those other two Commissions, to offices in the public service does not, as the appellants argue, show that the persons appointed for election purposes are outwith section 89. It merely recognises that such persons do not have continuing appointments, but are engaged for the temporary purpose of a specific election so that prior consultation of their appointment to some other post is inappropriate.

The independence and impartiality of the Electoral Supervisory Commission is of course accepted - but for the purpose of appointments like the present the Public Service Commission has not been shown to be other than impartial and independent. Moreover the conduct of public officers in the carrying out of these electoral functions is not impugned in these proceedings and there is no reason why they should not be appointed to act in the holding of elections (even if the Electoral Supervisory Commission had by the Constitution been constituted as the appointing authority).

The appellants have referred to the Constitutions of certain other countries of the Commonwealth where it is said that the equivalent to section 89 co-exists with provisions conferring on an electoral commission the power to appoint returning officers and other election officials. Their Lordships have not considered these provisions in detail and say nothing about them.

It is suggested by the appellants that section 89 is the general provision dealing with the public service and that section 41 is the special provision dealing with elections. On the basis that *generalia specialibus non derogant*, section 41 should prevail over the general provision. Their Lordships do not accept this. Section 41 is a general provision dealing with the "general responsibility" for the conduct of elections. Appointment can at best be a part of this overall responsibility. Section 89 is the provision dealing specifically with appointments. Section 41 cannot take away the specific provision contained in section 89 in relation to appointments.

It follows that the power of appointment and approval purported to be contained in regulations 3(1) and 20 of the Legislative Assembly Election Regulations 1968 are *ultra vires* the Constitution. The appointment of the returning officer by the second respondent under powers delegated by the Public Service Commission and his approval of other appointments was valid. This appeal must therefore be dismissed. The Supreme Court of Mauritius were right to dismiss the petition.

Even if their Lordships had concluded that appointments by the Public Service Commission were invalid they would not have declared this particular election to be null and void. By section 48 of the Representation of the People Ordinance 1958 as amended:-

> "Save as is otherwise provided by the Orders in Council in respect of Legislative Council elections, no election shall be invalid by reason of a non-compliance with this Ordinance (or any Ordinance amending or replacing this Ordinance) or with any Ordinance or other law which may at any time hereafter be in force, if it appears that the election was conducted in accordance with the principles laid down in any such Ordinance or other law and that such non-compliance did not affect the result of the election."

The present election, if the appointment of the returning officer is invalid, was plainly conducted, as the appellants accept, otherwise in accordance with the principles laid down in the relevant legislation and any non-compliance with the provisions of regulations 3 and 20 of the 1968 Regulations did not affect the result of the election.

As to costs their Lordships accept that, if it had been made clear that the validity of the first respondent's election was not challenged in view of the provisions of section 48 even if the appellants succeeded on the principal issue, the first respondent would not have found it necessary to be represented before the Judicial Committee. The appellants must therefore pay his costs before their Lordships. There will be no other order as to the costs of this appeal. The order of the Supreme Court as to costs stands.