

**SUIT E. 154/94**

### 3RD RESPONDENT

**Maurice Tenn for 3rd respondent**

**Heard: 1st, 2nd, 3rd and 10th June, 1994**

HARRISON J.

By an amended originating summons the applicant seeks, "..... the determination of the question,

1. Whether on a proper construction of the Election Petitions Act as a whole, and in particular section 20 (f) thereof, once an election petition is filed, no action may be taken by Sir Howard Cooke, O.N., G.C.M.G., G.C.V.O., on the advice of the Prime Minister pursuant to section 3 of the Representation of the People Act and section 32 of the Constitution, affecting the seat of the member to whose election the petition relates, until the judge or Court issues a certificate of determination or unless the petition is withdrawn, or a sole petitioner dies and no one is substituted as a petitioner.

AND FOR

2. A declaration that the act of Sir Howard Cooke, O.N., G.C.M.G., G.C.V.O., in purporting to issue his writ of election of a member of the House of Representatives for the Constituency of East Central Saint Andrew to be held on Tuesday 26th April 1994 is illegal and/or void and ought to be set aside."

The second and the third respondents each took a preliminary objection to the hearing of the said summons.

The facts relevant are unchallenged and are as follows:

The applicant was the unsuccessful candidate in an election for a seat in the House of Representatives in respect of the constituency of East Central Saint Andrew, on the 30th day of March 1993. Mr. Arthur Jones was certified as being duly elected.

On the 23rd day of April 1993 the applicant filed a petition under the Election Petitions Act complaining of election irregularities and sought thereby a declaration that he was duly elected and ought to be returned as the member for the said constituency.

On the 25th day of February, 1994 Mr. Arthur Jones resigned his seat, on the ground of ill health.

On the 5th day of April 1994, His Excellency the Governor-General issued a writ of election in accordance with section 3 of the Representation of the People Act. The Returning Officer for the said constituency issued a notice dated the 6th day of April 1994 announcing that nomination day would be on the 9th day of April 1994 and election day for the taking of the poll would be on the 27th day of April 1994.

Previously, on the 24th day of March 1994, the applicant obtained an order in the Supreme Court on a summons for inspection of documents in the custody of the Chief Electoral Officer, in relation to the election of the 30th day of March 1993.

On the 13th day of April 1994, the applicant filed the originating summons, the subject of these proceedings.

Mr. Leys argued, on behalf of the second respondent that the declaration sought and the issues raised can only be brought on an election petition because the case falls within the ambit of section 44 of the Constitution which governs the electoral process or any collateral question; that prior to 1883 the English Parliament regulated all matters concerning such process, until the said year when it conferred the jurisdiction on the Supreme Court, and this practice was followed in its colonies, including Jamaica; that by section 3 of the Representation of the People act the election begins with the issue of the writ of election, which writ issued on the 5th day of April 1994

could be challenged by the applicant thereby elevating his former petition; that the election process refers to the period commencing after the resignation of the member holding the seat; that this is a challenge to a seat in Parliament and the court should not intrude upon the privileges of that body.

He continued that the Constitution provided its own mechanism for election to Parliament, and once the provisions are complied with one may not look to any other law to test the validity of its compliance; that there exists a constitutional bar to the grant of the declaration even if the court finds an entitlement in the applicant; that it is not the duty of the court to decide on the right of Parliament to issue the writ of election; that the Election Petitions Act exists for settling disputes, and, that laws should be construed in harmony with the Constitution. Therefore if the declaration is granted it would be seeking to fill a vacancy, not in accordance with the Representation of the People Act and thereby would be contrary to the Constitution. He relied, *inter alia*, on the unreported case of Attorney General of Jamaica et al vs. Thompson, Supreme Court Civil Appeal Nos. 46 & 47/80 delivered 23rd July 1981, and Temple vs Bulmer [1943] 3 D.L.R. 649.

Mr. Tenn for the 3rd respondent argued that Arthur Jones, the former member of the said seat was elected on 30th March, 1993, an election petition was filed on 23rd April 1993, he resigned on 28th February, 1994 and the 3rd respondent was duly elected as a member on 26th April, 1994 pursuant to the said writ of election; that there is no statutory bar, created by the filing of the petition, to the issue of the writ of election; that the court has no jurisdiction to grant the declaration, which is a challenge to the 3rd respondent's election and membership and that its grant would cause confusion to the electoral process. He also relied, *inter alia* on Thompson's case, *supra*.

Mr. George for the applicant submitted that the Election Petitions Act which provides a remedy by way of petition, is concerned with an "undue return" or "undue election" and is referable to the misconduct of returning officer, elected persons and others during the electoral process, i.e. after the writ of election is issued; that Thompson's case, *supra*, deals with

"nomination" and therefore anything said in that case of conduct prior to nomination, is obiter; that because the Election Petitions Act is concerned with events after the issue of the writ of election, there is no provision to bring a petition under the said Act on the ground that His Excellency the Governor General wrongly issued the said writ, and also because in Jamaica such an act is an administrative act done on the advice of the Honourable Prime Minister and in those circumstances does not fall under the said Act; that the 3rd respondent was elected in a manner prescribed by Parliament and statute, he committed no wrong, and therefore no election petition could be utilized; that the English Election Petitions Act, as repealed by an Act of 1949, deals exclusively with elections, it does not nor does the Jamaican Act intend to include the issue of a writ of election in its provision; that applicant cannot say writ of election issued not valid, but it is different from the other privileges of Parliament, because though Parliament handed to the courts the conduct of elections, it retained the issue of the writ of election, which though it is the initiator of the electoral process, it is not a part of it; that when the originating summons was filed on 13th April, 1994 prior to the election on 26th April 1994, there was no alternative process to the declaration, and so the applicant should not be deprived of the right he then had to obtain a declaration. He did not dispute that if the matter fell under section 44 of the Constitution it would be within the ambit of the Election Petitions Act, but maintained that the issue of the writ was not, because if it was Parliament and the Constitution would have said so. He said further that even if the issue of the writ of election was within the electoral process, it was not within the category of acts to come within the Election Petitions Act. He concluded that the Thompson case, supra, and the case of Ponnuswami vs. Returning Officer Namakkal Constituency et al (1952) S.Cr. 218 are distinguishable, as the complaint in each fell within the electoral process and that as shown in the Thompson case, the court will grant a declaration, even if the action of His Excellency the Governor General is regarded as being within the electoral process. He relied, inter alia, on In re Barnes Corporation, Ex parte Hutter (1933) 1 K.B. 668.

The Constitution of Jamaica provides for the settlement of disputes in electoral matters.

Sec 44 reads,

"(1) Any question whether -

(a) any person has been validly elected or appointed as a member of either House; or

(b) any member of either House has vacated his seat thereon.....

shall be determined by the Supreme Court or, on appeal by Court of Appeal whose decision shall be final, in accordance with the provisions of any law for the time being in force in Jamaica and, subject to any such law, in accordance with any directions given in that behalf by the Chief Justice.

(2) Proceedings for the determination of any question referred to in subsection (1) of this section may be instituted by any person (including the Attorney General)....."

Previously Parliament controlled the entire machinery and procedure concerning elections, until it divested this power to the judiciary.

The author of Erskine May's, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 18th edition (1971) observed, at page 29,

"before the year 1770, controverted elections were tried and determined by the whole House of Commons, as mere party questions, upon which the strength of contending factions might be tested.

In order to prevent so notorious a perversion of justice, the House consented to submit the exercise of its privilege to a tribunal constituted by law, which, though composed of its own members, should be appointed so as to secure impartiality and the administration of justice according to the laws of the land and under the sanction of oaths. The principle of the Grenville Act, and of others passed since 1770, was the selection by lot of committees for the trial of election petitions. Partiality and incompetence were however, generally complained of in the constitution of committees appointed in this manner; and in 1839, an Act was passed establishing a new system, upon different principles, increasing the responsibility of individual Members, and leaving but little to the operation of chance. This principle was maintained, with partial alterations of the means by which it was carried out, until 1868, when the jurisdiction of the House in the trial of controverted elections was transferred by statute to the courts of law.....

By Part III of the Representation of the People Act, 1949, the trial of controverted elections is confided to judges..... Petitions complaining of undue elections and return or of corrupt or illegal practices are presented to the Queen's Bench Division of the High Court of Justice....."

In Jamaica a similar practice was followed resulting in section 44 of the Constitution quoted above, and the enactment of the Election Petitions Act.

Section 45 of the Constitution provides:—

- "(1) (a).....
- (b).....
- (2) Whenever the seat of any member of the House of Representatives becomes vacant the vacancy shall be filled by election in the provided by or under law for the time being in force in Jamaica."

The Representation of the People Act provides the procedure for the filling of vacancies to the Parliament of Jamaica. Section 3 of the said Act reads:

- "(1) Elections shall be instituted by writs of election which shall be in the form set out in the Second Schedule."

Form No. 1 of the said Schedule reads, in part,

"The Representation of the People Act,

Writ of Election

To.....

Returning Officer for Constituency of .....greeting:

.....

I command you that notice of the time and place of election being first duly given, you do cause election to be made according to law of a member to serve in the House of Representatives for the said constituency of.....on the .....day of.....and that you do cause the name of such member when so elected, whether he be present or absent, to be certified to the Chief Electoral Officer as by law directed.

Witness my hand.....

Governor-General"

The writ of election is therefore the genesis and spans the entire electoral process terminating in the directive that the elected member be certified to the Chief Electoral Officer. The executive action of the Honourable Prime Minister in directing the issue of the writ of election effectively places it within the powers of the Governor-General to do so. To regard the electoral process as beginning after the issue of the writ of election, is to relegate such issue to a neutral mode, referable neither

to the executive nor to the electoral process - a novel argument but less than satisfying. In the circumstances of this case, the electoral process began on the resignation of the former member of the said seat, Mr. Arthur Jones; the issue of the writ of election is therefore a part of the electoral process. Some support for this finding exists.

In section 2 of the Representation of the People act, the phrases "during an election", or "at an election" or "throughout an election", are defined as including,

"...the period after the issue of the writ of election, or after the dissolution of the House of Representatives or the occurrence of a vacancy in consequence of which a writ for an election is eventually issued, until the elected candidate is returned as elected."

One cannot therefore maintain a reasoning that the electoral process may begin at resignation, stop before the issue of the writ of election and recommence thereafter, thereby excluding the writ of election from the electoral process.

In the Thompson case, the phrase "electoral process" was considered. A passage from the case of *Pornuswami vs Returning Officer*, *supra*, reads, at pages 227 - 228,

"That the word 'election' bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject or in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in Halsbury's Laws of England in the following passage under the heading 'Commencement of the Election':

'Although the first formal step in every election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is 'reasonably imminent'. Neither the issue of the writ nor the publication of the notice of election can be looked at as fixing the date when an election begins from this point of view. Nor, again does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that, as to when 'the conduct and management of an election may be said to begin. Again, the question as to when a particular person

commences to be a candidate is a question to be considered in each case'

The discussion in this passage makes it clear that the word 'election' can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process."

Carey, J.A., in Thompson's case said, at page 45,

"By election disputes I am to be taken as including any irregularities affecting a candidate from the date the poll is fixed by the Governor General to the date the results of that poll are announced."

The law does not contemplate any lacuna in the filling of a vacancy in Parliament i.e. an uncertain period before filling of the vacancy - vide section 45 of the Constitution. Therefore in the circumstances of this case the electoral process begun at the time of resignation.

An election petition filed in accordance with the provisions of the Election Petitions Act is, in the circumstances, the appropriate process.

Section 3 of the latter Act provides,

"3. A petition may be presented to the Supreme Court by any one or more of the following persons, that is to say -

(a) .....

(b) in relation to the House of Representatives or a Parish Council, by the Attorney-General or by any other person"

The Act presents a comprehensive mechanism for the settlement of disputes in the electoral climate. Section 5 provides for publication of the petition filed, section 6 deals with service on the respondent within ten days of filing, section 8 deals with the petitioner's grounds, section 9 with ~~service of~~ notices and sections 13,14,15 and 16 deals with withdrawal of the petition, death of either the petitioner or respondent and the consequent results. Section 19A reads,

"The trial of an election petition shall, so far as practicable consistently with the interest of justice in respect of the trial, commence within ninety days of the date of filing of the petition and be continued from day to day on every lawful day until its conclusion."

As a compliment to this section, section 24 provides,



- "24 (1) .....  
 (2) .....  
 (3) An election petition shall be deemed to be a proceeding in the Supreme Court and, subject to the provisions of this Act and to any directions given by the Chief Justice, the provisions of the Judicature (Civil Procedure Code) Law and the rules of the court shall so far as practicable, apply to election petitions."

Section 20 deals with the mode of trial and determination, section 22 with appeals and section 26, 27 and 28 with the attendance of witnesses, payment of their costs and other costs, respectively. The petition is adequate for settlement of electoral disputes.

The applicant however claims, that the declaratory judgment is the appropriate process, and even if the court finds that the election petition is the correct process the Court may grant the declaration.

The declaratory judgment is an order of the Court declaring the rights of the parties, but such orders are not enforceable as the ordinary judgment is. Professor Wade in Administrative Law, 6th edition, at page 593, said,

"Declaratory judgments play a large part in private law and are a particularly valuable remedy for settling disputes ... The essence ... is that it states the rights or legal position of the parties as they stand, without changing them in any way..."

However, the parties affected by the declaration usually respect and respond to the order of the court.

The substance of the applicant's case is, that the writ of election which was issued on 5th April, 1994 was invalid in that his prior petition complaining of an undue return in respect of the said seat was not yet heard and concluded. The applicant was therefore challenging the due election of the 3rd respondent and seeking to use his prior claim to the said seat - his petition filed on the 23rd day of April, 1994, as the ground for his current challenge. This is a dispute in the electoral process that falls within the ambit of the Election Petitions Act. The applicant is really saying I am entitled to the said seat held by Arthur Jones, and that issue is not settled and therefore the issue of the writ of election on 5th April 1994, is of no effect because my claim is still outstanding.

This Court is of the view that a claim remains a mere claim, until adjudicated on and thereby may be elevated to the status of an interest. The Representation of the People Act, section 3 and section 45 of the Constitution authorised the issue of the writ of election, unconditionally. There was therefore an existing election. The applicant's recourse therefore, was to file, a petition under the Election Petitions Act, because the electoral process had begun. He could thereby advance all his claims, by proving his entitlement to the said seat, and maintain that as a consequence it was not validly held by Arthur Jones, whose resignation was therefore of no effect, consequently no legal basis arose for the issue of the writ of election on 5th April, 1994.

A declaration is not available to the applicant in these circumstances. It seems to me that the declaration granted by the Court of Appeal in the Thompson case, is probably explicable in the context that the statute was not being followed by the Governor General in the revoking of the proclamation, and therefore the court, not bound by any statutory provision to give rise to an election petition, could pronounce on the invalidity of the act. I am not in agreement that the Thompson case must be viewed as restricted to its finding in respect of post-nomination conduct only. In the case of In re Barnes Corporation, supra, the court held that there was no lawful election, so therefore no question arose of utilizing the election petition under the statute; the prerogative order of mandamus was issued.

In the instant case, the Governor General validly complied with the statute - the act of the executive; - the electoral process had already begun. The election petition should therefore have been utilized. There was no place for the declaratory judgment. The grant of a declaration would amount to permitting the applicant by his dilatoriness, to effectively control the executive as to when they may fill a vacancy by the issue of the writ of election. He filed his former petition on 23rd April 1993 and took no steps in its prosecution until his excursion for the order for inspection of documents which was obtained on 23rd March 1994. In Temple vs Bulmer [1943] 3 DLR 649, it was confirmed that the power and time of issue of the writ of election is the sole prerogative of the executive. In the circumstances

of the instant case the Representation of the People Act and the Election Petitions Act which contemplate diligence and dispatch in the use of the electoral machinery, provide the election petition as the appropriate process to be used by the applicant.

This Court holds that it has no jurisdiction to determine the matters raised nor to make the declaration on this summons. This originating summons is accordingly dismissed, with costs to the 2nd and 3rd respondents to be agreed or taxed; - certificate for counsel for each respondent.

Leave to appeal granted.

*Case 1*

① *Honey Sengul* [S.O. 213] No 46847/80-23/11/81

② *Tony G. ...* [S.O. 213] L.R. 649

③ *... ..* [S.O. 213] ... ..

④ *... ..* [S.O. 213] ... ..