

CHANDRAKUMAR
v.
KIRUBAKARAN AND OTHERS

COURT OF APPEAL
A. DE Z. GUNAWARDANA, J.
ELECTION PETITION NO. 01 OF 1988
JUNE 16, 1989

Election petition – Time limit for filing election petition – Section 108(1) of the Provincial Councils Elections Act – Notice of presentation of an election petition – Rule 14 of Provincial Council Election Petition Rules of 1989 – Whether affidavit is required in respect of allegations of corrupt practices in proof of charge of general intimidation – Section 98(d) of Provincial Councils Elections Act.

The petitioner sought to have the election of 1-11 respondents to the Provincial Council of Northern and Eastern Provinces set aside on two grounds:

- (1) general intimidation, misconduct and other circumstances;
- (2) non-compliance with provisions of the Provincial Councils Elections Act.

Three preliminary objections were taken to the hearing of the election petition, namely;

- (1) that the election petition had been filed out of time,
- (2) that notice of presentation of petition had not been given within the time specified in Rule 14 of the Provincial Council Election Petition Rules,
- (3) that an affidavit had not been filed along with the petition in terms of section 98(d) of the Provincial Councils Elections Act.

Held—

- (1) The failure of the petitioner to file the petition within 21 days from the date of the publication of the results of the election in the Gazette, was a fatal irregularity. The fact that the Registrar and the Assistant Registrar were not available in office on the days the petition should have been filed would not amount to the office of the Registrar being "closed," as contemplated under section 8(1) of the Interpretation Ordinance.
- (2) The 10 days time limit, in this instance 14 days, prescribed by Rule 14(1) of the Provincial Councils Election Petition Rules for service of notice of presentation of election petition on the respondents is mandatory and applies to every mode of service of notice set out under paragraphs 1(a) and (b) and paragraph 2. The mere delivery of notice to the Registrar within the 10 day limit, in this instance 14 days, is not sufficient compliance with Rule 14. The actual service on the respondents must be effected within the time limit specified in paragraph 1 of Rule 14.

- (3) An affidavit is not required to be filed in support of the allegations of corrupt practices, where such practices have been alleged merely for the purpose of proving the charge of general intimidation.

Cases referred to:

1. *Nahayakkara vs. Kiriella and others* [1985] 2 Sri LR 391
2. *P. A. Cooray vs. H. J. C. Fernando* 54 NLR 400, 405
3. *Abeywardene vs. Ariya Bulegoda and two others* [1985] 1 Sri LR 86, 99

ELECTION PETITION to have election to Provincial Council set aside.

S.C. Crossette Thambiah with *R. Gunaratne* and *S. Peiris* instructed by *Pushpa Amaratunga* for petitioner.

J. C. T. Kotalawala with *S. R. de Silva* instructed by *R. Abeyratne* for 1 to 8 respondents.

R. Jayatilake, D.S.G. with *F. N. Gunawardana*, S.C. instructed by *Miss. A. Shanmuganathan*, A.S.A for 12th respondent.

A. H. M. Ashroff with *Miss Arulpragasam* for 13 to 15 respondents.

Cur. adv. vult.

July 20, 1989.

A. DE Z. GUNAWARDANA, J.

The petitioner who was a candidate at the Election held on 19.11.1989 for election of Members to the Northern and Eastern Provinces Provincial Council, has filed this Election Petition praying that the said election be declared void in respect of the Administrative District of Batticaloa. In paragraph 6 of his petition he urges general intimidation, misconduct and other circumstances as grounds for setting aside the said election. In addition, in paragraph 8 he pleads the non-compliance with the provisions of the Provincial Councils Elections Act No. 2 of 1988 as another ground for avoiding the said election. He has cited as respondents Members who were elected as 1 to 11 respondents. It later transpired that 9 to 11 respondents have ceased to be Members of the said Provincial Council, and in their place 13 - 15 respondents were added, after notice published in the Gazette by the Registrar of this Court, in terms of Rule 29(2) of the Provincial Councils Election Petition Rules of 1989. The 12th respondent was the Returning Officer for the Administrative District of Batticaloa at the said Election.

At the hearing of this petition all the respondents took up a preliminary objection viz. that the petition has been filed in the Court of Appeal, out of time. In addition 1 to 8 respondents and 13-15 added respondents took up the objection that notice of presentation of petition had not been given within the time specified in Rule 14 of the Provincial Councils Election Petition Rules, and thereby the petitioner has not complied with the provisions of Rule 14. A third objection was raised by the Counsel for the 1 to 8 respondents, namely, that there was a fatal irregularity in not filing an affidavit with the petition as required under section 98(d) of the Provincial Councils Election Act, as the petition disclosed corrupt practices.

First I would deal with the preliminary objection that the petition has been filed out of time. It is common ground that the said election was held on 19.11.88 and that the results of the said election were published by the Commissioner of Elections, in Gazette Extraordinary No. 534/2 dated 28.11.1988, declaring that the 1 to 11 respondents have been duly elected as Members of the said Council. The present petition challenging the said election had been filed in the Court of Appeal on 21.12.88. This is evidenced by the date stamp on the petition and the Journal Entry dated 21.12.88. According to section 108(1) of the Provincial Councils Elections Act the petition has to "be presented within 21 days of the date of publication of the results of the election in the Gazette." It was contended by the learned Deputy Solicitor General on behalf of the 12th respondent that the last date on which the petition would have been filed is 18.12.1988, which is a Sunday, and therefore should have been filed on the 19th. It was pointed out that this has not been complied with, and in fact, the petition had been filed on 21.12.88, which is 24 days after the publication of the results in the Gazette. The learned Counsel for the 12th respondent drew the attention of Court to section 8(4) of the Interpretation Ordinance. He submitted this being a time period exceeding 6 days, Sundays and public holidays will have to be included in the computation of the time limit as provided for in section 8(3) of the Interpretation Ordinance. He added that provision in section 108(1) of the Provincial Councils Election Act is a mandatory provision and the words used there are, "shall be presented within 21 days" and therefore the Court has no discretion in the matter.

Counsel for the petitioner contended that the petition could not be filed on the 19th or 20th of December 1988 as the Registrar of the

Court of Appeal who normally accepts election petitions was not available and even the Assistant Registrar of the Court of Appeal was not available. This he submitted was evidenced by the affidavit filed of record, by the registered Attorney-at-Law for the petitioner, which is dated 4.1.1989. According to the Counsel, petition was filed on 21.12.1988 with the Asst. Registrar and even on that date the Registrar who normally accepts election petitions was not available. In the circumstances, he submitted that it would tantamount to the office being closed on 19th and the 20th of December 1988. He cited section 8(1) of the Interpretation Ordinance in support of his contention that although the office of the Registrar of the Court of Appeal was not officially closed on those two days, since the Attorney-at-Law for the petitioner was unable to transact the business that she wanted to be done on that day, it would amount to the office being "closed."

Learned Deputy Solicitor General for the 12th respondent pointed out that under Rule 3(1) of the Provincial Councils Election Petition Rules, there is no requirement that the petition should be handed over to the Registrar. Rule 3(1) states,

"the presentation of an election petition shall be made by delivering it at the office of the Registrar, and the Registrar or the officer of his department to whom the petition is delivered shall, if required, give a receipt in the following form:"

He further submitted that 19th and 20th of December 1988 were not public holidays and the office of the Registrar of the Court of Appeal was open for normal business.

The Counsel for the 1 to 8 respondents submitted that the Attorney-at-Law for the petitioner has not shown due diligence, and that if she was unable to present the petition to an officer at the Registry she should have made representations to a higher official or even to the President of the Court of Appeal in view of the urgency of the matter in hand.

Counsel for the added respondents submitted that there is no evidence to show that normal routine of the office of the Registrar of the Court of Appeal had come to a stand-still and the mere fact that the Registrar was not available is not sufficient reason for the petitioner not to have filed the petition in time. The learned Counsel also pointed out that the affidavit filed by the Attorney-at-Law for the

petitioner is belated, in that it had been filed on the 4th January, 1989.

It is seen from the provision in section 8(1) of the Interpretation Ordinance that where a person is allowed to do any act or take any proceedings in Court or office, and the last day of the limited time is a day on which the Court or office is closed, then the act or proceedings can be done or taken on the next day such Court or office is open. The word "closed" had been used in the said section as opposed to the word "open", because it is stated there that an act or proceedings taken on the next date on which court or office is open is considered to have been done or taken in due time. It is common ground that the office of the Registrar of the Court of Appeal was literally and physically open for transaction of official functions on the 19th and 20th of December, 1988. For this Court to hold that office of the Registry of Court of Appeal is "closed", because the Registrar or the Assistant Registrar who normally accepts election petitions were not available in office on those days, to accept the petition of the petitioner, would amount to giving an artificial meaning to the word "closed". In my view such an extension of the meaning or interpretation of the word is not warranted in law. Therefore, I hold that the petitioner has failed to file the said election petition within the stipulated time in section 108(1) of the Provincial Councils Election Act. The petitioner's failure to do so is a fatal defect. Therefore, I uphold the objection taken on this ground.

The second preliminary objection taken to the hearing of this petition was that the petitioner has failed to comply with Rule 14 of the Provincial Councils Election Petition Rules in that the petitioner has failed to serve notices of the presentation of the petition to the respondents, within 14 days. Rule 14(1) of the Provincial Councils Election Petition Rules of 1989 states as follows:

"14 (1) Notice of the presentation of a petition, accompanied by a copy thereof shall within ten days of the presentation of the petition –

- (a) be served by the petitioner on the respondents; or
- (b) be delivered at the office of the Registrar for service on the respondent, and the Registrar or the officer of his department to whom such notice and copy is delivered

shall, if required, give a receipt in such form as may be approved by the President of the Court of Appeal.

Provided that where an election petition, in respect of an election held under the Act has been presented to the Court of Appeal, prior to the date on which these rules come into operation, the petitioner shall be deemed to have complied with the provisions of this paragraph if he serves or delivers, as required by this paragraph, notice of presentation of the petition, within a period of fourteen days from the date on which these rules come into operation.

(2) The service under paragraph (1) of the presentation of a petition and copy thereof by the petitioner on the respondent may be effected either by delivering such notice and copy to the agent appointed by the respondent under rule 9 or by posting them in a registered letter to the address given under rule 9 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or by a notice published in the Gazette stating that such petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar.

(3) Where notice of the presentation of a petition, accompanied by a copy thereof, is delivered under paragraph (1) at the office of the Registrar for service on the respondent, such service may be effected in the same manner as the service of a notice issued by a court is effected under the Civil Procedure Code.

It was contended on behalf of the 1 to 8 respondents that Rule 14 contemplates several modes of service of notice of presentation of petition and the said respondents have not been served with the said notices under any of those modes of service. Therefore there is a total failure on the part of the petitioner to comply with Rule 14, which he submitted was a fatal irregularity. Hence the petition should be dismissed in limine.

The Counsel for the added respondents also supported the said objection.

Counsel for the petitioner submitted that the petitioner has resorted to four ways of giving notice of presentation with a copy of the petition to the respondents. Firstly by delivering the said notices

along with petition at the office of the Registrar of the Court of Appeal on 3.2.89, as evidenced by Journal Entry of the said date. This delivery he pointed out was within 14 days of the said rules coming into force, as required under proviso to Rule 14. Secondly, by publishing a notice in the Gazette dated 17.2.89 giving notice of presentation of petition under Rule 14. Thirdly the said notices have been sent to the respondents under registered cover and the date stamp on the photo-copy of the registered article receipt filed of record appears to be of 2.2.89. Fourthly a notice had been published in the "Dinapathi" Newspaper dated 29.3.89 giving notice of the presentation of the petition. It is to be noted that only the first three methods are the recognized modes of service in terms of Rule 14. The publication in the newspapers is not contemplated under Rule 14, and it would be irrelevant to consider that mode.

In regard to the delivery of the said notices to the Registrar to be served on the respondents in terms of Rule 14(1)(b) the Counsel for the petitioner submitted, that, what is contemplated in that subparagraph is the delivery of the said notice within 14 days to the Registrar and the Registrar should get the notices served through the Fiscal within a reasonable time. This, he contended would be sufficient compliance with the requirement of Rule 14(1)(b), as the service of the said notice on the respondent through the Registrar is a matter beyond the control of the petitioner. The Counsel pointed out that although efforts were made by the Registrar to serve the said notice on 1 to 8 respondents through the Fiscal, those attempts were not successful. It is because of the failure of this mode of service that the petitioner resorted to other modes of giving notice to the respondents.

The question that has to be considered is whether the mere delivery of the said notices to the office of the Registrar within 14 days of the said rules coming into force is sufficient compliance with Rule 14. The Counsel for the petitioner contended that the time limit contained in paragraph 1 of Rule 14 is not applicable to the service of the said notices on the respondents by the Fiscal and was only applicable to the period within which the said notices have to be delivered at the office of the Registrar, to be served on the respondents.

When one examines the provisions of Rule 14, it is clear that the purpose of Rule 14 is to give expeditious notice to the respondents of

the filing of the election petition, so that they may be alerted to prepare their defence and take any other necessary steps. This is the reason why, in my view, a short period of only 10 days, in this instance 14 days, has been specified. Therefore the delivery of the said notices at the office of the Registrar could only be a half measure, and would not achieve that objective. Furthermore, the mere delivery of the notices at the office of the Registrar, would not in all circumstances ensure that such notices would be received by the respondents within the stipulated time, because the Registrar has to set in motion another process, viz: service through the Fiscal, which would cause delay and it may result in certain instances, as in the present case, of such notice being not served within the required time. Thus the intention of the legislature of informing the respondents expeditiously would be defeated. What is important is to inform the respondents and not the Registrar of the filing of the petition. Therefore, in my view, the time limit stipulated in para (1) of Rule 14 is clearly applicable to the services of the said notices on the respondents and not to the delivery of the said notices at the office of the Registrar.

It is also appropriate to note here that sub-para 3 of Rule 3 which provides for the manner in which the said notices are to be served refers to paragraph 1 of Rule 14. The words "delivered under paragraph 1 at the office of the Registrar," would mean that the service of the said notices under Civil Procedure Code, as provided for in that paragraph, should be done within the stipulated time in paragraph 1 of Rule 14.

The election petition proceedings being purely statutory proceedings, the statutory requirements of the election law must be strictly observed. If the legislature intended to exclude this mode of service of notice on the respondents from the application of the time limit applicable to the several modes of service stipulated in Rule 14, it is to be expected that this mode of service, would have been expressly excluded from the application of the said time limit or would have been enacted as a separate rule.

I am fortified with the construction I have given to Rule 14 sub-para (b), when one looks at the scheme of the Act where time limits have been stipulated for various steps to be taken at various stages so that there would be expeditious disposal of the election petition. Some examples of such time schedules are, that an election has to be

presented within 21 days from the publication of the results of the election under section 108(1). The security has to be provided at the time of filing the petition or within 3 days thereafter – section 103(1). It is required under section 9(2) that every election petition shall be tried as expeditiously as possible and every endeavour be made to conclude the trial of every petition within a period of 6 months. An appeal from the determination or order of an Election Judge has to be made before expiry of one month from the date of the determination or order – section 102(2). Every appeal to the Supreme Court from an Election Judge's determination or order will be given priority over other business of that Court – section 102(5). If the petitioner claims the seat of an unsuccessful candidate, each side must, 6 days before the trial, deliver to the Registrar a list of votes intended to be objected to in terms of Rule 6. In a recriminatory case, the respondent, must six days before the trial, deliver to the Registrar a list of objections on which he intends to rely in terms of Rule 7.

Thus it is clear from the said provisions that time limits have been prescribed to ensure that an election petition is disposed of expeditiously. This is done because it is in the interest of both the winning candidate as well as the electorate to know as early as possible, for certain, what the position is, regarding the status of their elected representatives.

The Rule 15 of the Parliamentary Elections Rules (1946) which is almost identical with the said Rule 14 had been the subject of interpretation by Supreme Court in the case of *Nanayakkara vs. Kiriella and others* (1). The majority of judges in the said case held that,

“The ten day limit prescribed by Rule 15(1) of the Parliamentary Elections Petition Rules for the service of notice of presentation of an election petition on the respondents is mandatory and applies to every mode of service of notice set out under sub-para (a) and (b). Even where the petitioner delivers to the Registrar the notices and copies of the petition under Rule 15(1)(b) the actual service must be effected within ten days.”

Although this decision is not binding on this Court, in view of the reasons I have adduced above, I am inclined to follow the said majority view expressed in the said case.

I hold that, the petitioner has failed to comply with the requirement in Rule 14(1)(b), to have the said notices served on the respondents within 14 days.

The second mode of service resorted to by the petitioner to give notice of presentation of petition was to have a notice published in the Gazette dated 17.2.89. Rule 14(2) provides for such notice as follows:

".....or by a notice published in the Gazette stating that such petition has been presented and that a copy of it may be obtained by the respondents on application at the office of the Registrar."

What is crucial in this mode of giving notice is also the time limit. The time limit applicable in this instance too would be that prescribed under Rule 14 para (1), namely 10 days or in this instance, 14 days, in terms of the proviso. In the case of *P. A. Cooray vs. H. J. G. Fernando* (2), Justice Swan, considering a similar provision under Parliamentary Elections Order in Council states;

"So that the only other matter to consider is whether the notice published by the respondent in the Government Gazette complies with the requirements of Rule 15. This notice appeared in the Gazette of 27.6.52, i.e. beyond the period of ten days. Mr. Kannangara says it was handed to the Government Printer on 25.6.52. But the date of publication is the required date, not the date on which it was handed in for publication."

Thus in the present case too the relevant date is the date on which the notice was published, namely, 17.2.1989, which is beyond 14 days from the date on which the Provincial Council Election Petition Rules were published. The Provincial Council Election Rules were published in Gazette Extraordinary dated 25.1.89. I hold that the time limit specified in para 1 and proviso to Rule 14 is applicable to this mode of giving notice, and therefore the petitioner has failed to publish the said notice in the gazette within the time required in Rule 14(2).

The petitioner has submitted photo-copies of the registered article receipts on which date stamp appears to be 2.2.89, as proof of posting of the said notices in terms of Rule 14(2). However, the 1 to 8 respondents have denied receipt of this notice by post. In my view the period of time stipulated in para 1 and proviso of Rule 14 is

applicable to this mode of service too. There is no proof that these notices were received by post by the 1 to 8 respondents, within the time stipulated in Rule 14 paragraph (1). Therefore I hold that the petitioner has failed to comply with Rule 14 (2) in regard to service of notice of presentation of petition by this mode too.

The resulting position is that the petitioner has failed to comply with the requirement of service of notice of presentation of petition by any of the modes stipulated in Rule 14. The petitioner's failure to do so is a fatal irregularity. Therefore I uphold the objection on this ground.

The Counsel for the 1 to 8 respondents contended that the failure of the petitioner to support the allegations of corrupt practices pleaded in paragraph 7 of the petition by an affidavit was a fatal irregularity. He cited section 98(d) of the Provincial Councils Election Act which states as follows:

"(d) shall set forth with full particulars of any corrupt or illegal practice that petitioner alleges, including as full a statement as possible all names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice, and shall also be accompanied by an affidavit in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice;"

He drew the attention of court to para 7(d) of the petition which states that,

"Several voters were impersonated at the said election."

and para 7(e) which states that;

"several votes were cast by persons impersonating voters who were dead at the time of the said poll."

These the learned Counsel submitted were corrupt practices. Therefore the petition should have been accompanied by an affidavit, and the failure to do so was fatal defect.

The Counsel for the petitioner submitted that these acts were alleged not as grounds to avoid the election but to substantiate the charge of general intimidation. He pointed out that the petitioner is seeking to have the election declared void under section 92(1) on the ground of general intimidation, and in such a situation, these being

only some of the acts alleged to prove general intimidation, no affidavit is necessary. He cited in support of his contention the judgment of Justice Wimalaratne in the case of *Abeywardene vs. Ariya Bulegoda and two others* (3). In dealing with almost identical provision in section 80B(d) of Ceylon (Parliamentary Elections) Order in Council, 1946 as amended by Act No. 9 of 1970, Justice Wimalaratne states;

"An affidavit is required to accompany and support the petition only if the petition alleges the commission of a corrupt or illegal practice. No affidavit is required in support where the petitioner alleges general intimidation. As I have already held, paragraph 4 of the petition contains only one ground of avoidance, which is general intimidation. Therefore no affidavit need accompany the petition supporting the allegation in para 4 of the petition."

I am inclined to agree with the view expressed there in the said case.

In this case also the ground of avoidance is not the commission of corrupt practice, but general intimidation. The acts which would amount to corrupt practices have been alleged with a view of supporting the ground of general intimidation. In such circumstances, in my view the failure to support the petition with an affidavit is not a fatal irregularity. Therefore, I overrule the objection taken by Counsel for the 1 to 8 respondents on that ground.

In view of the fact that I have upheld the first two objections taken by the respondents, I dismiss the election petition filed by the petitioner, but without costs.

Petition dismissed on preliminary objections.