

**HAFI**  
**v**  
**DAYANANDA DISSANAYAKE**  
**COMMISSIONER OF ELECTIONS AND OTHERS**

COURT OF APPEAL  
DISSANAYAKE, J.  
PETITION NO. 6/2001  
C.A. ELECTION  
APRIL 2 and  
MAY 27, 2003

*Election Petition – Parliamentary Elections Act, No. 1 of 1981 – S. 53, S.55, S.60 – S. 92 – Failure to serve the Notice of presentation of the petition within 10 days – Is it fatal?*

The petitioner complained that the 2nd respondent (Returning Officer) had by changing and/or altering the number of preferential votes at his office had violated/failed to comply with the lawful procedure/requirements laid down in the Elections Act thereby prevented the petitioner being elected as a member of Parliament and facilitated the 3rd respondent being declared elected.

The Counsel appearing for the 3rd respondent took up the preliminary objection that, the petitioner has not given the notice of presentation within 10 days of the presentation of the petition (Rule 14).

**Held :**

- (i) It appears that, Rule 14 has been complied with as far as 4 – 93rd respondents are concerned
- (ii) The Notice on the 3rd respondent has been issued on a wrong address.
- (iii) Petitioner has violated Rule 14 of the 4th schedule of the Election Petition Rules. Failure to comply with Rule 14 is fatal.

Petition challenging the election of the 3rd respondent as a Member of Parliament, and the Parliamentary Elections held on 5.12.2001, in respect of the Puttalam District.

**Cases referred to :**

1. *Saravanamuttu v De Silva* – 42 NLR 561 (distinguished)
2. *Nathan v Chandrananda de Silva*, Commissioner of Elections 1994 2 SRI LR 209
3. *Aaron v Senanayake* - 40 NLR 257
4. *Cooray v Fernando* – 54 NLR 400

*Shibly Azeez P.C. with Nishantha Sirimanne and Rohana Deshapriya* for the petitioner.

*A. Gnanathasan D.S.G. with Janak de Silva SC* for the 1st and 2nd respondents

*Romesh de Silva P.C. with Sugath Caldera* for 3rd respondent.

*Cur.adv.vult*

July 10, 2003

**DISSANAYAKE, J.**

The petitioner was the United National Party candidate at the Parliamentary General Election for administrative district of Puttalam, in the Wayamba Province, held on 5th of December 2001. The 3rd to 151st respondents were all candidates who contested the said election from various political parties and independent groups from the Puttalam District and the 3rd, 5th, 7th, 9th, 34th, 39th and 41st respondents were duly elected members of Parliament for the Puttalam District. The 1st respondent is the Commissioner of Elections of the Democratic Socialist Republic of Sri Lanka. The 2nd respondent was the returning officer for the Puttalam District at the election. The 3rd, 5th, 7th and the 9th respondents were elected from the United National Party.

The petitioner based this action on the ground that the 2nd respondent had by changing and/or altering the number of preferential votes at his office had violated or failed to comply with the lawful procedure and requirements laid down in sections 53, 55 and 60 of the Election Act, No. 1 of 1981 as amended, and had thereby prevented the petitioner who had received 35634 votes being elected as a member of Parliament for the Electoral District of Puttalam, and facilitated the 3rd respondent who had obtained 34348 preferential votes being declared elected.

The petitioner prayed for the declaration that the Parliamentary Elections held on 05.12.2001 in respect of the Puttalam is void, and for declaration that the election of the 3rd respondent is undue, and that he be declared elected.

Learned President's Counsel who appeared for the 3rd respondent took up the following preliminary objections, namely:-

- (i) The petition does not conform to the requirements contained in the Parliamentary Elections Act, No. 1 of 1981 as amended, in that under and in terms of Rule 14 of the Election Petition Rules, which are contained in the fourth schedule to the Act, the petitioner has not given notice of presentation within ten days of the presentation of the petition. Even the petition does not set out grounds that will invalidate the election in terms of section 92 of the Act, No. 1 of 1981. 30
- (ii) The petition does not conform to the essential requirements contained in Parliamentary Elections Act, No. 1 of 1981.

The 3rd respondent in his objections dated 9th October 2002 has also set out the above objections as (b) and (c) of paragraph 7 of his objections tendered to this court. Therefore the 3rd respondent is entitled to take up the aforesaid objections. Since the allegation by the 3rd respondent that he did not receive the notice of presentation of the petition within 10 day of presenting the petition is a non-compliance of a mandatory provision under Rule 14 of the 4th schedule of the Election Petition Rules, I am of the view that the 3rd respondent is entitled to take up the aforesaid objection as a preliminary objection as it goes to the maintainability of the petition. 40 50

Therefore I am of the view that the decision in *Saravanamuttu v De Silva* <sup>(1)</sup> does not apply to the instant case.

On an examination of the journal entry of 31.12.2001 where the tendering of the petition to this court is recorded, it is clear that proof of service of Notice of presentation has not been journalised. Therefore when the matter has come up on 05.03.2002 after a period of about three months and notice has been issued by court on the 3rd respondent for the first time. Subsequently when the matter was taken up on 27.03.2003 notices on the 2nd and 3rd respondents were ordered by court to be reissued. Thereafter the matter came up on 04.04.2002 and on 29.05.2002 on which dates the 3rd 60

respondent appeared in court.

The 3rd respondent's position was that no notice of presentation of petition was served on him. He took up the position that it was by letter dated 04.03.2002 of the registered Attorney-at-Law of the petitioner which was produced marked 'A' that he was informed of this matter for the very first time.

On examination of the record it is observed that the registered Attorney-at-Law for the petitioner has tendered a motion to court dated 11.01.2002 and had tendered registered article receipt in proof of dispatching notices to be served on the respondents. By motion dated 13.03.2002 she had tendered the names of the respondents on whom the notices were dispatched. It is to be observed that inadvertently no notice has been issued on the 3rd respondent on that occasion. However by letter dated 04.03.2002, notice of presentation has been issued on the 3rd respondent.

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The petition has been tendered to court on 31.12.2001 and the proof of presentation of notice has to be tendered to court within ten days of the presentation of the petition.

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The registered Attorney-at-Law has compiled with Rule 14 as far as the 4th to 93rd respondents are concerned.

When the matter was taken up on 10.06.2002 Miss Nailanathan, registered Attorney-at-Law of the petitioner submitted that notice has been issued on the 3rd respondent. However it has been discovered that the notice has been issued on the 3rd respondent on a wrong address. Despite the fact the registered Attorney-at-Law Miss Nailanathan taking steps to issue notice, it appears that her efforts have been in vain as the address of the 3rd respondent on whom the notice had been issued was found to be wrong. It is to be observed that the 3rd respondent receive due notice only by letter dated 04.05.2002.

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The issue of notice on the wrong address however cannot be considered due compliance of Rule 14 of the 4th schedule of the Elections Act, No. 1 of 1981. Therefore I am of the view that the petitioner has violated Rule 14 of the 4th schedule of the Election Petition Rules. Failure to comply with Rule 14 has been held to be fatal in the case of *Nathan v Chandrananda de Silva* Commissioner

of Elections<sup>(2)</sup> also vide *Aaron v Senanayake*<sup>(3)</sup> and *Cooray v Fernando*<sup>(4)</sup>.

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Since the failure to serve the notice of presentation of the petition within 10 days is fatal to the petition, I am of the view that the other preliminary objection relating to non-conformity of the petition of the provisions of the Parliamentary Election Act, is not necessary to be considered.

The petition of the petitioner is dismissed *in limine* with costs.

*Petition dismissed*