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**DR. VIGNESWARN**  
**vs.**  
**SAMBANTHAN AND OTHERS**

COURT OF APPEAL  
IMAMJ  
CA (ELECTION PETITION)  
2/2004 (TRINCOMALEE)  
SEPTEMBER 21, 2004

*Election Petition - Parliamentary Elections Act 1 of 1981 - Sections 14(1)(a), 92(1), 92(1)(b), 98, 98(e) - Rules under the Act - Directory or Imperative? - who should sign the Petition? - Notice of Presentation of petition to be served on the Respondents within 10 days - Is it mandatory? - Court of Appeal (Appellate Procedure) Rules 1990 - Affidavit to support Petition? - circumstances - Local Authorities Elections Law - amended by Act, Nos 48 of 1983 and 25 of 1990 - Section 31(1).*

The Petitioner an unsuccessful candidate of the Eelam People's Democratic Party (EPDP) sought a declaration that the election of the 1st and 2nd Respondents as Members of Parliament for the electoral district of Trincomalee be declared null and void.

The Respondents raised preliminary objections to the Petition -

- i. that the Petition was not signed by the Petitioner himself;
- ii. that the Petitioner failed to give Notice of presentation of the Petition together with a copy thereof within 10 days of the presentation of same to be served on the Respondents.

Petitioner contended that, the Preliminary Objections should be rejected in limine as it is not supported by a valid affidavit as required by the Court of Appeal (Appellate Procedure) Rules.

**Held:**

- (i) According to Rule 3(7) of the Court of Appeal Rules - a statement of objections containing any averment of **fact** shall be supported by an affidavit in support of such averment. The Statement of Objections do **not** contain any averment of fact - and as such an Affidavit is not required.

**Held further :**

- (ii) Rule 4 specifically provides the format for the Election Petition, it should be signed by the Petitioner himself. Rule 4 does not refer to any Agent or Agents.-
- (iii) Rule 14(1) - prescribes a 10 days limit - The mere delivery of the Notice to the Registrar within 10 days limit is not sufficient compliance with Rule 14. The actual service on the Respondents must be effected within the time limit specified in Rule 14.
- (iv) An application for Leave to withdraw a Petition could be signed by the Petitioner or his Agent - Rule 21(1).

In the matter of an Election Petition in terms of Section 92 - Parliamentary Elections Act .

**Cases referred to :**

1. D. M. Jayaratne vs. Vass Gunawardena and 114 others - CA 325/2002
2. Malik Mohammd Ikhtiyar vs. Khanna and another - (28) 1941 AIR Lahore 310.
3. W. M. Mendis & Co. vs. Excise Commissioner -1999 1 Sri LR 351
4. Saravanamuttu vs. R. A. de Mel - 48 NLR 529
5. Chandra Kumar vs. Kirubaran and others - 1989 - Sri LR 35
6. Nathan vs. Chandrananda de Silva , Commissioner of Elections & others 1994 - 2 Sri LR 209

*Dr. Jayatissa de Costa with Ms. Maheswari Velayudan, Asoka Fernando and Dushantha Epitawela for Respondents.*

*K. Kanag Iswaran., P. C., with M. A. Sumanthiran, Laxman Jayakumar, R. M. Balendra for Respondents.*

*Janak de Silva State Counsel for 10-11th Respondents.*

*cur adv vult*

November 29, 2004

**IMAM , J.,**

The Petitioner was an unsuccessful candidate of the Ealam People's Democratic Party (hereinafter referred to as the EPDP) and was allotted No. 3 in the list of candidates of EPDP at the Parliamentary Elections

held on 02.04.2004 for the Trincomalee District. The 1st, 2nd, 8th and 9th Respondents were the elected candidates at the said Election. The 1st-7th Respondents were candidates of Illankai Tamil Arasu Kachchi (hereinafter referred to as ITAK), The 8th Respondent was a Candidate of the Sri Lanka Muslim Congress (herein after referred to as SLMC) and the 9th Respondent was a candidate of the United People's Freedom Alliance (hereinafter referred to as UPFA.), Although the Petition disclosed 114 Respondents, the addresses of 13-114 Respondents were not furnished, and Court made order on 22.06.2004 discharging them on application made by counsel for the Petitioner.

By this petition, the petitioner is seeking a declaration that the election of the 1st and 2nd Respondents as Members of Parliament for the Electoral District of Trincomalee be declared null and void.

On 22.06.2004 Counsel for the petitioner submitted to court that he is not seeking to serve Notices on respondents 13-114, and hence the service of Notices on respondents 13-114 was dispensed with by Court. The 8th and 9th Respondents were absent and unrepresented. The parties present agreed to tender written submissions with regard to the Preliminary Objections taken up by the President's Counsel who appeared for the 1st to 7th respondents, and decided to abide by the decision of this Court on the written submissions.

Section 92(1) of the Parliamentary Elections Act No. 1 of 1981 states that "The election in respect of any electoral district shall be declared to be void on an Election Petition on any of the following grounds which may be proved to the satisfaction of the Election Judge namely ;

- (a) that by reason of general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those enumerated before or not, a section of electors was prevented from voting for the recognized political party or independent group which it preferred and thereby materially affected the result of the election. Thereby
- (b) Non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance materially affected the result of the election."

In this petition, the Petitioner relies upon the ground of corrupt or illegal practices that were committed by the 1st and 2nd Respondents or with their knowledge or consent or by any agent or the said candidates. It was contended by the Petitioner that the supporters of ITAK with the assistance of LTTE warned the Tamil people in the Electoral District of Trincomalee that they should vote only for the house symbol of ITAK or not vote at all. It is further alleged in the petition that on the polling day, namely 02.04.2004 the supporters and/or candidates of ITAK used more than 50 vehicles which they had previously arranged and transported genuine electors as well as impersonators to polling stations, which matter was reported to the Returning Officer, but that no action was taken to prevent the same. Furthermore on 01.04.2004 and several times later it is alleged that between 4.30 pm. and 10.00 p.m., members of the LTTE announced over loudspeakers that every Tamil should vote for ITAK, and if not such persons would be punished. To support these allegations the Petitioner produced documents marked 'X1', (fax message), 'X2' (result sheet), affidavits marked 'X3(A) to X3(I)', an extract of the Government Gazette dated 06.04.2004 marked 'X4', Gazette dated 24.02.2004 marked 'X5', and a letter dated 11.03.2004 addressed to the Commissioner of Elections by the Secretary General EPDP marked 'X6'. The aforementioned affidavits do not make any reference either to the 1st or to the 2nd Respondent.

The Petitioner contended that the Preliminary Objections tendered on behalf of the 1st to 7th Respondents should be rejected in limine as it is not supported by a valid affidavit as required by Rule 3(7) of the Court of Appeal (Appellate Procedure) Rules of 1990. However the aforesaid rule states that ".....A statement of objections containing any averments of **fact** shall be supported by an affidavit in support of such averments." The statement of objections **do not** contain any averment of **fact** and as such in my view do not require an affidavit. Thus I hold that there is no lapse on the part of the 1st to 7th Respondents in this regard and accordingly accept these objections. One of the preliminary objections taken on behalf of the 1st to 7th respondents is that the petitioner has failed to **sign** the Petition as required by **Section 98(e)** of the Parliamentary Elections Act No. 1 of 1981, and the form prescribed in **Rule 4** of the fourth schedule to the Act. Section 98 sets out the contents of an election petition which are

- " (a) shall state the right of the Petitioner to petition under section 95 of this Act;
- (b) shall state the holding and result of the election;
- (c) shall contain a concise statement of the material facts on which the Petitioner relies ;
- (d) shall set forth full particulars of any corrupt or illegal practice that the Petitioner alleges, including full statement as possible of the 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.
- (e) shall conclude with a prayer as, for instance, that the election in respect of any electoral district should be declared void, and shall be **signed** by all the petitioners;

Provided however, that nothing, in the preceding provisions of this section shall be deemed or construed to require evidence to be stated in the petition."

It was contended on behalf of the petitioner that Rule 4 of the Fourth Schedule to the Act is only regulatory and not mandatory, and hence the same submission is applicable to section 98(e) of the Parliamentary Elections Act. Furthermore it was pointed out that Rule 21(1) of the Parliamentary Election Petition rules, 1981 states that " **An application for Leave to withdraw a Petition shall be in writing signed by the Petitioner or Petitioners or his or their Agent of Agents** .....

It was thus pointed out by the Petitioner that if in the case of a withdrawal of an Election Petition an **Agent** for the Petitioner is authorised by Law to sign the requisite application, the intention of the Legislature is clear, and thus an Agent of the Petitioner could sign the election Petition. Furthermore it was averred that in **D. M. Jayaratne vs. Vass Gunawardene and 114 others** <sup>(1)</sup> this Court held that in section 31(1) of the Local Authorities Elections Law (as amended by Act No. 48 of 1983 and Act No. 25 of 1990) the word "shall" as used in the Act does **not** always mean that compliance with the conditions is obligatory. In the case of **Malik Mohammad Ikhtiyar vs. Khanna and another** <sup>(2)</sup> it has been stated that "the word "shall" in

an Act does not always mean that compliance with the condition is obligatory. Intention of Legislature should be gathered by reference to the whole scope of the Act. The word "shall" as used in the Act of the Legislature does not always mean that compliance with the condition is obligatory. Whether the matter is imperative or directory only should be determined by the **real** intention of the Legislature, which should be ascertained by carefully attending to the whole scope of the Act." However it is my view that unlike in any other applications in the Court of Appeal where generally Petitions are filed and signed by Attorneys-at-law, **Rule 4** specifically provides the format for the Petition, and thus should be signed by the **Petitioner himself**. Furthermore in the withdrawal of an election Petition, rule 21(1) of the Parliamentary Election petition Rules refer to the Petition or Petitioner or his or their Agent or Agents. However rule 4 does not refer to any Agent or Agents. Moreover in this case the Election petition has not been signed by the Petitioner himself, but by the Agent of the Petitioner. This does not satisfy the requirements of Rule 4 of the Parliamentary Election Petition Rules, and thus I accept this preliminary objection of 1-7th Respondents.

The 1st to 7th respondents have taken up another Preliminary Objection that the Petitioner has failed to give Notice of the presentation of the Petition together with a copy thereof within 10 days of the presentation of the same to be served on the respondents. It is submitted that the petitioner has thus violated the Mandatory provision of rule 14(1)(a) of the Parliamentary Elections Act, which makes the Petition Void.

Section 14(1) states "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 respondent; 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."

On 22.06.2004 President's Counsel appearing for the 1-7th Respondents indicated to court that in accordance with Rule 14 of the Parliamentary Elections Act No. 1 of 1981 notice of the Election Petition and a copy

thereof had not been served on the aforesaid respondents within ten days of the presentation of the petition as required by law, and thus he tendered Preliminary Objections to the Petition, setting out other grounds as well. At this stage, Learned counsel for the Petitioner invoked section 97 of the Parliamentary Elections Act No. 1 of 1981, stating that he could join as Respondents to the election Petition certain parties, but did not state that copies of the Petition had been served on 1-7th respondents **within 10 days as stipulated by the law**. It was submitted on behalf of the Petitioner that an Election Petition should not be dismissed merely on the grounds of highly technical objections without giving it a hearing, and an Election Petition should not be dismissed without trying its issues at the trial. Rule 15 of the Parliamentary Election Petition Rules, 1981 were referred to which states "On the expiration of the time limited for making petitions, the Petition shall be deemed to be at issue".

The Petitioner further referred to the Judgment in *W. M. Mendis and Co. vs. Excise Commissioner* <sup>(23)</sup> where it was held that "The object of rules of procedure is to decide the rights of parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence."

The Judgment by *Dias J in Saravanamuttu Vs. R. A. de Mel* <sup>(24)</sup> which stated "Since certain fundamental rights of citizens are involved in an Election Petition Inquiry, it is not merely a contest between litigants but a matter in which the whole electorate, not to say the whole country has a vital interest." was also referred to.

The 1-7 respondents in their written submissions referred to the Judgment in *Chandra Kumar Vs. Kirubaran and others* <sup>(25)</sup> where two preliminary objections almost identical to this were taken up. One of the Objections was that the Petitioner failed to give Notice to the Respondents of the presentation of the Petition together with a copy within ten days of the presentation of the Petition. It was submitted that the Petitioner violated the **Mandatory Provisions of Rule 14(1)(a)** of the Parliamentary Elections Act which is fatal to the Petition. It was held that "the ten days limit"..... prescribed by Rule 14(1) of the Parliamentary Election Petition Rules for service of notice of presentation of Election Petition on the Respondent 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 the Notice

to the registrar within the 10 day limit ..... 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". Furthermore in **Nathan vs. Chandrananda de Silva, Commissioner of Elections and others**<sup>(6)</sup> it was held that under Rule 14, Notice of presentation of an election petition must be served on the respondents within 10 days of the presentation of the Petition.

Having examined this Preliminary objection, I am of the view that the Petitioner has violated the Mandatory Provisions of Rule 14(1)(a) of the Parliamentary Elections Act No. 1 of 1981, and thus I uphold the preliminary objections taken up by the 1-7 Respondents in this regard too.

The statement of Preliminary Objections tendered by the 1st to 7th Respondents set out four grounds on which the Petition should be dismissed **in limine**. This Court has already accepted grounds (b) and (c) as set out in the aforementioned objections, considered the written submissions tendered on behalf of the parties, and other material placed before it. This Court has also examined grounds (a) and (d) of the Preliminary Objections, and in view of the fact that no valid Petition has been tendered to Court, there is no necessity to scrutinize this application further.

Having considered the details of this Election Petition and connected matters, I proceed to make an order under section 92(1) (b) of the Parliamentary Elections Act, No. 1 of 1981 which would meet the ends of justice. As the Election petition tendered to Court **cannot** be accepted for the reasons I have set out, I uphold grounds (b) and (c) of the Preliminary Objections raised on behalf of the 1st to 7th Respondents and proceed to dismiss the Petition in limine subject to Rs. 35,000 as total punitive costs due to the 1-7 Respondents.

*Preliminary objections upheld.  
Election Petition dismissed.*