

**KUGENDRAN
VS
PREMACHANDRAN AND OTHERS**

COURT OF APPEAL
WIJEYARATNE, J.
CA/EP/01/2004.
DISTRICT No. 10 - JAFFNA.
AUGUST 29, 2005.

Parliamentary Elections Act, No. 01 of 1981 sections 92, 98 (c) and 98 (e) - Rules - Non - compliance - Fatal? - Court of Appeal (Appellate Procedure) Rules 1990- Applicability.

The petitioner was a candidate of the Ealam Peoples Democratic Party (EPDP) who was allotted No. 3 in the EPDP list for the Electoral District of Jaffna. The petitioner was not elected.

The petitioner filing an election petition complained that the said election was not conducted in accordance with the principles laid down in section 92 and sought a declaration that the said election is void.

The respondents contended that :-

- (a) the petitioner has failed to sign the petition ;
- (b) the petitioner has failed to give notice of the presentation of the petition together with copies thereof within 10 days of presentation to be served on the respondent- Rule 14(1) (a) ;
- (c) the petitioner failed to give a concise statement of material facts, section 98 (c) ; and sought the dismissal of the election petition *in limine*.

HELD :

- (1) The petitioner not signing the petition is material non-compliance and the failure to satisfy the requirement in section 98(e) is fatal.
- (2) The petitioner who presented his petition on 27.04.2004 has tendered notice only on 19.05.2004-22 days after the presentation of the petition. Under Rule 14 notice of presentation of the election petition must be served on the respondents within ten days of the presentation of the petition. Failure to do so is fatal.

ELECTION PETITION in respect of Electoral District No. 10 Jaffna - Parliamentary Elections, on preliminary objections raised.

Cases referred to :

1. *Chandrakumar vs. Kiribanda and Others* 1982 2 Sri LR 35
2. *Nathan vs. Chandrananda de Silva, Commissioner of Elections and Others* 1994 2 Sri LR 209
3. *Nanayakkara vs. Kiriella (deceased) and Others* 1985 2 Sri LR 391

Dr. Jayatissa de Costa with *D. Epitawela* for petitioner.

K. Kanag-Iswaran, P. C. with *M. A. Sumanthiran* for 1st - 121st respondents.

Cur. adv. vult.

August 29, 2005.

P. WIJEYARATNE, J.

The Petitioner was a candidate from the Ealam Peoples Democratic Party (EPDP) who was allotted No. 3 in the list of EPDP for the electoral District of Jaffna for the election held on 2nd April, 2004. The 1st to 119th named respondents to this petition were candidates at the said election and the 120th respondent is the returning officer and 121st respondent is the District Secretary Government Agent for the Killinochchi District and 122nd respondent is the Commissioner of Elections. The 1st, 3rd, 4th, 5th, 6th, 7th, 10th 12th and 15th respondents were returned as duly elected. Of the parties that contested such elections Ilangqai Tamil Arasu Kachchi (ITAK) had secured 8 seats at the said election. The Petitioner avers that ITAK was well known to have allegiance to LTTE a terrorist organization. The Petitioner stated that the election of members of Parliament for the electoral District No. 10 Jaffna is void on grounds of non - compliance with provisions of Parliamentary Elections Act, No. 1 of 1981 and other provisions of section 92 of the said Act. As the said election was not conducted in accordance with the principles laid down in such provisions and enumerated such instances under paragraph 9(a) to 9 (h) of his Petition among them were systematic rigging, impersonation by ITAK, general intimidation of voters, corrupt or illegal practices by officials were grounds upon which the petitioner seeks a declaration that the Parliamentary Election for the Electoral District No. 10 Jaffna held on 2nd April, 2004 is void and further declare that the return of 1, 3, 4, 5, 6, 7, 10 and 12 respondents were undue, in terms of provisions of section 92(1) of the Parliamentary Election Act, No. 1 of 1981.

The Petitioner relied on documents marked X 1 to X 6. The Petitioner tendered his petition dated 27th April, 2004 signed by his agent and moved to support the same on 22nd June, 2004. However the petitioner on 19th May, 2004 tendered notices to be issued on respondents and in terms of rule 14 of schedule 4, Court ordered issue of notices on respondents fixing the date of the trial on 22nd June, 2004. On 22.06.2004 1st to 12th respondents represented by their counsel noted their preliminary legal objections which they tendered by way of motion on 13.07.2004. The petitioner by his affidavit dated 20th September, 2004 countered the same. The inquiry into the preliminary objection was agreed to be disposed of by way of written submissions tendered by the respective counsels representing parties.

By way of preliminary objections the 1st to 12th respondents urged that-

- (a) the Petitioner failed to sign the Petition as required by section 98(e) of the Parliamentary Elections Act, No. 1 of 1981 as amended ;
- (b) the Petitioner has failed to give notice of the presentation of the Petition together with copies thereof within 10 days of presentation to be served on respondents as required by rule 14 (1) (a) of the said Act, No. 1 of 1981;
- (c) the Petitioner failed to give a concise statement of material facts on which the Petitioner relies "as required by section 98 (c) of the Act, No. 01 of 1981.

The Petitioner countering the same contended that the signing of the Petition by the Petitioner himself was not mandatory but directory only and the requirements denoted by the words "shall" appearing in the section should be determined by the real intention of the legislature which would be ascertained by carefully attending to the whole scope of the Act. He also attempted to draw an analysis with wordings of rule 21(1) of Election Petition rules 1981 which permitted an agent to withdraw an election petition. The Petitioner emphasized that his Petition does contain a concise statement of facts relied on by him.

Relying on decisions of previous cases, he argued that a matter of election petition is one in which the whole electorate, not to say the whole country, has an interest and any order disposing of such application should therefore be made from the largest standpoint of the State and an election petition should not be refused without hearing.

The Petitioner also urge that the objections presented without being supported by an affidavit as required by rule 3(7) of the Court of Appeal (Appellate Procedure) Rules 1990 should be rejected *in limine*.

The rules refer to appeals and not to election petitions. However, the requirement of such rules pertains to any averment of facts only and such facts only shall be supported by affidavit. The preliminary objections raised

is on pure matters of law presented by way of motion only and not by way of statement of objections. The counter objection thus is not tenable.

The respective submissions made were in support of respective positions taken up with reference to the decided cases.

I shall proceed first to examine the preliminary objection pertaining to the validity of the Petition on the conceded fact that the same is signed only by the agent and not by the Petitioner. Section 92 (1) of the Parliamentary Elections Act states : 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 satisfactory 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 and such section (e) clearly spells out that the Petition "shall be signed by all the Petitioners."

Rule 4 of the fourth schedule prescribing form also provide for Petitioner's signature and not of the agents.

I am unable to agree with the submission on behalf of the Petitioner that the word appearing in sub section (e) of section 92 is not mandatory on a mere comparison with the provisions of rule 21 because the very absence of provisions in subsection (e) for the agent to sign appear on such comparison to be intentional on the part of the legislature, which only allowed an agent to withdraw a Petition. I therefore hold that the Petitioner not signing the petition is material non-compliance and a failure to satisfy the requirement of sub section (e) of section 98 which is fatal to the application of the Petitioner.

Having held that the Petition of the Petitioner is not in compliance with the requirements of section 98(e), I shall still consider the matter of the respondents being given notice in terms of rule 14(1). As borne out by the minutes of record the Petitioner who presented his petition dated 27.04.2004 has tendered notice only on 19th May 2004, on a date at least twenty two days after the presentation of the Petition.

In the case of *Chandrakumar vs. Kirubaran and Others*⁽¹⁾ it was held that : "the 10 days limit, 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 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."

This was followed by the decision of *Nathan vs. Chandrananda de Silva, Commissioner of Election and Others*⁽²⁾ where 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. One of the modes of service prescribed in Rule 14 may be adopted but service of the notice within 10 days is mandatory. Failure to do so is fatal.

The view that actual service of notice together with copies of the Petition, must be effected within ten days was taken in the case of *Nanayakkara vs. Kiriella (deceased) & Other*⁽³⁾.

Following the decisions referred to above, I hold that non service of notice, together with copies of Petition, on the 1st to 12 respondents within ten days of presentation of the Petition *i.e.* 27th April, 2004 is fatal and the Petition should be refused.

Having held that the Petition presented is not lawful and that within ten days of presentation of such purported petition, notice of the same was not given to the respondents rendering the petition not being capable of proceeded with, it is my view that a scrutiny as to contents of the same being in accordance with the requirement of relevant provisions of law is futile.

Upholding the two preliminary objections of law, I dismiss the petition in terms of section 92 (1) (b) of the Act *in limine* subject to total punitive costs of rupees. 60,000 to be awarded collectively to 1st to 12th respondents.

Petition dismissed.