

GUNASINGHE BANDA
v.
NAVINNA AND OTHERS

COURT OF APPEAL
JAYAWICKRAMA, J.
ELECTION PETITIONS
CA 5/99, CA 6/99
13RD MARCH, 12TH MAY, 2000
30TH JUNE, 03RD JULY, 2000

Provincial Councils Elections Act No. 2 of 1988 S.82, S.92, S.98, S.101, S.105, S.107 - Parliamentary Elections Act 10 of 1978 - S.98 - Presidential Elections Act 15 of 1981 - S.96 - Election Petition - Corrupt practice - Affidavit - Hearsay - Bad in Law cannot be acted upon - What is an affidavit - Oaths and Affirmation Ordinance No. 9 of 1895 - amended by S.22 of 1915, 13 of 1954, 23 of 1953 - Civil Procedure Code S.181, 182, 437 & 440 - State Lands Recovery of Possession Act 7 of 1979 - S.5(2)

The Petitioner had alleged two grounds of corrupt practice based on two different interviews, said to have been given to the "Lakbima" newspaper by the 1st and 2nd Respondents. No affidavit from either of the journalist had been tendered.

The Respondent raised a preliminary objection that, in respect of the grounds of corrupt practice pleaded as Charges 1 and 2 the Petitioner failed to support same by any acceptable prima facie material and as such it is not competent for the Petitioner to maintain/prosecute the Petition. It was contended that the affidavit annexed in support of the allegation of corrupt practice which is the foundation of the Petition contains hearsay and as such is not an affidavit as contemplated by Law.

The Petitioner contended that the Petition is not required to contain the evidence, conversely that it could contain hearsay evidence, the affidavit in support of the allegations in the Petition will not necessarily be required to contain evidence and could contain hearsay evidence as well, and that in setting out an allegation of corrupt practice the Petitioner is not bound by rules of evidence and could include in and as part of the allegation of corrupt practice, statements which are hearsay in the Petition.

Held :

(i) Wording in S.98(d) of the Provincial Councils Election Act 2 of 1988 regarding the filing of an affidavit in supportive of the allegation of such

corrupt or illegal practice is different from S.80(B)d of the Ceylon Parliamentary Elections Order in Council. In S.80(B)(d) an affidavit in the prescribed form has to be filed. In S.98(d) of the Parliamentary Elections Act 10 of 1978 and Provincial Councils, Elections Act 2 of 1988 the words 'in the prescribed form' are not included. In the subsequent amendment to these Acts, those words have been deleted. Although S.80B(d) refers to a prescribed form, no form has been prescribed by law.

Whatever the form may be, an affidavit must conform to the provisions of the Oaths and Affirmations Ordinance No. 9 of 1895 as amended by Act 22 of 1915, and Act 13 of 1954 and Act 23 of 1953 and Sections 181, 182, 437 of the Civil Procedure Code.

It is very clear that an affidavit could contain only such facts as a declarant is able of his own knowledge and observation to testify to. Therefore hearsay could not be included as contents of an affidavit.

(ii) A Petition stating facts of observation and belief is not converted into an affidavit by the addition of a verifying clause, an affirmation or oath to the effect that the statements in the Petition are true.

Per Jayawickrema, J.

"If one is to base legal action on news items appearing in newspapers no one will be safe in this country. Present day media are hell bent only as on exposure rather than keeping the nation informed of the news. The truth or otherwise of news items depends on the integrity, impartiality, consistency and credibility of a journalist. The present day print and electronic media make very serious allegations or statements bordering on defamation against persons in every strata of society including religious leaders and Judges just to demean such persons standing in society."

(iii) It would be a very dangerous precedent to allow a person to file an affidavit entirely depending on publications in the media, without being able of his own knowledge and observation to testify to the truth or otherwise of the facts stated therein.

(iv) Petition cannot be supported by an affidavit which is based on hearsay even if the names of persons to whom the alleged statements have been made are named as witnesses. Even if the Journalists vouch for the fact that the Respondents did make such statements the Petitioners cannot base affidavits on that basis, for the simple fact that the facts are not of their own knowledge and observations.

Election Petitions in respect of the North Western Provincial Council Elections.

Cases referred to :

1. *Collettes v. Commissioner of Labour and others* (1989) 2 Sri L R 6 at 15
2. *Jayarathne v. Sirimavo Bandaranaike* 69 NIR 184
3. *David & Company v. Albert Silva* 31 NLR 316
4. *Simion Fernando v. Gunasekera* 47 NLR 512
5. *Rajapakse v. Gunasekera* (1984) 2 Sri L R 1 at 15, 16, 17
6. *Jayasinghe v. Jayakody* 1985 2 Sri L R 77
7. *Subramaniam v. Public Presecutor* (1956) 1 WLR 965 at 969
8. *Kandiah v. Abeykoon* 1986 3 CALR 141
9. *Bandaranaike v. Premadasa* 1989 1 SRI LA 240 at 254-225

K.N. Choksy P.C., with L.C. Seneviratne, P.C., Daya Pelpola, D.H.N. Jayamaha, Ronald Perera, Lakshman Perera, Ms. Kusan Wijetunga for Petitioner.

H.L. de Silva, P.C. with D.S. Wijesinghe, P.C., Dr. Jayampathy Wickremaratne and Peter Jayasekera for 1st Respondent.

Faiz Musthapha, P.C. with Dr. Jayampathy Wickramaratne and Gaston Jayakody for the 2nd Respondent.

Cur. adv. vult.

August 01, 2000.

JAYAWICKRAMA, J.

Two Election Petitions Nos. 5/99 and 6/99 were filed by two different petitioners against the 1st and 2nd respondents praying that the election of the 1st respondent as a member of the North Western Province Provincial Council at the Election held on 25th January 1999 be declared null and void.

As both petitions were identical in content they were taken up together for inquiry. The learned President's Counsel for the Respondent Mr. Faiz Musthapha raised the following preliminary objection:

"The petitioner has, in respect of the grounds of corrupt practice pleaded as charges No. 1 and No. 2, failed to

support same by any acceptable prima facie material and as such, process has been secured without warrant and/or justification thereof and as such, it is not competent for the petitioner to maintain and/or prosecute the petition.”

Thus the objection was taken that the petitioner could not have and maintain the petition for the reason that the affidavit annexed in support of the allegation of corrupt practice which is the foundation of the petition, contains hearsay and as such is not an “affidavit” as contemplated by law.

The relevant facts and points of law as presented by the respondent are as follows:

(1) The petitioner has come to Court alleging two grounds of corrupt practice based on two different interviews said to have been given to the “Lakbima” Newspaper by the 1st and 2nd respondents respectively. In paragraph 12 of the supporting affidavit, it is averred that the 1st respondent “subjected himself to an interview through a journalist by the name of K. Dasanayake Bandara and that the said interview was carried in a particular issue of the said Newspaper. Paragraph 17 of the affidavit alleges that the 2nd respondent granted an interview to one Sampath Deshapriya and that the newspaper carried an interview. There had been no affidavits from either of the journalist.

(2) Nowhere in the affidavit is it stated that the petitioner was present when either of the interviews was granted. Quite clearly, the affidavit in such circumstances contains hearsay and is violative of section 181 of the Civil procedure Code. Vide *Collettes Ltd. v. Commissioner of Labour and others*⁽¹⁾ at page 15.

(3) The affidavit does not in any way add to the production of the newspaper and does not in any way, even prima facie, establish or suggest that the offending statements were made. Vide *Jayarathne v. Sirimavo R.D. Bandaranaike*⁽²⁾.

(4) The legal requirements of an affidavit are set out in sections 181, 182 and 437 of the Civil procedure Code. Section 181 bars hearsay and an affidavit which constitutes hearsay is bad in law and cannot be acted upon. Vide *David & Company v. Albert Silva*⁽³⁾, *Simion Fernando v. Gunasekara*⁽⁴⁾.

(5) In terms of section 92 of the Provincial Councils Elections Act No. 2 of 1988 an election can be avoided on the grounds of general intimidation, bribery, etc, or non compliance with the Act and an election of a candidate can also be set aside on any of the several grounds set out in S.92(2). Section 98 sets out the requirements of an election petition and singularly it is only in respect of an allegation of corrupt or illegal practice that a supporting affidavit is required as per section 98(d). The reason for this distinction is that an allegation of corrupt practice has, apart from avoiding the election of a particular candidate, the effect of placing the offender in peril of:

(i) the conviction and resulting penal consequences. Section 82(1) of the Act.

(ii) subjecting such person to loss of competence to vote or being elected at an election to Provincial Council for 07 years. Section 82(2).

(iii) loss of competence in the same manner as such (ii) above consequent to a report by an election Judge. Section 101 read with section 105 and 107.

(6) Section 98(d) clearly makes the supporting affidavit mandatory for it says that the petition "shall also be accompanied by an affidavit." The contents of the affidavits is also clearly sets out by section 98(d) which requires that "full particulars of any corrupt or illegal practice" should be set out including **"as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and date and the place of the commission**

of such corrupt or illegal practice.” The Section further requires that the accompanying affidavit shall be **“in support of the allegation of such corrupt or illegal practice.** This provision necessarily refers to the requirements set out in the preceding portion of the section, namely “as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of commission of such corrupt or illegal practice.”

(7) An affidavit based on hearsay does not clearly satisfy the requirements of the law. (Vide *David & Company v. Albert Silva(Supra)*, *Simion fernando v. Gunasekera(Supra)* *Collettes v. Commissioner of Labour(Supra)*) and its acceptance, would totally defeat the rationale for requiring an affidavit and is in the teeth of the case of *Jayaratne v. Bandaranaike(Supra)*

(8) The proviso to section 98 which states that there is no requirement that evidence should be stated in the petition, does not detract from this position. For, in order to enable the Court to embark upon the inquiry, there must be an affidavit which prima facie suggests the commission of the act alleged. A serious allegation of this nature must be prima facie plausible as it is on par with the Court determining whether there is, for instance, a cause of action on the face of the plaint in a Civil action for the issue of process.

The Learned President's Counsel Mr. L.C. Seneviratne for the petitioners formulated his points of law in the following terms:-

(1) That *Simion Fernando v. Gunasekera* and *Jayaratne v. Sirimavo Bandaranaike* are not applicable to the present case for the reason that *Simion Fernando(Supra)* case was in relation to an application for a writ of *quo warranto* seeking to oust the respondent in that case who was the Chairman of a Village Committee on the ground that his election to office is null and void and *Jayaratnes' Case(Supra)* is a contempt of Court matter and in those cases Court had to take a decision

on the facts placed before Court by way of an affidavit and documentary evidence. The function of the affidavits in a writ application and in an election petition are wholly different. In Contempt matters to issue a rule nisi the Court has to act on available evidence that would lead the Court to conclude that an offence appears to have been committed. In *Jayarathnes' Case (supra)* no affidavit had been filed. An Election petition is decided after evidence is led and heard by Court.

(2) Section 98 of the Provincial Councils Elections Act No. 2 of 1988 deals with “**contents of the petition**” and **sub section (d) of section 98 requires the petition to contain full particulars of the corrupt practice alleged and the affidavit which accompanies the petition is filed in support of the said allegation of corrupt practice and the date and place of such commission of such practice.**”

(3) The proviso to section 98 is fundamental to the matter in issue now. It states that “**provided, however, that nothing in the preceding provisions in this section shall be deemed or construed to require evidence to be stated in the petition.**” If the petition is not required to contain the evidence, conversely that it could contain hearsay evidence, the affidavit in support of the allegations in the petition will not necessarily be required to contain evidence and could contain hearsay evidence as well. The law is therefore clear that in setting out an allegation of a corrupt practice the Petitioner is not bound by rules of evidence and could include in and as part of the allegation of corrupt practice, statements which are hearsay evidence in the petition. It therefore follows that the affidavit which is required to support the allegation of corrupt practice set out in the petition cannot be confined to rules of evidence only if it is to support an allegation of corrupt practice in the petition which is based on hearsay. The objective of the affidavit which accompanies the election petition is to act as a restraint against frivolous allegations being made in the petition. Thus what section 98 requires is that the affidavit

should support the allegation of corrupt practice and not the facts pertaining to the said allegation which may be hearsay since such facts would be elicited at the hearing of the petition.

(4) In the case of *Rajapaksa v. Gunasekara*⁽⁵⁾ at 15, 16, 17 the Supreme Court stated that the Court is not called upon to make any order to the prejudice of the respondent on the basis of prima facie evidence furnished by the affidavit nor to inquire into the truth of the averments in the affidavit before taking a further step on the petition. It is for this reason that section 98(d) only requires the affidavit to support the allegation made in the election petition.

(5) The Supreme Court further states that "An Election petition cannot and should not be dismissed or rejected in limine on the ground of incorrect or erroneous averments made in the affidavit filed in support of corrupt or illegal practice. The Election Judge enters on the exercise of his jurisdiction on the basis of the averments in the election petition.

(6) In *Jayasinghe v. Jayakody*⁽⁶⁾, the Supreme Court held that even though an affidavit accompanying the election petition, is based on information received by the Deponent from others (that is hearsay evidence) and the affidavit is defective in that respect, the petition should not be dismissed on that ground namely that the source of information has not been disclosed as it is not a requirement of the law that the source of information or the ground of deponent's belief has to be set out in the affidavit. A defective affidavit will not affect the validity of an election petition in view of the decisions in the above judgments.

(7) Although the above authorities are in respect of election petitions on the ground of corrupt or illegal practice under the Parliamentary Elections Act No. 01 of 1981 as amended, Section 98 of the Parliamentary Elections Act which deals with the contents of the petition is virtually the same as

section 98 of the Provincial Councils Elections Act, under which this election petition has been filed. Infact 98(d) and the proviso to section 98 of the Parliamentary elections Act No. 1 of 1981 as amended is identical with section 98(d) and the proviso to section 98 of the Provincial Councils Elections Act. Further section 96(d) and the proviso to section 96 of the Presidential Elections Act No. 15 of 1981 as amended is identical with section 98(d) and the proviso to section 98 of the Provincial Councils Elections Act are also identical.

(8) The authorities cited and relied on by the respondents which deal with the elections under the Parliamentary Elections Act are equally applicable to the election petition filed under the Provincial Councils Elections Act in this case.

(9) The affidavit of the petitioner even assuming that it contains hearsay evidence does not in any way vitiate the election petition filed by the petitioner and that the preliminary objections of the respondents would therefore be dismissed.

(10) The law does not prevent evidence of a statement made by another being led in evidence without the other being called for the purpose of establishing that such a statement was infact made. What the law states is that evidence of such a statement could be admitted to establish the fact of the statement having been made but such evidence would not establish the truth of the contents of the statements. This would have to be proved by calling the person who made the statement or otherwise "*Subramaniam v. Public Prosecutor*"⁽⁷⁾ at 969.

(11) The purpose of the said document the extract from the newspaper interview is the key to the admissibility of the statement. The affidavit does not seek to establish the truth of what is contained in the newspaper article at this stage but only the fact that relevant statements have been made at the interview which constitutes corrupt practice. According to this

principle of law also the evidence cannot be challenged, as it only seeks to support the fact that a press interview had been held as stated in the newspaper article. The affidavit does not seek to establish the truth or falsity of the contents of the statement which would be done at a stage of leading of evidence.

It is to be noted at this stage that the wording in section 98(d) regarding the filing of an affidavit in supportive of the allegation of such corrupt or illegal practice is different from section 80(B)(d) of the Ceylon Parliamentary Elections Order in council. In section 80(B)(d) an affidavit "in the prescribed form" has to be filed in support of the allegation. In section 98(d) of the Parliamentary Elections Act No. 10 of 1978 and Provincial Councils Elections Act NO. 2 of 1988 the words "In the prescribed form" are not included. In the subsequent amendment to these Acts the words "in the prescribed form" has been deleted. Although section 80(B)(d) refers to a prescribed form, no form has been prescribed by law.

Whatever the form may be an affidavit must conform to the provisions of Oaths and Affirmations Ordinance No. 9 of 1895 as amended by Act No. 22 of 1915 and Act No. 13 of 1954 and Act No. 23 of 1953 and sections 181, 182, 437 of the Civil Procedure Code. It was held in *Kandiah v. Abeykoon*⁽⁸⁾, that an affidavit has to be in strict compliance with those which the legislature has thought important enough to set out in the schedules. In that case Gunawardana, J. observed: - . . .

"Counsel for the Petitioner also drew our attention to certain defects in the affidavit referred to and argued that they deprive it of the effect contended for it. Firstly he pointed out that the Jurat was not in the form as amended by act No. 58 of 1981 and was deficient in not indicating the place of deposition . . . State Counsel appearing for the Respondent contended in terms of Oaths and Affirmations Ordinance these are mere irregularities and do not touch the validity of

the proceedings held before the Magistrate . . . One must I think be guided in this regard by the form of the affidavit as contained in the schedule to the act ("Form C") and it must indicate on its face whether it was, that the deponent took an oath or made an affirmation, before it could be said that it was capable of "verifying to the matters set forth in such an application."

The above case relates to an application under State Lands (Recovery of Possession) Act No. 7 of 1979 and it was held that the objections taken in regard to the validity of the affidavit were validly taken and go beyond mere technicality. In that case Gunawardana, J. held that when such papers are defective and not in accordance with the relevant provisions, the Court should not issue summons. He further observed that an application under section 5(2) has to be "supported by an affidavit in Form C set out in the schedule" to the Act "verifying to the matters set forth in such application."

When one considers the judgments referred to by the learned counsel for the petitioner, it is abundantly clear that the question of hearsay was never considered in any of the cases cited above. Technical objections as to the defects in the affidavit were considered in the above cases but the validity of an affidavit which consist only of hearsay to support the petition has not been considered in any of the above cases. The question that this election Court has to decide is whether the election petition could be supported by an affidavit the contents of which is based only on hearsay. According to section 6 of the Oaths and Affirmations Ordinance, all oaths and affirmations for any other purpose shall be administered according to such forms and with such formalities as may be from time to time prescribed by rules made by the Supreme Court and until such rules are made according to the Forms and the formalities now in use. (Vide First schedule to the Civil Procedure Code Form No. 75) In the cases cited above defects in the affidavits were ignored because the form of the mandatory affidavit was not prescribed by law.

According to section 12(3) of the Oaths and Affirmations Ordinance every Commissioner before whom any affidavit is taken under this Ordinance, **shall state truly in the Jurat or attestation at what place and on what date the same was administered or taken.**"

Provisions in regard to affidavits in the Civil Procedure Code are as follows:-

- (1) Affidavits shall be confined to the statement of such facts as the declarant is able of his **"own knowledge and observation to testify"** to, except on interlocutory applications in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit (Section 181).
- (2) A petition stating facts of observation and belief is not converted into an affidavit by the addition of a verifying clause, an affirmation or oath, to the effect that the statements in the petitions are true (section 182).
- (3) Evidence on affidavit, signing of the affidavit and alteration of an affidavit are dealt with in sections 437 to 440 of the Civil Procedure Code.

According to the above provisions an affidavit could contain only facts as a declarant is able of his own knowledge and observation to testify to. Therefore hearsay could not be included in an affidavit.

What is an Affidavit?

In English Law an affidavit is a written statement in the name of a person, the deponent, who makes it and signs and swears (or affirms) to its truth before a Commissioner for Oaths. (The Oxford Companion to Law by David M. Walker 1980 Ed. page 38). An allegation means generally any statement of fact made in a pleading or affidavit. (Page 49 Oxford Companion to law)

An affidavit must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief, with the grounds thereof may be admitted. An affidavit may be sworn by any person acquainted with the facts of the case. An allegation is a statement of fact made by a party in a legal proceeding. (Aiyar's Law Terms and Phrases 4th ed. by A.S. Chaudhri 1958 page 31 and 44).

Affidavits may contain only such facts as the deponent is able of his own knowledge to prove, unless the Court otherwise orders. However, for the purpose of interlocutory applications, affidavits may contain the statements of informations or belief with the source and grounds thereof. Affidavit evidence can only be entitled to the same weight as oral evidence if those who swear affidavits realize that the obligations of the oath is as serious when making an affidavit as when making statements in the witness box. (Phipson on Evidence 14th ed. page 165).

An affidavit is a statement made in writing, confirmed by the maker's oath, and intended to be used as judicial proof. (The Oxford English Dictionary - 1989 2nd ed. Vol. 1 page 216).

When one takes into consideration the above interpretations and provisions of law it is very clear that an affidavit could contain only such facts as a declarant is able of his own knowledge and observation to testify to. Therefore hearsay could not be included as contents of an affidavit.

In the instant applications the affidavits tendered in support of the petitions do not state at what place the affirmations were administered as required by 12(3) of the Oaths and Affirmations Ordinance. The attestations are as follows:-

“read over and explained in English and having understood signed and affirmed to on this 18th day of

February, 1999." At what place the affirmations were taken is not indicated. Below the signature of the justice of the peace in his seal the name and address is stated. But the place of affirmation has not been indicated clearly. The petitioner in paragraph 2 of the affidavit states that "I depose to this affidavit from facts within my personal knowledge and documents in my custody." But in the two charges against the respondents, the petitioner states that the 1st respondent and the 2nd respondent having subjected themselves to interviews to two journalists by the name of K. Dasanayaka Bandara and Sampath Deshapriya of the Sinhala Newspaper Lakkbima the full texts of which were published on Sunday the 13th December of 1988 and 20th December 1988 the 1st and 2nd respondents have answered a series of questions put to them by the said journalists at the said interviews and made the alleged statements.

The above statements in the affidavits are hearsay. Infact the date and the place where the respondents made the alleged statements are not stated in the affidavits. On a reading of the affidavits and the charges against the respondents it is abundantly clear that the statement attributed to the respondents were not made to the petitioner or in his presence. Therefore the facts alleged in the affidavit are not facts that the declarant is able of his own knowledge and observation to testify to. It is clear on a reading of the two publications of the Lakkbima Newspaper the petitioner has thought that the respondents have made such statements to these journalists.

If not for the publishing of the alleged statements in the publications referred to, the petitioner would have not known what the respondents have stated to the journalists. On a reading of the relevant publications the petitioner have come to the conclusion that the respondents have infact made such statements about the petitioner in application No. 05/99. A petition stating facts of observation and belief is not converted

into an affidavit by the addition of a verifying clause, an affirmation or oath, to the effect that the statements in the petition are true. (182 of the Civil Procedure Code) The petitioners have not made any attempt to verify the fact, that whether the alleged statements were infact made to the journalists. In normal circumstances if some news appears in a newspaper detrimental to a person, the immediate reaction is to write to the paper to find out the truth or otherwise of the making of such statement or send a letter demand seeking an apology or retraction and failing to do so would make them liable for legal action. **If one is to base legal action on news items appearing in Newspapers no one will be safe in this country. Present day media are hell bent only on exposures rather than keeping the nation informed of the news. The truth or otherwise of news items depends on the integrity, impartiality, consistency and credibility of a journalist. The present day print and electronic media make very serious allegations or statements bordering on defamation against persons in every strata of society including religious leaders and judges just to demean such persons standing in society.** In Courts of law such allegations have to be proved after properly initiating proceedings according to law and procedure, to have any resulting consequence. It would be a very dangerous precedent to allow a person to file an affidavit entirely depending on publications in the media without being able of his own knowledge and observation to testify to the truth or otherwise of the facts stated therein as observed by their Lordships of the Supreme Court in *Bandaranaike v. Premadasa*⁽⁹⁾ at 254 to 255. Their Lordships observed as follows:-

“Just as much the public have interests in the election petition, there is also the principle that the election of a candidate should not be lightly interfered with. In Samar Singh v. Kedar Nath, it was contended that the Court has no power to reject an election petition

in limine on a preliminary objection but must proceed with the trial, record the evidence, and only after the trial of the petition is concluded, reject a defective petition. The Supreme Court in rejecting this argument observed that "it would be in the interests of the parties to the petition and to the constituency and in the public interest to dispose of preliminary objections and to reject an election petition if it does not disclose any cause of action."

In Arthur Hussain v. Rajiv Gandhi when a similar submission was made, the Supreme Court rejected the argument as untenable and observed that the powers (to reject an election petition in limine) in this behalf are meant to be exercised to serve the purpose for which the same have been conferred on the competent Court so that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties. And so that they can adjust their affairs on the footing that the litigation will not make demands on their time or resources, will not impede their future work, and they are free to undertake and fulfil other commitments. So long as the sword of Damocles of the election petition remains hanging, an elected representative of the legislature would not feel sufficiently free to devote his wholehearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the concerned constituency. We take the view that the Court has the power to reject an election petition in limine, if there is a fundamental defect in an election petition arising out of non-compliance with a mandatory provision."

On a reading of the petitions and affidavits it is abundantly clear that the petitioners were not able at least even to support by an affidavit that the alleged statements were infact made by the respondents. To initiate proceedings by way of an Election Petition on corrupt or illegal practice the petitioner must be able to of his own knowledge and observation to testify that such statements were made. The mere reading of a publication and believing that the statements attributed to the respondents were infact made is not sufficient to file an election petition under section 98(d) of the Provincial Councils Elections Act. One could overlook the defects as regards the formalities in an affidavit provided the statements of facts stated therein are facts as the declarant is able of his own knowledge and observation to testify to. In the instant election petitions the petitioners were not able to state when and where the alleged statements were made by the respondents other than the producing of a copy of a newspaper, the publication of which was obviously subsequent to the date of making of such statement if such a statement was infact made. The date and the place where the alleged statements were made are not stated in the affidavits.

In the instant cases if the petitioners made an attempt to verify from the newspapers to find out the truth or otherwise of the fact of making such statements, and if the respondents denied making of such statements then there would have been no ground for acting against them. In such an event the remedy would have been for the petitioners to take legal action against the publishers for the publications.

In view of the above reasons I am of the view that a petition cannot be supported by an affidavit which is based entirely on hearsay even if the names of persons to whom the alleged statements have been made are named as witnesses. Even if the journalists vouch for the fact that the respondents did make such statements, the petitioners cannot base affidavits

on that basis for the simple fact, that the facts are not of their own knowledge and observations. Therefore the judgments referred to by the petitioners could be distinguished in these instances as the affidavits were based entirely on hearsay.

For the above reasons I uphold the preliminary objection and dismiss both election petitions with costs.

Preliminary Objection upheld.

Election Petitions dismissed.