1971. *Present :* H. N. G. Fernando, C.J., Silva, S.P.J., and Sirimane, J.

H. P. WIJEWARDENA, Appellant, *and* DUDLEY S. SENANAYAKE and 6 others, Respondents

Election Petition Appeal No. 2 of 1970—Electoral District No. 130, Dedigama

Parliamentary election—Election petition—Allegation of corrupt practice—Necessary parties—Allegation of general intimidation—Requirement that the petition must state the material facts relating to it—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), as amended by Act No. 9 of 1970, ss. 80A, 80 B (c), 80 B (d), 83 (1), Rule 15.

The requirement of section 80 A of the Parliamentary Elections Order in Council that, in an election petition, the petitioner shall join as respondent every person against whom allegations of any corrupt practice are made in the petition is mandatory. Failure to comply with it would render a "charge" of undue influence liable to be dismissed. In such a case the Election Judge has no power, before the trial commences, to add as parties persons who should have been joined in the petition.

Where general intimidation is alleged in an election petition as a ground for the avoidance of a Parliamentary election, section 80 B (c) of the Parliamentary Elections Order in Council requires that the petition must state the material facts on which the petitioner relies. The petition must specify at the least the nature of the alleged intimidation : whether it consisted of actual violence, or of threats of violence, or of some other kind of intimidation, and when and where such intimidation is alleged to have occurred. The petitioner cannot be permitted merely to specify a ground of general intimidation with the hope that he can substantiate it with evidence subsequently secured.

ELECTION Petition Appeal No. 2 of 1970—Dedigama.

Nimal Senanayake, with *Suriya Wickremasinghe*, *Adela P. Abeyratne*, *Asoka Gunasekera* and *Peter Jayasekera*, for the petitioner-appellant.

C. Ranganathan, Q.C., with *Izzadeen Mohamed, Q.C.*, *P. Naguleswaran*, *H. D. Tambiah*, *S. C. Crossette-Thambiah*, *K. Kanagaratnam* and *Sarath Dissanayake*, for the respondents-respondents.

Cur. adv. vult.

February 26, 1971. H. N. G. FERNANDO, C.J.—

This election petition challenged the election of the Respondent at a Parliamentary Election on two grounds, one of which was that the corrupt practice of undue influence was committed by an agent of the Respondent or with the knowledge and consent of the Respondent.

1 *—K 3713—2,255 (5/71)

Schedule A to the petition contained a statement that six named persons with others unknown committed the corrupt practice of undue influence on 2nd May 1970, and also a statement of acts of violence and of threats alleged to have been done or made by the said persons, which acts and threats were alleged to have impeded the free exercise of the franchise of certain named electors.

Section 80A of the Parliamentary Elections Order in Council, as amended in 1970 (Act No. 9 of 1970, s. 30) provides *inter alia* that *a petitioner shall join* as respondent to his election petition . . . . . *any person against whom allegations of any corrupt practice* are made in the petition.

The learned Election Judge has pointed out that allegations of the corrupt practice of undue influence were made in this petition against six named persons, but that none of them were (as required by s. 80A) joined as respondents. He held that the requirement of s. 80A is mandatory, that there is no power to add as parties persons who should have been joined, and that accordingly he had no power to grant relief for the failure to join the proper persons as Respondents to this petition.

Learned Counsel appearing for the petitioner in this appeal conceded that the petitioner was, by reason of s. 80A, bound to join as respondents the six persons named in schedule A to the Election Petition. Nevertheless he argued that the purpose of s. 80A was to afford to persons, against whom allegations of corrupt practice are made, the opportunity to defend themselves at the trial of an election petition, and that this purpose can be achieved by their being joined before the trial commences.

Counsel submitted in this connection that our s. 80A appears to have adopted from s. 82 of the Indian Representation of the People Act the requirement for the joinder of any person against whom a corrupt practice is alleged, and that we should apply the decision in *Jagan Nath v. Jaswant Singh* [1], in which the Supreme Court of India held that a person not joined in terms of s. 82 of the Indian Act could be so joined before trial.

In rejecting this same submission, the learned Election Judge has pointed out that in the Indian case there had been an omission to join an unsuccessful candidate, whereas in the present case there was an omission to join a person against whom an allegation of a corrupt practice was made in the petition. The point thus made by the learned Judge merits fuller explanation.

The purpose of joining a person alleged to have committed a corrupt practice is to afford to him a full opportunity to defend himself and to avoid a finding which will involve deprivation of his civic rights. If s. 80A is duly observed by his being joined in the original petition, it follows that the "charge" against him is laid within 21 days of the publication of the result of the Election (s. 83 (1)), and that within 10

[1] *1954 A. I. R., S. C. 211.*

days thereafter he is served with notice of the "charge" (Rule 15). In this way, due compliance with s. 80A ensures that such a person knows within 31 days of the election that he has to face the "charge", and is able at an early stage to prepare for his defence. Counsel for the petitioner urged in another connection that the requirements of s. 83 (1) and Rule 15 are peremptory and that the Courts have no power to allow any relief against delay in complying with requirements of this nature. But if a joinder were to be permitted after the lapse of the 31-day period, the Court would indirectly be affording relief against the failure to comply with these peremptory requirements as to time. Even a Court must not do indirectly that which it has no power to do directly.

In the case of *Rajapakse v. Kathirgamanathan*[1] decided in 1965, Tambiah J. held that the successful candidate must be joined in an election petition, and dismissed a petition in which he was not so joined. The Legislature, in expressly requiring such joinder by the new s. 80A enacted in 1970, has endorsed that decision. And when the new s. 80A further required the joinder of any person alleged to have committed a corrupt practice, it placed such a person in the same position as a successful candidate. Thus non-compliance with the further requirement must entail the same consequence of dismissal as does non-compliance with the requirement to join the successful candidate.

The decision of the Supreme Court of India dealt with a different situation, in which the considerations I have discussed may not be of the same importance.

Counsel for the petitioner submitted for our consideration a hypothetical case in which a petitioner is aware that some person had been an agent of a candidate and had committed a corrupt practice, but is not aware of the name and address of that person. He submitted that in such an event, the petitioner can satisfy the requirements of s. 80 B (*d*) by setting out particulars of the corrupt practice alleged to have been committed by "an unknown person", but that if the name becomes known later the Election Judge could properly join the known person at the later stage. In Counsel's submission, there was thus shown to exist an inherent power for the Judge to join a person who had not been joined in the petition.

Assuming for present purposes the validity of these submissions, there are many reasons why they do not assist the petitioner in this case :—

(i) In the hypothetical case, there is in fact no non-compliance with s. 80A, which requires a petitioner only to join known persons—*lex non cogit ad impossibilia*. Hence even if the Judge can subsequently join some person when his name and identity becomes known, the Judge will not be granting relief against a non-compliance with s. 80A.

[1] *(1965) 68 N. L. R. 14.*

(ii) In the present case, the names of the persons alleged to have committed a corrupt practice were known and were stated in the petition ; even if an Election Judge has inherent power to join a new respondent, the considerations already discussed will prevent a Judge from exercising such inherent power where there has been a clear default on the petitioner's part.

(iii) A decision that joinder may be allowed in the instant case in exercise of inherent power will mean that petitioners are free to ignore the clear and simple requirements of s. 80A which Parliament imposed so soon prior to the last General Election.

For these reasons, I agree with the learned trial Judge that the " charge" of undue influence has to be dismissed.

The other ground on which the election of the respondent was challenged was stated in the petition as follows :—

> " And your petitioner states that by reason of general intimidation or other circumstances the majority of electors were or may have been prevented from electing the candidate whom they preferred. "

The learned Election Judge has held that this statement in paragraph 3 of the petition does not satisfy the requirement in s. 80B (*c*) that the petition must set out *the material facts* on which the petitioner relies. In a case in which a petitioner relies on the commission of a corrupt or illegal practice by the successful candidate or his agent, paragraph (*d*) of s. 80 expressly specifies the facts which the petitioner must state with regard to the commission of the alleged corrupt or illegal practice. But this specification of what are material facts in that class of case does not in my opinion relieve the petitioner of the duty to specify material facts in a case in which he seeks to avoid an election on a different ground. For instance, a petitioner cannot merely state that the successful candidate was disqualified for election, for such a statement would specify only *the ground* for the avoidance of the election, *but not any fact* on which he relies to establish that ground ; in this example, if the material fact is that the respondent was at the time of his election a public officer or a government contractor, or was not a citizen of Ceylon, or was the subject of some disqualifying conviction, s. 80B (*c*) requires that fact at least to be stated. So also, in the case of a charge of general intimidation, a petitioner must specify at the least the nature of the alleged intimidation ; whether it consisted of actual violence, or of threats of violence, or of some other kind of intimidation, and when and where such intimidation is alleged to have occurred. A petitioner cannot be permitted merely to specify a ground of general intimidation in an election petition with the hope that he can substantiate it with evidence subsequently secured.

Prior to the amendment of 1970, the scheme of the Order in Council was such that particulars of a matter alleged in an election petition could under Rule 5 of the Rules be furnished on application of the respondent. There were decisions to the effect that in view of this rule, a bare allegation

e.g., bribery by an agent, need only be made in a petition. I agree with the trial Judge in this case that the amendments of 1970, which repealed Rule 5 and required a concise statement of material facts to be made in the petition, were intended to secure that a respondent will know from the petition itself what facts the petitioner proposes to prove in order to avoid the election and will thus have a proper opportunity to prepare for the trial.

On this point also, Counsel for the petitioner stressed the fact that the phraseology of s. 80B is very similar to that of the corresponding Indian Section, and argued that we should follow Indian decisions. The answer to this argument is that the history of the Indian law on this matter is different from the history of our law, and that to apply Indian decisions would be to ignore the intention of the Legislature in amending our law in 1970. The term "material facts" has a plain meaning in the context of requirements relating to pleadings, namely facts material to establish a party's case.

No doubt the petitioner in the instant case has stated a material fact, namely that there was general intimidation; but there will be many other material facts which need to be proved before an Election Judge can hold that there actually had been general intimidation. I agree with the learned Election Judge that s. 80B (*c*) requires the petitioner to state the other material facts in his petition.

For these reasons the appeal is dismissed with costs.

SILVA, S.P.J.—I agree.

SIRIMANE, J.—I agree.

Appeal dismissed.