

1971

*Present : H. N. G. Fernando, C.J.***P. B. WIJESUNDERA v. WAGISA PERERA*****In re* Election Petition No. 2 of 1970 (Ratnapura)**

Parliamentary election—Election petition—Decision in petitioner's favour—Deposit of Rs. 5,000 and costs of the petition—Persons who are entitled to withdraw the sums—Election Petition Rules 12 and 14.

After an election petition had been decided in the petitioner's favour, the petitioner, as well as the Proctor who represented him before his proxy was revoked before trial, made applications to the Supreme Court to withdraw the deposit of Rs. 5,000 which had been made on the petitioner's behalf as security for the costs of the petition, and the sum of Rs. 3,000 ordered by the Election Judge to be paid as costs by the respondent to the election petition. The Proctor alleged that the deposit of Rs. 5,000 was made by him and that it consisted of money that had been given to him by a third party (the Secretary of the United National Party); whereas the petitioner claimed that he himself handed the money in cash to the Proctor.

Held, after consideration of Rules 12 and 14 of the Election Petition Rules and the revocation of the proxy, that the Proctor was not entitled in law to ask for the payment of the deposit to himself. There was no need to decide upon the truth of the evidence given respectively by the Proctor and the petitioner. As for the Rs. 3,000 ordered as costs of the petition, further proceedings were necessary in the present case.

APPPLICATION made by the petitioner to withdraw the deposit of Rs. 5,000 which had been made on his behalf as security for the costs of Election Petition No. 2 of 1970—Ratnapura.

D. T. P. Rajapakse, for the petitioner.

Wagisa Perera appeared in person.

T. Samson de Silva was present on notice.

Cur. adv. vult.

December 21, 1971. H. N. G. FERNANDO, C.J.—

This Election Petition resulted in an order by which the learned Election Judge declared to be null and void the election as a Member of Parliament of the respondent to the Petition. The determination of the Election Judge was thereafter affirmed in appeal.

Subsequently the petitioner personally made application to this Court to withdraw the deposit of Rs. 5,000, which had been made on his behalf as security for the costs of the petition, and costs of Rs. 3,000 ordered by

the Election Judge to be paid as costs by the respondent to the petition. There was also a motion by Mr. M. Wagisa Perera, Proctor, to withdraw the security deposit of Rs. 5,000.

The two applications were set down for inquiry, at which I heard certain submissions and recorded the evidence of the petitioner and of Mr. Perera.

It appears that the security deposit of Rs. 5,000 was actually made by Mr. Perera. His evidence was that the money for the deposit was handed to him in cash by the Secretary of the United National Party; whereas the evidence of the petitioner was that he himself handed the money in cash to Mr. Perera.

Although Mr. Perera prepared and filed the Election Petition, he took no part at the trial; his proxy was revoked on 30th August 1970 and thereafter Proctor T. D. M. S. de Silva was appointed the agent of the petitioner and acted as such for the purpose of the trial and appeal.

In brief, Mr. Perera's position now is that the security deposit should be returned to him in order that he may in turn re-pay it to the Secretary of the United National Party.

It turns out that there is no need for me to decide upon the truth of the evidence given respectively by Mr. Perera and the petitioner, because in my opinion Mr. Perera is not entitled in law to ask for the payment of the deposit to himself.

Rule 12 of the Election Petition Rules requires that security for the payment of costs "shall be given on behalf of the Petitioner". Rule 14 contains provision that the deposit shall (a) "be returned or otherwise disposed of as justice may require by order of the Chief Justice" and (b) that the order "may direct payment either to the party in whose name the same is deposited or to any person entitled to receive the same".

Mr. Perera submitted that these provisions contemplate that the security may be given, not necessarily by the petitioner himself, but by another person on his behalf. He contended that in the latter event the security should be returned to the other person. The language of Rule 14, so he contended, was wide enough to vest in the Chief Justice a discretion to return the deposit to the person who has actually provided the money.

There is at first sight some substance in this contention, because of the apparent discretion vested in the Chief Justice by Rule 14. It seems to me, however, that this ignores an important aspect of the matter. The deposit is made under Rule 12 as "security for the payment of all costs, charges and expenses that may become payable by the petitioner". In an appropriate case, particularly one in which the petitioner is unsuccessful payment will have to be made to various parties and witnesses, all of whom will be persons "entitled to receive" such payment out of the security deposit. I doubt very much whether Rule 14 was intended to

mean that the Court must inquire into the sources from which the money for the deposit was made available, and further to inquire into any dispute as to such sources.

It seems to me that if some person provided to a petitioner the money for the deposit, the transaction would be one either of gift or of loan. If it is a gift, then there obviously cannot be a claim for the return of the money. If it is a loan, then too the money becomes the property of the petitioner, subject to any liability for re-payment which may arise from the loan transaction; but that liability must surely be established in a proper action and cannot appropriately be the subject of decision under Rule 14.

Lastly, when Mr. Perera's proxy was revoked, he ceased to be the agent for the petitioner, and he has no further status in the proceedings. Considering that Mr. Perera is no longer the agent, I hold that the petitioner is entitled to withdraw the security deposit of Rs. 5,000 and order accordingly.

As for the Rs. 3,000 ordered as costs of the petition, these costs are properly payable to the Proctor who represented the petitioner.

This sum will be paid to him on a motion filed by him for that purpose.

Post Scriptum

The Registrar has informed me that the sum ordered by the Election Judge to be paid as costs has not been paid into Court, and also that the 1st respondent has not consented to payment of these costs out of the security deposited for the purpose of the appeal.

In these circumstances it will be for the Proctor who represented the petitioner to take appropriate steps by motion or otherwise for the recovery of the sum of Rs. 3,000.

Petitioner's application allowed.
