1936 *Present :* **Akbar S.P.J.**

ARON *v.* SENANAYAKE.

In re ELECTION PETITION IN RESPECT OF DEDIGAMA ELECTORAL DISTRICT.

Election (State Council) Petition Rules, 1931—Failure to give respondent notice of presentation of petition and security—Fatal irregularity—Schedule VI, rule 18.

The provision in rule 18 of Election (State Council) Rules, 1931, relating to the service of notice on the respondent of the presentation of an election petition and of the nature of the security given is imperative. Where there has been a failure to comply with the rule, the petition must be dismissed.

THIS was an application by the respondent to an election petition to have the petition dismissed on the ground that the petitioner had failed to comply with the provisions of rule 18 of the Election (State Council) Petition Rules which require that notice of the presentation of the petition and of the nature of the security should be given to the respondent or his agent.

N Nadarajah (with him *T. S. Fernando*), for petitioner.—We admit that no notice of the filing of the petition and of the nature of the security was served on the respondent. Section 18 of schedule VI. has not been complied with. The removal of the copy of the petition is sufficient notice. Under section 18, schedule VI., there is no condition that the petition should be dismissed, if the rules are not complied with. Section 83 makes the English Parliamentary Rules applicable. Therefore rule 60 of the English Rules which says that no formal objection should avoid a petition, should apply. *Young et al. v. Figgins*[3] held that failure to give notice is a formal defect as there is no express provision for dismissal of the petition. The same principle would apply to Ceylon.

[1] *23 Calcutta 851.* [2] *29 Madras 111.*

[3] *19 Law Times 499.*

R. L. Pereira K.C. (with him *H. V. Perera*), for respondent.—We rely on *Williams v. Mayor of Tenby*[1] also reported in (1875) 5 C. P. D. 135 and (*1880*) *49 L.J. 325.* Under 35 & 36 Vic. C. 60, section 21, sub-section (2) (the Municipal Election Act) it is stated that rules, made under the Parliamentary Elections Act, 1868, should apply to Municipal Elections as well. Though *Williams v. Mayor of Tenby* (*supra*) referred to Municipal Elections, rule 60 of the Parliamentary Elections Act referred to by my learned friend applied, yet the Court dismissed the petition on the objection that notice of the filing of the petition was not served on the respondent. Rule 60 was not held to cure this defect.

[AKBAR J.—How do you explain *Young v. Figgins* (*supra*) which was a case under the Parliamentary Election Act and which held that a formal defect could be cured under rule 60?]

It is submitted that *Williams v. Mayor of Tenby* (*supra*) being the later case impliedly overruled the earlier case *Young v. Figgins* (*supra*).

H. V. Perera then continued the argument.—It is submitted that *Young v. Figgins* (*supra*) was correctly decided, but the objection was not that notice had not been served on the candidate-respondent, but that notice had not been served on the returning officer who was himself a respondent. The petition against the candidate was fully perfected. The returning officer was then made a party. Section 51 of the Parliamentary Election Act, 1868, says in such a case he shall be deemed to be a respondent. The returning officer took the objection that he had not been served with notice. If the objection was upheld, then a petition perfect as regards the candidate-respondent would have been held void because of some incidental defect in serving notice on the returning officer. Therefore, the Court rightly held this to be a formal defect cured by rule 60. the word "formal" is the antithesis of "substantial." *Ex parte Coates*[2] shows what a formal defect is when a necessary thing has to be done and is not done, the omission is not a formal omission. We have no notice of this petition at all. The serving of notice is a necessary step. If notice is not given the Court cannot extend the time. The right to object to security is dependent on the notice of the petition given to the respondent. If notice is not given, the respondent cannot object to the security, the next step cannot be taken. The logical consequence is that the petition should be dismissed.

Nadarajah, in reply.

Cur. adv. vult.

May 25, 1936. AKBAR S.P.J.—

The petitioner filed his petition on March 30, 1936, asking for a declaration that the election of the respondent be held to be void. On March 31, 1936, the respondent filed a writing appointing Mr. S. R. Amerasekere as his agent and giving an address for service of all notices, under rule 10 of the Election (State Council) Petition Rules, 1931. On April 1, 1936, security in the form of a recognizance with two sureties was tendered to the Registrar under rule 12. The respondent by his petition and affidavit dated April 16, 1936, has asked for a dismissal of

[1] *42 Law Times 187.*

[2] *5 Ch. D. 979.*

the petition on the ground that neither he nor his agent has been served at any time with a notice of the presentation of the petition or of the nature of the security and that no notice of either kind was published in any issue of the *Government Gazette* by the petitioner or his agent. Mr. Nadarajah for the petitioner admitted that no notice of the petition or of the nature of the security was served on the respondent and that no such notice was published in the *Government Gazette*. Rule 18 of the Election Petition Rules, 1931, is explicit that notice of the presentation of the petition and of the nature of the security, accompanied by a copy of the petition shall be served by the petitioner on the respondent within ten days. The rest of the rule goes on to say that such service may be effected by delivery to the agent, or by posting to the address given under rule 10 in sufficient time for delivery within the ten days or in case there is no agent appointed or address given by publication in the *Gazette* that a petition had been presented and that a copy may be obtained on application at the office of the Registrar. The matter has been simplified by the admission of Counsel that no notice had been served either of the presentation of the petition or of the nature of the security in any of the ways indicated in the rule ; nor is there any evidence contradicting the respondent's affidavit in which he states that neither he nor his agent had at any time been served with notice of the presentation of the petition or of the nature of the security. It will be noticed that on March 31, 1936, when the respondent filed his writing appointing his agent and giving an address for service only the petition had been filed and that the recognizance was signed and filed on the next day, namely, April 1, 1936. One would have thought apart from any authority that the provision in rule 18 requiring service of notice not only of the presentation of the petition but also of the nature of the security was imperative and that non-compliance put a stop to any further step in the matter of the petition. This seems to be so, for the next rule, viz., rule 19, gives the right to the respondent to object to the recognizance provided he objects in writing within 5 days from the date of service of the notice of the petition and of the nature of the security. Rule 20 giving power to the Election Judge to hear any objection to the security can only refer to the objection mentioned in the preceding rule.

Mr. Nadarajah for the petitioner argued that the English law would be applicable under section 83 (4) of the Ceylon (State Council Elections) Order in Council, 1931, as this is a matter of procedure or practice which is not provided for by the order or rules, inasmuch as rule 18 does not provide for the effect which a non-compliance of that rule regarding service of notice will entail. He referred to rule 12 (3) which expressly stated that if security was not given as required by that rule the petition was liable to be dismissed with costs and also to rule 22. There is no provision in the Parliamentary Election Act, 1868, similar to rule 12 (3), and therefore rule 12 (3) may have been specially inserted to make it clear that the security was to be given as provided for in that rule. As the Supreme Court indicated in *Mendis v. Jayasuriya*[1] the rules relating to security have not been clearly expressed. I do not think any special enactment in the rules was required regarding the effect of a distinct

[1] *33 N. L. R. 121.*

non-compliance of any of the steps which a petitioner had to take and no argument can be drawn from rules 12 (3) and 22 in the sense contended for by Mr. Nadarajah.

Section 80 of the Order in Council for instance requires a petition to be presented within 21 days of the date of publication of the result of the election in the *Government Gazette*. Can it be contended that an election petition may be entertained if it is presented after the prescribed 21 days, simply because there is no enactment specially stating that the petition is to be dismissed if it is not presented within the 21 days ? This is the very question which Grove J. put to the Solicitor-General in the case of *Williams v. The Mayor of Tenby*[1]. It is true that that was a case of a disputed Municipal election, but the law applicable under section 13 (4) of 35 & 36 Vict. 60 and rule 2 of the additional general rules, 1875, was the same as the law under the Parliamentary Elections Act, 1868. Grove J. held that the provision relating to the service of notice of the presentation of the petition and of the nature of the security within 5 days after the presentation of it was peremptory and that it is a condition precedent for the due presentation of the petition. Lopes J. agreed with Grove J. Mr. Nadarajah relied on the judgment of Martin B. in *Young and another v. Figgins*[2]. That was a summons calling on the petitioners of an election petition to show cause why the petition should not be struck off the file on the ground that the petitioners complained of the conduct of the returning officer and as section 51 of the Parliamentary Elections Act, 1868, provided that where an election petition complains of the conduct of a returning officer such officer shall, for all the purposes of the act except the admission of the respondents in his place, be deemed to be a respondent, the returning officer was entitled to notice by virtue of section 8. Martin B. in a short judgment, said that even if the objector was right in his arguments he should not allow such formal objections to defeat the petition under rule 60 of the Parliamentary Election rules.

Mr. Nadarajah argued that as no dismissal of the petition was provided for when there was an omission to comply with rule 18, this was a *casus omissus* and that by section 83 (4) of the Order in Council, rule 60 of the Parliamentary rules was applicable and on Baron Martin's ruling in *Young v. Figgins* (*ubi supra*) the objection should not be upheld. I cannot accede to this argument and prefer to follow the judgment of Grove and Lopes JJ. in the case cited by the respondent, for several reasons. In the first place, the summons in *Young v. Figgins* was to take the whole petition off the file, including presumably that part of it against the sitting member. In the second place section 51 of the Parliamentary Elections Act stated that the returning officer was to be *deemed* to be a respondent, except for the admission of the respondent in his place. Further, Baron Martin had some doubts of the argument of Counsel for the returning officer and he said that even if the argument was sound the objection should not be allowed to defeat the petition, meaning I suppose the whole petition. The case cited by the respondent was one decided by a Bench of two Judges, and no less a person than the Solicitor-General argued the case for the petitioner. It is true that rule 60 of the Parliamentary Election rules (if that applied under section

[1] *L. R. 5 C. P. D. 135*

[2] *19 L. T. N. S. 499.*

21 (2) of 35 & 36 Vict. C. 60) or the similar rule 69 of Municipal Elections (see *12 Halsbury (new ed.)*, P.494) was not referred to in the argument, but I cannot construe this omission as an oversight. It is probably a recognition by the Solicitor-General Sir H. Giffard and the Court that an objection of the kind raised in the case was something more than a formal objection.

The case of *Ex parte Coates* (*In re Skelton*[1]) indicates the difference between a formal defect and one of a matter of substance. It was of the utmost importance for the respondent to have notice of the nature of the security so as to enable him to object to it in case of its insufficiency.

The petition is dismissed and the petitioner will pay the costs of the respondents.

Petition dismissed.