

1953

Present : Swan J.

M. J. ABEYWARDENE, Petitioner, and C. A. DHARMAPALA,  
Respondent

*Election Petition No. 19 of 1952, Hakmana*

*Election Petition—Status of petitioner to present petition—Burden of proof—Evidence Ordinance, s. 103—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 79.*

In an election petition it is incumbent on the petitioner to lead evidence to prove his qualification to present the petition under section 79 of the Parliamentary Elections Order in Council.

Objection by the respondent that the petitioner's status has not been proved may be raised by him at the close of the petitioner's case.

**O**RDER made in the course of the trial of Election Petition, Hakmana.

*N. Nadarasa*, with *S. P. Amarasingham*, *Izzadeen Mohamed* and *A. K. Premadasa*, for the petitioner.

*E. G. Wikramanayake, Q.C.*, with *G. E. Chitty*, *R. A. Kannangara* and *A. S. Vanigasooriyar*, for the respondent.

*Cur. adv. vult.*

September 25, 1953. SWAN J.—

At the close of the petitioner's case Mr. Wikramanayake appearing for the respondent drew my attention and the attention of petitioner's counsel to the fact that there was no proof that the petitioner had any status to file the election petition. He said that he did not want to take the petitioner's counsel by surprise but would be moving to have the petition dismissed if no evidence was led regarding the status of the petitioner. Mr. Nadarasa then said that he would recall Dr. Wickremasinghe to prove that the petitioner was a person who had a right to vote at the election and did in fact exercise that right. I pointed out to Mr. Nadarasa that the evidence of Dr. Wickremasinghe would not be enough because it was not possible for him to say that the petitioner had actually voted, nor could he identify the petitioner as the person whose name appeared in the Electoral Register as M. J. Abeywardene. Thereupon Mr. Nadarasa stated that he would be calling evidence on the following day in order to satisfy me that the petitioner had the necessary status.

On the following day, however, he took up the position that it was not incumbent on the petitioner to prove either that he voted or was entitled to vote at the election because the burden was on the respondent to establish that the petitioner was not qualified to file the petition. He submitted further that the objection raised by counsel for the respondent came too late. On this point he contended that the law and practice in England was that an objection of this nature should be taken by way of a substantive motion and before the trial.

I shall deal with this point first before I consider the question of the burden of proof. I do not think, as Mr. Nadarasa argued, that a substantive motion must necessarily be a motion in writing. In my opinion a substantive motion is one of real importance. I am unable to agree with Mr. Nadarasa that it must be taken *in limine* before the trial and if not so taken must be deemed to have been waived. In *East Cork* 6 O'M. & H. 361 the objection that the petitioner's status had not been proved was taken at the close of the whole case so that the petitioner had no opportunity to meet it. It was therefore properly overruled. I consider the application of Mr. Wikramanayake made at the close of the petitioner's case to have the petition dismissed unless evidence was led to prove the petitioner's qualification to file the petition to be a substantive motion and that it has not been made so late as to entitle me to reject it.

It should be noted that at the initial stages of the case the petitioner attended court almost everyday and at no stage was it indicated by Mr. Nadarasa that he was not going to call the petitioner. On the other hand I have a faint recollection that he stated that certain points in dispute would be clarified and proved when the petitioner gave evidence. However that may be there was absolutely no indication that the petitioner would not be called until his case was closed. I do not think it can be said that Mr. Wikramanayake did anything improper when at the close of the petitioner's case he drew everybody's attention to the fact that an element in the case had not been established. He could not have known till then that the petitioner was not giving evidence.

At this stage Mr. Nadarasa seemed to agree that he would have to lead evidence to establish that the petitioner was entitled to file the petition. In fact I adjourned Court much earlier than usual in order to give Mr. Nadarasa an opportunity to lead such evidence. On the following day, however, he took up an entirely different position. He submitted that it was not for him to establish that the petitioner had the requisite status but that it was for the respondent to prove that the petitioner had not that status. This appeared to be a startling proposition but it was argued at length and very earnestly by counsel for the petitioner. He referred me to certain passages in *Rogers on Elections* Vol. 2 at pp. 164 and 215 and 216 and in *Nanakchand on The Law of Elections & Election Proceedings* at pp. 481-483.

A cursory reading of these passages might give the reader the idea that the law in England and the law in India is that there is a presumption that a man who files an election petition is qualified so to do, and if his status is challenged it is for the respondent to prove that he is disqualified.

I shall first deal with the reference to Nanakchand. There can be no doubt that the learned author is merely stating the law as set out by Rogers. It will be observed that the case to which he refers in support of his dictum that "*the burden of proof rests on the respondent to show that the petitioner is not qualified to present a petition*" is the identical case cited by Rogers, namely *Walsall* (1892) Day's Election Cases 1. There is no reference to any Indian authority where it has been held that there is a

presumption in favour of the petitioner of his status to file and maintain a petition and that the burden is on the respondent to rebut that presumption.

Unfortunately the report of the case cited by Rogers and Nanakchand is not available here, but reading the passages to which I have been referred I do not think I can be persuaded that there is any presumption in favour of the petitioner and that the burden is on the respondent to prove that the petitioner has not the necessary status to file the petition.

There may be occasions where the burden might shift to the respondent to prove that the petitioner is disqualified. If, for instance, the petitioner gave evidence and said that he had voted and pointed to the fact that his name appeared on the Electoral Register as a duly qualified voter, and the respondent challenged his status, or contended that he was disqualified, or that he was not the person who was duly registered although his name appeared on the Electoral Register but that the person registered was somebody else residing in the same village and bearing the same name, then the burden would be on the respondent to prove the facts he alleges.

In my opinion the question of the burden of proof is governed by the Evidence Ordinance and I do not think that the law, practice or procedure in England in Election cases is different. Section 103 provides that "*the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*". It is an elementary principle of law that every fact that is not admitted must be proved by the person who asserts that fact. In this case I can find no admission, direct or indirect, on the part of the respondent that the petitioner either voted at the election or had the right to vote. It is thus incumbent on the petitioner to satisfy me that he had the right to file this election petition under Section 79 of the Order in Council. I therefore call upon Mr. Nadarasa to lead evidence on this point.

*Objection raised by respondent upheld.*

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