1932 *Present:* **Akbar J.**

IN THE MATTER OF THE ELECTION FOR THE GAMPAHA ELECTORAL DISTRICT.

MENDIS *v.* JAYASURIYA.

Election petition—Failure to give particulars—Application to dismiss petition—Right to lead evidence—Postponement of trial—Costs—Ceylon (State Council Elections) Order in Council, Rules 5 and 7.

Where, in an election petition, the petitioner does not claim the seat for an unsuccessful candidate, the petition cannot be dismissed for non-compliance with an order to file particulars nor can the petitioner be precluded from leading evidence on the charges originally made in the petition.

The Court may, however, grant a postponement subject to an order for costs, to enable the respondent to cross-examine the witnesses on further instructions.

THE petitioner, in an election petition alleging, *inter alia*, bribery against the respondent, but not claiming the seat for an unsuccessful candidate, was ordered to deliver particulars on or before March 31, 1932. On April 12, 1932, an application for an extension of time to supply the particulars asked for was refused. On April 21, 1932, the petitioner filed an affidavit explaining the reason why he could not furnish particulars on or before March 31, 1932. He also filed the particulars asked for, and served a copy of these particulars on the respondent.

On the trial date, April 25, 1932, the petitioner was asked to show that he was entitled to lead evidence in spite of his default in filing the particulars within the due date.

H. V. Perera, for the petitioner.—Unless the order directing that particulars should be delivered on or before a certain day itself stated that the petition would be dismissed in case of default, the petition cannot be dismissed for non-compliance with that order. A distinction must be drawn between two kinds of election petitions—

(i) A petition which alleges that election of the respondent is not a due election because another candidate had a majority of lawful votes—*i.e.*, A *v.* B.

(ii) A petition which alleges that the respondent has committed bribery—*i.e.*, The State *v.* B.

Once the Court entertains a petition, the petitioner cannot as of right withdraw. (*Rules 29 et seq., Order in Council, 1931.*)

Where the petitioner claims the seat, rule 5 is not applicable. Rule 7 applies where the petitioner claims the seat for an unsuccessful candidate. Rules 5 and 7 are mutually exclusive (*Munro v. Balfour,*[1] *Furness v. Beresford.*[2])

Counsel also cited *Rogers (20th ed. Vol.* II. *509, 510, 1 O'M. & H. 35, 1 O'M. & H. 119.*

B. F. de Silva (with him *Gilbert Perera* and *Jayasuriya*), for respondent.—Election petition is more a civil than a criminal proceeding. Section 75 (3), Order in Council, 1931, defines jurisdiction of election Judge. Particulars are meant to tie the hands of a person wanting to lead evidence. If particulars are not supplied certain penalties follow. The petition is liable to be dismissed, section 109, Civil Procedure Code. If particulars are not duly given, it automatically follows that no evidence can be led.

Counsel cited *1 O'M. & H. 63, 5 O'M. & H. 42, 1 O'M. & H. 213, 2 O'M. & H. 6, Mild v. Batty.*[3]

H. V. Perera, in reply.—Section 109 of the Civil Procedure Code does not apply to an election petition. Section 75, Order in Council, only gives the necessary powers of a District Court to an election Judge for the purpose of summoning or compelling the attendance of witnesses.

April 30, 1932. AKBAR J.—

On April 12, 1932, an application was made before me for a further extension of time to deliver the particulars asked for by the respondent.

This order was refused by me with costs, mainly on the ground that no proper material in the shape of an affidavit or other evidence was placed before me to show that an extension of time should be given and I made the order that the trial was to come on, on April 25, which was the date fixed by my brother Drieberg. On April 21, the petitioner filed an

[1] *L. R. (1893) 1 Q. B. D. 113.* [2] *(1898) 1 Q. B. D. 495.*
[3] *43 L. J. C. P. 73.*

affidavit explaining the reason why he was unable to furnish the particulars on or before March 31, 1932, and he also filed the particulars asked for, of the charges. The proctor for the respondent received notice of this affidavit and was also served with a copy of the particulars. On April 22, 1932, the petitioner filed a list of eleven witnesses and obtained summons in respect of four of them, of which too the respondent's proctor had notice.

Mr. Perera argued that he was entitled to lead evidence in spite of the default of the petitioner in filing the list of particulars within the due date and that the petition cannot be dismissed for non-compliance of the order to file particulars; or in other words that I cannot shut out evidence on the petition merely because particulars had not been furnished as ordered, although he admitted that it was competent for the Court to punish the petitioner in costs for his default.

It will be noticed that I have already awarded costs in favour of the respondent with regard to the petitioner's application on April 12 for an extension of time. The short point that I have to decide is whether there is a rule of Court or a rule of law entitling the respondent to ask that the petition should be dismissed merely because particulars had not been filed within the due date. The case has been ably argued by counsel on both sides and I have already indicated to them that subject to an order as regards costs which will be made at the end of the trial, the petitioner was entitled to lead evidence on all the three charges appearing in the original petition, subject however to the right of the respondent to ask for time to get particulars of witnesses, &c., to enable him to cross-examine them. In accordance with this order I have heard evidence of witnesses on April 25, 26, 27, and 28, 1932, and postponed the cross-examination of certain witnesses till May 9, 1932, to enable the respondent's counsel to be fully instructed so as to cross-examine them. It only now remains for me to state my reasons for the order I have already made. It will be seen that the application for particulars was asked for and allowed in accordance with rule 5 of the rules relating to election petitions. Under that rule the Judge is authorized upon application by a respondent to order such particulars as are necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial upon such terms as to costs or otherwise as may be ordered. Rule 7 applies only in a case where a petitioner claims a seat for an unsuccessful candidate alleging that he had a majority of lawful votes. In such an application, rule 7 states that the party complaining or the party defending the election shall before six days of the trial, deliver to the Registrar a list of the votes intended to be objected to and of the heads of objection to each such vote. The rule then goes on to provide that no evidence shall be given against the validity of any vote nor upon any head of objection not specified in the list except by leave of the Judge and upon such terms as regards costs, &c., that the Judge may order. Now it is clear that this application before me is not one under rule 7, because the petitioner did not claim the seat for an

unsuccessful candidate but one under rule 5. It has been held by the English Courts (see the case of *Munro v. Balfour* [1]) that rule 7 was exclusive of rule 6 (which corresponds to our rule 5) and that rule 7 only applied to an application where the petitioner claims the seat. Similarly in the case of *Furness v. Beresford* [2] it was held that rule 6 (corresponding to our rule 5) did not apply in the case of a claim for the seat of an unsuccessful candidate on the ground that he had a majority of lawful votes and that in such a case rule 7 was exclusively applicable. Therefore it follows from these authorities that rule 5 governs the present case and it is significant that rule 5 does not contain the limitation shutting out evidence (not included in the particulars) at the day of trial. There is no other section or rule of law excluding such evidence. The question then arises; is there then a rule of Court? Under the English procedure the particulars asked for are issued in the form of a summons for particulars (see form No. 38, *Vol. II., Rogers on Election, p. 126*) and the application for the summons contained not only the nature of the particulars required but also prayed for an order that the petitioner be precluded at the trial from going into any case in respect of which particulars have not been duly delivered unless the Judge ordered otherwise and it was in these terms the order of the Judge was made. Even then it will be seen that the Judge could in certain cases afterwards modify such an order. In *Wigan (1881) (see Vol. II., Rogers on Election, p. 195) Bowen* J. stated as follows:—"What they are bound to do is to tell the most they can at the time these particulars are given . . . . But it is said that the order for particulars has been drawn up by the Court in a form that the petitioners could be 'precluded at the trial from going into any case of which the aforesaid particulars have not been delivered.' That is . . . . an order that can be modified at any time, and I confess I should not hesitate myself at any moment to disregard that prohibition, and to amend the order by stating that further cases might be gone into if the justice of the case required it, and if there was no chance or danger of surprise upon the sitting member." See also the case of *East Cork, 6 O'Malley and Hardcastle's Election Petitions, p. 320.* The test seems therefore to be whether the evidence that was going to be led was likely to cause the danger of surprise upon the sitting member or unnecessary expense. In the case now before me although the respondent in his application for particulars filed on July 27, 1931, also asked for an order that the petitioner be precluded at the trial of the petition from giving evidence in respect of matters of which particulars were not duly given and also for an order praying that the petitioner do declare by affidavit all documents in his possession relating to the subject-matter of the petition and for the inspection of these documents, the order that was made by my brother Drieberg was as follows:—"Supply the particulars only asked for in the application." No order was made by my brother excluding the leading of evidence relating to any incident or matter in respect of which particulars had not been given nor was an order made directing the petitioner to declare by affidavit all documents in his possession, nor to produce such documents for inspection. So there is no order of Court to justify me in shutting

[1] *L. R. (1393) 1 Q. B. D. 113.* [2] *(1898) Q. B. D. 495.*

out evidence on the date of trial nor is there any rule of law. The only limitation is, how far is the respondent prejudiced by the leading of such evidence; and if the trial is unnecessarily prolonged owing to the default of the petitioner in filing particulars at the time ordered by the Judge, can the expenses so incurred be sufficiently compensated by an order as regards costs. This seems to be the correct interpretation of rule 5 judging from the remarks of Mr. Baron Martin reported in the case of *the Borough of Bradford, 1 O'Malley and Hardcastle's Election Petitions, p. 35.* " Mr. Baron Martin, after reading out the seventh rule said, that this rule was confined to a petitioner claiming the seat; that at the time when the rules were made, it was thought that inasmuch as there was this particular rule as to the case of a candidate claiming the seat, it was but reasonable to apply it to other cases which were not strictly within the rule. That is how the thing arose at first. It was thought that particulars might be given, almost as a matter of course, to a very considerable extent. It was then suggested that some limitation had better be made upon it, for that it would give an opportunity of tampering with the persons whose names were mentioned in the particulars, and getting them out of the way, and that it might do more harm than good; the consequence was that there was a limitation put upon it, and we all agreed that we would wait and see what was the operation of the rule in the first five cases that we each had set down for hearing and see whether it would work well or not.

" Mr. Baron Martin further said, with regard to the Judge's order made in this particular case, that if there was any restriction in the order, of course the petitioners must be bound by it, but that if not, they were quite free, and that it was his own wish to make the thing as free as possible."

The case of the *Borough of Cheltenham, 1 O'Malley and Hardcastle's Election Petitions, p. 63,* and the other cases cited by Mr. de Silva are not helpful to me, because these cases were decided on the common form of summons issued by the English Court, to which I have referred above, namely, with the order that the petitioner was to be precluded from leading evidence on points of which particulars had not been given. As I have said, in this case before me there was no such order. In the case of the *Borough of Bodmin, 1 O'Malley and Hardcastle's Election Petitions, p. 119,* I find the following extract:—" In answer to a question put by counsel for the petitioners, Mr. Justice Willes said that he was induced by a consideration of public policy to allow any case in which the sitting member is alleged to be personally implicated to be added to the particulars, giving time, if necessary, for the case to be answered; but he would not allow any case against an agent to be added to the particulars, unless it be shown to have come to the knowledge of the petitioners since the particulars were delivered."

I see therefore no reason why I should not follow this dictum of Willes J. It was for this reason that I made my order that the petitioner was not precluded from leading evidence on all the charges mentioned originally in the petition, subject however to any order I may make as regards the granting of a postponement to enable the respondent's counsel to

cross-examine any witness on further and fuller instructions and also subject to any order as to costs I may make at the end of these proceedings. There is one other matter that I should mention and that is with regard to the first charge. There were three charges on the original petition, namely, (*a*) that the respondent had an interest in a contract with the public service of Ceylon, to wit, an interest in the licence for the sale of toddy at the toddy tavern at Kandana, (*b*) that the respondent had been guilty of the corrupt practice of treating in that he himself and other persons acting on his behalf corruptly gave drinks to the voters, (*c*) that the respondent had been guilty of the corrupt practice of bribery in that he gave corruptly valuable consideration to voters to vote for him in the election. It is true that my brother ordered particulars to be given on all these charges, the particulars to be given with regard to the first charge being the contract referred to in that charge and the nature of the interest, and with regard to the other charges the names of the persons said to have been treated and bribed, their registered numbers and occupation, the times and places and the witnesses who were to prove the various acts of treating and bribery. It will be seen that although particulars were asked for and ordered as a matter of course by my brother Drieberg with regard to the first charge, further particulars regarding the first charge were really not required by the respondent, if we keep the test of surprise in mind. The respondent ought to have known that according to the Order in Council of March 20, 1931, section 9, any person would be disqualified from being elected as a member who had directly or indirectly any benefit in any contract with the public service whether as owner or as *cestui que* trust. That was the reason why I refused to allow a postponement for the cross-examination of the witnesses testifying to the first charge on the application of the respondent's counsel at the trial. As a matter of fact the petitioner did file particulars including the particulars asked for of the first charge on April 21, and I did not think that in these circumstances any postponement would be justified on the ground of prejudice. The respondent's counsel cross-examined these witnesses at some length and I do not think that he has been handicapped by my refusal to give a postponement to enable him to cross-examine these witnesses. Mr. de Silva argued that the same test should be applied in election cases as in an ordinary civil case and that therefore the petition should be dismissed on the ground of petitioner's failure to give the particulars asked for. He cited section 75, sub-section (3) of the Order in Council relating to election petitions, but that sub-section only gives the necessary powers of a District Court to the election Judge for the purpose of summoning or compelling the attendance of witnesses. That sub-section also states that the witnesses are to be sworn in the same manner and are to be subject to the same penalties for giving false evidence as in a trial before a District Court. I cannot therefore see how Mr. de Silva's contention can apply to this case under the election rules. When an election petition is filed for the unseating of a candidate on the ground of corrupt and illegal practices the petitioner has not even the right to withdraw his claim (which he would have if this was a case under the Civil Procedure Code) without the leave of the Court and there are provisions in rules 29, 31, 32, 35, &c.,

for the substitution of a fresh petitioner in place of a petitioner who wishes to withdraw. In an application to unseat a candidate for corrupt or illegal practices, the procedure to be followed seems to be different to the procedure in an ordinary civil case and therefore the authority cited by Mr. de Silva, namely, the case of the *Republic of Liberia v. Edward Farrow Roye*,[1] has no application. I wish however to add to what I have stated that I reserve to myself the right if necessary to make an order as to costs in favour of the respondent at the end of these proceedings on the ground of the default by the petitioner in filing particulars within the time fixed by the Court.

[1] *L. R. Appeal Cases, p. 139.*