1943 *Present* : **de Kretser J.**

COSTA, Petitioner, *and* JAYAWARDENE, Respondent.

IN THE MATTER OF THE BY-ELECTION FOR THE KELANIYA ELECTORAL DISTRICT.

Election petition—Security by deposit of cash—Security to be made in name of petitioner—Deposit of money with the Deputy Financial Secretary—Election (State Council) Petition Rules, 1931, Rule 12 (1).

Under Rule 12 (1) deposit of money by way of security for payment of costs must be made in the name of the petitioner even when it is made by some other person.

It must be stated that the security was intended to cover the payment of all costs, charges and expenses as may become payable by the petitioner in the election petition.

Deposit of money with the Deputy Financial Secretary and a receipt from him would be sufficient.

THIS was an election petition in which the respondent filed objections to the security alleged to have been deposited on behalf of the petitioner.

H. V. Perera, K.C. (with him *M. T. de S. Amerasekere, K.C., N. K. Choksy, C. S. Barr Kumarakulasingham, V. F. Guneratne,* and *H. W. Jayewardene*), for respondent.

A. R. H. Canekeratne, K.C. (with him *P. Navaratnarajah*), for petitioner.

Cur. adv. vult.

June 18, 1943. DE KRETSER J.—

The respondent filed objections to the security alleged to have been deposited on behalf of the petitioners. Of the five objections taken, I intimated during the hearing that I was disposed to entertain only one of them, but Counsel pressed me on the other points too and earnestly desired that I should express an opinion on those as well.

Rule 12 (1) requires that at the time of the presentation of the petition or within three days thereof "Security for the payment of all costs, charges and expenses that may become payable by the petitioner shall be given on behalf of the petitioner".

Rule 12 (3) provides that if the security is not given by the petitioner the Judge might direct the dismissal of the petition.

The respondent contended that security should be given by the petitioner himself or at least in his name, while the petitioner's position was that because security was to be given "on behalf of the petitioner" therefore the security should be given not by the petitioner but by some other person on his behalf.

Counsel referred me to the case of *Pease v. Norwood*[1] where the opinion was expressed that security must be given by persons other than the petitioners themselves. That was a case dealing with a recognisance and the remarks made in the case applied only to that form of security. Rule 12 (3) of our rules found no place in the English law, and some meaning must be given to the provision, which implies that security must be given *by the petitioner*. Besides, the English decision went not merely on the words "on behalf of" but on other provisions in the Act. In Ceylon in the case of *Silva v. Karaliadde*[2], Drieberg J. held that where security was given by recognisance the bond must be signed by the petitioner as well as by the sureties. This view was endorsed by a Divisional Bench in the case of *Mendis v. Jayasuriya*[3]. "On behalf of the petitioner" does not necessarily mean that security should be given by some other person, for "on behalf of" the petitioner means nothing more than on his part or on his side. A petitioner making a deposit himself would be quite correct in saying—"I make this deposit as security on my behalf". Where the sentence is differently turned the language would alter but the meaning would be the same. I cannot see any reason for the security not being deposited by the petitioner himself. It is the petitioner who, if unsuccessful, will be condemned to pay costs, and unless the security is identified as having been made available for such costs the deposit cannot be drawn upon. In my opinion, therefore, the deposit must be made in the name of the petitioner even where it is made by some other person. In this case it was not even stated to be made on his behalf.

[1] *L. R., 4 C. P. 235, at p. 249.* [2] *33 N. L. R. 85.* [3] *33 N. L. R. 121.*

Rule 14 (3) seems to me to confirm this view, for when any excess is available the Chief Justice may direct payment either to the "party in whose name the same is deposited or to 'any person entitled to receive the same". It is not without significance that we have the *party* in whose name the same is deposited distinguished from the "person" entitled to receive the same.

Objection was also taken that the security was not expressed to be for the payment of all such costs, charges and expenses as may become payable by the petitioner. The receipt which has been filed merely says "Security in respect of Election Petition for Kelaniya By-Election". It is true the security has been lodged in connection with this petition by the proctor who filed the petition now being dealt with, but in my opinion the receipt itself should be quite explicit on the point. The oral evidence only made the position of the petitioners worse, for both the depositor and Mr. Stanislaus of the Treasury said that the words appearing on the receipt were exactly what the depositor said when making the deposit. One of the petitioners was, it is alleged, present at the time but the depositor made no reference to him and, from the manner of his evidence, it is very doubtful whether the depositor understood that he was making his money available as security for any costs payable by the petitioners. He seemed to be under the impression that the deposit was just one of the formalities needed on such an occasion. As Mr. Perera contended with great force, it should not be open to parties to supplement defects in the document required by the rules by means of oral evidence. Suppose the depositor had made the deposit in respect of a petition which he intended to file himself, would it be open to him to file the receipt and say later that the security was with respect to some other petition? Had no question arisen and had there been occasion to draw upon the deposit, the depositor might well have come forward and claimed that the deposit he made was not in respect of this particular petition and have given evidence to suit the position he was taking up, such as alleging that the receipt had been stolen from him or misapplied by his proctor. In my opinion, therefore, the objection on this ground is sound and the result is that no security has been given either by the petitioners or on their behalf. The consequence is that this petition must be dismissed.

The depositor stated very emphatically that at the time he made the deposit the petition had not been filed, and on this statement a further objection was raised that the deposit had not been made as required by the Rule. The petition had been received by the Registrar at 1.30 P.M. as his endorsement indicates. The depositor stated that he left the proctor's office at about 1.30 and considering that he had to make the journey to the Fort and had met with delay at the Treasury it is most likely that the deposit was made later than 1.30 P.M. It is surprising that the proctor sent no letter covering the deposit nor even instructed the depositor carefully. He had merely told the depositor to go to the Treasury and deposit the money and this the depositor did, having no idea of the requirements of the rule nor even of the reason for the deposit perhaps.

It was also urged that the deposit had not been made with the Financial Secretary but with the Deputy Financial Secretary, who had issued the receipt instead of the Financial Secretary doing so. In my opinion this objection is unsound for many reasons. By section 3 of the Order in Council the Interpretation Ordinance was made to apply to the Order in Council, and section 11 of the Interpretation Ordinance states that reference to a Chief or Superior Officer was sufficient to include a deputy or subordinate authorised to act for the chief or superior officer. The rule therefore can be interpreted to mean a deposit with the Deputy Financial Secretary, and a receipt by him would be quite sufficient. Mr. Perera sought to limit the meaning of section 11 to a "true deputy", as he called it, and argued that the Deputy Financial Secretary being the Head of a Department, *i.e.*, of the Treasury, was not a deputy. There is no evidence to justify this contention, and besides the word "deputy" in section 11 is not restricted in any way.

If one looks at the reason for the deposit one sees at once that all that is required is a deposit at the Treasury and a receipt from the duly qualified officer there.

In England the deposit is made in the Bank of England and placed in a separate account which is operated on by the Chief Justice. The English rule was adapted to meet conditions in Ceylon and the money placed where Government money is placed, and the Chief Justice then operates on it. Money placed in a bank would go to its credit and would not be placed in a separate chest. So in Ceylon the money is credited to Government and an account opened on which the Chief Justice operates. The money is earmarked through the account and the account must be in precise terms and must refer to the particular petition and not vaguely to the "Kelaniya By-Election Petition".

The history of the Constitution of Ceylon makes the position equally clear. "Financial Secretary" was merely a new name for the Colonial Treasurer, and the Amendment to the Interpretation Ordinance also made in 1931 by Ordinance No. 8 of 1931, expressly states that where earlier enactments referred to the "Colonial Treasurer" or "the Treasurer" the words "Financial Secretary" should be substituted. The Financial Secretary was thus the Treasurer for the Island. Schedule II. of the Order in Council allocated duties to him and chief among the matters he was to be in charge of were Finance and Supply. This was exactly the position of the Treasurer. When, therefore, the rule required the money to be deposited with the Financial Secretary all it meant was that it was to be deposited in the Treasury. The Order in Council provided for the Governor making a distribution of duties among the various Ministers and Officers of State. That would be merely a supplementing in detail of what the Order in Council had allocated generally in the Schedules. Accordingly a Manual of Procedure was drawn up consisting of the orders made and published in the *Gazette*. This allocation was purely administrative in its nature and did not relieve the Financial Secretary of the responsibility cast upon him by the Constitution. In this Manual the first of his functions was the receipt of public money. The Financial Secretary in his capacity of an Officer of State had certain departments placed in his charge. This did not mean that his own

department passed out of his charge. Departments were needed for the convenient and proper performance of his functions and he naturally entrusted each department to a separate Head. His own department he entrusted to a deputy and to assist him in his political capacity he created a new department called his Secretariat. Mr. Perera based his argument on this Manual of Procedure, but one must not forget that the Manual was intended for departmental use and not for the guidance of the Courts. Neither the Financial Secretary nor the Governor could have abrogated (nor did they intend to) the Order in Council. Mr. Perera argued that the name "Deputy Financial Secretary" was just a label and had no particular significance. One can scarcely believe that the brains of Government could not have invented some other name if it was intended to suggest that the Financial Secretary's deputy was not really his deputy but an independent officer. Mr. Stanislaus said that if the need arose the Deputy Financial Secretary would take directions from the Financial Secretary.

The income from all Government Departments finds its way to the Treasury and the control of the Treasury is one of the most important duties of Government and its state of primary importance: it was the Financial Secretary's special province, though he might administer it through a deputy.

The last objection was as to the form of the petition and the sufficiency of the security. I referred briefly to a similar matter in my order reported at page 567 of Volume XLII of the New Law Reports. In that case no objection had been taken to the form of the petition and my remarks were purely *obiter* and made without my attention having been drawn to the decision of Drieberg J. in *Tillekewardene v. Obeyesekere*[1] endorsed by Maartensz J. in *Vinayagamoorthy v. Ponnambalam*[2]. The decision of Drieberg J. is directly in point. Mr. Perera strongly urged upon me to reconsider the question in view of its importance. Had it been necessary to decide the point I should have referred it to a Divisional Bench. In deference to Mr. Perera's appeal all I would say is that I consider the question well worth the attention of a fuller Bench or of the Legislature. Drieberg J. had not before him an important piece of evidence, viz., the Report of the Donoughmore Commissioners, whose recommendation has been adopted almost verbatim in rule 12. That report clearly indicates that they contemplated specific charges (except of course when general charges were permitted by certain sections), and that in fixing the amount of security they had in mind specific charges and not merely types of offences. Drieberg J. was largely influenced by an English decision given after the Act of 1868, when bribery and other matters were not as yet criminal offences and when a petition was an indictment against an electorate rather than a charge against individuals. The decision was largely affected by the earlier history of the procedure on petitions. We had no such earlier history, and the history of the present legislation appears only from the Report of the Donoughmore Commissioners.

In England the nature of election inquiries rapidly improved and petitions became rare, and yet later judges had occasion to remark on the desirability of charges being more specifically made. In England the

[1] *33 N. L. R. 65.* [2] *40 N. L. R. 178.*

amount of security was fixed, as in Ceylon before the present Rules, and did not depend on the number of charges, and the change in Ceylon seems to have been made for special reasons. We have no idea whether in England charges were as recklessly made as they appear to be in Ceylon. In the case last dealt with, out of 105 charges only 5 were established, and there appears to be good reason why we should not follow English precedents if local conditions call for different lines of action, and if the improvement can be made within the language of our rules. The present petition is particularly bad in its vagueness and the scope it affords for vexatious charges to be fabricated. General charges stand on quite a different footing and receive quite different treatment. All these matters may well receive further consideration on a suitable occasion.

As already ordered, the petition is mismissed but without costs.

Objection upheld.