1953 *Present :* **Swan J.**

P. A. COORAY, Applicant, *and* H. J. G. FERNANDO, Respondent

Election Petition No. 6 of 1952, Kalutara

Election Petition—Presentation of petition—Failure to serve notice of it within prescribed time—Fatal defect—Modes of service of notice—Ceylon (Parliamentary Elections) Order in Council, 1946, Schedule 3, Rules 10, 15, 86 (2).

Where notice of the presentation of an election petition was sent by registered post to the successful candidate but the registered packets were not actually delivered to him until after the time limit of ten days prescribed by Rule 15 of Schedule 3 of the Parliamentary Elections Order in Council had elapsed—

Held, that when an election petition is presented the petitioner should serve notice of it on the respondent within the prescribed time. Failure to do so is a fatal defect. The fact that the respondent had knowledge of the presentation of the petition does not amount to notice and does not dispense with the requirement as to service of notice.

As to the mode of service, leaving copies of the notice and petition with the Registrar is not sufficient. Rule 10 of Schedule 3 is not applicable to the service of notice of presentation of the petition. Further, the modes of service mentioned in Rule 15 are not exhaustive. For instance, even where under Rule 10 an agent has been appointed or an address given the petitioner would not be precluded from effecting service on the respondent personally by delivering the notice and copy to him by his own hand or that of an agent. He could also use the medium of the post but in that event the date of delivery would be the crucial factor.

THIS was a motion filed by the successful candidate praying that no further proceedings be had on an election petition presented against him.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *M. Rafeek*, for the applicant.

R. A. Kannangara, with *A. S. Vanigasooriyar*, for the respondent.

Cur. adv. vult.

February 18, 1953. SWAN J.—

The applicant is the successful candidate in the Kalutara Election. The respondent alleges that he was a voter. The other candidates were Upali Batuwantudawe, A. P. de Zoysa and Cholmondeley Goonewardene. The election was held on 24.5.52 and the applicant was declared duly elected ; and the result of the election was published in the *Government Gazette* on 28.5.52.

On 16.6.52 the respondent filed an election petition praying for a declaration that the applicant was not duly elected or returned, and that the election was void on the grounds and for the reasons set out in the petition. Security was deposited on 18.6.52 and the receipt filed with the Registrar the following day. On 20.6.52 the respondent applied to this Court to have notice of the presentation of the petition served on the applicant through the Fiscal. The motion was duly allowed, and on the same day the Registrar forwarded the notice to the Deputy Fiscal, Kalutara, for service and immediate report. On 26.6.52 the Deputy Fiscal, Kalutara, reported that his officer made attempts on 21st, 23rd and 25th June to serve the notice on the applicant but that he was not to be found. It may be mentioned here that the address of the applicant as given in the notice entrusted to the Fiscal for service is " Galle Road, Katukurunda, Kalutara " which is the same address given by the applicant himself in the present application.

On 20.6.52 the respondent had also left with the Registrar a copy of the notice of the presentation of the petition. I refer to this because it was contended before my brother Pulle, and again before me at this inquiry, that this was sufficient service on the applicant of the notice of presentation. I shall deal with this point later.

On 20.6.52 the respondent also posted under two separate covers two copies of the petition he had filed and two copies of notice of the presentation of the petition. They were sent by registered post and the registered letter receipts have been filed. In the ordinary course of events these packets should have been received by the applicant on the following day. In order to avoid any argument based on a presumption under Section 112 of the Evidence Ordinance I wanted evidence to satisfy me as to the exact date or dates on which these registered packets were

delivered to the applicant because there was no suggestion that they were returned to the sender undelivered. I was not unmindful of the fact that it was for the respondent, if he relied on service by means of these registered letters, to prove that they were delivered within the prescribed time ; but Counsel for the applicant was willing to undertake the *task* of proving when they were actually received. I have deliberately avoided using the word *burden* because it is clear that the burden was on the respondent. The evidence led satisfies me beyond any manner of doubt that these registered packets were delivered to the applicant on 30.6.52, *i.e.*, after the prescribed time.

It was suggested that the applicant was avoiding taking delivery of these registered packets. There is no evidence to support the suggestion. But assuming that he was, I would say that he was under no obligation, legal or even moral, to stay at home to receive them. A man may know he has been sued for a debt which he owes ; he may have received a letter of demand ; his creditor may have told him personally that plaint has been filed ; he may walk into the office of the Court where the action has been instituted, see the plaint for himself and a copy of the summons stuck on the notice board and yet he is under no obligation to appear in Court and answer to the plaint until he is served with summons.

The respondent also alleges that news of the presentation of the petition with particulars of the charges appeared in the late edition of the *Times of Ceylon* of 16.6.52 and in the *Dinamina*, the *Ceylon Daily News* and the *Ceylon Observer* of the following day. I fail to see how this can help the respondent.

The respondent also alleges that the applicant and his proctor were seen at the Registry on 20.6.52 and must have heard of the presentation of the petition against him. But even if the applicant was aware of this fact it does not amount to, and cannot dispense with, service of notice on him, if service of notice is required by law.

The respondent also alleges that he caused a notice to be published in the *Ceylon Daily News* on 24.6.52 giving notice to the applicant of the presentation of the petition on 16.6.52, and stating that he had left two copies of the petition with the Registrar. But as the law does not recognize a publication of this sort as the equivalent of service I would only say that the insertion of this notice was a waste of money ; and even if the applicant had read that notice (of which fact there is no proof) I would say that knowledge of the presentation of the petition does not amount to notice and could not dispense with the requirement as to service of notice.

I shall, at this stage, refer to what I consider the rule that provides for service of notice. It is Rule 15 in Schedule 3 of the Ceylon (Parliamentary Elections) Order in Council 1946 and reads as follows :—

> " Notice of the presentation of a petition, accompanied by a copy thereof, shall within ten days of the presentation of the petition be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the agent appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time, that in the

ordinary course of post, the letter would be delivered within the time above mentioned, or if no agent has been appointed, nor such address given, by a notice published in the *Government Gazette* stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar. "

Before proceeding any further I shall quote Rule 10 as well, because it has been contended that Rule 10 is also applicable.

" Any person returned as a Member may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him on his behalf, appointing a person entitled to practise as a proctor of the Supreme Court to act as his agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within the city of Colombo at which notices addressed to him may be left, and if no such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the office of the Registrar. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force ".

At this juncture I should mention that on 3.7.52 the respondent filed a petition supported by affidavit with a motion praying that " orders be made and directions given to enable further proceedings to be taken on the said petition ". The petition and affidavit filed with the application set out in detail the various steps taken by the respondent to have notice of the presentation of the petition served on the present applicant. Mr. A. B. Perera appeared on 16.7.52 before my brother Pulle in support of that application. From the record of those proceedings I find that my brother pointedly asked Mr. Perera whether he had complied with Rule 15 but that Mr. Perera avoided a direct answer and stated that notice had been duly given or served by reason of the fact that the necessary documents were left at the office of the Registrar in terms of Rule 10. He added that Rule 15 merely indicated some of the ways of service, and that Rule 15 must be read in conjunction with Rule 10. My learned brother told Mr. Perera that he found some difficulty with regard to the interpretation which Mr. Perera sought to place on Rules 10 and 15. Mr. Perera then asked for further time to consider the question and the matter ended there. No further steps were taken on that application.

On 9.10.52 I was appointed Election Judge to hear and dispose of this Election Petition, and some days later I fixed the trial for 15.12.52. On 21.11.52 the applicant filed petition and affidavit and moved that no further proceedings be had on the Election Petition. It is with this application that we are now concerned. The application is based on the ground that no due and proper notice of the presentation of the petition was served on the applicant as required by law ; and the applicant prays that no further proceedings be had on the Election Petition and that it be dismissed.

Three matters arise for consideration :—

(1) Was service of notice of the presentation of the petition necessary?

(2) If so has such notice been duly served?

(3) If the first of these questions is answered in the affirmative and the second in the negative must the Election Petition be dismissed or can this Court grant relief to the respondent and permit him to proceed with the trial ?

Rule 15 provides the answer to the first question. It says " notice of the presentation of a petition . . . . *shall be served* by the petitioner on the respondent. " Mr. Kannangara does not suggest that service is unnecessary but contends that there has been sufficient compliance with the requirement regarding service of notice.

As to the mode of service I shall forthwith dispose of the contention that Rule 10 applies and that leaving a copy of the notice and a copy of the petition with the Registrar is sufficient. To my mind it is clear that Rule 10 was not meant to apply to, and does not in fact apply to the service of notice of presentation of the petition.

The English rule corresponding to our Rule 15 is Rule 14. It reads as follows :—

" Where the respondent has named an agent or given an address, the service of an election petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the respondent, unless a judge, on an application made to him not later than five days after the petition is presented on affidavit showing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the respondent, including when practicable, service upon an agent for election expenses, in which case the judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable. "

Rule 15 of the English Petition Rules provides :—

" In case of evasion of service the sticking up a notice in the office of the master of the petition having been presented, stating the petitioner, the prayer, and the nature of the proposed security shall be deemed equivalent to personal service if so ordered by a judge. "

The following differences between our rules and the English rules will be observed. The English rule does not prescribe a time limit for service—our rule does, namely, ten days. Where there is proof of evasion of service we have no provision for substituted service such as " sticking up " a notice in the office of the Registrar.

Rule 15 provides for service by (1) delivery of the notice and copy to the agent of the successful candidate where an agent has been appointed under Rule 10 or (2) by posting the same in a registered letter to the address given under Rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the prescribed time ; and (3) where no

agent has been appointed nor such address given, by a notice published in the *Gazette* stating the fact of presentation and that a copy of the petition could be obtained at the Registry.

Undoubtedly the sentence begins with the words " such service *may* be effected ". The use of the word *may* only means that the modes of service thereafter set out are not exhaustive. For instance, even where under Rule 10 an agent has been appointed or an address given the petitioner would not be precluded from effecting service on the respondent personally by delivering the notice and copy to him by his own hand or that of an agent. He could also use the medium of the post, but in that event the date of delivery would be the crucial factor.

It is clear that in this case the respondent to the present application has not served or caused to be served the notice and copy by delivering them or having them delivered into the hands of the applicant within the prescribed time. So that the only other matter to consider is whether the notice published by the respondent in the *Government Gazette* complies with the requirements of Rule 15. This notice appeared in the *Gazette* of 27.6.52, *i.e.*, beyond the period of ten days. Mr. Kannangara says it was handed to the Government Printer on 25.6.52. But the date of publication is the required date, not the date on which it was handed in for publication. In this connection I was told that the respondent had attempted to publish the notice the previous week but went to the Government Printer too late for the notice to appear in the *Gazette* of 20.6.52. The *Gazette* is published every Friday and I was informed that to get in a notice for a particular Friday it had to be handed in by the previous Wednesday. But I am certain that if the respondent had applied to this Court he could have had an order on the Government Printer to publish the notice in a *Gazette* Extraordinary.

The respondent has, in my opinion, failed to comply with the requirements of Rule 15 as to service of notice of the presentation of the petition. The only point I have further to consider is whether the petition should be dismissed. Mr. Kannangara maintains that it should not, because the objection taken by the applicant is a formal objection and that Rule 60 of the English Rules would apply. It will be noted that under Section 86 (2) of the *Ceylon (Parliamentary Elections) Order in Council 1946* provision is made as follows :—

> " If any matter of procedure or practice on an election petition shall arise which is not provided for by this Order or by such rules or by any Act of Parliament, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with this Order or any such rules or Act of Parliament and is suitable for application to the Island, be followed and shall have effect. "

Rule 60 of the English Petition Rules states " no proceedings under the Parliamentary Elections Act, 1868 shall be defeated by any formal objection ".

But is a plea of failure to serve notice of presentation of a petition a formal objection? In this connection Mr. Kannangara referred me to

the case of *Young and another v. Figgins* [1] where it was held that no technical or formal objections will be allowed to prevail. In that case a summons called upon the petitioners to show cause why the petition should not be struck off the file on the ground that the petitioners had complained of the conduct of the returning officer but had omitted to give him notice of the petition or the recognizance. It was held that this was no ground for striking the petition off the file.

In my opnion that case can be distinguished. Under English Law where the petitioner complains of the conduct of the returning officer the latter is deemed to be a respondent. Counsel for the sitting member contended that that being so, the returning officer was entitled to notice. Counsel for the petitioners was not even called upon. Martin B. dismissing the summons remarked that even if Counsel for the sitting member were right in his arguments he, *i.e.*, Baron Martin, would not allow such a formal objection to defeat the petition.

There is local authority for the proposition that failure to give notice of the presentation of a petition is a fatal defect. In *Aron v. Senanayake* [2] Akbar S.P.J. so held. In this case *Young and another v. Figgins* [1] was relied on by the petitioner. Counsel for the respondent relied on the case of *Williams v. Mayor of Tenby* [3]. Akbar S.P.J. said that he preferred to follow the judgment in this case.

In *Aron v. Senanayake* [2] the Court was construing the meaning and implications of Rule 18 of the Election (State Council) Petition Rules. That rule corresponds to our present Rule 15, the only difference being that no longer is there any need to give notice of the nature of the proposed security because all security is now provided by a deposit of money.

In the *Avissawella Election Petition* [4] where, owing to some mistake in the office of the proctor representing the petitioner, a copy of the wrong petition was served on the respondent, Akbar J. made order dismissing the petition inasmuch as there had been no compliance with the provisions of Rule 18.

In *Piyadasa v. Hewawitarane* [5] Maartensz S.P.J. held that failure to serve notice of the nature of the proposed security as required by Rule 18 was a fatal defect. The learned Judge cited with approval the finding of Akbar S.P.J. in *Aron v. Senanayake* [2] that failure to give notice of the presentation of the petition and of the nature of the security in the manner required by Rule 18 was a fatal defect for which the petition was liable to be dismissed.

I agree with the view taken by Akbar S.P.J. and Maartensz S.P.J. I hold that the respondent to this application has not complied with the requirements of Rule 15. I dismiss the Election Petition with costs.

Motion allowed and Election Petition dismissed.

[1] *(1869) 19 L. T. R. 499.*
[2] *(1936) 38 N. L. R. 133.*
[3] *L. R. 5 C. P. D. 135.*
[4] *(1936) 16 C. L. Rec. 2.*
[5] *(1936) 40 N. L. R. 421.*