1936

Present: **Maartensz S.P.J.**

PIYADASA *v.* HEWAVITARNE.

In re ELECTION PETITION FILED IN RESPECT OF THE MATARA ELECTORAL DISTRICT.

Election petition—Publication in the Gazette *of notice of presentation of petition without stating the nature of the proposed security—Delivery by petitioner's agent of copies of petition and recognizance to a clerk of a person not duly appointed as agent of respondent—Insufficiency—Election (State Council) Petition Rules, 1931, r. 18.*

The petitioner published, within ten days of the presentation of his petition at the Registry of the Supreme Court, a notice, stating the presentation of the petition in the *Government Gazette.* It did not state the nature of the security which the petitioner proposed to furnish though the security was given within three days of the presentation of the petition by a recognizance signed by the petitioner and two sureties. The petitioner's agent also served within the period of ten days on the clerk of a person not duly appointed as the agent of the respondent copies of the petition and recognizance.

Held, that the nature of the proposed security should have been set out in the notice published in the *Government Gazette* and that, there was a failure to give the respondent proper notice.

Further, that the service of copies of the petition and recognizance on a person not duly appointed as the agent of the respondent did not constitute service of notice on the respondent.

Failure to give notice of the nature of the security in the manner required by rule 18 of the Election (State Council) Petition Rules, 1931, is a fatal defect, rendering the petition liable to be dismissed.

Aron v. Senanayake (40 N. L. R. 257) followed.

THIS was an election petition in which notice of the presentation of the petition was served by a notice published in the *Government Gazette* within ten days of the presentation of the petition. The notice

[1] *(1906) A. C. 43.*

made no reference to the security or the nature of the security given by the petitioner. The respondent moved the rejection of the petition on the ground, among others, that the petitioner had failed to give proper notice as required by rule 18 of the Election (State Council) Rules, 1931.

R. L. Pereira, K.C. (with him *H. V. Perera, M. C. Abeyewardene* and *A. E. R. Corea*), for the respondent.—The publication in the *Government Gazette* fails to give due notice of the nature of security. The petitioner relies on the notice served by Mr. Wijeratne on Mr. de Silva. In fact it was served on Mr. de Silva's clerk. The appointment of Mr. F. G. de Silva was for the purpose of accepting from the Registrar a copy of the charges framed against the respondent. It was not a writing as required by rule 10. The service of notice on Mr. de Silva was not such a service as would comply with the requirements of rule 18.

H. V. Perera, K.C. (continuing the argument).—Rule 18 supersedes rule 10. It is the first step in the action. Under the Civil Procedure Code when an action is instituted the first summons is served on the person of the other party. After that all papers may be left with the proctor.

The authority given to Mr. Wijeratne, the agent of petitioner is not stamped. It can be validly said that his appointment was bad. Hence all acts done by him are void. The notice delivered to Mr. de Silva's clerk was signed by him. The notice with regard to the nature of the proposed security must reach the respondent or his agent. Mr. de Silva was not the agent of the respondent as he was appointed for a special purpose only. Therefore service on Mr. de Silva was not service on the respondent. Delivery under rule 18 is personal service. See *Gooneratne v. The Bank of Chettinad* [1], which was decided under the Insolvency Ordinance.

[MAARTENSZ J.—What about the Privy Council cases ?]

The Supreme Court had held that personal service is contemplated. Where notices were served on proctors it was held that that was bad service. Each step is dependent on the previous one and if the first is bad, then the subsequent ones are bad.

Any act done under an unstamped letter of authority is bad. See *The Queen v. Kelk* [2]. The document cannot be further acted on and as such it is bad. Hence the notice given by Mr. Wijeratne is bad. Further it is bad for the reason that it was not delivered to the respondent, but to Mr. de Silva who was not the agent of the respondent.

[MAARTENSZ J.—The Registrar has entered the name of Mr. de Silva as the agent of the respondent under rule 11.]

He has no right to do so. If it is said that the notice was not delivered to Mr. de Silva, but left at the address given by him, it cannot be maintained that that is due service, since under rule 10 the address must be given by the respondent and not by the agent. In this case Mr. de Silva sent a letter to the Registrar giving his address.

[MAARTENSZ J.—You are taking advantage of your mistakes.]

Yes. Further, the petition is not stamped and should have been stamped. Now it is too late to rectify it.

[1] *(1936) 16 Ceylon Law Rec. 13.* [2] *(1840) 12 Ad. & E. 559.*

See *In the Matter of the Election Petition filed in respect of the Dedigama Electoral District*[1] which follows *Williams v. Tenby*[2].

No affidavits had been filed to prove the sufficiency of the security. Rule 24 indicates that the burden of proof is on the petitioner.

Francis de Zoysa, K.C. (with him *A. R. H. Canekeratne* and E. A. P. *Wijeyeratne*), for petitioner.—The objection that the petition had not been stamped is one that can go to the root of the case and it could be taken at any time, but it must be taken within reasonable time. In this case this objection was taken after the Attorney-General had been noticed. No documents in election cases need be stamped. The authorities were submitted in the case *In the Matter of the Election Petition filed in respect of the Point Pedro Electoral District*[3].

These proceedings are *quasi* criminal. Section 34 of the Stamp Ordinance states the procedure with regard to criminal offences. Under section 34 (1) it is left to the discretion of the Court.

[MAARTENSZ J.—Whether it is criminal or civil does not matter. If to initiate the proceeding a stamped document is necessary it must be stamped.]

There is no provision for this to be stamped. A petition cannot be called either in technical language or in common parlance an instrument.

The publication stating that a petition has been filed under rule 18 in the *Government Gazette* is sufficient. It does not matter whether the appointment of Mr. Wijeratne is stamped or not. The object is merely to give notice to the respondent.

Rule 18 can be split up into two parts. In the publication in the *Government Gazette* the mere notice is sufficient. Further information must be obtained from the Registry. Since at the filing of the petition no security need be given, the nature of the security need not be published.

The respondent had not appointed an agent nor had he given an address under rule 10. In the *Gazette* notice we stated that all the connected papers were filed in the Registry.

[MAARTENSZ J.—Why is it that the notice of the nature of the recognizance is dispensed with in the *Gazette* ?]

It is because the respondent did not appoint an agent. The respondent may be put into hardship, but it is his own seeking since he did not do what was expected of him.

Rule 11 compels the Registrar to keep a book in which are entered the names and addresses of the agents.

He can appoint an agent at any time. We can leave the papers with the agent then. Rule 10 corresponds to rule 10 given in *Roger's, vol. II., p. 510.* Rule 19 had been taken over from the English rules, but the alteration in rule 18 had been neglected.

Rule 43 makes it incumbent on the agent to leave a paper stating that he was appointed agent.

It is submitted that the notices were served on Mr. de Silva by Mr. Wijeratne. As a fact the delivery book was signed by the clerk. The notices need not be served personally by the petitioner.

[1] *40 N. L. R. 257.* [2] (1879) *L. R. 5 C. P. D. 135.*
[3] *40 N. L. R. 178.*

It is not known whether the name inserted by the Registrar as the name of the agent cannot be taken. There is no right incumbent on the petitioner to scrutinize the appointment.

If the respondent made a mistake in the appointment he cannot take advantage of it.

Election agent and polling agents are appointed on unstamped documents. The writing is necessary so that they may not deny the agency.

It is under item 35 of the Stamp Ordinance, No. 22 of 1909, that the respondent says that the authority should be stamped. It deals with powers of attorney which is defined in section 3. It is an authority which binds the grantor. In special applications like *mandamus, quo warranto,* &c., the proxies and petitions are not stamped. Revenue Statutes must be interpreted in favour of the person always. *Maxwell's Interpretation of Statutes (7th ed.), p. 246.*

H. V. Perera, K.C., in reply, quoted *Fradd v. Fernando* [1] and *Annamaly Chetty v. Thornhill* [2].

E. A. L. Wijeyewardene, S.-G. (with him *R. R. Crossette-Thambiah, C.C.*) for Attorney-General.—The appointment of agent must be given in writing under rule 9 and not orally.

Cur. adv. vult.

November 20, 1936. MAARTENSZ J.—

The question for decision in these proceedings is whether the petitioner has given the respondent notice of the nature of the proposed security.

Notice of the presentation of the petition was served by a notice published in the *Government Gazette* of April 3, 1936, within ten days of the presentation of the petition.

The notice is dated March 31, and is as follows :—

"Notice is hereby given under section 18 of the rules made under Article 83 of the Ceylon (State Council Elections) Order in Council, 1931, as amended by the Ceylon (State Council Elections) amendment Orders in Council, 1934 and 1935, that an Election Petition has been presented by Hewa Lunuwillage Piyadasa of Meddawatta in Matara, against the election of Raja Hewavitarne as member of the State Council for the Electoral District of Matara at the election held on March 5, 1936. A copy of the said petition together with the connected papers may be obtained by the said Raja Hewavitarne, the respondent to the said petition, on application to the Office of the Registrar of the Supreme Court.

H. L. Piyadasa,
Petitioner".

Colombo, March 31, 1936.

The notice makes no reference to the proposed security. The security was given on April 1, by a recognizance signed by the petitioner and two sureties.

The petitioner contends that where service of the notice prescribed by rule 18 is effected by a notice in the *Government Gazette* the notice need only state that a petition has been presented and that a copy of the same

[1] *(1934) 36 N. L. R. 132.* [2] *(1935) 36 N. L. R. 413.*

may be obtained by the respondent on application at the office of the Registrar, and that the respondent must by inquiry at the office of the Registrar ascertain for himself the nature of the proposed security.

Rule 18 enacts that " notice of the presentation of a petition, and of the nature of the proposed security, accompanied by a copy of the petition, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent ". It then goes on to prescribe the mode of service thus. " Such service may be effected either by delivering the notice and copy aforesaid to the agent of the respondent or by posting the same in a registered letter to the address given under rule 10 . . . . 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.*

I am unable to accept this contention that the words in italics dispense with notice of the proposed security where service is effected by a notice in the *Government Gazette.*

Rule 18 enacts in unmistakable terms that notice of the presentation of the petition and of the proposed security must be given to the respondent and I cannot agree that that direction is superseded by a provision regarding the mode of serving the notice. The object of the words in italics is to give the respondent notice that a copy of the petition may be obtained at the office of the Registrar so that the notice in the *Government Gazette* might not be encumbered by the petitioner having to annex to it a copy of his petition, which must accompany the notice when service is effected in one of the other ways prescribed by the rule. That service of the notice of the nature of the security is necessary is shown by rule 19 which enables a respondent where security is given wholly or partially by recognizance, within five days of the service of the notice of the petition and the nature of the security to object in writing to the recognizance on the grounds set out in the rule. It will be difficult to determine the day from which the five days is to be calculated if a notice as to the nature of the security left at the office of the Registrar is to be deemed service of the notice. Under rule 12 (1) security must be given within three days of the presentation of the petition, but notice of the nature of the security may be given within ten days of the presentation of the petition. Thus if a notice of the presentation of the petition is published in the *Government Gazette* three days after presentation, as was done in this case, the respondent will have to visit the office of the Registrar daily to see whether notice of the nature of the proposed security has been given.

As a matter of fact a notice of the nature of the proposed security was not left at the office of the Registrar. The petitioner only sent to the Registrar through his agent *inter alia* a copy of the recognizance, to be handed to the respondent on application. Technically therefore there was no service of the notice of the proposed security on the respondent. But it is not necessary for me to determine whether a formal notice should have been left at the office of the Registrar in view of the opinion I have come to that notice of the proposed security should have been set out in

the notice published in the *Government Gazette*, or by another notice published in the *Government Gazette* within the time prescribed by rule 18.

I accordingly uphold the objection that notice of the proposed security was not served on the respondent by the notice published in the *Government Gazette* of April 3.

The petitioner appeared to have been of the same opinion for Mr. J. G. de S. Wijeyeratne purporting to be his agent served on Mr. F. G. de Silva's clerk on April 3, copies of the petition and recognizance. The service on Mr. de Silva's clerk is not a compliance with the terms of rule 18 for two reasons. First, Mr. de Silva was not a duly appointed agent of the respondent. The letter relied on by the petitioner as constituting Mr. de Silva the respondent's agent runs as follows :—

Colombo, 31st March, 1936.

The Registrar,
The Supreme Court,
Colombo.

Sir,—I have the honour to request you to hand over to my agent, Mr. Fred. G. de Silva, Proctor, S. C., a copy of the charges framed against me in the election petition filed by one Piyadasa of Matara.

I beg to remain,
Your obedient Servant,
Rajah Hewavitarne.

The respondent in this letter refers to Mr. de Silva as his agent but the letter certainly does not amount to an appointment of Mr. de Silva as agent of the respondent. In the second place service on Mr. de Silva's clerk is not service upon him. If the respondent had not taken objection to the sufficiency of the security within five days of the service of the notice on Mr. de Silva's clerk and later contended that he had not been duly served with notice of the proposed security, I should have been bound to uphold his contention on the ground that notice had not been served upon him or his agent as required by section 18. The fact that he has entered an appearance cannot cure the defect in the service of the notice.

I need not in the these proceedings determine whether the document appointing Mr. Wijeyeratne the petitioner's agent is chargeable with stamp duty.

I hold that notice of the nature of the proposed security was not served on the respondent. There remains the question whether the petition should be dismissed. On this question I have the advantage of authority. *In the Matter of the Election Petition filed in respect of the Dedigama Electoral District*[1] it was held by Akbar J. (I quote the headnote): "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 of the Election Petition Rules, 1931, is a fatal defect for which the petition is liable to be dismissed ".

I respectfully agree with the opinion of Akbar J. and with his reasons for coming to that opinion.

I accordingly dismiss this petition with costs.

Petition dismissed.

[1] *40 N. L. R. 257.*