

Rajapakse. L V. Kathirgamanathan.S

14/1965

Present: Tambiah, J.

**L. RAJAPAKSE, Petitioner, and S. KATHIRGAMANATHAN,
Respondent**

**Election Petition No. 41 of 1965—Electoral District No. 75
(Tissamaharama)**

Election petition—Necessary parties—Requirement that successful candidate should be made a party—Distinction between a recount and a scrutiny—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 80 (b), 85, Schedule III, Rules 8, 10, 29 (1).

In this election petition the petitioner sought a declaration that he was duly elected if a scrutiny or recount showed that he had polled a majority of the lawful votes. He made only the Returning Officer a respondent. He failed to make the successful candidate a party.

Held, (i) that a clear distinction should be drawn between a recount and a scrutiny.

(ii) that, in an election petition, particularly in a case like the present one, the successful candidate should be made a respondent.

ELECTION Petition No. 41 of 1965—Electoral District No. 75
(Tissamaharama).

P. Nagendran, for petitioner.

M. Kanagasunderam, Crown Counsel, for respondent.

Cur. adv. vult.

October 4, 1965. **TAMBIAH, J.—**

In this case the petitioner has made only the Returning Officer a respondent. He has failed to make Mr. C. F. W. Edirisuriya, the candidate returned at the election, a party to this petition. When this matter was mentioned in chambers, I brought to the notice of counsel for the petitioner and the Crown Counsel, who represented the Returning Officer, that I would like to consider whether the election petition is properly constituted.

On the 31st of August this matter was argued and the learned Crown Counsel submitted that the successful candidate is a necessary party in this case and since the petitioner has not made him a party the petition should be dismissed.

After a careful consideration of the arguments presented by counsel I am of the view that the successful candidate is a necessary party to this petition. Particularly, in view of the grounds on which this election petition is based and the remedies sought for in the prayer of this petition, the successful candidate should have been a party to the petition.

The petitioner alleges that he was not given permission for a recount despite his request to do so, and that the purported recount granted to him was in fact and in law no recount at all as the manner of the recount could not and did not exclude errors in counting nor did it aid the discovery of errors in sorting. He prays that a scrutiny be granted in terms of section 80 (b) of the Ceylon (Parliamentary Elections) Order in Council, 1946, and also for a recount. He seeks a declaration that in the event of the scrutiny or recount showing that the petitioner had polled a majority of the lawful votes that the petitioner be duly elected.

A clear distinction should be drawn between a recount and a scrutiny. A recount is only ordered when there has been no count according to law and a scrutiny is granted when, as a result of bribery, impersonation, etc., a winning candidate has not obtained the votes he is entitled to in law. In a scrutiny the inquiry into each vote is dealt with separately (vide *The Law of Elections and Election Petitions* by Hugh Fraser (3rd Edition), page 225). On a scrutiny the Court is empowered to strike out the votes which were procured by

bribery, cheating, undue influence, impersonation and on other grounds set out in section 85 of the Parliamentary Elections Order in Council. When a scrutiny is asked for by a petitioner the successful candidate is also entitled to show that votes cast in favour of the petitioner should be struck off for similar reasons.

In an election petition where scrutiny is asked for, if the petitioner leads evidence to establish a case for scrutiny, the Returning Officer would naturally be not interested in defending the case. The only person who could disprove the allegations and who is interested in the matter would be the successful candidate. It is clear therefore that the person who is vitally interested in the scrutiny demanded is the successful candidate. It is a fundamental and elementary proposition of law that no order can be made against a person before he is heard. The *audi alteram partem* rule is ingrained in every legal system of the civilized world.

Counsel for the petitioner however contended that although scrutiny and recount were remedies asked for in the petition, he would confine his case only to a recount. Since the time allowed for amending the petition has elapsed, counsel for the petitioner cannot now amend the petition by striking out the prayer for scrutiny. Even if the remedy sought for is only a recount, still the successful candidate should have been made a party to this action. The successful candidate may be able to show that there had been a proper count and therefore no case has been made for a recount. He could do this by cross-examination of the witnesses who may be called by the petitioner as well as by calling evidence on his own behalf. This opportunity has been denied to the successful candidate.

The third schedule to the Ceylon (Parliamentary Elections) Order in Council, 1946 contains a form of the petition. It has no form of the caption but from the several provisions found in the schedule it is clear that the successful candidate is a necessary party in an action of this nature. The prayer in the model petition that is set out in schedule 3 of the Order in Council states as follows : “ Wherefore your petitioners pray that it might be determined that the said A. B.

was not duly elected or returned, and that the election was void (or that the said E. F. was duly elected and ought to have been returned, or as the case may be).” The terms of the prayer in the model petition have been followed in this petition. In the prayer the petitioner seeks for a declaration that he should be duly elected. In these circumstances it would be a denial of justice if the successful candidate is not given a chance to defend the action.

Rule 8 of the third schedule referred to above enacts :

“ The respondent in a petition complaining of an undue return and claiming the seat for some person may lead evidence to prove that the election of such person was undue. In such case the respondent shall, six days before the day appointed for trial, deliver to the Registrar, and also at the address, if any, given by the petitioner, a list of the objections to the election upon which he intends to rely, and the Registrar shall allow inspection of office copies of such list to all parties concerned ; and no evidence shall be given by a respondent or any objection to the election not specified in the list, except by leave of the Judge, upon such terms as to amendments of the list, postponement of the inquiry, and payment of costs, as may be ordered.”

From this it is clear that the successful candidate is a respondent within the meaning of Rule 8. Rule 10 of the third schedule referred to, refers to the appointment of an agent by a winning candidate, although no election petition has been filed against him. The caption to this rule is as follows : “ Appointment of agent by respondent”. This rule again clearly contemplates the making of a successful candidate a respondent. Rule 29 (1) enacts that if before the trial of an election petition a respondent dies or resigns, or gives notice in writing to the court that he does not intend to oppose the petition, the petition shall not be abated but shall continue whether or not any person applies to be admitted as respondent as hereinafter provided. All these rules clearly contemplate that the successful candidate should be made a respondent to an election petition if a declaration is sought that the candidate who has lost should be declared duly elected.

In India it has been held that all candidates nominated at an election must be made respondents if the petitioner, in addition to calling in question the election of the returned candidate, also claims to be duly elected (vide Sharanpore Case, 1 Hammonds Indian Election Petitions at 199, cited in Elections and Election Petitions by Nanak Chand, Manchand and Kali Sharan, p. 501). If this is not done the petitioner cannot be declared to be elected even though the election of the respondent has been over-ruled.

The petitioner could have amended his petition during the time allowed to him by law. This time has elapsed now. The court has no power to add the successful candidate as a party to the petition. Therefore I hold that the election petition is badly constituted since the successful candidate has not been made a respondent. The petition is therefore dismissed with costs.

Election petition dismissed.