

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Election Petition in terms
Of Section 92 of the Parliamentary Election Act
No 1 of 1981 read with Article 144 of the
Constitution

K. Thiruchchelvan

Petitioner

Vs

CAEP03/2010

Dayananda Dissanayake
Commissioner of Election.

And 217 Others
Respondents

Before : Sisira de Abrew J

Counsel : Kang Iswaran President's Counsel with J.Laxman and
HV Vamadeva for the Petitioner
A Gnanathan President's Counsel, ASG with
Yuresha Fernando SC for the 1st and 2nd Respondents
Nihal Jayamanne President's Counsel with
Kushan de Alwis, Chandra Liyanapatabendy and
D.de Silva for 3rd and 4th to 9th Respondents.
MA Sumarithiran with Juanita Arulanathan for the
199th to 204th Respondents.

Argued on : 28.2.2012 and 6.3.2012

Decided on : 30.5.2012

Sisira de Abrew J.

When this case was taken up learned Additional Solicitor General (ASG) appearing for the 1st and the 2nd respondents raised following three preliminary objections.

1. The notice of presentation of the election petition had not been served by the petitioner on the 1st and the 2nd respondent within the time limit stipulated in Rule 14 in the 4th schedule of the Parliamentary Election Act No.1 of 1981.
2. Paragraphs 10,11,12,14,15 and 22 of the petition contained specific allegations of corrupt practice committed by the 3rd respondent. But the petitioner failed to support these allegations by an affidavit in contravention of the mandatory provisions of Section 98 (d) of the Parliamentary Election Act No.1 of 1981.
3. Paragraphs 13,14,17 and 19 of the petition contained specific allegations of corrupt practice committed by easily identifiable persons. But the petitioner has failed to join them as respondents in contravention of the mandatory provisions of Section 97 (1) (b) of the Parliamentary Election Act No.1 of 1981 and also failed to support the allegation by an affidavit in contravention Section 98(d) of the said Act.

Learned President's Counsel appearing for the petitioner submitted that notices of presentation of the petition were delivered at the office of the Registrar of the court of Appeal within ten days of filing of the petition and that the petitioner has complied with Rule 14.

Rule 14 of the Parliamentary Election Act reads as follows:

14. (1) Notice of the presentation of a petition, accompanied by a copy thereof shall, within ten days of the presentation of the petition-

- (a) be served by the petitioner on the respondent; or
- (b) be delivered at the office of the Registrar for service on the respondent, and the Registrar or the officer of his department to whom such notice and copy is delivered shall, if required, give a receipt in such form as may be approved by the President of the Court of Appeal.

(2) The service under paragraph (1) of notice of the presentation of a petition and copy thereof by the petitioner on the respondent may be effected either by delivering such notice and copy to the agent appointed by the respondent under rule 9 or by posting them in a registered letter to the address given under rule 9 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned or by a notice published in the gazette stating that such petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar.

(3) Where notice of presentation of a petition, accompanied by a copy thereof, as delivered under paragraph (1) at the office of the Registrar for service on the respondent, such service may be effected in the same manner as the service of a notice issued by a court is effected under the Civil Procedure Code.

There is no evidence to suggest that the petitioner on his own served notice of presentation on the respondents. Therefore the petitioner

cannot rely on the mode of service envisaged under Rule 14(1)(a). The petitioner is relying on Rule 14(1)(b). The election petition was filed on 11.5.2010. Journal entry dated 2.6.2010 reveals that the notice has been tendered at the office of the Registrar Court of Appeal on 2.6.2010. According to Journal entry dated 7.6.2010, notice of presentation of the petition has been dispatched on 7.6.2010. Thus the said notice has not been served on the respondents within ten days of the presentation of the petition.

The contention of learned President's Counsel (PC) for the petitioner is that notices of presentation of the election petition were delivered at the office of the Registrar of the Court of Appeal within ten days of the filing of the election petition and as such he had complied with Rule 14(1)(b). Learned PC contends that along with the motion dated 17.5.2010 the petitioner tendered relevant notices and the stamp envelopes to the office of the Registrar of the Court of Appeal. Although the motion says so the journal entry dated 18.5.2010 does not indicate such a delivery. I am therefore unable to agree with the said contention. Learned PC further contended that when the case was taken up on 24.5.2010 petitioner's counsel informed Court that notices, as required by the rules, had been tendered to the office of the Registrar of the Court of Appeal. According to the journal entry dated 24.5.2010 such submission had been made. But journal entries of the case record do not indicate that such notices had been tendered to the office of the Registrar of the Court of Appeal before 24.5.2010. The petitioner has failed to produce any receipt to prove his position. Under Rule 14 the petitioner has the right to ask for such receipt. When I consider all these matters I am unable to agree with the submission of learned PC.

I now advert to the 1st objection raised by the learned ASG. The question whether compliance under rule 14 is mandatory or not was considered by a bench of three judges of the Supreme Court in Nanayakkara Vs Kiriella [1985] 2SLR page 391. In the said case notices of presentation of the election petition was delivered at the office of the Registrar Court of Appeal within ten days of the filing of the election petition, but the notices could not be served on some of the respondents within ten days of the filing of the election petition. The election judge ruled that the petitioner had not complied with Rule 15(1)(b) in the 3rd schedule of the Ceylon (Parliamentary Election) Order in Council 1946. The said Rule 15 is in terms identical with Rule 14 in the 4th schedule of the Parliamentary Election Act No 1 of 1981. In the said case it was contended that what was required under Rule 15(1)(b) was to deliver the notices of presentation of the election petition within ten days of filing of the petition to the registry of court. It was further contended in the said case that ten day limit was applicable only to sub paragraph (a) of Rule 15. His Lordship Justice Collin Thome with Justice Thambiah agreed held at page 397-398: "that governing words 'within ten days of the presentation of the petition' in Rule 15(1) apply to all and every mode of service set out in Rule 15. It is mandatory for all modes of service so as to ensure service within the specified time limit. Under Rule 15(1)(b) where the notices are tendered to the Registrar for service, both the delivery and the service must be effected within ten days. His Lordship Collin Thome further held that the failure to serve notices on the respondents within the mandatory ten day period was a fatal defect. I am bound by this judgment. The contention of learned President's Counsel for the petitioner was that the petitioner discharges his burden under Rule 14(1) (b) of the Parliamentary Election Act when the notices are delivered at the registry of

Court within ten days of filing the petition. But this contention cannot be accepted as correct in view of the above judgment. Applying the principles laid down in the above judicial decision I hold that serving of notice of the presentation of the election petition on the respondents under paragraph (a) or (b) of rule 14 within ten days is mandatory and failure to do so is fatal. As I pointed out earlier the election petition was filed on 11.5.2010 and the notice of the presentation of the election petition was dispatched to the respondents on 7.6.2010. Thus the notices of the presentation of the election petition were not served on the respondents within ten days of the filing of the election petition. For these reasons I hold that the petitioner has not complied with Rule 14 of the Parliamentary Election Act No 1 of 1981 which is mandatory. For the above reasons I uphold the 1st preliminary objection. The petition of the petitioner should be dismissed on this ground alone.

I now advert to the 2nd preliminary objection. In order to appreciate this objection it is necessary to consider Section 98(d) of the Parliamentary Election Act which reads as follows:

“An election petition-

Shall set forth particulars of any corrupt or illegal practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice, and shall also be accompanied by an affidavit in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice.”

Learned President's Counsel for the petitioner contended that filing of an affidavit was not necessary. But when one reads the said section, it is clear that if the petitioner alleges corrupt or illegal practice, in terms of

Section 98(d) of the Act, it is necessary for him to support such allegations by way of an affidavit. Therefore I am unable to accept the contention of learned President's Counsel. When one reads paragraph 10,11,12,14,15 and 22 of the petition, it is clear that the said paragraphs contain specific allegations of corrupt and illegal practice committed by the 3rd respondent. The petitioner has failed to file an affidavit along with his petition supporting the averments in the above paragraphs. I therefore hold that the petitioner has not complied with Section 98(d) of the Parliamentary Election Act. For these reasons I uphold the 2nd preliminary objection raised by the learned Addl. Solicitor General. In view of the conclusion reached on the 1st and the 2nd preliminary objections, it is not necessary to consider the 3rd preliminary objection. I have earlier upheld the 1st and the 2nd preliminary objections. I therefore dismiss the petition of the petitioner with costs.

Petition dismissed.

Judge of the Court of Appeal.