

NATHAN
v.
CHANDRANANDA DE SILVA
COMMISSIONER OF ELECTIONS AND OTHERS

COURT OF APPEAL.
R. B. RANARAJA, J.
ELECTION PETITION
NO. C.A. E/P 7/94
DECEMBER 02, 1994.

Election Petition – Rule 14 of 4th Schedule to Parliamentary Elections, Act No. 1 of 1981 – Service of notice within 10 days of presentation of petition.

Under Rule 14 notice of presentation of an election petition must be served on the respondents within 10 days of the presentation of the petition. One of the modes of service prescribed in Rule 14 may be adopted but service of the notice within 10 days is mandatory. Failure to do so is fatal.

Cases referred to :

1. *Nanayakkara v. Kiriella* [1985] 2 Sri LR 391.
2. *Saravanamuttu v. De Silva* 42 NLR 561.
3. *Aron v. Senanayake* 40 NLR 257.
4. *Senanayake v. Chandrananda de Silva* CA No. 4/1989.

Election petition to have election declared void.

D. W. Abeykoon with K. S. Ratnavel, P. Sivapalan and R. Raviraj for petitioner.

J. A. N. de Silva DSG with P. A. Ratnayake S.S.C. and R. M. R. Rajakaruna S.C. for 1st to 4th respondents.

Faiz Mustapha P. C. with R. E. Thambiratnam and A. Vinayagamoorthy for 5th to 7th respondents.

N. Rahuman with Daya Pelpola and A. Maujooth for 8th respondent.

December 16, 1994.

RANARAJA, J.

The petitioner who was a candidate for the electoral district of Wannu at the Parliamentary elections held on 16.8.1994, has filed this petition praying for a declaration that, for the reasons stated in the petition, the election for that district is void and the return of 5 to 10 respondents elected for the district is undue. The petition was presented to court on 7th September 1994. The President of the Court of Appeal directed the petitioner to serve notices on the respondent. The Registrar of this Court was directed to effect service on the respondents, if the petitioner delivered the requisite notices and copies of the petition. On being nominated to hear and determine the petition, I fixed the matter for trial on 27.10.1994. On 23.9.94 the petitioner tendered the notices for service on the respondents. They were dispatched on 28.9.94. The notice issued on the 9th respondent was returned undelivered. On the date of trial all respondents, except the 9th and 10th who were absent, were represented by counsel. The 5th to 8th respondents, who had by then filed their objections, moved for a dismissal of the petition *in limine* for, amongst other grounds, the non-compliance of rule 14 of the 4th schedule to the Parliamentary Elections Act. No. 1 of 1981. It was agreed by all counsel present, that this preliminary objection be decided in the first instance on written submissions and if need be, on supplementary oral submissions. Time was given till 2.12.94 for tendering of written submissions. By that date, the petitioner and 1st to 8th respondents had filed their submissions. Counsel for the 10th respondent stated he was associating himself with the submissions made by the other respondents. All counsel stated they did not intend making further oral submissions. The decision on the preliminary objection was put off for 16.12.94.

Rule 14 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) Service under paragraph (1) of the 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 the presentation of a petition, accompanied by a copy thereof, is 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."

This rule requires the petitioner to serve the notice of the presentation of the petition on the respondent within ten days of filing the petition. In the alternative, the petitioner may deposit the notices at the office of the Registrar of the Court for service. If the petitioner chooses to serve the notices himself, he could do so by personal service on the respondent or his agent or by posting them under registered cover to reach the respondent within ten days of presentation of the petition. In the alternative, having deposited the notices in the office of the Registrar, he should publish a notice in the Gazette within the stipulated ten days stating that a petition has been presented and copies of it may be obtained from the Registrar. The other option available is to deliver the notices to the Registrar within ten days of the presentation of the petition, for service on the respondents under the provisions of the Civil Procedure Code.

In the instant case, the petitioner has not taken upon himself the task of serving notices on the respondent. Instead he has sought the intervention of the Registrar to do so. On 23.9.94 the Attorney-at-Law of the petitioner has tendered the requisite notices to the Registrar for service. That is, admittedly, outside the ten day period from the date of presentation of the petition.

The learned counsel for the petitioner has made two submissions. Firstly, that rule 14 is not mandatory but directory. Secondly, rule 14 should not be strictly interpreted.

In dealing with the first submission, it is relevant to consider the previous decisions of this court as well as the Supreme Court on rule 14 and its precursor, rule 15 of the Ceylon (Parliamentary Elections) Order in Council 1946, as amended by section 29 of Act No: 11 of 1959. Rule 15 was exhaustively dealt with by a bench of three judges of the Supreme Court in the case of *Nanayakkara v. Kiriella*⁽¹⁾. Colin Thome J. after dealing with the previous judgments of that court concluded;

"I hold that the 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 limit. Under rule 15 (1) (b) when the notices are tendered to the Registrar for service, both the delivery and service must be effected within ten days. I hold that the failure to serve notices on the 1st, 3rd and 8th respondents within the mandatory ten days is a fatal defect."

Ranasinghe, J. in the same case in a dissenting judgment on the main issue, came to the same conclusion on the mandatory nature of rule 14, when he stated;

"The view I take of the said new rule 15 does not, in my opinion, detract from the view which has been expressed, that limits relating to time, within which any act should be done, set out in the said Order in Council of 1946 are mandatory."

Thus it is clear that a bench of three judges of the Supreme Court has unambiguously treated rule 15, which is identical to rule 14 we are now concerned with, to be mandatory and not directory. Non-compliance with this rule is necessarily fatal to proceeding further with the petition.

Learned Counsel submits that *Nanayakkara (supra)* did not consider the need to interpret rule 14 less strictly in the light of the observations of De Kretser J. in *Saravanamuttu v. De Silva*⁽²⁾ where he stated at p. 569;

"In proceedings following an Election Petition it is not the policy of the law to place obstacles in the way of the petition being heard, as rule 60 of the rules framed under the Parliamentary Elections Act of 1868 provides that no proceedings shall be defeated by reason of any formal objection."

In that case the rules that came under consideration were rules 9 and 16 of the Election (State Council) Petitions rules. They were held to be directory and not mandatory. However, Akbar J. who considered rule 18 of the same rules, which corresponds to the present rule 14, in *Aron v. Senanayake* ⁽³⁾ expressed a contrary view when he stated;

"Rule 18 of the Election Petition Rules 1931, is explicit that notice of the presentation of the petition and the nature of security, accompanied by a copy of the petition shall be served by the petitioner on the respondent within 10 days . . . One would have thought apart from any authority that the provision in rule 18 requiring service of notice not only of presentation of the petition but also of the nature of security was imperative and that non-compliance put a stop to any further step in the matter of the petition. This seems to be so, for the next rule, viz rule 19, gives the right to the respondent to object to the recognizance provided he objects in writing within 5 days from the date of service of the notice of the petition and of nature of the security."

I would prefer to follow the reasoning of Akbar J. in *Aron's* case. Furthermore, a similar submission was made by counsel for the petitioner in *Senanayake v. Chandrananda de Silva* ⁽⁴⁾. In that case it was urged that rule 14 is now set in an Election Law that contains fundamentally changed concepts as to the modes of elections and that the rule should be looked at afresh untrammelled by any previous decisions. S. N. Silva J. after a survey of the authorities on the principle of *stare decisis* concluded;

"Therefore I am of the view, that the decision in *Nanayakkara's* case (*supra*) is binding on this court and that notice of the presentation of the petition as provided for in rule 14 must be served on each of the respondents within a period of ten days."

I see no reason to depart from that conclusion on the need to follow decisions of superior courts until they are varied by the same or higher court. The petitioner has failed to deliver the requisite notices within the ten day period stipulated by rule 14. This is a fatal

defect which precludes the petitioner from proceeding further with his petition. I accordingly dismiss the petition with costs.

Petition dismissed.
