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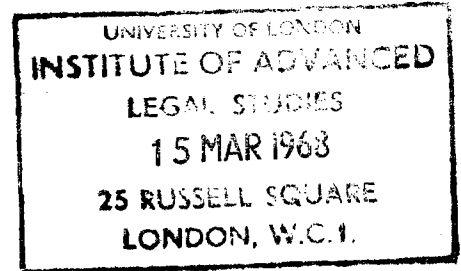
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No. 33 of 1965

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA  
HOLDEN AT KUALA LUMPUR  
(Appellate Jurisdiction)



B E T W E E N :

C. DEVAN NAIR Appellant

- and -

10 YONG KUAN TEIK Respondent

(In the matter of Election Petition No. 1 of 1964 in the High Court of Malaya Election for Bungsar Ward to the Dewan Ra'ayat holden on the 25th day of April 1964

BETWEEN Yong Kuan Teik Petitioner  
- and -  
C. Devan Nair Respondent)

CASE FOR THE RESPONDENT

Record

20 1. This is an appeal by leave of the Federal Court of Malaysia from a judgment of that Court (Thomson L.P. Dyed Shah Barakbah C.J. and Tan Ah Tah F.J.) allowing the Respondent's appeal from a judgment and order of the High Court of Malaya (Ismail Khan J.) that the Respondent's Election Petition be struck out and that the Respondent should pay the Appellant's costs. The said order was made by the High Court upon consideration of the Election Offences Ordinance, 1954, and the Election Petition Rules, 1954, which are the second  
30 schedule to the said Ordinance. Section 42 of

p54  
pp42-51  
pp14-19  
No.14 pp20,21

Record the Ordinance provides

"(1) The procedure and practice on election petitions shall be regulated by rules of court.

(2) Until varied or revoked by rules of court, the rules contained in the Second Schedule shall be in force."

The scheduled Rules have not been varied or revoked, and they constitute, it is submitted, a self-contained although incomplete code, to the exclusion of other rules of court.

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2. This appeal raises questions upon the true construction and effect of the Rules and, in particular, whether non-compliance with Rule 15 obliges or entitles the striking out of an election petition presented, in accordance with Section 38 of the Ordinance, by a person who, by Section 34 of the Ordinance, is qualified to present it.

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p10 18

3. On the 25th April, 1964 an election was held to elect a member for Bungswar Ward to the Dewan Ra'ayat. The Appellant was a candidate and the Respondent was a voter. The Appellant was returned as elected and the result of the election was published in the Gazette dated 11th June, 1964.

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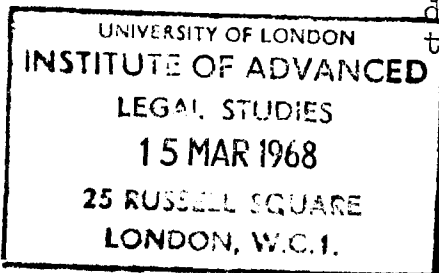
4. Section 38 (i) of the Election Offences Ordinance, 1954, provides (with exceptions not material to this appeal) that:-

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"Every election petition shall be presented within twenty-one days of the date of publication of the result of the election in the Gazette".

No.1 pp 1,2  
p 2

5. The Respondent presented his election petition on the 29th June, 1964. The ground of his petition was that the Appellant was disqualified for election in that he was not at the time of election a citizen of Malaysia.



Disqualification for election is a ground for avoiding a candidate's election, on an election petition, by virtue of Section 32 (e) of the Ordinance.

Record

10 6. On the 29th June, 1964 the Respondent was in accordance with the Ordinance a person entitled to present an election petition, he did so within the time prescribed by and upon a ground provided in the Ordinance and his petition took the form prescribed by Rule 4 of the said Rules. A petition in being (as was the Respondent's) is liable to come to an end without a trial in three cases only:-

p 1,2

20 (i) If the election petitioner fail to give the security for costs, charges and expenses specified by Rule 12 of the Rules, in which case no further proceedings are to be had on the petition and the respondent to the election petition may apply to the Election Judge for an order directing the dismissal of the election petition.

30 (ii) If the election petitioner, with the consent of all his co-petitioners if there are any, withdraw his petition as envisaged by Rule 21. This cannot be done without the leave of the Election Judge and the Rule is designed to ensure that a petition is withdrawn only upon proper grounds and without any improper collaboration by the parties.

(iii) If a sole election petitioner or the survivor of several election petitioners die, in which event by Rule 27 the election petition is abated.

40 By Rule 16 the petition is deemed to be at issue on the expiration of the time limited for making petitions. It is to be observed that in cases (ii) and (iii) any person who might have

Record

been an election petitioner may apply to be substituted for the original election petitioner, although out of time for presenting a petition of his own. Election petitions are not litigation personal to the parties, and when once begun in earnest a trial cannot readily be avoided. In no case do the Rules provide for striking out a Petition and, indeed, even in case that the petition is unopposed, or the respondent to it dies or resigns, the petition must, it appears, come on for trial.

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A. p 58

7. The Respondent duly gave security for costs and his election petition was not liable to be dismissed pursuant to the said Rule 12.

8. By Rule 10 of the Rules "Any person returned 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 "[sic]" appointing an advocate and solicitor to act as his solicitor 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 Federation 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..."

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C. p 60

The Respondent's solicitor on behalf of the Respondent on the 7th July, 1964 sent a copy of the election petition and a notice of the presentation of the petition to the Registrar, (that is, the Registrar of the Supreme Court). That notice was left at the office of the Registrar within ten days of the presentation of the petition.

9. By Rule 15 of the Rules "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

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- on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the solicitor appointed by the respondent under Rule 10 of these Rules or by posting the same in a registered letter to the address given under Rule 10 of these Rules at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no solicitor has been appointed, or no such address given, by a notice published in the 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." Record
- 20 10. Notice dated the 13th day of July, 1964, of presentation of the Respondent's election petition was published in the Gazette dated 23rd July, 1964. The Gazette is published fortnightly. H p63
- 30 11. By a summons dated 6th August, 1964 the Appellant sought an order that particulars of the Respondent's election petition be delivered, and by summons dated 8th August, 1964 the Respondent sought leave to interrogate the Appellant. No. 4 p 3  
No. 5 p 4
12. On the 17th August, 1964 the two said summonses came on for hearing before Ismail Khan J, the Election Judge, in chambers. By consent an order was made for the delivery by the Respondent of the particulars sought by the Appellant and the Respondent's application for leave to interrogate was by consent adjourned, to the 28th August, 1964. No. 7 p 7  
p43 127
- 40 13. On the 24th August, 1964 the Respondent by his solicitors served on the Appellant's solicitors the particulars required. No. 8 p 8
14. On the 25th August, 1964 the Appellant's solicitor made an affirmation No.10 p10

Record  
No.9 p 9

deposing (inter alia) that notice dated 13th July, 1964 of presentation of the Respondent's election petition was served by publication in the Gazette on the 23rd July, 1964; and, also on the 25th August, 1964, the Appellant's solicitors took out a summons to strike the petition off the file.

15. The Appellant's application came on for hearing before the said Judge in chambers on the 28th August, 1964. 10

p12 120

16. It is submitted, as it was submitted to the learned Judge, that if the Respondent had failed to comply with a requirement capable of being waived, or if the failure were one on which the Appellant might be precluded from relying, the interlocutory steps which as aforesaid he took waived the failure or precluded the Appellant from reliance upon it.

17. On the 26th September, 1964 the Election Judge, delivering his judgment in open court, held that notice of presentation of the Respondent's election petition was out of time, that there was no provision for enlarging time, that the "absence of a notice of service is something more than a mere irregularity" and that the petition was a nullity; he ordered it struck out. He considered Rule 10 and Rule 15 and by implication rejected the Respondent's contention that good service of notice of presentation was achieved by timeous delivery to the Registrar. The learned Judge gave leave to appeal. 20 30

p20 17  
p18 14  
p18 118  
p19 11  
p19 130

p20 115

18. It is submitted that Rule 10 is intended to achieve means of service without imposing upon an election petitioner the need to seek out and personally serve the successful candidate. The successful candidate may provide an address for service if he wishes - in which case he must notify it to the Registrar (who by Rule 11 is obliged to keep a book of such addresses open to public inspection). If the candidate does not provide an address, notices and proceedings are to be left with the Registrar 40

as if he were poste restante. The time for service is dealt with by Rule 15, and is fixed at ten days.

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10 19. It would frequently be impossible to obtain publication in the fortnightly Gazette within the prescribed ten days and there must, it is submitted, be some point in providing that documents are to be left with the Registrar; the point is to enable service within ten days when no address has been provided. It is submitted that upon the true construction of Rules 10 and 15, the election petitioner's obligation is to leave the notice and the petition (or one of them) with the Registrar within the prescribed ten days and thereafter notify the successful candidate through the medium of the Gazette so that he may collect the documents (or document) from the Registrar. 20 The prescribed ten days, it is submitted, does not relate to the publication of notice in the Gazette.

30 20. It is, however, submitted that once the Respondent, being a person qualified to present an election petition, had presented his petition within the twenty-one days prescribed by Section 38 (1) of the Ordinance, the scheduled Rules, which by Section 42 regulate only procedure and practice, became applicable as directions only; they did not provide the power of striking out which the learned Judge wrongly purported to exercise, and the Judge, lacking any such power, was in law obliged to allow this petition to proceed to trial. There is no sanction for non-compliance with the Rule and, as the Federal Court of Malaysia held, non-compliance - if there were non-compliance - did not affect the right to proceed with the election petition.

p51 125

40 21. By his Memorandum of Appeal dated 4th December, 1964 and in argument before the Federal Court of Malaysia the Respondent raised the matters hereinbefore submitted, but the Federal Court decided the appeal below on the ground that there was no power to strike the

16 pp22-24

Record petition out.

The Respondent submits that this appeal should be dismissed for the following amongst other.

R E A S O N S

- (1) BECAUSE the Respondent had complied with the Election Petition Rules, 1954.
- (2) BECAUSE the Respondent had given notice of presentation of an election petition in accordance with and within the time prescribed by the Election Petition Rules, 1954. 10
- (3) BECAUSE failure to give such notice was a mere irregularity and did not nullify the petition.
- (4) BECAUSE the Appellant took steps in the action and (whether at common law or by virtue of the Rules of the Supreme Court) waived or could not rely on the irregularity. 20
- (5) BECAUSE the Appellant was not prejudiced by any failure to comply with the said Rules.
- (6) BECAUSE the public interest required that the Respondent's properly constituted election petition should be tried and not summarily dismissed.
- (7) BECAUSE there was no power or no jurisdiction to strike out the Respondent's petition. 30
- (8) BECAUSE the Election Petition Rules, 1954 do not provide for the striking out of an election petition.
- (9) BECAUSE non-compliance with the



Election Petition Rules, 1954 did not affect the validity of the Respondent's petition.

Record

- (10) BECAUSE the Election Petition Rules, 1954 do not create any condition precedent to the exercise of a right to petition.
- (11) BECAUSE the Election Petition Rules, 1954 do not affect the substantive right to petition but affect procedure only.
- (12) BECAUSE upon the true construction of the Election Petition Rules, 1954, an election petition is not to be defeated for irregularity.
- (13) BECAUSE the judgment and Order of the High Court of Malaya were wrong.
- (14) BECAUSE the judgment and Order of the Federal Court of Malaysia were right.

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KEITH McHALE

No. 33 of 1965

IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT  
OF MALAYSIA HOLDEN AT KUALA LUMPUR  
(Appellate Jurisdiction)

BETWEEN:

C. DEVAN NAIR            Appellant

- and -

YONG KUAN TEIK        Respondent

(In the matter of Election  
Petition No. 1 of 1964 in the High  
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holden on the 25th day of April  
1964

BETWEEN Yong Kuan Teik    Petitioner

- and -

C. Devan Nair    Respondent)

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CASE FOR THE RESPONDENT

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Solicitors for the Respondent.