

No. 33 of 1965

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
15 MAR 1968  
25 RUSSELL SQUARE  
LONDON, W.C.1.

B E T W E E N :

C. DEVAN NAIR Appellant

- and -

YONG KUAN TEIK Respondent

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C A S E FOR THE APPELLANT

Record

1. This is an appeal from an order of the Federal Court of Malaysia (Thomson, L.P., Barakbah, C.J. and Tan, J.) dated the 13th May 1965, which allowed the Respondent's appeal from an order of the High Court of Malaya (Ismail Khan J. sitting as the Election Judge), dated the 26th September, 1964, that an Election Petition filed by the Respondent be struck out. In that Petition, the Respondent had prayed that the election of the Appellant for the Bungsar Ward to the Dewan Ra'ayat on the 25th April, 1964 be set aside on the ground that the Appellant was disqualified from being elected.

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p.52

p.20

p.1-2

2. The relevant statutory provisions are :

"Courts of Judicature Act, 1964

67. The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law

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regulating the terms and conditions upon which such appeals shall be brought.

68. (1) No appeal shall be brought to the Federal Court in any of the following cases:

.....

(d) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final."

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"ELECTION OFFENCES ORDINANCE, 1954

PART VII

ELECTION PETITIONS

33(1) Every election petition shall be tried by the Chief Justice or by a Judge of the High Court nominated by the Chief Justice for the purpose.....

(4) Unless otherwise ordered by the Chief Justice, all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the High Court.

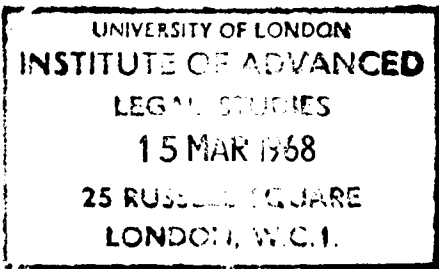
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36. At the conclusion of the trial of an election petition the Election Judge shall determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination -

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(a) to the Election Commission in the case of an election of a person to be a member of the Dewan Ra'ayat, a Legislative Assembly, the municipal council of the federal capital or of any other election that the Election Commission may be authorised to



conduct; or

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(b) in the case of any other election, to the Ruler or Governor of the State.

Upon such certificate being given such determination shall be final; and the return shall be confirmed or altered, or the Election Commission or the Ruler or Governor (as the case may be) shall within one month of such determination give notice of election in the constituency, electoral ward or electoral district concerned, as the case may require, in accordance with such certificate.

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42(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.

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SECOND SCHEDULE

1. These Rules may be cited as the Election Petition Rules, 1954.

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15. 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 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

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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."

- pp.1-2      3.    The Respondent presented a Petition, which was undated but was presented on the 29th June, 1964, whereby he stated that he was a person who had voted at the Election for the Bungsar Ward to the Dewan Ra'ayat held on the 25th April, 1964. The Petition stated that the Appellant had been one of the candidates, and the Returning Officer, by Notification 2234 in the Federal Government Gazette for the 11th June, 1964, had returned the Appellant as being duly elected. The Respondent alleged that the Appellant was at the time of his election a person disqualified for election by virtue of Article 47(b) of the Federal Constitution and Regulation 4(1) of the Election (Conduct of Elections) Regulations, 1959 in that the Appellant had not been at the time of his election a citizen of Malaysia. The Respondent prayed that it might be determined that the Appellant had not been duly elected or returned and that the election was void.      10
- p.2,11.18-28      4.    On the 29th June, 1964, the Petition was lodged with the Registrar of the High Court at Kuala Lumpur, in accordance with the Election Offences Ordinance, 1954. The Appellant did not (as he might have done under Rule 10 of the Election Petition Rules) leave with the Registrar any written appointment of an advocate or solicitor to act for him in case there should be a petition against him, nor did he give any address at which notices addressed to him might be left. On the 7th July, 1964 the Respondent's Solicitors filed with the Registrar of the High Court a notice of presentation of the Petition and of the deposit of security for costs. On the 6th August, 1964 the Appellant issued a summons for particulars of the Petition. This summons was heard by Ismail Khan, J. on the 17th August, 1964, and an order for the particulars was made by consent.      30
- p.3,11.1-15      40
- p.3
- p.7

5. On the 25th August, 1964, the Appellant issued a summons to strike out the Petition on the ground that notice of the presentation of the Petition had not within 10 days of its presentation been served by the Respondent on the Appellant as required by Rule 15 of the Election Petition Rules, 1954. The summons was accompanied by an affidavit sworn by the solicitor for the Appellant, in which he deposed that the Petition had been presented to the High Court on the 29th June, 1964, and notice of such presentation had been served on the Appellant by a notice (dated the 13th July, 1964) published in the Federal Government Gazette on the 23rd July, 1964. By reason of the failure of the Respondent to comply with Rule 15, it was submitted that the Petition was bad in law and should be struck off the file.

6. The summons to strike out was heard by Ismail Khan, J. in Chambers on the 28th August, 1964, and judgment was given in open Court on the 26th September 1964.

7. In his judgment, the learned Judge set out the history of the steps in the proceedings that had been taken so far, as described in the preceding paragraphs. He said that the application, to strike out the Petition on the ground that notice of the presentation of it had not been served on the Appellant within 10 days of its presentation as required under Rule 15, had been resisted by the Respondent on various grounds. The first two objections could be shortly disposed of since they were without merit. The first objection was that since the Appellant had failed to appoint an advocate and solicitor or to leave an address for service, the Respondent had only needed to leave the notice of presentation of the Petition with the Registrar and that this would be deemed good service. The learned Judge read Rule 15, and dismissed this objection on the ground that, where there had been a failure to appoint a solicitor or to leave an address for service, the only mode of service was publication in the Gazette. The Respondent had in fact adopted this mode of service when he had published his

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p.15, l.40-  
p.16, l.8

notice in the Gazette on the 23rd July, 1964. The second objection was that the period of 10 days stated in Rule 15 was only intended to apply to the service on solicitors for a respondent or to the posting of the notice to a respondent's address, and that there was no limitation of time as regards publication of a notice in the Gazette. The learned Judge held that such a construction was not warranted by the plain language of Rule 15, the first limb of which stated clearly the period within which service was to be effected, while the second limb merely set out the various methods of service which were open to a petitioner. 10

p.16, l.9-  
p.18, l.6

8. The last objection raised by the Respondent was that the failure to comply with the Rule 15 was a mere irregularity, which was validated by the Appellant, when he took a step in the proceedings by obtaining the order for particulars on the 17th August, 1964. The learned Judge considered two cases which had been cited by the Respondent. The first had no application, because it had been decided upon a particular provision of the Bankruptcy Ordinance. The second depended upon a rule under which a writ no longer in force could be renewed. In such cases, the Rules themselves permitted an enlargement of time, while in the present case the time for service was prescribed by Statute, and there was no provision for enlargement of time in the Election Petition Rules. No attempt had been made in the cases to define the difference between a nullity and an irregularity. In the present case, the learned Judge held that the absence of a notice of service was something more than a mere irregularity. The case most in point was Williams v The Mayor of Tenby (1879), 5 C.P.D. 135. That English case turned upon the construction of the Municipal Elections Act, 1872 s.13(4), which provision was similar to Rule 15. It had been held by the Court of Appeal in that case that the rule was peremptory, and the terms not complied with were a condition precedent to the Election Petition. The same principle applied in the present case, and the learned Judge therefore held that the provisions 20

p.18, l.6-  
p.19, l.30

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of Rule 15 were mandatory and the breach of them rendered the Petition a nullity. In the result he ordered that the Petition be struck out, and that the Respondent pay the costs.

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9. The Respondent appealed to the Federal Court of Malaysia. The appeal was heard by the Federal Court (Thomson, L.P., Barakbah, C.J. and Tan, J.) on the 3rd and 4th March, 1965. Judgment was given on the 13th May, 1965.

pp.21-24  
pp.24-42

10. In this judgment, Thomson, L.P. stated the facts of the case relevant to the appeal as they had been set out by the learned Judge below. He said that the learned Judge had taken the view that the provisions of Rule 15 were mandatory, and that failure to comply with that Rule was not a mere irregularity that was capable of being waived by the other party. The condition not having been fulfilled, the Petition had been struck out. The learned Lord President then considered in detail the provisions of the Election Offences Ordinance, 1954, and the Election Petition Rules, 1954. He continued that the jurisdiction to deal with election petitions created by the Ordinance was clearly vested in the High Court in Malaya and not in any specially created "Election Court". It had been argued that since the jurisdiction was vested in the High Court, the present case fell within the scope of Order 70 Rule 2 of the Rules of Court, which provided that no application to set aside any proceeding for irregularity should be allowed if the party applying had taken any fresh step after knowledge of the irregularity. If the present case had been any ordinary civil proceeding that argument would probably have been conclusive. It, however, overlooked the very special and distinctive nature of the jurisdiction with which the Court was concerned. Courts in England had pointed out that that jurisdiction did not deal with the rights and obligations of individuals, as in the ordinary civil jurisdiction, but with matters affecting on the one hand the integrity of the country's legislature and on the other the representation in that legislature of constituencies comprising many thousands of electors. The Malaysian

pp.42-43

p.43, 1.38  
- p.44, 1.4

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p.46,1.8 -  
p.48,1.9

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p.48,1.10 -  
p.49,1.41

Ordinance was based on the law in the United Kingdom, contained in sections 107 et seq. of the Representation of the People Act 1949. The learned Lord President then considered the history of the practice, and the authorities relating to the withdrawal and abating of election petitions, in England. He said the Malaysian legislation should be approached as having in view the same mischiefs, and that strongly supported the view that, under the local Ordinance, once an election petition had come into existence it could only be disposed of in some way which the legislation itself permitted. Any rules relating to the exercise of ordinary civil jurisdiction should be disregarded. The Ordinance made specific provisions for the disposal of a petition. It followed, in Thomson, L.P.'s view, that the trial Judge had no power to strike out the Petition for non compliance with the Rule 15, since there was nothing in the Ordinance or the rules which gave him power to do so. He thought the case of Williams v Tenby Corporation was an isolated case, which could be distinguished by reason of a difference of form between the United Kingdom Act of 1872 and the Local Ordinance. The appeal should accordingly be allowed with costs. 10

p.50-51

p.42,11.6-7

11. Barakbah, C.J. and Tan, J. agreed with this judgment. 20

pp.54-55

12. The Appellant was granted final leave to appeal to the Privy Council by the Federal Court on the 30th August, 1965. 30

13. The Appellant respectfully submits that the judgment of the Federal Court of Malaysia was given without jurisdiction and ought to be set aside. It is submitted that the whole of the procedure relating to the trial and disposal of election petitions is contained in the Ordinance of 1954, whereby a special jurisdiction was established for the purposes of election petitions. There is no provision in the Ordinance or in any other statute, for appeals from any decision at any stage at the trial of an election petition, and Section 36 provides that a determination upon a petition of the Election Judge shall be final. It is submitted that such 40



provision applies to any final decision made by the Election Judge at any time after an election petition has been presented. The jurisdiction of the Federal Court to entertain appeals is governed by statute, whereby it is specifically provided that if any written law expressly declares the judgment or order of a lower Court to be final, then there is no jurisdiction for any appeal to be brought before the Federal Court. Furthermore, the common practice of the countries (like Malaysia) deriving their electoral system, particularly the jurisdiction to deal with disputed elections, from that existing in the United Kingdom is to confer a particular jurisdiction upon a special tribunal, which is provided with the entire control over its proceedings. In the absence of any express provision for appeal, it is submitted that no appeal will lie from any decision of such a tribunal made at any stage of the trial of an election petition.

14. In the alternative, the Appellant respectfully submits that this appeal ought in any event to be allowed. It is respectfully submitted that the decision of the learned Election Judge was correct, and it was within his competence to strike out the Petition. The ground upon which the Federal Court allowed the Respondent's appeal was that there was no express provision in the Election Petition Rules to permit the Judge to strike out the Petition for breach of Rule 15. It is respectfully submitted that this approach is not correct and it is inherent in the jurisdiction of any Judge that he may strike out any proceedings for breach of a condition precedent to their validity. If such inherent jurisdiction did not exist, there would be no obligation upon any party to observe the Election Petition Rules, with their expressly provided time limits, in which event the purpose of the special jurisdiction would be defeated. It is submitted that this case is governed by the decision in Williams v. Tenby Corporation, which case cannot be distinguished either on the ground taken by the Federal Court or on any other ground. The provision of Rule 15 applicable in the present case is on all fours with the provisions held in that case to be conditions

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precedent, which had to be fulfilled before the Petition could be entertained.

15. The Appellant respectfully submits that his appeal should be allowed and that the judgment of the Federal Court of Malaysia should be set aside, with costs, for the following, among other

R E A S O N S

1. BECAUSE the Federal Court had no jurisdiction to entertain the appeal: 10
2. BECAUSE the judgment of Ismail Khan, J. was final, and no appeal lay from it:
3. BECAUSE the Respondent did not comply with Rule 15 of the Election Petition Rules:
4. BECAUSE the Election Petition was a nullity:
5. BECAUSE the learned Judge had jurisdiction to strike out the Election Petition: 20
6. BECAUSE of the other reasons given by Ismail Khan, J.

J.G. LE QUESNE

MERVYN HEALD

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C A S E

FOR THE APPELLANT

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E.C.4.

Solicitors for the Appellant.