

MUHAMMAD RASHID MUHAMMAD KASSIM
v.
IRMOHIZAM IBRAHIM & ORS AND ANOTHER APPEAL

High Court Malaya, Shah Alam

Zaleha Yusof J

[Election Petition Nos: 26PP-1-06/2013, 26PP-2-06/2013, 26PP-3-06/2013 & 26PP- 4-06/2013]

31 July 2013

Case(s) referred to:

Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) and Ors [2005] 1 MLRA 151; [2005] 3 MLJ 193; [2005] 2 CLJ 237 (refd)

Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No 1) [2000] 1 MLRH 356; [2000] 6 MLJ 98; [2000] 3 CLJ 519; [2000] 3 AMR 3419 (refd)

Dr Shafie Abu Bakar v. Pegawai Pengurus Pilihan Raya N26- Mohd Zakri Haji Hussin & Ors and Other Petition (No 2) [2004] 3 MLRH 450; [2005] 2 MLJ 149; [2005] 5 CLJ 349; [2005] 3 AMR 292 (refd)

Gan Joon Zin v. Fong Kui Lun & Ors [2004] 2 MLRA 273; [2004] 4 CLJ 729; [2004] 5 AMR 750 (refd)

Kho Lohai Phiaw v. Chong Chieng Jen [2008] 7 MLRH 85; [2009] 4 MLJ 103 (refd)

Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors [2010] 1 MLRH 552; [2010] 6 MLJ 363; [2010] 8 CLJ 608 (refd)

Muhammad Sanusi Md Nor v. Mohd Tajuddin Abdulah & Yang Lain [2008] 2 MLRA 451; [2009] 1 CLJ 1 (refd)

Legislation referred to:

Election Act 1958, ss 5(1), 9A

Election (Regulation of Elections) Regulations 2002, reg 12

Election Offences Act 1954, ss 2, 4, (a), (g), 10(a), 11(1)(b), 12, 26(1)(e)(iii), (1)(g), 32(a), (b), (c), 35

Election Offences (Amendment) Act 2002

Election Petition Rules 1954, rr 4(1)(b), (4), 9, 10, 15(1), (c), 34

Rules of Court 2012, O 18 r 19(1)(a), (b), (d)

Counsel:

For the petitioner (26PP-1-06/2013 (Petition No 1)): Nasar Khan Mirbas Khan (together with Muhammad Hawari Hanafi, Mohamed Hanipa Maidin, Ariff Azami Hussein, Ahmad Termizi Abdullah, Abang Ahmad Kerdee Abang Masagus and Noorazmir); M/s Mazwan & Nasar

For the 1st respondent (26PP-1-06/2013 (Petition No 1)): Datuk Mohd Hafarizam Harun (together with Wan Azmir Wan Majid, Norhazira Abu Haiyan, Fahmi Adilah, Mior Nor Haidir Suhaimi and Mohamad Reza Abu Hassan); M/s Hafarizam Wan & Aisha Mubarak



For the 2nd & 3rd respondent (26PP-1-06/2013 (Petition No 1)): Tuan Haji Effandi Nazila Abdullah, Fatnin Yusof and Normastura Ayub, Senior Federal Counsels with Federal Counsels Mona Shazwani Kamarul Zaman, Kogilambigai Muthusamy, Noor Nadira Noordin and Ismail Baharom @ Abdul Rahim and Cyntia Nor Hazean Sulaiman; Attorney General Chambers, Putrajaya

For the petitioner (26PP-2-06/2013 (Petition No 2)): Nasar Khan Mirbas Khan (with Muhammad Hawari Hanafi, Mohamed Hanipa Maidin, Ariff Azami Hussein, Ahmad Termizi Abdullah, Abang Ahmad Kerdee Abang Masagus and Noorazmir); M/s Mazwan & Nasar

For the 1st respondent (26PP-2-06/2013 (Petition No 2)): Datuk Mohd Hafarizam Harun together with Wan Azmir Wan Majid, Norhazira Abu Haiyan, Fahmi Adilah, Mior Nor Haidir Suhaimi dan Mohamad Reza Abu Hassan; M/s Hafarizam Wan & Aisha Mubarak

For the 2nd & 3rd respondent (26PP-2-06/2013 (Petition No 2)): Tuan Haji Effandi Nazila Abdullah, Fatnin Yusof and Normastura Ayub, Senior Federal Counsels with Federal Counsels Mona Shazwani Kamarul Zaman, Kogilambigai Muthusamy, Noor Nadira Noordin and Ismail Baharom @ Abdul Rahim and Cyntia Nor Hazean Sulaiman; Attorney General Chambers, Putrajaya

For the petitioner (26PP-3-06/2013 (Petition No 3)): Conrad Young Wye King together with Pek Chin Choo and Ng Siau Sun; M/s Govindasamy & Pek

For the 1st respondent (26PP-3-06/2013 (Petition No 3)): Datuk Mohd Hafarizam Harun together with Wan Azmir Wan Majid, Norhazira Abu Haiyan , Fahmi Adilah , Mior Nor Haidir Suhaimi dan Mohamad Reza Abu Hassan; M/s Hafarizam Wan & Aisha Mubarak

For the 2nd & 3rd respondent (26PP-3-06/2013 (Petition No 3)): Tuan Haji Effandi Nazila Abdullah, Fatnin Yusof and Normastura Ayub, Senior Federal Counsels with Federal Counsels Mona Shazwani Kamarul Zaman, Kogilambigai Muthusamy, Noor Nadira Noordin and Ismail Baharom @ Abdul Rahim; Attorney General Chambers, Putrajaya

For the petitioner (26PP-4-06/2013 (Petition No 4)): Wan Azmir Wan Majid, Norhazira Abu Haiyan , Fahmi Adilah , Mior Nor Haidir Suhaimi; M/s Hafarizam Wan & Aisha Mubarak

For the 1 & 2nd respondent (26PP-4-06/2013 (Petition No 4)): Tuan Haji Effandi Nazila Abdullah, Fatnin Yusof and Normastura Ayub, Senior Federal Counsels with Federal Counsels Mona Shazwani Kamarul Zaman, Kogilambigai Muthusamy, Noor Nadira Noordin and Ismail Baharom @ Abdul Rahim and Cyntia Nor Hazean Sulaiman; Attorney General Chambers, Putrajaya

For the 3rd respondent (26PP-4-06/2013 (Petition No 4)): Nasar Khan Mirbas Khan together with Muhammad Hawari Hanafi, Mohamed Hanipa Maidin, Ahmad Termizi Abdullah and Abang Ahmad Kerdee Abang Masagus; M/s Mazwan & Nasar

[Strike all out.]

GROUND OF JUDGMENT

Zaleha Yusof J:

[1] There are four (4) election petitions before me. They are 26PP-1-06/213, 26PP-2.06/2013, 26PP-3-06/2013 and 26PP-4-06/2013 and I shall deal with



26PP-3-06/2013 first.

26PP-3-06/2013 (Petition No 3)

[2] I wish to deal with this petition first as this was fixed for hearing earlier than the rest ie 25 July 2013 while the other petitions were fixed on 26 July 2013.

[3] However, on the date of hearing on 25 July 2013, Datuk Hafarizam for the 1st respondent had raised a preliminary objection (po) on the appointment of Mr Conrad Young Wye King and Miss Ng Siau Sun as advocates for the petitioner as it was allegedly contrary to r 9 read together with r 34 of the Election Petition Rules 1954 (EPR) which requires the petitioner to leave at the office of Registrar the name of an advocate whom the petitioner authorises to act as his advocate, when filing his petition. The only name which the petitioner left with the petition was of Miss Pek Chin Choo. Hence, he argued that Mr Conrad Young and Miss Ng had no locus standi to appear for the petitioner. Datuk Hafarizam cited the decision of the election court in Petisyen Pilihanraya Negeri Kelantan No 26PP-5-06/2013 between Wan Zawawi Ismail v. Ahmad Jazlan Yaakub and 2 Others wherein En Sivarasah, Pn Latheefa Koya and En Mohammad Afiq were not allowed by the election judge to represent the petitioner on the ground that r 9 and r 34 had not been complied with. This argument of Datuk Hafarizam was supported by Tuan Haji Effandi Nazila, Senior Federal Counsel for the 2nd and 3rd respondents.

[4] As she was not informed of the po earlier, Miss Pek had asked the court to adjourn till the next day for her to prepare to answer the p.o. I allowed the request and this petition No 3 was then fixed to be heard on the same day with the other petitions ie on 26 July 2013.

[5] On 26 July 2013, Miss Pek argued that r 9 of the EPR does not state the filing of the petition is the only time the petitioner can appoint an advocate. The rr do not restrict the appointment of further advocate by the petitioner. She argued that r 34 is of general application and governs all appointments of advocates by any parties, so if a petitioner wishes to add to his team of advocate, r 34 is the r to use. Rule 34 can be utilized by either the petitioner or respondent as it does not specify its applicability to only one party. She said, Wan Zawawi Ismail's case can be distinguished as there was no notice of appointment under r 34 of Mr Sivarasah. Whereas in the instance, notice of appointment under r 34 of Mr Conrad Young and Miss Ng Siau Sun was filed on 23 July 2013, before the hearing of 25 July 2013 as shown in encl 22.

[6] Tuan Haji Effandi, SFC argued that the petitioner can only use r 9 read together with r 34, while the use of r 34 is solely applicable to the respondent only as r 10 which provided for appointment of an advocate by the respondent had been deleted by Act A1177. Miss Kogilambigai, Federal Counsel argued further that the words "with the petition" in r 9 show that the petitioner can only appoint an advocate at the time of filing the petition.

[7] Datuk Hafarizam argued that the petitioner cannot have r 34 without r 9.



While for respondent the only requirement is r 34.

[8] In reply, Miss Pek argued that r 9 governs the procedure on what document the petition has to file and how. It does not say that later on he cannot add additional counsel to his team of counsels. Rules 9 and 34 cannot be read in the manner that only respondent can appoint additional counsel when he sees fit but the petitioner cannot do so.

[9] To me, the issue here is whether a petitioner can appoint additional counsel after the appointment under r 9. After considering the arguments put forth by the parties, I agree with the submission of the learned counsel for the petitioner and would answer the issue in the affirmative. I opine, the rr are there for a purpose. To my mind, it is ridiculous to say that the petitioner can only appoint those lawyers named when he files a petition and cannot do so when he feels a need to appoint additional one. So, what is the purpose of r 34 then? It cannot be said that r 34 is to cater for the respondents only. Rule 34 was already there before the deletion of r 10. That means, r 34 was and is still meant to be used by all parties. The old r 10 talked about naming an advocate after a person is returned, without having to wait for a petition to be filed against him. I am of the view that the old provision of r 10 did not serve any purpose but a waste of money because not every election result would end up with a petition and to appoint an advocate means one needs to spend money unnecessarily. Hence the deletion of r 10 cannot be used to support the argument that r 34 is only meant for respondents.

[10] It is my opinion that r 34 of the EPR can be used by all parties to the petition. To restrict the petitioner from using r 34 to appoint additional counsel is like denying him of his right to legal counsel.

[11] Hence, I disallow the po on the appointment of Mr Conrad Young and Miss Ng Siau Sun.

[12] Now on the petition proper, before I start, I must stress that I bear in mind there are many decided cases which held that an election petition requires strict compliance of the law. Among the many authorities is the decision of the Federal Court in *Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No 1)* [2000] 1 MLRH 356; [2000] 6 MLJ 98; [2000] 3 CLJ 519; [2000] 3 AMR 3419.

[13] On this petition, the 1st respondent filed an application to strike out the petition under O 18 r 19 (1)(a), (b) and (d) of the Rules of Court 2012. The 1st argument put forth was that defective petition was served on the 1st respondent and the complete set was filed out of time and without court leave.

[14] The 1st respondent contended that the sealed petition which was served on him did not contain p 10. However, I find that, it is a fact, which the court's officer had admitted, that the missing p 10 was inadvertently omitted when the court scanned the petition manually into the computer system for the purpose of e-filing. As a result, the sealed petition extracted from court was without p 10. This had been explained in the petitioner's affidavit and during the case



management before me in the presence of the Senior Assistant Registrar.

[15] To me, this is a technical error and the petition cannot be thrown out just because of this. As far as the petition is concerned, on the part of the petitioner, it has been filed within the prescribed time. The error was not the petitioner's error and it had been rectified and the full set was served on the respondents subsequently. Enclosure 8 shows the manner the petition was served and to me it has definitely complied with r 15(1) of the EPR. Even r 15(1)(c) provides that the respondents can apply for a copy of the petition from the Registrar. Hence, I do not see how the respondents would be prejudiced in this instant case.

[16] Next argument put forward by the 1st respondent was that since all the complaints in the petition are directed to the 2nd and 3rd respondents; then there is no cause of action shown against the 1st respondent and therefore the petition ought to be struck out as against the 1st respondent. However, the learned counsel for the petitioner argued that one of the reliefs sought is that the 1st respondent had not been properly elected. Therefore it is only right for the 1st respondent to be cited as a party. I agree with this argument. The 1st respondent's position would be affected if the court were to allow the petition, hence, just like in any other civil proceeding, the 1st respondent needs to be cited as a party and to argue against the petition.

[17] But that is not the only objection raised by the 1st respondent. All the respondents including the 2nd and 3rd respondents had raised the following objections:

a) That the petitioner has failed to comply with the requirement of r 4(1)(b) of the EPR and has failed to satisfy the requirement of s 32(b) of the Election Offences Act 1954 (EOA); and

b) That the complaint in para 4 of the petition is an abuse of court process as it contradicts s 9A of the Election Act 1958.

[18] The petitioner had complained that there were inconsistencies between the result gazetted on 22 May 2013 and the total unreturned votes recorded in Form 14 made available to the petitioner and certified by the presiding officer and this is said to be contrary to s 4(a) of the EOA read together with its s 32(b). If we read s 32(b), the grounds for avoiding election under s 32(b) is non-compliance with written law relating to the conduct of election. However s 4(a) is an offence s and not about conduct of election. The only ground for avoiding election in the event of commission of offences is under s 32(a) and s 32(c) of the EOA, which obviously to me do not include offences under s 4(a).

[19] Rule 4(1)(b) of the EPR requires the petitioner to state the facts and grounds relied on to sustain the prayer. Looking at the facts and the grounds in this petition, there is no nexus between the offence said to have been committed under s 4(a) and s 32(b). I therefore agree with the respondents' submission that on this complaint of the petition, the petitioner has failed to satisfy r 4(1)(b) of the EPR and has also failed to satisfy the requirement of s



32(b) of the EOA. Refer to *Dr Shafie Abu Bakar v. Pegawai Pengurus Pilihan Raya N26- Mohd Zakri Haji Hussin & Ors and Other Petition (No 2)* [2004] 3 MLRH 450; [2005] 2 MLJ 149; [2005] 5 CLJ 349; [2005] 3 AMR 292 and also *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) and Ors* [2005] 1 MLRA 151; [2005] 3 MLJ 193; [2005] 2 CLJ 237.

[20] The petitioner also complained of the misuse and manipulation on the part of the 2nd and 3rd respondents which resulted in the failure of the usage of indelible ink. On this issue of the indelible ink, although there is wide allegation of it being misused or abused or manipulated, but what is important, the petition itself has not shown for example, that as a result, there are voters who had voted more than once or that those voters had voted for the 1st respondent or that the 2nd respondent had won because of those votes. Again, here, I agree with the respondents' submissions that r 4(1) (b) of the EPR and s 32(b) of the EOA have not been satisfied as the petitioner had failed to plead detail particulars and show how those if proved will affect the result of the election. Refer to the Federal Court decision in *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) and Ors* [2005] 1 MLRA 151; [2005] 3 MLJ 193; [2005] 2 CLJ 237.

[21] Next was the argument on s 9A of the Elections Act 1958, which talks about the electoral roll being final and binding once certified and published and shall not be quashed and questioned by any court. It is the petitioner's argument that he is not challenging the validity of the electoral roll but the transfer of votes without the voters' knowledge and without any application by the voters which is in violation of r 12 of the Election (Regulations of Election) Regulations 2002.

[22] On this issue, I would like to quote the Federal Court decision in *Muhammad Sanusi Md Nor v. Mohd Tajuddin Abdulah & Yang Lain* [2008] 2 MLRA 451; [2009] 1 CLJ 1, which had also referred inter alia to the said r 12 and concluded at p 8 as follows:

"samalah juga keadaannya dengan kecuaian, kesilapan dan ketidakpatuhan Ketiga kepada peruntukan tersebut. Ianya tidak sama sekali menyentuh cara pilihan raya itu dikendalikan"

[23] Hence, following the said case, the non-compliance of the said r 12 does not in any way touch the conduct of the election nor affect the election result. Clearly, s 32(b) of the EOA has not been satisfied.

[24] After considering submissions of the petitioner as well as of the respondents, based on the above, I am of the view that there are sufficient reasons for the whole petition to be struck out with cost.

26PP-1-06/2013 (Petition No 1)

[25] In this petition, the 1st respondent had also filed an application under O 18 r 19(1) (a), (b) and (d) of the Rules of Court 2012 to strike out the petition and the 2nd and 3rd respondents had also lodged preliminary objection against



the petition.

[26] Like in petition No 3, the first objection raised is on the missing page (p 24) in the petition when it was served on the respondents making it defective and that the complete set was filed out of time and without court leave. On this, I adopt my decision in petition No 3 and of the view that this objection lacks merit.

[27] The first complaint in the petition by the petitioner is that of bribery allegedly committed by the 1st respondent which is said to be contrary to s 10(a) read together with s 32(c) of the EOA.

[28] The second complaint is offences committed in making false statement in Form 14 by the election officers which is said to be contrary to s 4(a) of the EOA read together with s 32(b) of the same Act.

[29] The petition is also grounded on the alleged failure to deliver the Form 14 to the counting agent which allegedly contravenes s 4(g) of the EOA and therefore void under s 32(b) of the same Act.

[30] The petitioner also alleged that the 1st respondent had persuaded voters to vote for the 1st respondent. The petitioner also complained against the alleged failure of the 2nd respondent to ensure that the 1st respondent did not breach s 26(1)(e)(iii) and 26(1)(g) of the EOA, resulting in the breach of s 4(g) of the EOA and s 5(1) of the Elections Act and therefore void under s 32(b).

[31] The objection raised by the 1st respondent against the first complaint is that the charge is bad as it does not include s 11(1)(b) of the EOA. To this, I agree, as to avoid election under s 32(c), one must show corrupt practice. Section 10 alone is not sufficient as it only defines the act of "bribery" but s 11(1)(b) is the one which makes bribery a corrupt practice. Therefore the charge of corrupt practice under s 32(c) is bad if s 11(1)(b) is not cited. As decided by the election court in *Kho Lohai Phiaw v. Chong Chieng Jen* [2008] 7 MLRH 85; [2009] 4 MLJ 103, all the sections ie s 10, s 11(1)(b) and s 32(c) must be cited, which the petitioner had failed to do so in the instance.

[32] Further, the petition had named two persons as agents of the 1st respondent ie Sivasubramaniam Letchmanan and Umi Kalsum Idris as the 1st respondent's agent who had committed the alleged act of bribery. Section 32(c) requires corrupt practice to be committed with the 1st respondent's knowledge or by his agent. There is no mention in the petition that this was done with the 1st respondent's knowledge and there is also no fact to show how these two persons were made agents of the 1st respondent. Election agent is defined in s 2 of the EOA as persons appointed under s 12 of the same. There is no mention of this appointment in the petition. Therefore, even it is true that these two persons had committed the alleged act of bribery, the petitioner has failed to show any linkage between them and the 1st respondent.

[33] On the second complaint, making false statement in Form 14, the objection is that there are no sufficient facts to constitute a cause of action



under s 32(b) of the EOA as required by r 4(b) of the EPR as s 4(a) has nothing to do with conduct of election but an offence section. Here again, I adopt my decision in case No 3 and therefore agree with the objection raised by the respondents.

[34] The same goes to the objection on the third complaint in the petition which concerns another offences ie s 4(g) which has nothing to do with conduct of election under s 32(b) of the EOA. The same argument in para 33 above is adopted. Although here, the petitioner did make reference to reg 25 (12)(b) of Election (Conduct of Elections) Regulation 1981, the basis of the complaint was alleged contravention of s 4(g) which resulting in the alleged breach of s 32(b) of the EOA. Hence, I opine there is no merit in the complaint.

[35] The same argument is also used for the objection on the complaint that the 2nd respondent had failed to ensure the 1st respondent did not breach s 26(1)(e)(iii) and 26(1)(g) of the EOA as the same s 4(g) and s 32(b) of the EOA were used as the basis of the complaint. Although s 5(1) of the Election Act was also cited, but I agree with the 1st respondent that s 5(1) is not a written law on the conduct of the election sbut relates to powers and duties of the Election Commissioner.

[36] Again, after considering submissions of the petitioner as well as of the respondents, based on the above, I allow the 1st respondent's application and the 2nd and 3rd respondents' preliminary objection. The 1st petition is therefore struck out with cost.

26PP-2-06/2013 (Petition No 2)

[37] Again, the 1st respondent had filed an application under O 18 r 19(1)(a), (b), (d) of the Rules of Court 2012 and the 2nd and 3rd respondents had raised preliminary objection. The first objection here by the 1st respondent is that notice of presentation of petition is defective as it's last paragraph states the said petition may be obtained by the respondent on application at the office of Registrar. On this, I am of the view that, the EPR do not provide for any special form for notice of presentation of petition. In any event, the notice had been properly served on the respondent as shown in encl 12 and no prejudice had been shown to have caused by the said notice. Hence, I am of the view that this objection cannot hold water. See *Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors* [2010] 1 MLRH 552; [2010] 6 MLJ 363; [2010] 8 CLJ 608.

[38] The common grounds of objections by all respondents are as follows:-

[1] The petitioner relies on s 4(g) of the EOA and consequently 32(b) EOA by stating that the Presiding Officers of the 2nd and 3rd respondent are guilty under that s as they had failed to ensure the total number of ballot papers into the ballot box did not exceed the total number of voters who casted their votes when they failed to ensure each voter was only given one ballot paper as provided under reg 19(1)



of the Election (Conduct of Elections) Regulations 1981 and to ensure there was no breach of s 3(1)(g) of the EOA.

[2] The petitioner relies on ss 4(a) and 32(b) EOA as the Presiding Officers of the 2nd and 3rd respondents in certifying total of votes obtained by each candidate prepared a statement in Form 14 as required under reg 25(12) (b) of the Election (Conduct of Elections) Regulations which they allegedly had reasonable cause to believe not to be true.

[3] In its intitulement, the petitioner also refers to s 32(c). However, nothing in the content of the petition makes any reference to this s and facts and grounds relied on as required under r 4(1) (b) and 4(4) of EPR.

[39] The same arguments were raised by the respondents that the petitioner had failed to satisfy r 4(b) of the EPR and the requirement of s 32(b) of the EOA. As I have stated earlier, ss 4(a) and 4(g) of the EOA cited by the petitioner in his complaints have nothing to do with conduct of election. They are provisions on offences. We must always bear in mind that the operating words of s 32(b) are "non compliance of written law relating to conduct of elections". Further looking at the petition, I am of the view that the petitioner had also failed to show how the alleged non compliance by the Presiding Officer of the 2nd and 3rd respondents had affected the result of the election or the success of one candidate over the other as provided in s 32(b). Refer to the Federal Court in *Dato Ismail Kamus' case (supra)*. Hence, I adopt my decision in Petition No 3 and Petition No 1 and allow the 1st respondent's application and the 2nd and 3rd respondent's preliminary objection. I agree that s 32(c) in the intitulement of the petition is not relevant as there is no evidence of corrupt or illegal practice were adduced in the petition. This petition is therefore struck out with cost.

26PP-04-06/2013 (Petition No 4)

[40] For this petition, the respondents were not the only ones who had raised po, but the petitioner had also raised an objection ie that the po raised by the respondents was void and defective as the po was made by way of letters and did not specify under which provisions of the Rules of Courts 2012 the po was made; and that a Notice of Application supported by an affidavit should have been filed instead.

[41] So the first issue that I need to consider is whether this court has the power to strike out an election petition by way of a po? On this issue, I agree with the respondents that it is not necessary for the respondents to file a Notice of Application in order to strike out an election petition. It is sufficient for the respondents to raise their po by way of letters as had been done here and for the parties to argue based on the po and the petition, and the court has the power to strike out or not to strike out the petition based on the po. On this issue, I rely and agree with the decision of the learned Azahar Mohamad J (as he then was) in the case cited by the 1st and 2nd respondents, namely *Mohd*



Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors (Supra) [2010] 1 MLRH 552; [2010] 6 MLJ 363; [2010] 8 CLJ 608.

[42] Now on the po raised by the respondents to strike out this petition. All the respondents had raised the following objections against complaints made in the petition:-

i. The petitioner in the petition was questioning the rejection of ballot papers which were stained with indelible ink by the presiding officer and/or his agent. The respondent in their po argued that s 41 of the EOA provides that the decision of a returning officer or presiding officer, whether or not a ballot paper shall be rejected, shall not be questioned. However, the petitioner argued that the po was without merit because nothing in reg 25(7) of the Elections (Conduct of Elections) Regulations 1981 which allows rejection of ballot papers on the ground that they were stained with indelible ink. The said Regulations 25(7) allows only the following ballot paper to be rejected ie ballot paper:-

- a. which is not stamped or perforated with the official mark, or initialled by the presiding officer;
- b. on which votes are given for more than one candidate;
- c. on which anything is written or marked by which the voter can be identified;
- d. which is unmarked or marked other than in the place or manner provided; or
- e. which does not clearly indicate the intention of the voter.

Therefore the petitioner argued that the said rejection is an issue of law to be decided by this court in a full hearing.

I am of the opinion that if it is indeed an issue of law, it needs not go for full trial because issue of law can always be argued based on the provision of the law. What with the clear provision of s 41 of the EOA which prohibits an election petition from questioning the decision of the returning or presiding officer for rejecting a ballot paper. It must also be born in mind that it is trite law that provisions of an Act supersedes provisions of a subsidiary legislation such as the impugned Regulations. Further, reg 25(10) of the said Regulations also clearly stipulates that the decision of the presiding officer, whether or not any ballot paper shall be rejected, shall be final. Therefore I agree with the respondents and of the view that the law is clear, that the rejection of a ballot paper by the returning or presiding officer cannot be challenged.

ii. The respondents further contended that the petitioner in complaining that the 1st and 2nd respondents had breached the



provision of s 32(b) of the EOA and reg 25(7) and (10) of the Elections (Conduct of Elections) Regulations 1981, had failed to state concise facts and grounds of his complaints as required by s 32(b) of the EOA read with rr 4(1)(b) and 4(4) of the EPR. On this issue, I totally agree with the respondents as it is clear that the facts stated in the petition are too general. As submitted by the learned counsel for the 3rd respondent, how many ballot papers were rejected, the stream at which it happened, in which ballot box and whether there was any objection raised by the petitioner; all these were not stated concisely by the petitioner. These to me are material facts which need to be pleaded in order to comply with rr 4(1)(b) and 4(4) of the EPR. I also adopt the reasoning used in para 20 above.

iii. The respondents also objected to the 1st relief prayed for in the petition ie for a declaration that the counting of votes and totalling of ballot papers at polling stations in Parliament P 113 Sepang held on 5th May 2013 was null and void; and according to the 1st and 2nd respondents, the 4th relief as well ie for confirmation and direction under s 36 of the EOA; as those reliefs are not provided for by s 35 of the EOA.

The said s 35 provides as follows:-

" 35. Relief which may be claimed All or any of the following reliefs to which the petitioner may be entitled may be claimed in an election petition:

- (a) a declaration that the election is void;
- (b) a declaration that the person was not duly elected or ought not to have been returned;
- (c) (Deleted by Act A1177)
- (d) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny."

[43] Upon scrutinizing the said s 35, I agree with the respondents that those reliefs No 1 and 4 are clearly not provided for by s 35.

[44] Apart from those po, on the part of the 3rd respondent, the following po had also been raised.

- i. Failure on the part of the petitioner to serve the petition on the 3rd respondent in accordance with r 15(1)(a) or (b) of the EPR.

I had perused the file and found in encl 9 there was an affidavit of service which shows that the petitioner had served the said notice and petition together with a covering letter on the 3rd respondent with his instructions through a telephone conversations on 19 June 2013, to



leave the said notice and petition at his office and was acknowledged by his office; and that the petitioner had also sent the same by AR Registered post to the 3rd respondent's business address. Hence, I am of the opinion that this objection has no merit.

ii. The next objection was that failure on the part of the petitioner to leave two copies of the petition at the Registrar's office for them to be included in the file. Again, to me, this objection is without merit because there are indeed two copies of the petition in the court file.

iii. The 3rd respondent also contended that the petitioner had failed to plead sufficient facts under s 32(b) of the EOA. This is in respect of the 1st complaint in the petition ie the alleged failure on the part of the 1st and 2nd respondents in determining the standard to be used to determine spoilt votes caused by stain of indelible ink on the ballot papers. On this issue, I totally agree with the 3rd respondent that the petitioner had failed to plead what was the written law involved and that the non compliance of such written law had affected the result of the election as required by the said s 32(b).

[45] To sum up, as far as this petition No 4 is concerned, after considering submissions made by the petitioner as well as the respondents, I am also of the view that there are sufficient grounds as stated earlier for me to strike it out for non compliance of the mandatory provisions of the election law; with cost.

Conclusion

[46] An election court has the power to strike out any election petition based on preliminary objections if it is shown that the petition does not comply with the mandatory provisions of the election laws. On this I would like to quote the learned Abdul Hamid Mohamad FCJ (as he then was) in *Gan Joon Zin v. Fong Kui Lun & Ors* [2004] 2 MLRA 273; [2004] 4 CLJ 729; [2004] 5 AMR 750 at pp 742 to 743 as follows:-

" After hearing submissions on the preliminary objections, the learned judge held that the said petition was defective as the mandatory requirements were not met. As such the said petition was struck out with costs.

We do not think that it can now be argued that an Election Judge has no power to strike out an election petition but must go through the whole process of trial and make a determination at the conclusion of the trial. We have seen that it had been the practice of Election Judges in this country ever since the law on elections were introduced in this country to strike out election petitions in appropriate cases. The observation by the Privy Council in *Devan Nair (supra)* is very clear."

[47] Election laws require strict compliance. For eg, you cannot simply marry s 32(b) of the EOA with offences under s 4 when that s has nothing to with conduct of election. On top of that under s 32(b) it must also be proven that



the breach of such written law has affected the result of the election. It must also be born in mind that not all commission of offences can be ground for avoiding offences. The offences have to be the one mentioned in ss 32(a) and 32 (c) of the EOA.

[48] Hence a petitioner has to be careful when drafting his petition. As the court cannot allow a flawed petition to go for trial. As pointed out in the case of *Gan Joon Zin (Supra)*, the practice of striking out election petitions in appropriate cases is not new. As strict compliance is essential, it is the court's role to look at whether the requirement of the law has been adhered to. There are fundamental non compliance of the mandatory provisions of the election law in all the four petitions in the instance and I therefore have no alternative but to strike them all out.

