[IN THE PRIVY COUNCIL]

1954 *Present :* **The Lord Chancellor, Lord Cohen and Mr. L. M. D. de Silva**

E. L. SENANAYAKE, Appellant, *and* H. M. NAVARATNE *et al.*, Respondents

PRIVY COUNCIL APPEAL NO. 17 OF 1954

Election Petition 3 of 1952, Kandy

Privy Council—Election petition—Appeal to Supreme Court—Decision of Supreme Court is final —No appeal to Privy Council—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82, 82A–D, as amended by Act No. 19 of 1948.

Where a party who is dissatisfied with the determination of an election judge prefers an appeal to the Supreme Court on questions of law under section 82A of the Parliamentary Elections Order in Council, no appeal will be entertained by the Privy Council from the decision of the Supreme Court, even if the jurisdiction of the election judge to deal with the subject-matter at issue is challenged.

"The peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in Parliament of the constituency affected make it clear that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown."

APPEAL from a judgment of the Supreme Court reported in (*1953*) *55 N. L. R. 193.*

Sir Hartley Shawcross, Q.C., with *Kenneth Diplock, Q.C., R. K. Handoo* and *Walter Jayawardene*, for the appellant.

S. Nadesan, with *Sirimevan Amerasinghe* and *P. B. Tampoe*, for the respondent.

Cur. adv. vult.

June 21, 1954. [*Delivered by* THE LORD CHANCELLOR]—

The Supreme Court of Ceylon by judgment dated the 18th December, 1953, affirmed by a majority an Order of the election judge (de Silva P.J.) dated the 13th February, 1953, determining that the appellant's election to the House of Representatives, Ceylon, as the member for the Kandy Electoral District was void.

The election judge found that the appellant had committed two corrupt practices. The Supreme Court reversed his decision on one of them but affirmed his determination that the election was void on the ground that the appellant in breach of para. (*f*) of section 58 of the Ceylon (Parliamentary Elections) Order-in-Council 1946 had knowingly made the declaration as to election expenses required by section 70 of the Order-in-Council falsely.

Before the Supreme Court the appellant argued that the determination of the election judge ought to be reversed on two grounds: (1) that there was not evidence to support the finding of the election judge; (2) that he had no jurisdiction to hear the Petition since, although the Petition had been presented in accordance with section 83 (1) of the Order-in-Council, the application for leave to amend the Petition by alleging a false declaration as to election expenses had not been made within twenty-one days of the date on which the result of the election had been published in the *Government Gazette* in accordance with section 50.

The Supreme Court rejected both pleas, the second by a majority on the ground that the case fell within the proviso to section 83 (1), the original Petition (which raised other charges of corrupt practices) having been presented within the specified period of twenty-one days and the amendment raising the charge now in question having been made within twenty-eight days after the transmission to the returning officer of the allegedly false return of election expenses.

The appellant applied to this Board for leave to appeal from this decision. The respondents did not appear on the hearing of the Petition but the appellant's counsel very properly called the Board's attention to certain authorities which raised a doubt whether the Appeal could be entertained having regard to the subject-matter, the validity of a Parliamentary Election with which it dealt. Leave was granted on the 10th February, 1954, but "without prejudice to the right of the Attorney-General of Ceylon or the respondents to argue the question as to the jurisdiction of the Lords of the Committee to entertain the Appeal".

The Case lodged on behalf of the respondents contained no reference to the question thus reserved, but the respondents shortly before the hearing gave notice of their intention to raise it, and it was argued before their Lordships as a preliminary point.

Having regard to the conclusion which their Lordships have reached thereon, it will not be necessary to set out in great detail the provisions of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or Acts of the Ceylon Legislature amending the same but it will be convenient to refer to a few sections which may throw some light on the preliminary point.

Section 81 of the Order-in-Council in its original form was as follows:—

> "At the conclusion of the trial of an election petition the election judge shall determine whether the Member 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 to the Governor. Upon such certificate being given, such determination shall be final; and the return shall be confirmed or altered, or the Governor shall within one month of such determination by notice in the *Government Gazette* order the holding of an election in the electoral district concerned, as the case may require, in accordance with such certificate."

By section 82 (1) of the Order-in-Council the election judge was also required to report in writing to the Governor whether any corrupt or illegal practice had or had not been committed by or with the knowledge

of any candidate at the election or by his agent and by section 82 (3) when an election judge reported that a corrupt or illegal practice had been committed by any person, that person was to be submitted to the same incapacities as if at the date of the said report he had been convicted of that practice pursuant to section 58 of the Order-in-Council.

Sections 81 and 82 of the Order-in-Council were repealed by section 3 of the Parliamentary Elections (Amendment) Act, No. 19 of 1948, and new sections 81, 82, 82A, 82B, 82C and 82D were substituted therefor. Their Lordships need not set out the new sections in full. Suffice it to say that they confer a right of appeal to the Supreme Court on a person dissatisfied with the determination of an election judge on a question of law but not otherwise. The Appeal has to be presented before the expiry of a period of one month next succeeding the date of the determination against which the Appeal is preferred. Section 82B (3) provides that the decision of the Supreme Court is to be final and conclusive.

A right of appeal from a determination of the election judge having been given the provisions in the original section 81 directed to securing an early election to fill any vacancy created by the determination had to be modified, but the substituted sections 82C and 82D contain provisions securing that the Governor-General shall direct the holding of a new election within one month after receiving notice of the final determination that an election was void.

In support of his preliminary point Mr. Nadesan for the respondents relied on three decisions of this Board, *Theberge v. Laudry* [1], *Strickland v. Grima* [2], and *de Silva v. Attorney-General* [3]. In *Theberge v. Laudry* (supra) their Lordships were considering a petition for leave to appeal from a decision of the Superior Court of Quebec declaring the appellant's election to the House of Assembly void on the ground of corrupt practices. The Jurisdiction of the Superior Court in election matters had been established by the Quebec Controverted Elections Act (38 Vict. c. 8 Quebec Statutes) which had transferred to the Superior Court a jurisdiction previously exercised by the Assembly itself and which contained a provision that the Judgment of the Superior Court in such cases should not be susceptible of appeal. Refusing leave to appeal Lord Cairns delivering the judgment of the Board said :

> "Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words ; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights ; they are Acts creating an entirely new, and up to that time unknown.

[1] *(1876) 2 A. C. 102.* [2] *(1930) A. C. 285.*

[3] *(1949) 50 N. L. R. 481.*

jurisdiction, in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known. "

In *Strickland v. Grima* (supra) a similar issue arose as to the constitution of the Senate of Malta. Leave to appeal had been granted but the question of their Lordships' jurisdiction was raised at the hearing of the appeal. Lord Blanesburgh delivering the judgment of the Board said :—

" Although special leave to appeal had been granted by His Majesty in Council it was recognised that it was not thereby intended that the Board, with all the facts before it, should be precluded from reconsidering whether the appeal was competent. "

The statutory provisions as to the composition of the Senate were complicated and it is sufficient for present purposes to say that letters patent governing the matter contained a provision in these terms :—

" All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by our Court of Appeal in Malta. "

Their Lordships applying *Theberge v. Laudry* (supra) held that upon the construction of the letters patent an appeal would not lie and accordingly refused further to entertain the appeal.

In *de Silva v. Attorney-General* (supra) their Lordships were considering an application for leave to appeal from a determination of the election judge under the original section 81 of the Order-in-Council now before their Lordships. The determination had been given before the passing of Act No. 19 of 1948 and there was therefore no right of appeal to the Supreme Court. Their Lordships advised Her Majesty to refuse leave to appeal. Delivering the judgment of the Board, Lord Simonds after referring to *Theberge v. Laudry* (supra) continued :—

" It is no doubt true, as counsel for the petitioner urged, that the prerogative right to entertain an appeal is ' taken away only by express words or the necessary intendment of a statute or other equivalent act of state ' (see *Renouf v. A. G.* (1936) A.C. 445 at 460) but as was pointed out in *Theberge v. Laudry*, the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case as in that it appears to their Lordships that the peculiar nature of the

jurisdiction demands that this question should be answered in the negative. It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election judge to hear election petitions is not substituted for that of the legislative body itself but is created *de novo* upon the establishment of that body. But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of *Strickland v. Grima*. Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submited to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted. "

Since *de Silva v. Attorney-General* was decided, the Ceylon Order-in-Council has been amended by allowing an appeal to the Supreme Court on questions of law but their Lordships cannot regard that amendment as effecting the application to the present case of the principle laid down in the cases cited.

In none of these cases was the jurisdiction of the tribunal to deal with the subject-matter at issue challenged whereas in the present case Sir Hartley Shawcross on behalf of the appellant seeks to challenge the jurisdiction of the election judge on the second ground raised by the appellant before the Supreme Court, namely, that the application for leave to amend the petition was not made within twenty-one days after the publication of the result of the election in the *Government Gazette*.

The jurisdiction of the election judge being challenged the Judicial Committee, so the argument ran, must have jurisdiction to determine whether his Order was a nullity.

In support of this argument he relied on the observations of Viscount Simon L.C. in *Nawaz v. King-Emperor* [1] where, dealing with the question of the class of criminal cases in which the Judicial Committee will give leave to appeal, he said at p. 128: "Another and obvious example would arise if the Courts had no jurisdiction either to try the crime, or to pass the sentence". But in that case their Lordships were considering not whether an appeal to the Judicial Committee was competent but whether in a class of cases in which admittedly an appeal was competent their Lordships should in their discretion grant leave to appeal. Here as was pointed out in *de Silva v. Attorney-General* (supra) their Lordships are dealing with "the peliminary question whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown".

Sir Hartley Shawcross mainly relied, however, on some observations of Lord Esher in *R. v. Commissioners for Special Purposes of The Income*

[1] *L. R. 68 I. A. 126.*

Tax [1] where Lord Esher was dealing with the powers which an Act of Parliament may confer on an inferior court or tribunal or body when first creating it. He said:

> "It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Sir Hartley said that the Courts, in determining into which class a particular tribunal falls, should lean against the second alternative since it might leave the subject at the mercy of an arbitrary tribunal without any right of appeal. Such he said would have been the position in Ceylon before the amending Act No. 19 of 1948. Their Lordships must point out that Lord Esher was dealing with a case where the statute had made the existence of a special set of facts a condition precedent to the exercise of jurisdiction by a tribunal whereas their Lordships have to deal with a case where the question of jurisdiction depends on the construction of the statute itself. Their Lordships are therefore unable to derive much assistance from the case last cited. They are satisfied that the election judge as established by the Order-in-Council of 1946 was a tribunal with a jurisdiction not only to determine finally the question whether the corrupt practices alleged in the petition had been committed but also to determine finally whether upon the true construction of the Order-in-Council it was competent in the circumstances for the petitioner to maintain his amended petition. Their Lordships do not desire to repeat what was said by their predecessors in the cases cited. Suffice it to say that in their Lordships' opinion the peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in

[1] *21 Q. B. D. 313 at p. 319.*

Parliament of the constituency affected make it clear that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown.

It is for these reasons that their Lordships have humbly tendered their advice to Her Majesty that the appeal ought not to be further entertained.

The appellant must pay the respondents' costs of this appeal less the appellant's costs of the respondents' two applications made on the 15th July, 1954, and the 20th July, 1954, respectively.

Appeal rejected.