1971 *Present:* G. P. A. Silva, S.P.J., Sirimane, J., and Samerawickrame, J.

GAMINI DISSANAYAKE and another, Appellants, *and* HERATH M. ABEYSINGHE and 3 others, Respondents

ELECTION PETITION APPEALS NOS. 1 AND 2 OF 1971

Election Petition No. 11 of 1970—Electoral District No. 53 (Nuwara Eliya)

Parliamentary election—Election petition—Sum deposited by petitioner as security for costs—Objection raised by respondent (successful candidate) as to its sufficiency—Order of Election Judge rejecting the objection—Incapacity of respondent, if he is unseated, to question the correctness of it in appeal—"Question of law"—Affidavit accompanying election petition—Form of the affidavit—Computation of quantum of security for costs—Meaning of expression "charge constituting a distinct ground" in Rule 12 of Parliamentary Election Petition Rules—Whether "ground" can be made up of several "charges"—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), as amended by Act No. 9 of 1970, ss. 77, 89A, 80B, 80B (c) (d), 81, 82A (1) (a) (b), 83 (1), 86 (2), Rule 12 of Third Schedule.

Held by SIRIMANE, J., and SAMERAWICKRAME, J. (SILVA, S.P.J. dissenting): Where, at the hearing of an election petition, the Election Judge rejects (even incorrectly) a preliminary objection raised by the successful candidate that the security for costs deposited by the petitioner in order to comply with the requirements of Rule 12 (2) of the Parliamentary Election Petition Rules (as amended by section 33 of Act No. 9 of 1970) is not sufficient, the candidate, if he is unseated at the conclusion of the trial, has no right of appeal from the Election Judge's decision that the security deposited is sufficient. In such a case, even if the security deposited may be insufficient in law, an incorrect decision by the Election Judge at the preliminary stage that the security is sufficient is not a question of law within the meaning of section 82A (1) of the Ceylon (Parliamentary Elections) Order in Council when an appeal is preferred by the unseated candidate after the conclusion of the trial.

Per SIRIMANE, J.—"It must be remembered that section 82A (1) (*a*) grants a right of appeal on a point of law from a determination whether a Member was duly returned, or whether the election was void, and nothing else. A decision at a preliminary stage that the security furnished is sufficient and the petitioner is entitled to be heard, has, in my opinion, nothing to do with the determination after the conclusion of the trial contemplated in section 81."

Per SAMERAWICKRAME, J.—"The decision that security is sufficient has nothing to do with the determination at the conclusion of the trial whether the member was duly returned or elected, or whether the election was void. Such a decision therefore cannot be canvassed in an appeal against the determination."

Per SILVA, S.P.J. (in dissenting judgment)—"When this Court is given the power to entertain an appeal on a question of law the Legislature could not have intended that any illegality which the Election Court committed in the course of the proceedings should be condoned but that only an illegality which affected the actual 'determination' should be dealt with."

Held further by SILVA, S.P.J., and SAMERAWICKRAME, J., that a preliminary objection raised before an Election Judge against his hearing an election petition, on the ground that the petition is accompanied by an affidavit which does not comply with the requirements of section 80B (*d*) of the Ceylon

(Parliamentary Elections) Order in Council, cannot succeed inasmuch as no particular form for an affidavit has been prescribed either in the Order in Council or any rules attached thereto; it cannot be contended that section 86 (2) of the Order in Council is wide enough to compel recourse to the practice followed in England regarding the Form of an affidavit, if indeed such an affidavit is a requirement in England too. *Per* SIRIMANE, J.—There is no right of appeal from an order of an Election Judge refusing to uphold a preliminary objection relating to the impropriety of the affidavit.

Quaere, whether, for the purpose of computing the quantum of security that has to be deposited under Rule 12 (2) of the Parliamentary Election Petition Rules, as amended by section 33 of Act No. 9 of 1970, the expression "charge constituting a distinct ground" in Rule 12 (2) can be interpreted to mean that a "ground" can be made up of several "charges".

ELECTION Petition Appeals Nos. 1 and 2 of 1971—Electoral District No. 53 (Nuwara Eliya).

C. Thiagalingam, Q.C., with *P. Navaratnarajah, Q.C., Neville Samarakoon, Q.C., Eric Amerasinghe, K.N. Choksy, Mark Fernando* and *Rami Tennekoon*, for the 1st respondent-appellant.

H. W. Jayewardene, Q.C., with *H. Rodrigo, M. A. Mansoor, Kumar Chitty* and *R. de Silva*, for the 2nd respondent-appellant.

K. Shinya, with *Nimal Senanayake* and *Nihal Singaravelu*, for the petitioner-respondent.

Cur. adv. vult.

December 21, 1971. G. P. A. SILVA, S.P.J.—

The 1st respondent-appellant was duly elected as Member of Parliament for the Nuwara Eliya Electoral District at the Parliamentary General Election held on 27th May, 1970. On the 21st June, 1970, the petitioner-1st respondent, whom I shall hereinafter refer to as the petitioner, filed an election petition praying that the election of the appellant be declared null and void and for a determination that the appellant was not duly elected or returned.

The said petition contained the following charges :—

(*a*) that the 1st respondent-appellant and/or the 2nd respondent-2nd respondent acting as the agent of the 1st respondent-appellant and/or with his knowledge and/or consent was or were guilty of undue influence within the meaning of Section 56 (2) (C) of the Ceylon (Parliamentary Elections) Order-in-Council 1946 as amended and reprinted on 12th April 1970 in that he or they held or caused to be held a public meeting at a place of worship for the purpose of promoting the election

of the 1st respondent-appellant at the election. The said public meeting was held in the Hindu Temple at Scrubbs Estate, Nuwara Eliya, on or about the 24th day of May 1970 from or about 10.00 p.m. onwards ;

(*b*) that the 1st respondent-appellant and / or the 3rd respondent-3rd respondent acting as the agent of the 1st respondent-appellant and/or with his knowledge and/or consent was or were guilty of undue influence within the meaning of Section 56 (2) (*c*) of the Ceylon (Parliamentary Elections) Order-in-Council in that he or they held or caused to be held a public meeting at the Mariamma Kovil of Ward No. 3, Hawa-Eliya, Nuwara Eliya, for the purpose of promoting the election of the 1st respondent-appellant at the election. The said meeting was held on or about the 16th of May 1970, from about 12.30 p.m. onwards ; and

(*c*) that the 4th respondent-respondent acting as agent of the 1st respondent-appellant or with his knowledge and/or consent committed the corrupt practice of making false statements during the election for the purpose of affecting the return of the S.L.F.P. candidate Tantalage William Fernando in relation to the personal character and conduct of such candidate within the meaning of Section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council in that he did at a public meeting held at Golf Links Grounds opposite Cargills Ltd., Old Bazaar, Nuwara Eliya, on or about the 24th May 1970 in the evening, with words to the effect that the said Tantalage William Fernando had earlier been working on tea estates during which time he had indulged in nefarious activities (පාදඩකම්) and those who follow this cad (කුලාඩිය) William Fernando are cads (කුලාඩි) like himself and are like blood sucking leeches (ලේ උරා බොන).

The petitioner gave security in a sum of Rs. 12,500 in respect of the charges contained in the petition. Annexed to the petition was an affidavit which was intended to secure compliance with the provisions of section 80B (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946. The 1st respondent-appellant made an application to the Election Judge before commencement of the hearing of the petition that no further proceedings be had on the said petition and that the said petition be dismissed on account of the inadequacy of the amount of security given and the failure to file a proper affidavit which he contended was not in compliance with the requirements of section 80B(*d*). This application was dismissed by the Election Judge. At the subsequent hearing of the petition, the charge in respect of the meeting held at Mariamma Kovil was abandoned at a certain stage of the evidence and the charge in respect of the meeting at Scrubbs Estate was dismissed, the Election Judge having rejected the evidence as false, as, in his opinion, the witnesses were speaking to an incident which never took

place. In respect of the charge against the 4th respondent as agent of the 1st respondent-appellant, of making false statements relating to the personal character of the Sri Lanka Freedom Party candidate, T. William Fernando, for the purpose of affecting his return, the learned Judge accepted the evidence called by the petitioner and declared the election of the 1st respondent-appellant void.

Apart from the grounds of law raised against the findings contained in the determination, it is sought to be attacked *in limine* on two grounds. The first is that the petition was not properly constituted inasmuch as it was not accompanied by a proper and lawful affidavit as required by the imperative provisions of section 80B (*d*) and that the court exceeded its jurisdiction in finding the 4th respondent guilty of a corrupt practice and in declaring the election void. The second is that the failure on the part of the petitioner to furnish security as required by Rule 12 (2) of the Third Schedule rendered the petition liable for dismissal and required the Judge to stop further proceedings and that the further proceedings had by him in contravention of this requirement were therefore illegal and without jurisdiction.

We invited counsel to argue as a preliminary issue these matters as well as the question whether the appellants have a right of appeal against any wrong findings of the Election Judge on those matters as we felt that, if our decision on those matters was favourable to the appellants, it would compel us to reverse the determination of the Election Judge without proceeding any further. However, as we were unable at the conclusion of the argument which took several days to arrive at a definite decision, counsel were asked to make their further submissions on the main appeal. I shall myself follow that order and deal first of all with the matters which are included in this preliminary issue.

I shall first consider the submission regarding the affidavit the absence of which in terms of section 80B (*d*) of the Order-in-Council is relied upon by the appellants as an irregularity which is fatal to the proceedings in the trial of this petition. This section provides as follows :—

80B. An election petition—

. . . . . .

(*d*) shall set forth full particulars of any corrupt or illegal practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice, and shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice.

The word " prescribed " as defined in our Interpretation Ordinance, means " prescribed by the enactment in which the word occurs or by any rules duly made thereunder. " Admittedly there is no form of affidavit to be found either in this Order-in-Council or any rules attached thereto and the absence of such a form seems to be clearly an omission on the part of the Legislature. The last general election being the very first one conducted in accordance with the provisions of the Order-in-Council as amended by Act No. 9 of 1970, any petitioner in an election petition was therefore left to rely on his own resources as to the particular form this affidavit should assume. Counsel for the appellants sought to argue that this omission in the enactment or the rules was one in respect of which the provisions of section 86 (2) of the Order could be invoked and the procedure or practice followed in England on the same matter should be followed by us. I find some difficulty in accepting this argument In my view section 86 (2) is intended to provide for a *casus omissus* in regard to a matter of procedure or practice in an election petition. That is to say, if in the course of a trial of an election petition, there should arise a matter of procedure or practice in regard to which our enactment has been silent, inadvertently or otherwise, then recourse could be had to the procedure and practice obtaining in England on the same matter. It will however not be permissible for us to follow such procedure and practice obtaining in England in respect of a matter which our legislature has been very conscious of and has specifically provided for, even though it has failed to carry out its intention of prescribing the form of the affidavit. Such a course would also be in conflict with the provision of the Interpretation Ordinance referred to which enjoins one to look to the enactment itself or the rules made thereunder for the form of the affidavit. I do not mean by this that any serious objection could have been taken if a petitioner followed the form of an affidavit used in England in the same matter, if indeed such an affidavit was a requirement in England too. But it would be unfair to penalise a petitioner if, without following the form in England, he prepared an affidavit in a form generally accepted in other legal proceedings, which is the best he could have done in the circumstances. To insist on a particular form of affidavit from him would be to impose on him a duty that the Legislature itself has rendered impracticable of performance. For these reasons I think that the contention of the appellant regarding the propriety of the affidavit fails.

I shall now examine the submissions regarding the insufficiency of security tendered by the petitioner. Seldom has there been in our courts a more controversial subject for judicial interpretation than the meaning attributable to the words " ground " and " charge " in election law. Eminent Judges of the past and present commencing from the year 1931 have pronounced divergent views from time to time without ever being able to reach complete agreement. There would have been few election petitions since the conferment of adult suffrage introduced by the Donoughmore Constitution in 1931 in which the question of the sufficiency of the security deposited by the petitioner did not directly or

indirectly arise. The rule in regard to the furnishing of security by the petitioner in an election petition has remained substantially unaltered until the amending Act No. 9 of 1970 introduced a notable and important change. A court that is called upon to place an interpretation on this altered provision to be found in Rule 12 as recently amended has therefore a special responsibility to pause and reflect carefully on the background of the change, the reasons that would have actuated the legislature to produce the change and the intention of the legislature in effecting the change before such court embarks on an interpretation which is bound to be relied upon as a guide on future occasions. This court has both the advantage and the duty of construing the altered rule unimpeded by the views expressed in a string of judicial decisions deriving of course any legitimate assistance from the erudition and industry which have been lavished on the subject by the eminent Judges who have had to interpret the provision contained in the rule as it existed prior to the amendment.

One of the earliest cases in which the words " charge " and " grounds " in respect of election petitions came to be considered was that of *Tillekewardene v. Obeyesekere*[1], 33 N. L. R. 65. In the petition filed in that case the petitioner alleged that the respondent was guilty of three offences : bribery, treating and paying or contracting for the payment for conveyance of voters. He gave security in a sum of Rs. 5,000 on the basis that there were three charges only and that the relevant Rule required a deposit of Rs. 5,000 for the first three charges. In answer to an application for particulars the petitioner stated 17 cases of bribery, 26 of treating and at least 14 cases of payments or contracts for conveyance. After the particulars were filed an application was made that the petition should be dismissed as the security was inadequate, the contention being that for each charge in excess of three the petitioner should deposit a sum of Rs. 2,000 each of the cases of bribery, treating and payment or contract for conveyance of voters being a separate charge. Drieberg, J. took the view that security which had to be deposited within 3 days of the filing of the petition and long before the particulars were furnished, should be given on the basis of the petition ; that by the word " charges " was meant the various forms of misconduct coming under the description of corrupt and illegal practices and that, whatever may be the number of acts of bribery sought to be proved against the respondents, for instance, the charge to be laid against him was one of bribery. He accordingly held that the security was adequate and disallowed the application for a dismissal of the petition. Although Drieberg, J. did not precisely so hold, his decision amounted to a conclusion that there was hardly a distinction in this case between a ground and a charge, meaning all the instances of a particular class of misconduct taken collectively.

[1] *(1931) 33 N. L. R. 65.*

In the case of *Perera v. Jayawardene*[1], 49 N. L. R. 1, the respondent sought, before a Divisional Bench, to assail the decision in the 33 N.L.R. case (supra) but Soertsz, S.P.J., with the concurrence of the other two Judges, followed the view expressed by Drieberg, J. As an added reason for agreeing with this view Soertsz, S.P.J. observed :—" But, today there is much stronger reason for following his ruling because when Rule 12 was re-enacted in 1946, the word ' charges ' reappears in precisely the same way, and it is a well established principle that when a word has received a judicial interpretation and the same word is re-enacted, it must be deemed to have been re-enacted in the meaning given to it. As Sir W. M. James L.J. remarked in *Ex parte Campbell in re Cathcart :* 'Where once certain words in an Act of Parliament received a judicial construction in one of the superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them'. "

In *Perera v. Bandaranaike*[2], 67 N. L. R. 544, Sirimane, J. took a somewhat different view. In that case the petition alleged in the third paragraph that the respondent had been guilty of undue influence; in the fourth paragraph that the respondent had been guilty of a corrupt practice and, in the fifth paragraph, that by reason of misconduct on the part of the respondent, her agents and supporters and others interested in promoting her candidature, and by reason of other circumstances (particulars of same to be furnished with the particulars of the aforementioned charges) the majority of electors were or may have been prevented from electing the candidate whom they preferred within the meaning of section 77 (*a*) of the said Order-in-Council. It was held that every one of the grounds set out in section 77 (*a*) constituted a separate and distinct charge and that while " misconduct " meant some act on the part of the respondent (other than those specified earlier in the petition) which affected the result of the petition, those matters which did not come under " misconduct " but which still affected the result of the election would be other circumstances such as a flood, cyclone or the collapse of a bridge which prevented the voters from proceeding with reasonable safety to a polling booth. A further important matter to which he directed his mind in this case was the meaning to be given to the word charge, which he defined as a complaint, that is, something the petitioner has reason to complain of, which prevented the majority of electors from electing the candidate whom they preferred.

In the case of *Perera v. Samarasinghe*[3], 67 N. L. R. 530, T. S. Fernando, J. adpoted the view of Sirimane, J. and endeavoured, successfully, I think, to distinguish the case before him from the earlier cases in which Drieberg, J. and Soertsz, J. expressed certain views. The reason given

[1] *(1947) 49 N. L. R. 1.* [2] *(1965) 67 N. L. R. 544.*
[3] *(1965) 67 N. L. R. 530.*

by, T. S. Fernando, J. for the distinction he drew was that the allegations in those two cases were confined to what may strictly be called corrupt or illegal practices and that the court was not concerned in either of those cases with allegations of general bribery, general treating, general intimidation or other misconduct which are strictly not corrupt or illegal practices as defined in sections 54 to 71 of the Order-in-Council. I am myself in respectful agreement with the views expressed by Sirimane, J. and T. S. Fernando, J. in those two cases and would like to associate myself with the observation that when a charge is framed to read that "a corrupt practice or practices or an illegal practice or practices was or were committed", several charges within the meaning of Rule 12 could be laid in a petition and, further, that a ground does not mean the same thing as a charge and that a single ground may sometimes involve several charges.

The last decision on the subject to which our attention was drawn by counsel was that of the Divisional Bench case which dealt with three appeals *Wijesekere v. Perera*, *Perera v. Samarasinghe* and *Perera v. Bandaranaike*[1], 68 N. L. R. 241, all of which involved *inter alia* the construction of the provisions of the law relating to charges and grounds with reference to Parliamentary Election Petitions. It was held that—

(i) In an election petition alleging the commission of corrupt practices or illegal practices contemplated in section 77 (*c*) of the Parliamentary Elections Order-in-Council, all allegations of the commission of the same corrupt practice or the same illegal practice by a candidate, or his agent, or with his knowledge and consent, constitute only one charge for the purpose of giving security for costs in compliance with Rule 12 of the Parliamentary Election Petition Rules, irrespective of the number of alleged commissions of the same practice specified in the petition or intended to be proved at the trial. For example, two or more acts of the same corrupt practice of bribery constitute only one "charge".

(ii) An allegation in terms of section 77 (*a*) of the Parliamentary Elections Order-in-Council that "the majority of the electors were or may have been prevented from electing the candidate whom they preferred" constitutes a "charge" for the purposes of Rule 12 of the Parliamentary Election Petition Rules. Further, it constitutes only one "charge", irrespective of the nature or the number of facts or matters by reason of which it is alleged that the majority of the voters were or may have been prevented from electing the candidate whom they preferred. Accordingly, general bribery, general intimidation, general treating, misconduct, act of God, etc., are merely causes or reasons upon which a Judge can be satisfied that there was prevention of free voting, and do not constitute separate "charges" for the purpose of Rule 12.

[1] *(1966) 68 N. L. R. 241.*

Counsel for the appellant submitted that this case was wrongly decided and also contended for the correctness of the judgment of Sirimane, J. I have already expressed my agreement with the views of Sirimane, J. and T. S. Fernando, J. and I regret my inability to fall in line with the views of the learned Chief Justice in the later case. Counsel for the respondents drew our attention to the following observation made by the learned Chief Justice in the course of his judgment at page 247 :—" It is only reasonable that petitioners and their advisers should in depositing security be guided by an authoritative decision on such matters. And if in a particular case, security furnished in conformity with such a decision were to be held insufficient, the right of a citizen to challenge an election would be denied to him not through his error but because of his reliance on that decision. The circumstances are eminently such as call for the application of the principle of *stare decisis*, " and suggested as a possible implication of this observation that, but for the desirability of upholding the principle of *stare decisis*, he may well have fallen in line with the views expressed by Sirimane, J. and T. S. Fernando, J, referred to above. There is much to be said for this suggestion. Furthermore, an observation made by My Lord the Chief Justice in a subsequent case, *Herath v. Senaviratne*[1], 70 N. L. R. 145 at 148, also cited by counsel which referred to a new particular allowed by the Election Judge at a very late stage of the trial as a *new charge* confirms me in the view that, had the learned Chief Justice construed the meaning of the word " charge " independently of the decisions in the cases of *Tillekewardene v. Obeyesekere* and *Perera v. Jayawardene* (supra) he may well have adopted the same line of reasoning as Sirimane, J. and T. S. Fernando, J. For, when he referred to the new particulars allowed by the Election Judge as constituting a new charge, he meant a charge of making a false statement regarding the unsuccessful candidate. As the charges alleged against the respondent upto the stage when the new particulars were allowed by the Election Judge were also charges of making false statements it was a misdescription to say that the new particulars introduced a new charge if he was following the reasoning of the decision of Drieberg, J. and Soertsz, S. P. J. in the earlier cases. Mr. Thiagalingam, supported by Mr. Jayewardene, also contended that it was the unsatisfactory and uncertain state of the law resulting from conflicting judicial decisions that prompted the Legislature to introduce the far reaching amendments contained in Act No. 9 of 1970. Their further submission was that the Legislature gave expression in this Act to the views expressed by Sirimane, J. and T. S. Fernando, J. in regard to the meaning of " grounds " and " charges " and to the giving of security when (*a*) a significant amendment was brought about in Rule 12 of the Third Schedule, (*b*) Rule 5 was repealed, and (*c*) certain fundamental changes were introduced to section 80B. Whatever be the cause of the amendment, the changes brought about appear to me so substantial and deliberate as to merit a construction of the relevant provisions through a new approach, unfettered by the various dissenting opinions of different Judges over the last 40 years.

[1] *(1967) 70 N. L. R. 145 at 148.*

The word " grounds " or " ground " in regard to election petitions is to be found in section 77 of the Order-in-Council and in Rule 12 as well as Rule 4 of the Third Schedule and the word " charge " occurs in Rule 12 of the Third Schedule. The meaning of " ground " presents no difficulty and an exhaustive list of the grounds on which an election can be avoided is set out in section 77. It is the interpretation of the word " charge " that confronts a court with questions of a varied nature.

Before embarking on an interpretation of the present law it is also useful to remember an observation made by the Judge in an old case referred to as to the materiality of the stage at which the security has to be calculated by a petitioner who has the duty of furnishing it. In the case of *Tillekewardene v. Obeyesekere* (supra) Drieberg, J. observed at pages 66 and 67 :—" In this petition the petitioner alleged that the respondent was guilty of three offences : bribery, treating and paying or contracting for the payment for conveyance of voters. The petitioner gave security in a sum of Rs. 5,000 on the basis that there were three charges only.

. . . . . .

Security to the required amount has to be given on the presentation of the petition or within 3 days and, if not so given, the petition must be dismissed. It follows from this that the amount of the security must be determined on the averments in the petition. "

At the time this matter came up for consideration a petitioner was expected to state in the petition broadly the facts and grounds on which he relied. He would therefore have satisfied the law if he stated for instance that the successful candidate or an agent, as the case may be, was guilty of certain corrupt or illegal practices, that the candidate was disqualified from seeking election or that for some reason set out in the order the majority of electors were or may have been prevented from electing the candidate whom they preferred. The security he had to deposit would have depended on the number of charges thus alleged on the face of the petition which would almost have been the equivalent of grounds for setting aside the election. Questions of particulars would not arise at the time of filing the petition or within three days thereafter, before which security had to be given and there is therefore much to be said in favour of the adequacy of the security if the amount deposited was calculated on the broad number of charges which would invariably have meant the grounds as well. Had the law been in the present form requiring the petitioner to state in the petition itself full particulars of the corrupt or illegal practices that he alleges, including a full statement of the names of the parties alleged to have committed these corrupt or illegal practices and the date and place of the commission of the practices, Rule 5 regarding subsequent furnishing of particulars being repealed, Drieberg, J. would not have had occasion to make the observation which I have quoted above and the entire process of reasoning which he adopted on the basis of the petition containing broad charges may have assumed

a different form. For, he would then have had to consider a petition with charges, for example, of a corrupt practice committed by one person in certain circumstances, by another in a different place and under a different set of circumstances and by a third person on a different date, a different place and in yet other circumstances. All the three parties concerned would have been joined as respondents in terms of section 80B (*d*) which is a new provision introduced by Act No. 9 of 1970. There would be no question of further particulars being furnished setting out details of the parties and the acts complained of, Rule 5 being repealed. The petition would in other words have contained the various charges on the face of it. The considerations for the computation of security in respect of such a petition would have differed so sharply from the petition which he in fact considered and he may well have reached the conclusion that the quantum of security depended on the charges set out in the petition in respect of each of the persons joined as respondents. This essential and basic difference in the present law as contrasted with the earlier law has therefore to be always kept in mind in considering the question of security under the present law.

I shall now examine the present law in greater detail in its application to the requirement of a petitioner to give security. The question to be considered is the meaning to be attached to the words "charge constituting a distinct ground" in Rule 12. These words introduced by section 33 of Act No. 9 of 1970 effect a definite departure from the original words found in Rule 12. The relevant portion of the Rule, namely 12 (2) in the Ceylon (Parliamentary Elections) Order-in-Council 1946 reads as follows :—

> (2) The security shall be to an amount of not less than five thousand rupees. If the number of charges in any petition shall exceed three, additional security to an amount of two thousand rupees shall be given in respect of each charge in excess of the first three. The security required by the rule shall be given by a deposit of money.

Rule 12 (2) as amended by section 33 of Act No. 9 of 1970 reads as follows:—

> (2) The security shall be an amount of not less than five thousand rupees in respect of the first charge constituting a distinct ground on which the petitioner relies, and a further amount of not less than two thousand five hundred rupees in respect of each additional charge constituting any such ground. The security required by this rule shall be given by a deposit of money.

It would seem that the words used in the amended Rule, which entirely deals with the subject of giving security, are intended to define the word "charge" in its application to the amount of security which a petitioner has to deposit either with the petition or within three days thereof. Whereas this word was unqualified in the earlier enactment and no indication was given regarding any distinction between a charge and a

ground in the rule itself, the 1970 enactment draws a distinction between the two, with the compelling implication that a ground can be made up of several charges. In terms of this rule, for the first charge constituting a distinct ground on which the petitioner relies, security should be furnished in a sum of Rs. 5,000/- and in respect of each additional charge constituting a distinct ground additional security in a sum not less than Rs. 2,500/- should be furnished. This requirement alone makes it clear that "charge" and "ground" in this context refer to two different concepts and not the same concept. What then is a charge constituting a distinct ground on which the petitioner relies? It seems to me that, if a charge is such that the proof of that alone will be a sufficient ground—as it generally would be —for the petitioner to rely in order to have the election declared void, such a charge will attract security. A petitioner however is not precluded from alleging several charges constituting the same ground, as he so often does, without pinning his faith on one charge, in which event he will have to deposit security at the rate of Rs. 2,500/- in respect of each of those additional charges which he may allege. For, the same election offence, e.g., a corrupt practice, can be committed by a candidate or an agent on more than one occasion and a corrupt practice can embrace a wide variety of acts such as procuring personation, treating, undue influence, bribery and publication of false statements. A charge relating to any such acts will constitute a ground for avoiding an election and will require separate security the purpose of which of course is to enable the respondent or respondents, as the case may be, to recover costs if the charge concerned is not established.

In other words if one paraphrases the present Rule 12(2), what it says is that in the first place the petitioner must give security in respect of each separate charge which constitutes a ground of avoidance of the election, the difference in the quantum between the first and subsequent charges being that the first attracts Rs. 5,000/- while the others attract Rs. 2,500/- each. A possible question that can arise is whether the word "constitutes" in this rule has the effect of equating a charge to a ground. If that were so there is no warrant for the use of the word "charge" at all and the Legislature may well have said that each ground should be backed by security in a certain specified amount. In fact the wording of the rule suggests that such an equation is precisely what the Legislature wished to avoid. Under the old rule there was some justification for equating charges to grounds in interpreting the two words for the reason, *inter alia*, that the word ground was not mentioned there at all. The juxta-position of the two words which the Legislature has now adopted compels one to give to the two words two different meanings. As the Order-in-Council sets out in section 77 the grounds for avoiding an election, any petitioner who wished to attack an election would naturally have to do so on one or more of the grounds enumerated therein. However, with reference to a petition, each paragraph giving the reason for the prayer would more appropriately have been described as a charge and in some instances, such a description would even be very apt. By reason of the appropriateness of the word in certain instances, it has of

course been used in a general sense to describe what is stated in each paragraph of a petition for avoiding an election as a charge though that is a very inappropriate description in some other cases. For, even an allegation such as civil commotion or an act of God such as a flood or any other disaster which prevented voters from reaching the polls has also been considered as a charge even though it does not involve any blameworthiness on the part of the successful candidate and the allegation could more appropriately be described as a ground. For this reason even though Judges hearing election petitions have so often attempted a definition of the term "charge" in this context they have not succeeded in giving one which will fit in with every case. It can mean an accusation or allegation against a candidate or an agent, or a mere reason, which constitutes one of the grounds refferred to in sections 77 (*a*), 77 (*b*) or 77 (*c*) for avoidance of an election.

When one considers the scheme of the new amendment from another aspect too it would seem that such an interpretation would be consonant with what the Legislature sought to achieve. For, the new section 80A requires a petitioner *inter alia* to join as respondents to his election petition any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition. If therefore allegations of a particular corrupt or illegal practice are made in respect of more persons than one it will be incumbent on the petitioner to join as respondents all such persons. It is undeniable that each such allegation will constitute a distinct ground for avoiding the election because the proof of any one of those charges would be sufficient for the purpose. This requirement brings into focus another reason which supports the view that security is, under the new law, required in respect of each charge constituting a distinct ground of avoidance of an election. For, unlike previously when a person against whom a charge was made was not joined as a respondent, as the Legislature by enacting section 80A (1) (*b*) of the 1970 Act compels such person to be joined, it is but fair that the same Legislature should have considered it necessary to require a petitioner to deposit a certain sum as security for costs of the named respondent, in the event of the petitioner failing to establish the charge. The person to be joined as respondent has to defend himself on pain of suffering two severe penalties, the forfeiture of civic rights as well as a criminal prosecution, and any person so joined will naturally defend himself securing for himself the best available legal assistance and he can look forward only to the security in order to meet the cost of defending himself, if the allegation is unsuccessful or false. The importance of security for costs was incidentally referred to by T. S. Fernando, J. in the case of *Perera v. Samarasinghe*[1], 67 N.L.R. 530. As I consider some of the observations made by him to be very important in their application to certain aspects in the instant case such as the distinction between charges and grounds, the purpose of security in

[1] *(1965) 67 N. L. R. 530.*

respect of each charge and the cautions that one has to exercise in applying the *ratio decidendi* of past decisions and as this is one of the decisions that can be said to have influenced the Legislature to introduce the Act of 1970, I think it will be useful to quote the following passage at page 532 :—

" It was first contended on behalf of the petitioner that paragraph 5 contains no charge at all within the meaning of rule 12 (2). Reliance was placed on the definition of a charge as set out by Drieberg J. in *Tillekewardene v. Obeyesekere* (supra) which was approved by the Divisional Bench in *Perera v. Jayewardene* (supra). In the first-mentioned of these cases, Drieberg J. stated " In my opinion by the word ' charges ' in rule 12 (2) is meant the various forms of misconduct coming under the description of corrupt and illegal practices; for example, whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him in a petition is one of bribery ". I do not think it can be said that this definition—if it was intended to be such—is exhaustive. As Viscount Simon stated in *Harris v. Director of Public Prosecutions*, " it must be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the Court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances ". The Court was not concerned in either of the two cases, *Tillekewardene v. Obeyesekere* and *Perera v. Jayewardene*, with allegations of general bribery, general treating, general intimidation, or other misconduct which are strictly not corrupt or illegal practices as defined in sections 54 to 71 of the Order-in-Council. The allegations in the petitions in both these cases were confined to what may strictly be called corrupt or illegal practices. Our Courts have held that allegations of general intimidation and general treating go to form a " charge " as contemplated in the rule in question—vide *Jeelin Silva v. Kularatne*. It is implicit also in the decision in *Mohamed Mihular v. Nalliah* that grounds (*a*) and (*b*) in the petition on which that case commenced which did not by any means allege the commission of any corrupt or illegal practice constituted charges within the meaning of Rule 12 (2). At one stage of the argument, learned counsel for the petitioner contended that every ground for avoiding an election is not a charge within the meaning of Rule 12, and that it is only a ground that involves the respondent (the elected candidate) in some form of misconduct for which he is answerable that constitutes a charge. This proposition means that, allegations against persons like returning officers and others, allegations of general bribery, etc., and an allegation that the person elected was disqualified for election do not constitute charges at all. I am unable to agree that the argument is sound; it is indeed contrary to the practice that has hitherto obtained, and, if it is correct, it follows that where a petitioner alleges against an elected candidate three charges of corrupt or illegal practices and one or more charges against a returning officer or other

officer, the amount that is required to be given as security is Rs. 5,000. Such a situation leaves the respondent or respondents other than the elected candidate without security for his costs at all ."

If this is a correct statement of the law as it existed before the amendments contained in Act No. 9 of 1970, as I think it is, *a fortiori* sections 80A and 80B read with Rule 12 (2) allows no escape from the conclusion that each charge set out in the petition, which constitutes a distinct ground enumerated in section 77, and which alone can therefore be a basis for avoiding an election, attracts security in a sum of Rs. 5,000/- if it is the first charge and Rs. 2,500/- if it is an additional charge after the first charge. In his judgment, the learned Judge considered it necessary that in the class of charges where certain public officers are made respondents, even they should be safeguarded against costs by the insistence on the deposit of security even though the State would ordinarily undertake their defence through the Attorney-General. Such a safeguard should therefore with greater justification be provided for ordinary citizens who may be made respondents to an Election petition. A vexatious petition can harass an innocent respondent as much as it can harass a successful candidate. The Legislature therefore owed a duty to protect not only an elected representative but also a citizen, who may have been one of his strong supporters and for that reason is made a victim of a false accusation, from harassment by frivolous or vexatious charges through the medium of a spurious election petition.

It is a notorious fact that while the unsuccessful candidate is invariably the *de facto* petitioner in an election petition, the nominal petitioner is, or at least can be, an impecunious individual who will have no assets from which the costs incurred by a successful respondent can ever be recovered. The expense involved would depend on the duration of the trial which in turn would be in proportion to the number of charges which a petition contains. When one examines the whole scheme of the new Act of 1970 therefore, it is reasonable to think that the Legislature had these considerations in mind when it affected a deliberate change in Rule 12 by Act No. 9 of 1970.

There was some argument on the interpretation of the words " any such ground " in Rule 12 (2). It appears to me that the words " a distinct ground " found earlier in Rule 12 (2) would mean one of the several grounds enumerated in section 77 for avoidance of an election on an election petition and, on the first charge constituting any one of those grounds, security in a sum of not less than Rs. 5,000/- will have to be given on behalf of the petitioner. When Rule 12 (2) refers later on to the security in respect of an additional charge constituting " any such ground ", to my mind it can only mean any distinct ground, whether it happens to be the same ground to which the first charge relates or any other ground of avoidance enumerated in section 77. I am unable to accept the contention of counsel for the 4th respondent, Mr. Jayewardene, in this connection, namely, that " any such ground " relates to the same ground

on which the first charge was based. In my view therefore it is only the first charge contained in a petition that attracts Rs. 5,000/- as security and each additional charge attracts Rs. 2,500/-. I do not agree with Mr. Thiagalingam and Mr. Jayewardene, counsel for the respondents, whose submission was that the first charge in respect of any one distinct ground attracted Rs. 5,000/- as security and that any additional charge in respect of any of those grounds attracted Rs. 2,500/-, in which event the Legislature could with advantage have used some other words. I rather think that the words " first charge " and " additional charge " are all used in relation to the petition and not in relation to the ground in the context and, even though the view put forward by counsel is not wholly untenable, there are two reasons why I prefer to take the other view. When a petition is filed against a Member of Parliament, he is bound to incur certain minimum costs even if there is one charge. These costs would be somewhat in the nature of his overhead expenses when he has to defend himself against a petition, whatever be the number of charges. If there are more charges than one he is not likely to spend the same amount in respect of each additional charge, whether it be expenses incurred on matters such as filing papers, summoning witnesses or payment to lawyers. What he will have to spend on the additional charges will be only a smaller proportion of the initial expense of defending himself in any event irrespective of the number of charges. It is therefore natural that the Legislature should have provided for security in a sum of Rs. 5,000/- for the first charge and a smaller sum in respect of additional charges, whether the latter charges relate to the same or to a different ground. Secondly, even under the old Rule security appears to have been based on this principle, namely, that a minimum of Rs. 5,000/- was to be deposited in any event, whether the number of charges be one, two or three and any charge in excess of these three attracted only Rs. 2,000/-, irrespective of the ground which the charge related to. So that the importance in this connection appears to me to attach to the number of charges and bears no relation to the grounds to which those charges relate.

I am not unmindful of the consideration on the side of a *bona fide* petitioner that it would not be in the interests of purity of elections to deter a prospective petitioner by the imposition of excessive security. One must remember however that in present day elections a contest at an election does not depend on the resources of an individual. It is a recognised political party that decides on the candidate and it is the party that meets the costs of the contest, particularly if the candidate's financial capacity is inadequate to meet the necessary expenses permitted by law. If the candidate thus sponsored by the party loses the election owing to corrupt or illegal practices by the successful candidate or his agents or due to other causes which will vitiate an election, it is the party in whose interests it will be to win the seat that would ordinarily espouse the cause of the unsuccessful candidate by financing an election petition. Whether that happens in actual practice or the unsuccessful candidate

himself or any independent voter interested in the election presents a petition, the only strain that he suffers would be the furnishing of the security and if his allegations in the petition are *bona fide* and well founded his security deposit will remain intact for withdrawal after the successful conclusion of the hearing. As against this, if, as is generally the case, the petitioner is a man of no means and adequate security is not furnished and the petition is not a *bona fide* one and is dismissed because the allegations are baseless, the respondent or respondents, as the case may be, would have been subjected to unnecessary expense, anxiety and harassment and are left to their own devices without a legal remedy even to the extent of reimbursing themselves of their actual out-of-pocket expenses incurred in defending themselves. While these considerations can have some weight in the interpretation of the law they can do so only up to a point when the legislative provision does not leave room for doubt.

I shall now deal with the submission regarding the inadequacy of the security. It is based on the argument that when paragraphs 3 and 4 of the petition allege that the candidate and/or the 2nd and 3rd respondents respectively committed a corrupt practice, each paragraph involves at least two charges. In considering this submission one has to bear in the forefront of one's mind the new provision contained in section 80B (*d*). This provision makes it obligatory on a petitioner *inter alia* to set forth in the petition full particulars of any corrupt or illegal practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice. I consider this requirement to be imperative having regard to the language used and the introduction of special legislation for the purpose of imposing the requirement. If we consider, as an example, a particular corrupt practice of bribery alleged to have been committed by the successful candidate, in order to secure compliance with this provision it will be necessary to set forth—

(*a*) that this respondent committed the act of giving a bribe ;

(*b*) that it was given to a named person ;

(*c*) that it was given on a particular day ; and

(*d*) that it was given at a particular place.

In considering the particular point that has been raised on behalf of the appellants, it is significant to note that the very first requirement in this provision is that the petitioner should set forth as full a statement as possible of the name of the party alleged to have committed the offence. I venture to think that this provision is intended to give notice to the respondent concerned of the charge that he has to meet. This object would hardly be satisfied by informing him that he or his agent committed the act. In the first place he is not definitely informed

whether the allegation is that he committed the act complained of. If it is not he who is accused, he does not have to defend himself whereas, if another person is accused on the footing that he was his agent, it is sufficient for his defence to show either that the alleged act was not committed or that, even if it was committed, the person committing was not his agent. Depending therefore on whether it is the candidate who is accused of the charge—I use the word accused in the broad sense—or another person said to be his agent, the charge itself will be different, the particulars to be set out under section 80B (*d*) will be different, the evidence will be different and the defences will be different. By no rational basis of reasoning therefore can it be said that it is one charge to allege in the petition that the respondent or his agent committed a corrupt act. Much less can it be asserted that it is one charge to allege that the respondent and his agent committed a corrupt act such as the one I have referred to, the concept of a common intention which occurs in criminal law (Ceylon Penal Code, section 32) being entirely foreign to election law. Furthermore, when the charge alleges a corrupt or illegal practice against the successful candidate and/or his agent the provisions of section 80B (*d*) would require the petitioner to name as respondents the successful candidate as well as the person alleged to have been his agent. The fact that the petitioner has in fact done so and named the agent in paragraph 3 as the 2nd respondent is itself an admission that one charge has been made against the candidate and another against the 2nd respondent as an alleged agent of the 1st respondent. Even if one leaves out the question whether the words "with his knowledge and/or consent" involved yet another charge the submission of counsel for the appellants must succeed, namely, that there are two charges at least in paragraph 3, two at least in paragraph 4 and one at least in paragraph 5, necessitating security in a minimum sum of Rs. 15,000, the amount being made up as follows :—

(1) Rs. 5,000 for the first charge constituting the distinct ground of the corrupt practice of undue influance against the 1st respondent.

(2) Rs. 2,500 for each of the next three charges, one being against the 1st respondent and two against the 2nd and 3rd respondents making up a total of Rs. 7,500.

(3) Rs. 2,500 for the next charge against the 4th respondent of making a false statement relating to the personal character of the defeated candidate, which is a charge constituting the distinct ground of committing the corrupt practice of making a false statement.

The security of Rs. 12,500 tendered by the petitioner is therefore not in compliance with the requirements of Rule 12 (2) of the Third Schedule to the Ceylon (Parliamentary Elections) Order in Council 1946 as amended by Act No. 9 of 1970. The Election Judge too agreed with the contention

of Counsel for the respondent that each of the paragraphs contained more than one charge when he observed at page 136 of his order as follows :—

> " In the result while I agree that the charge that a candidate held a meeting at a particular place is distinct from the charge that it was the agent who held the meeting in question, and that a charge that alleges the holding of a meeting on a particular day at a particular place is distinct from a charge that alleges the holding of a meeting on another day at another place, still I find that the ground of avoidance in each of these charges is identical, namely, undue influence, which is a corrupt practice, in terms of Section 77. The first of these charges appropriates to itself the distinctness of a ground which is asserted for the first time in the petition and therefore attracts security. The others do not, for they are based on grounds identical with the first and thereby have lost the claim that they are on distinct grounds. "

He has, however, misdirected himself in my view in holding that the charges other than the first do not attract security as they are based on grounds identical with the first. It seems to me that he has fallen into this error by a process of reasoning which has more or less equated a charge to a ground. This does not appear to me to be a correct view for the many reasons which I have endeavoured to set out earlier in this judgment.

The question immediately arises as to the consequences of this erroneous finding in regard to the adequacy of security. I shall first answer this question by saying that if the Election Judge had correctly decided this matter, he had no alternative but to stop further proceedings and to dismiss the petition in terms of the mandatory provisions of Rule 12 (3). The words of Rule 12 (3) are identical with the wording of this Rule prior to the amendment of 1970 and in every single instance in the past where an Election Judge trying an election petition found the security deposited to be insufficient, such petition was dismissed. Counsel on both sides, however, have not been able to cite to us a single case in which an Election Judge had erroneously held that security was adequate and proceeded to hear the petition and the validity of such further proceedings was raised in appeal. We have therefore no assistance in this matter from any previous decision and the question has to be considered as *res integra*. The provision contained in Rule 12 (3) is not merely mandatory but, unlike other mandatory provisions such as those contained in section 80B already referred to in another connection, imposes a distinct prohibition on the power of an Election Court to proceed with the hearing. The important question which Counsel for the appellants have raised therefore is whether by reason of an erroneous decision of the trial court in regard to adequacy of the security the proceeding had by that court in the teeth of such an express prohibition are valid proceedings on which a legal finding can be based

Counsel for the respondent, quite properly, did not contend that the Election Judge can lawfully proceed with a trial if the security deposited is insufficient presumably because Rule 12(3) leaves no room for such an argument. His contention in the first instance was that security was sufficient because paragraphs 3, 4 and 5 of the petition contained only one charge each and whatever may be the interpretation given to Rule 12 (2) the security required cannot exceed Rs. 12,500 which sum the petitioner has deposited. If this contention is correct, of course, no question of the legality of the further proceedings had on the petition arises. But as this contention cannot succeed in the view I have taken I shall now consider the second contention, namely, that this court has no power to review that decision of the Election Judge as it is no part of the determination against which alone there is an appeal to this court in terms of section 82A.

Strong reliance was placed by Counsel for the respondent on the judgment in the case of *Ramalingam v. Kumaraswamy*[1], 55 N. L. R. 145. In that case an election petition was dismissed by the Election Judge on the ground that notice of the presentation of the petition had not been served on the respondent as required by Rule 15 of the Parliamentary Election Rules. It was held that there was no right of appeal as one prerequisite for an appeal under section 82A (1) of the Parliamentary Elections Act was that it must be against the determination of an Election Judge under section 81 and as in that case there had been no determination. Sir Alan Rose, C.J., observed in the course of his judgment that there were two prerequisites for an appeal, namely, that it must be a question of law and secondly that it must be against a determination and went on to analyse what was meant by a " determination ", which however was absent in that case. Gratiaen J. who agreed with Rose C.J. added that the Supreme Court did not enjoy an unexpressed but inherent statutory power in dealing with an appeal from the decision of an Election Judge and that as the law stood it had no power to remit a case for further proceedings. I have great difficulty in accepting the submission of Counsel for the respondent that this case should be considered as having strong persuasive authority for our decision in the instant case in view of the numerous distinctions between that case and the one before us.

In that case there was no determination as such under section 81; there is one in the instant case. That was a case where a preliminary objection was upheld and no further proceedings were taken and the appeal was against the decision on a preliminary point alone for which there was no provision; in the instant case, the preliminary objection which we now consider to have been a sound one and which should have been upheld, was overruled and proceedings were taken and a determination was reached. The appeal here is not merely in respect of an illegality contained in the determination but against the illegality

[1] *(1953) 55 N. L. R. 145*

of the entire determination based on evidence admitted, in the submission of Counsel, in disregard of a specific legislative prohibition which has much greater force than even a mandatory provision and which therefore rendered the whole proceeding illegal. In other words there was no determination in that case which was sought to be attacked while in the instant case the attack is not merely on some ground of law in respect of a proper determination but on the illegality of the entire determination being founded on evidence altogether prohibited. In view of these clearly different considerations in the two cases, I wish to remind myself of the observations of T. S. Fernando J. which I have quoted earlier and the dictum of Viscount Simon which he referred to therein. Having regard to the vastly different considerations in the present case, the observations of Rose C.J. and Gratiaen J. can at most be taken as *obiter dicta* except perhaps for the meaning to be attached to a " determination " which too, with great respect, is in my view too narrow a definition to be immutably applied to every different set of facts and circumstances. I should therefore like to consider the present problem independently of this decision, the submission of Counsel for the appellants repeatedly made to us being that their appeal was against the determination itself and its validity in terms of Section 82A (1) (*a*) and not against the erroneous decision in regard to the adequacy of security even though that erroneous decision is the primary basis on which the attack on the determination is founded. The argument of Counsel for the respondent, as I have indicated earlier, is based on the assumption that the appeal, so far as this point is concerned, is against a decision on a preliminary matter which is not provided for in section 82A unless that decision had the effect of finally disposing of the petition (section 82A (1) (*b*)) and that the appellant therefore cannot canvass that decision because it is no part of the " determination " under section 81. He added that this court has no roving jurisdiction as it were to review all illegalities committed by an Election Judge in the course of the trial but only a limited jurisdiction to review a determination on a ground of law. The answer of Counsel for the appellants to this submission is that when a right of appeal to the Supreme Court is conferred by statute on a party, all the rights that accrue to him, when he has a right of access to the Appeal Court, are available to him and that he can ask for relief on any errors of law pertaining to the judicial process which culminated in the determination. The appellants would thus be entitled to challenge or criticise the jurisdiction of the election court either to commence the hearing or to continue the hearing after a certain stage when the jurisdiction ceased to exist by virtue of a legislative prohibition against further proceedings being taken.

Before I express my own views on these respective submissions I consider it useful to examine the attitude adopted by this court sitting in appeal to questions which were raised before it and which did not have any bearing on the determination. The very first case after an

appeal was provided for the parties from a determination by an Election Judge was that of *Thambiayah v. Kulasingham* [1], 50 N. L. R. 25. In fact it may be said that the Amending Act No. 19 of 1948 was introduced for the special purpose of giving an opportunity to the appellant, who did not previous to the Act enjoy it, a right of appeal against the determination under section 81. It is both interesting and significant to note that the first argument, which was ably advanced by the respondent himself by way of a preliminary objection and which appears to have been treated with such great respect by the court that it necessitated the court calling upon both the appellant's Counsel and the Attorney-General for assistance, was not one which had the remotest bearing on the determination under section 81 against which an appeal was provided for by the amending legislation. It was a challenge to the constitutional validity of the legislation itself which conferred the right of appeal and therefore to the jurisdiction of the Supreme Court to hear the appeal. The Appeal Court does not appear to have made any endeavour to shut out the respondent from putting forward his argument on the ground that he had an appeal only against the determination under section 81 and not in regard to the validity of the amending legislation nor was his preliminary objection sought to be met by Mr. H. V. Perera for the appellant or Mr. Alan Rose (as he then was) Attorney-General, as *amicus curiae*, with any contention to that effect. The preliminary objection was thus seriously accepted by all parties and endorsed by the Court as a legitimate matter to be raised before it on an appeal under section 82A (1) (*b*) which specified the determination under section 81 as being the only matter against which an appeal lay on a question of law but not otherwise. This case appears to me to support the contention of the appellant that when a right of appeal is allowed to a party to come before the Supreme Court, he is not confined in his argument only to the questions of law which vitiate the ultimate finding referred to as the " determination " in section 81 but that he can raise any questions as to jurisdiction and/or any other matters of law. If that court took the view that the appeal can only be against the determination, it seems to me that the preliminary argument raised by the appellant could not have been entertained. Further, the Court invited submissions from both sides as well as from the Attorney-General, as *amicus curiae*, and gave its considered decision which showed that the appellant was not confined to a criticism of the determination.

In the recent election petition appeal No. 4 of 1970 relating to the Jaffna Electoral District, which was argued before My Lord the Chief Justice, my Brother Samerawickrame and myself, the main argument centred round the rejection of a medical certificate on behalf of the petitioner and the refusal of the Election Judge to grant a postponement of the trial and the consequent violation of a rule of natural justice which deprived the petitioner of being heard. The argument was

[1] *(1948) 50 N. L. R. 25.*

not advanced at any stage on the basis that this ruling affected the determination. Here too the Court entertained the argument and pronounced its decision that the application for the postponement was properly refused. We did not at any stage refuse to hear submissions on this aspect on the ground that no appeal was available to the appellant from incidental orders made by the Election Judge in the exercise of his discretion or that such order was no part of the determination against which alone he had an appeal. Far from taking such a course the Court considered all the facts relating to the postponement, the grounds on which a postponement should be allowed and such other matters and devoted a good portion of the judgment to this aspect without a single reference to its bearing on the determination. Another point which was listened to and adjudicated upon was whether, when counsel for the petitioner stated to the Election Court that he had no instructions in regard to the second charge, it was tantamount to a withdrawal of the petition and whether the Election Judge should have thereafter followed the procedure prescribed in Election Petition Rules for a case of proposed withdrawal and substitution of another petitioner in place of the petitioner who filed this petition. This point of law too was not raised on the ground of its possible impact on the determination—not even a suggestion to that effect was made either in the argument or in the judgment—but on the ground that the procedure violated the imperative provisions of the Order. Both parties were heard at length and the matter was adjudicated upon even though it was not part of the determination reached by the Election Judge. This decision too fortifies me in the view that in an appeal to this Court an appellant is not restricted to criticisms of the determination under section 81 in the strict sense but is entitled to assail any errors of law committed in the course of the proceedings at the trial of the election petition. In the case of *Ratwatte v. Piyasena*[1], 69 N. L. R. 49, where each of the three Judges wrote a separate judgment, the main point argued did not concern the determination at all but the constitutional validity of the appointment of the Election Judge by the Governor-General and therefore his jurisdiction to hear the petition, and only one short paragraph at the conclusion of the main judgment dealt with the determination. Similarly in the case of *David Perera v. Peiris*[2], 72 N. L. R. 217, several legal questions that did not form part of the determination were entertained and pronounced upon by the court.

And this, I think, is as it should be. For, when this Court is given the power to entertain an appeal on a question of law the Legislature could not have intended that any illegality which the Election Court committed in the course of the proceedings should be condoned but that only an illegality which affected the actual "determination" should be dealt with. To take a few examples, supposing for instance the Election Judge was nominated by theChief Justice under section 78

[1] *(1966) 69 N. L. R. 49.* [2] *(1969) 72 N. L. R. 217.*

for a specified period or, after he was so nominated, he ceased to be a Judge of the Supreme Court and an election petition was heard and determined by him despite objection by the respondent after the expiration of the nominated period or after he had ceased to be a Judge of the Supreme Court. In an appeal to this Court against the determination, if the only point taken is one of absence of jurisdiction by reason of the violation of the provisions of section 78, I cannot think that this court can resist this objection and dismiss the appeal on the ground that it did not relate to the determination. Supposing again an election petition is filed out of time contrary to the mandatory provisions of section 83 (1) of the Order-in-Council and even though there is an application to the Election Judge for a dismissal of the petition on that ground he chooses to try the petition and make a determination, I doubt very much that the Appeal Court will condone the error and affirm the decision on the ground that that error was no part of the determination. If one considers the appeal in the recent case of *Wijeyewardene v. Senanayake*[1], 74 N. L. R. 97, which was preferred under section 82A (1) (*b*), the decision of this Court confirms the principle that the non-observance of the provisions of the Order-in-Council cannot be condoned. This Court consisting of My Lord the Chief Justice, My Brother Sirimane and myself affirmed the finding of the Election Judge that the provision of section 80A (1) (*b*) which requires the petitioner to join as respondents to the election petition every person against whom allegations of any corrupt practice are made in the petition, was mandatory and that the failure to comply with it rendered the petition liable for dismissal and secondly, that the requirement in section 80B (*c*) to state in the petition the material facts on which the petitioner relies which was not complied with by the petitioner in that case was also a mandatory provision. All these provisions which would operate in the hypothetical cases which I have referred to and in the case of *Wijeyewardene v. Senanayake* (supra) were considered as mandatory owing to the use of the word " shall " in connection with the requirement imposed by the Statute. The logical result of the failure to comply with such provisions would of course be to render invalid any subsequent proceedings, the non-compliance being fatal to their validity. This result would indeed have followed as a necessary corollary to the decision of this Court in the case of *Wijeyewardene v. Senanayake* had the Election Judge proceeded to hear the petition having overruled the objection raised against the non-compliance with the provisions referred to. These reasons lead me to the irresistible conclusion that when an appeal comes up before this Court from a determination of an Election Judge the only restriction which is imposed on this Court is that it cannot interfere with the decisions of the Election Judge on a pure question of fact *simpliciter*. It can however look into any errors of law committed by the Judge in the course of the proceeding culminating in the determination. It will in my view be monstrous for this Court to render itself so impotent as to ignore and condone every error in law, however

[1] *(1971) 74 N. L. R. 97.*

blatant it may be, and to look at only any errors of law contained in the determination strictly so called. It is I think the duty of this Court to examine the entire proceeding leading up to the determination and to affirm, vary or reverse the determination whenever the determination itself is invalid or it is tainted by reason of errors of law contained therein.

I have referred to the irregularities dealt with in the previous cases as they form a useful background to consider the illegality of the entire proceeding complained of in this case. In comparison with the provisions referred to in the cases cited above as mandatory the provision contained in Rule 12 would appear to be one *sui generis*. While Rule 12 (2) contains the mandatory requirement similar to those found in sections 80A and 80B, the requirement in Rule 12 (3) is such as is not found anywhere else in this Order. I might even say that the wording used imposes a clear prohibition against further proceedings the like of which I have not come across in any other enactment, nor has counsel for either party been able to bring to our notice any such enactment. If in the earlier cases referred to the non-compliance with the mandatory provisions of sections 80A and 80B have been considered as mandatory rendering the petition liable for dismissal and if in every case decided since the State Council Elections of 1931 the insufficiency of security has resulted in the dismissal of petitions and the Supreme Court has reversed such a finding only where it considered that the Election Judge was wrong in his decision that security was insufficient, this Court has no justification whatsoever to hold that even though the security is insufficient as in this case, the subsequent proceedings were valid proceedings on which a legal determination can be based. I should have thought that even if Rule 12 (1) and (2) stood alone the peremptory nature of the provision would have been sufficient for a court to dismiss an election petition if the petitioner had not complied with the provisions contained therein and this has been the course adopted by this Court in the cases which I have referred to for non-compliance with what has been called a mandatory provision. While these provisions are themselves adequate for the purpose the enactment by the Legislature of Rule 12 (3) which is almost superfluous in the circumstances can only be interpreted as an unmistakable injunction which is intended to prohibit a court from having any further proceeding on an election petition if the security as provided in this Rule is not given by the petitioner.

Maxwell on "Interpretation of Statutes", 11th Edition at page 367, enumerates a number of instances to illustrate the principle that enactments regulating the procedure in courts are imperative and not merely directory. The respect shown in the English courts to such provisions was exemplified in a case referred to among these instances (*Vaux v. Vollans* [1] (1833) 2 L.J. K.B. 87) and appears to support the

[1] *(1833) 2 L. J. K. B. 87.*

view which I am inclined to take. This case illustrates the extreme rigour with which the courts enforced compliance with statutory requirements which were imposed as conditions precedent to an action being brought. Even this requirement however does not appear to me to reach the level of the very strict requirement insisted upon by Rule 12 (2) read with Rule 12 (3) of the Order-in-Council with which we are concerned. I am confirmed in my view by the further comment contained at page 375 of this thesis :—

> "Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the Tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. It would not be competent to a court to dispense with what the Legislature had made the indispensable foundation of its jurisdiction."

A further aspect that remains for consideration is whether the wrong decision by the Election Judge in regard to the sufficiency of security can validate the subsequent proceedings. I am emphatically of the view that such a contention cannot be supported. When this Court is called upon to decide the matter the question whether security is sufficient must surely depend on the decision that this Court takes thereon. To decide otherwise and to give a construction that the decision of the Election Judge on this matter must prevail would be to read into Rule 12 a complete proviso that where however the security is considered adequate by the Election Judge and further proceedings are had such proceedings will be deemed to be valid despite the prohibition contained in Rule 12 (3). Such a course would in my opinion be an altogether unwarranted circumvention of the imperative legislative prohibition of Rule 12 (3) and cannot in any way be justified. In this connection it is important to bear in mind that it is not as it were that the objection was not taken by the 1st respondent-appellant before the Election Judge at the appropriate stage and that he is raising the matter for the first time in this court. He raised his objection to further proceedings being taken before the trial court and applied for a dismissal of the petition and having failed there as a result of the view which the Election Judge took which we find to be erroneous, he is now raising the same point in appeal to support his submission that all the proceedings subsequently taken were without jurisdiction and irregular. For this Court to hold that the Election Judge had a right to decide that matter which cannot be done except by reading into the Rule a non-existent proviso will be to misconceive the functions of a court whose clear duty is to interpret the law as laid down by the Legislature and not to indulge in a naked disregard of the legislative provision. If it was intended that the decision of the Election Judge on this matter should be final and that it cannot be canvassed in appeal, it seems to me that the Legislature could well have done so. The Legislature could also have had recourse to the simpler expedient of using a phrase like "if in the opinion of the court the security is sufficient" or "if the

court is satisfied that security is sufficient" further proceedings can be had on the petition. For, such language is not unknown to our law—vide Rules attached to the Appeals (Privy Council) Ordinance, Chapter 100 dealing with the security to be given by an appellant. But the Legislature did not adopt any of these courses. If one examines the various provisions of this Order itself one would find that finality against a review by a superior court has been given even to certain administrative decisions of the Commissioner of Elections, the presiding officer at an Election or the returning officer at the counting of votes and such decisions cannot naturally be questioned whether they be right or wrong. As no finality has thus been given to the decision of an Election Judge in regard to the sufficiency of security it is not permissible for this Court to hold that a wrong decision by an Election Judge is immune from review. So to decide would be tantamount to this Court vesting the Election Court with a jurisdiction which the Legislature clearly prohibited it from assuming. One can never overlook the fact that the Election Court is a creature of a statute, the Order-in-Council, and that all the powers of an Election Judge are derived from that statute alone. He cannot travel outside the powers given by the statute nor can he ignore any prohibition imposed on the exercise of his powers. An Election Court cannot therefore by a wrong decision in respect of a matter which is a condition precedent to the exercise of jurisdiction, vest itself with a jurisdiction which it would possess only if the condition precedent is satisfied.

A provision which I can think of as having a resemblance in some respects to the prohibition contained in Rule 12 (3) and from which an analogy may be drawn is to be found in the Conciliation Boards Act No. 10 of 1958. Section 14 of this Act imposes a prohibition on the institution of certain types of civil proceedings arising in an area in which a panel of conciliators has been appointed unless a certificate is produced by the plaintiff from the Chairman of such panel as provided by this section. This is equivalent to a provision that if a certificate from the Chairman of a panel of conciliators is not produced in such a case the Court shall not entertain any proceedings. If a court, for instance, entertains a plaint in such a case and completes the trial after rejecting an objection on the ground of the absence of the certificate referred to in section 14 and this Court on appeal finds that that Court was wrong in rejecting such objection, I think that this Court will have no alternative but to set aside all the proceedings at the trial on the ground that they were illegal as being contrary to the express prohibition contained in the said section. The merits of the case on the facts will be an altogether irrelevant consideration for this Court in arriving at its decision whether the proceedings were regular.

A further argument advanced by counsel for the appellants was that the refusal by this Court to interfere with this order would offend a fundamental principle of equity. For, section 82A (1) (*b*) specifically allows an appeal from a wrong decision of an Election Judge dismissing

a petition on the ground of inadequacy of security. If, as I stated earlier, this Court on appeal finds that the Election Judge was wrong in his decision, such decision would be set aside and the trial of the petition would be proceeded with. A petitioner would thus have a remedy against a wrong decision by the Election Judge in regard to the adequacy of security. If we adopt the argument of counsel for the respondent that section 82A (1) (*a*) does not permit this Court to correct an erroneous decision regarding security in an appeal by the original respondent the resulting position would be that the respondent only will have no relief from this Court against the Election Judge's wrong decision on the self-same matter in which the petitioner is granted relief. This seems to me to violate an elementary and fundamental principle and I should be most reluctant to subscribe to such an iniquitous principle unless the Legislature so laid down in language which is clear and unambiguous. For the many reasons I have given earlier, I do not think that the Legislature has either clearly laid down that such a result should follow a wrong decision by the Election Judge or even given any indication of such an intention. On the contrary section 82A (1) (*a*) taken by itself as well as the attitude taken by this Court in previous cases appealed from persuade me to the conclusion that a just and equitable construction is available, namely that while an aggrieved petitioner whose petition is dismissed can appeal to this Court under section 82A (1) (*b*), an aggrieved respondent can complain to this Court of such erroneous decision in his substantive appeal. This principle of not construing an enactment so as to result in an obvious injustice is referred to in the case of *Rex v. Tunbridge* [1], (1884) 13 Q.B.D. 339 at 342 where Brett M.R. observed :—

> " If an enactment is such that by reading it in its ordinary sense you produce a palpable injustice, whereas by reading it in a sense which it can bear, although not exactly its ordinary sense, it will produce no injustice, then I admit one must always assume that the Legislature intended that it should be so read as to produce no injustice."

These considerations constitute added reasons for a court to construe section 82A (1) (*a*) not in the narrow sense in which counsel for the respondent has invited us to do but to read it in a sense that it can bear so that it will not produce the palpable injustice of one party to a suit being given a right of appeal against an erroneous decision while the other party is denied such a right.

When I consider the eminent justice of this principle, far from agreeing with the submission of counsel for the respondent on this matter, it occurs to me that it may well be the recognition of this very principle that prompted the Legislature to introduce the provision in section 82A (1) (*b*) with the object of rectifying an injustice resulting to the petitioner by the enactment of section 82A (1) (*a*). For the Legislature may have thought that the enactment of section 82A (1) (*a*) gave the

[1] *(1884) 13 Q. B. D. 339 at 342.*

right to a respondent whose petition was heard and decided a right of appeal against the determination and incidentally a right to complain of wrong decisions by the Election Judge on any matters of law that occurred during the trial, while a petitioner against whom a wrong decision was made was left without a remedy in respect of such wrong decision which resulted in a dismissal of the petition, before the trial was proceeded with on its merits. As this situation was unfair to a petitioner and such unfairness was exemplified in the case of *Ramalingam v. Kumaraswamy* (supra) the Legislature would have provided by section 82A (1) (*b*) a remedy for the petitioner as well against such wrong decisions which was earlier available only to the respondent. If that view of the matter is correct, one is compelled to the conclusion that, since the enactment of section 82A (1) (*a*) a right to complain against incidental errors of law such as a wrong decision on the adequacy of security, proper issue of notice, joining of necessary parties and similar matters was always available to the respondent or an appellant once there was a determination, and that section 82A (1) (*b*) was enacted with the sole object of setting right the injustice suffered by a petitioner whose petition was prematurely dismissed by reason of an erroneous decision of the Election Judge on such preliminary matters. In other words section 82A (1) (*b*) was intended to give a petitioner the right of appeal in certain matters which section 82A (1) (*a*) conferred only on a respondent. For it would, I think, be quite wrong to attribute to the Legislature such an unreasonable intention as to provide for an appeal only to the petitioner who is aggrieved by a wrong order and to deny it to the respondent, which is what counsel for the petitioner wishes us to do. Counsel's answer to this is that there was a stage before Act No. 19 of 1948 was passed when neither party had an appeal and that, if the will of the Legislature is that the petitioner only should enjoy a right of appeal, there is nothing that the courts can do to relieve the respondent. This would, in my opinion, be a superficial way for a court to approach this problem. The position prior to Act No. 19 of 1948 can be easily understood. The Election Judge was made the final arbiter in the trial of an election petition and both parties were equally bound by his decision. Here there is no unfairness because, whether an error was committed to the prejudice of the petitioner or to the prejudice of the respondent, neither of them had a remedy. But to say that the Legislature deliberately introduced a provision in order to give a right of appeal to one party and in effect to deny it to the other in respect of an error committed by the Election Judge in regard to the same matter would be a preposterous proposition which offends one's elementary sense of justice. I do not therefore see any reason to attribute such an intention to the Legislature and to give the provision which we are considering the interpretation that counsel commends for our acceptance when another interpretation which is quite consistent with reasonableness on the part of the Legislature can well be given. When one analyses the problem in this way the view is inescapable that a right of appeal to the respondent in such a situation was already available in section

82A (1) (*a*) and that section 82A (1) (*b*) supplied an omission by granting a remedy to the petitioner who was aggrieved by an allegedly wrong decision resulting in a dismissal of his petition. It is also possible that the Legislature in enacting section 82A (1) (*a*) originally intended to give both parties a right of appeal to the Supreme Court from a determination which right did not exist before but overlooked the possibility of a premature end to a petition, which can only be to the prejudice of the petitioner, and a consequent desire on the part of the petitioner to appeal from that order. When it thereafter realised that possibility it enacted section 82A (1) (*b*) and supplied the omission.

For the reasons stated above I do not find it possible to resist the conclusion that the respondent-appellant has a right in this appeal to canvass the decision of the Election Judge on his application for the dismissal of the petition on the ground of insufficiency of the security deposited by the petitioner. The security being in my view insufficient having regard to the number of charges in the petition, the decision of the Election Judge should have been in favour of the appellant and Rule 12 of the Third Schedule left the Election Judge with no option but to dismiss the petition and to have no further proceedings thereon. As to why the Legislature has attached such importance and sanctity to the quantum of security is not for this court to question. The clear and imperative requirement of the Rule is that the Court can make only one decision if security " as in this Rule provided is not given". For a court to make any other order, if the security is not in accordance with this Rule would be to treat the Legislature with contempt and to hold that an illegal procedure can produce a legally valid result and it is not open to any court to adopt such a course. The fact that in the long line of election petition cases dating back to 1931 no court has ever taken such a course, confirms the peremptory nature of this Rule.

As I had occasion to observe in my dissenting judgment in the recent appeal in the Ratnapura Election Petition case [1], where the rights of the elected candidate and the rights of several thousand voters of the electorate are concerned, even if an enactment admits of two possible constructions, one of which results in harshness and the other does not, a court must lean towards the view that avoids the harshness. On this principle even if two interpretations are available in regard to section 82A (1) (*a*), both of which are reasonable, a court should prefer the interpretation that is favourable to the elected candidate. In regard to the question of the adequacy of the security however such a difficulty does not confront me as, in my view, the language of the enactment is clear and unambiguous and there is only one construction possible and that is for the dismissal of the petition if the security is insufficient.

This being my view of the legal issues involved in this appeal, I consider it unnecessary to deal with the submissions on the matters of law regarding the determination itself.

[1] *Ellawela v. Wijesundera (1971) 74 N. L. R. 265.*

I appreciate that in this case the Election Judge has heard all the evidence and arrived at a finding of fact that the election is void in consequence of a false statement made by the 4th respondent as agent of the first respondent. As I have pointed out earlier, however, when a court has to consider a pure question of law, it has to take an objective view of the point involved uninfluenced by the merits of the case on the facts. An approach to the problem with a mind which is influenced by the facts must necessarily warp one's judgment and render the decision erroneous. It is necessary therefore that one should not confuse one's imagination by a consideration of the facts which would be irrelevant for the purpose of arriving at a decision on the legal issue involved, even though such decision will result in a reversal of the decision on facts taken by the trial court. This is indeed a situation that courts of law are faced with very often in the sphere of criminal law and convictions have so often to be set aside however strong the facts may appear, if the trial court has been guilty of a procedural error laid down by law. The decision I have reached will thus result in a reversal of the declaration by the Election Judge avoiding the election of the 1st respondent. So far as the 4th respondent Vajira-buddhi Thero is concerned, however, this decision does not in any manner stand in the way of an independent prosecution against him for a corrupt practice of making a false statement in terms of section 58 (1) of the Order-in-Council followed by the loss of his civic rights as contemplated by section 58 (2), in the event of a conviction.

For the reasons stated above, I allow the appeal, reverse the decision of the Election Judge and hold that the 1st respondent was duly elected as Member of Parliament for the Nuwara Eliya Electoral District, No. 53.

SIRIMANE, J.—

The 1st Respondent, who was returned as the Member for the Nuwara Eliya Electorate at the last General Election, was unseated on the ground that the 4th Respondent, his Agent, had made a false statement affecting the personal character and conduct of the opposing candidate, William Fernando.

These appeals are by the 1st and the 4th Respondents and were argued together.

The main matter urged at the hearing of these appeals was that the security furnished by the petitioner was not in accordance with the provision of Rule 12 (2) in the Third Schedule to the Ceylon (Parliamentary Elections) Order-in-Council, Chapter 381, and the petition should have been dismissed under Rule 12 (3). The point was raised before the trial Judge, and after hearing arguments lasting for many days, he held that the sum of Rs. 12,500 furnished as security was correct on his interpretation of that Rule.

Is there a right of appeal ?

An " Election Judge " is created by this particular statute (Chapter 381). I think it is well established, that an appeal against the order of a special tribunal (such as an Election Court) must be expressly granted (see, for example, *Tillekawardene v. Obeyesekere*[1] 33 N. L. R. 193).

The right of appeal under this Chapter, as it exists today, is to be found under section 82A (1) which provides as follows :—

" An appeal to the Supreme Court shall lie on any question of law, but not otherwise, against—

(*a*) the determination of an Election Judge under section 81, or

(*b*) any other decision of an Election Judge which has the effect of finally disposing of an election petition."

Before 1948, there was no appeal at all against any decision by an Election Judge. The right of appeal set out in 82A (1) (*a*) was granted by an amending Ordinance, 19 of 1948. That was the only right of appeal until 1959.

In the course of hearing an election petition, the Election Judge may have to make many " other decisions " before the determination contemplated in section 82A (1) (*a*). That section requires an Election Judge *at the conclusion of the trial* to determine whether a member, whose election is challenged, " *was duly returned or elected or whether the election was void.....* " An Election Judge may be called upon to decide at a very early stage of the proceedings whether, for example, a particular Rule has been complied with. In 1959 by Ordinance 11 of 1959, the legislature granted a further limited right of appeal against " any other decision of an Election Judge " as set out in 82A (1) (*b*). The decision must be one which has the effect of finally disposing of an election petition.

An order holding that the security furnished is insufficient, resulting in a dismissal of the petition is, therefore, an appealable order only because it finally disposes of the petition, and the right of appeal against such an order is expressly granted, but a decision that the security furnished is sufficient is not an appealable order under the second limb of section 82A (1), and Counsel for the appellants rightly stated that they do not seek to come under that limb.

It must be remembered that section 82A (1) (*a*) grants a right of appeal on a point of law from a determination whether a Member was duly returned, or whether the election was void, and nothing else. A decision at a preliminary stage that the security furnished is sufficient and the petitioner is entitled to be heard, has, in my opinion, nothing to do with the determination after the conclusion of the trial contemplated in section 81.

[1] *(1931) 33 N. L. R. 193.*

It was argued that when the security furnished is insufficient, the Judge was obliged to dismiss the petition ; and if he wrongly decides that the security is sufficient and proceeds with the hearing and determines that a candidate is not duly elected, such determination, it was submitted, was not a *valid determination* as the trial Judge had no jurisdiction to do what he did.

I have carefully considered this argument, but I am unable to agree.

The question whether sufficient security has been furnished is a preliminary matter which must be taken before the trial Judge. The point was, in fact, raised in this case, and argued at length.

It was a question which the trial Judge had jurisdiction to decide, and his decision on that question *was one made within jurisdiction*. The real question is whether the legislature has given a right of appeal from such a decision. In my opinion, it has not.

In my view, it is fallacious to argue that the jurisdiction of the election Judge to hear and determine a petition is dependent on the decision of the Supreme Court on the quantum of security. It is for the trial Judge to decide such a preliminary point. I think, the election Judge considering his status could be said to have *total* (as opposed to limited) jurisdiction to decide the question of security. There is a passage in the judgment of *The Queen v. The Commissioner of Income Tax* [1] (21 Q. B. D. 313) referred to by Cannon, J. in *Muheyadin v. Thambiappah* [2] (46 N. L. R. 370 at page 372) which sets out the position thus :

> " The Legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exist 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. "

The local case of *Ramalingam v. Kumarasamy* [3] (55 N. L. R. 145) decided in 1953 also, in my view, throws much light on this point.

The petitioner in that case failed to comply with a preliminary rule, i.e., he failed to serve notice of the petition on the respondent as required by Rule 15. The petition was dismissed. In those days, the only right of appeal granted was against a determination whether a candidate was duly elected or not. There was, of course, no decision on that point in

[1] *21 Q. B. D. 313.* [2] *(1945) 46 N. L. R. 370 at 372.* [3] *(1953) 55 N. L. R. 145.*

that particular case, but the reasoning in the judgments clearly shows that the Legislature did not grant such a right on " other decisions " of the Election Judge. A right was granted in a limited way only in 1959 when the decision had the effect of finally disposing of the petition.

As I am of the view that there is no right of appeal from the trial Judge's decision on the quantum of security it is unnecessary to express an opinion on whether the security tendered in this case was, in fact, adequate as strongly contended for by the respondents. But I would like to say that after the amendment of Rule 12 (2) in 1970, the decision in *Perera v. Bandaranaike* [1] (68 N. L. R. 241) may need re-consideration.

Counsel for the appellants posed the question whether it would not be an anomaly to grant a petitioner a right to appeal if he is dissatisfied with the trial Judge's decision on the adequacy of security, and deny that right to a dis-satisfied respondent. But, I think the Legislature did not want interlocutory appeals in election cases which, it was hoped, would be speedily disposed of. Hence the amending section 82 A(1) (*b*) gave a right of appeal on a decision on preliminary matters only when they had the effect of finally disposing of the petition. Besides, if at the conclusion of a trial it has been conclusively proved that a candidate has been guilty of bribery, intimidation, and other corrupt and illegal practices, would it not be an anomaly if he is entitled to sit in Parliament, if it could be successfully argued in appeal that the trial Judge had erred on the quantum of security ?

Another point raised was that the affidavit filed with the petition as required by section 80B (*d*) was defective. This point, too, was argued at length before the trial Judge who gave his order against the respondent and decided to proceed with the hearing. On the same reasoning, there is, in my view, no right of appeal against that decision. I might also add that the section requires that the affidavit should be in the prescribed form. The Legislature has omitted to prescribe a form, and in the circumstances the petitioner has done his best causing (in my view) no prejudice at all to the respondents.

In my opinion, a trial Judge's decision on preliminary matters such as those set out above have no connection whatsoever with the determination at the conclusion of the trial whether a candidate has been duly returned or not.

I do not find the decision in *Wijewardene v. Senanayake* [2] (74 N. L. R. 97) of much assistance in the present case. There, the petitioner failed to add persons against whom allegations of corrupt practices were made, as parties in the case, and the trial Judge *dismissed the petition.* An appeal against such an order is expressly granted unlike in the two preliminary matters in this case.

The last point urged by Counsel for the appellants as affecting the final determination is the document P21 and the use of it made by the Judge.

[1] *(1966) 68 N. L. R. 241.* [2] *(1971) 74 N. L. R. 97.*

In the course of the cross-examination of the 4th respondent, it was suggested to him that he had made some defamatory or insulting remarks about the then Leader of the Opposition, which drew the attention of the crowd and made a section of it restive. While admitting that he made some reference to the Leader of the Opposition, he denied that the words used were defamatory. He also said that he never made personal attacks on persons. He was then asked whether at an election meeting held in 1965 he had made similar statements about the Leader of the Opposition. The remarks he is alleged to have made on that occasion, which constituted a fairly long passage, were read out to him from a Sinhalese newspaper. The passage put to the witness had not been taken down by the stenographers and Counsel for the petitioner marked the passage as it appeared in the newspaper as P21. An objection was raised by Counsel for the 1st Respondent, but the trial Judge allowed the passage to be marked, and a translation of it put in. The record shows that the 4th respondent said that he was not sure whether he spoke those words or not, but that because (so the witness said) he always thinks before he speaks it was likely that he had been mis-reported.

Counsel who marked the passage explained that the passage in the newspaper was so marked only for the purpose of identification as the stenographers were not taking down what was being put to the witness in Sinhalese.

It is obvious, however, that the newspaper report cannot be used to contradict a witness, and in this instance was not so used but only to ask him whether he used those identical words.

Did the trial Judge misuse P21, and was his assessment of the 4th Respondent's evidence affected thereby ?

I have given this matter my anxious consideration and reached the conclusion that even if the trial Judge attached undue importance to P21, yet it is impossible to say that his findings of fact were vitiated thereby.

The trial Judge when dealing with the denial of the 4th Respondent that he used defamatory words or that he referred to the opposing candidate at all said that he was of the view that the 4th Respondent was a person who was " capable of being carried away by his own oratory " and that at election meetings gibes at personalities were delectable to a certain section of the audience. He then went on to say that the 4th Respondent himself had uttered such a statement earlier *if the newspaper report was accurate.*

But in assessing the evidence, the trial Judge, who is one with considerable experience, and had, in fact, rejected a good deal of the evidence placed before him by the petitioner in connection with another charge, reminded himself that the petitioner must prove his allegation " with the certainty required for the proof of a criminal charge ".

At other places, in his judgment, he said that he must have the utmost confidence that the evidence put forward by the petitioner was entirely reliable, and that he should give the benefit of a reasonable doubt as to a person in the position of an accused, when a person denies what he has been accused of saying.

He approached the evidence in this way, and said that the evidence led by the Petitioner brings conviction to his mind.

On an appeal, which is on a question of law only, I am unable to say that the marking of the news para. as P21 and the use made of it have vitiated a trial Judge's findings of fact.

In my opinion, the appeals should be dismissed with costs, which I fix at Rs. 1,500.

SAMERAWICKRAME, J.—

It was urged on behalf of the appellants that the petition was not properly constituted inasmuch as it was not accompanied by a proper affidavit as required by the provisions of s. 80 B (*d*). I think this point cannot be upheld and I am in agreement with the finding in respect of it made by G. P. A. Silva, S.P.J., and the reasons stated in his judgment for the finding.

It was next contended that security had not been furnished in accordance with the provisions of Rule 12 (2) in that the amount deposited was inadequate and that the petition should have been dismissed in terms of Rule 12 (3). This matter was raised before the learned trial Judge prior to the hearing of the trial and he made order holding that the amount of security furnished was sufficient. Counsel for the petitioner-respondent submitted that this matter could not be raised as the appellants had no right of appeal against that order.

Section 82 A (1) provides :—

" An appeal to the Supreme Court shall lie on any question of law but not otherwise, against—

(*a*) the determination of the Election Judge under Section 81, or

(*b*) any other decision of an Election Judge which has the effect of finally disposing of an election petition. "

Section 81 reads :—

" 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 in writing under his hand. "

An appeal is not a matter of course but must be expressly given (vide *In re Wijesinghe*[1]—16 N. L. R. 312 and 39 Indian Appeals 197)[2]. The right of appeal granted by s. 82 A (1) (*a*) is a limited one. It is an appeal against the determination whether the Member was duly elected. Learned counsel for the appellants used " final determination " in the course of their arguments but the word " final " does not appear in the section. The decision that security is sufficient has nothing to do with the determination at the conclusion of the trial whether the member was duly returned or elected, or whether the election was void. Such a decision therefore cannot be canvassed in an appeal against the determination.

It was within the jurisdiction of the Election Court to determine the adequacy or otherwise of the security furnished. Being a Superior Court a judgment by it on any relevant matter against which there is no appeal is conclusive.

I am therefore of the view that the submission that the petition should have been dismissed on the ground that the security furnished was insufficient must be rejected.

In view of the finding at which I have arrived, it is unnecessary to consider and adjudicate on the arguments in regard to the adequacy of the security. I am however of the view that the learned trial Judge's order that the security furnished was sufficient is correct and had it been necessary to go into the matter I would have upheld his order.

I am satisfied that no ground has been shown for setting aside the finding of the learned trial Judge that the 4th respondent had made a false statement affecting the personal character and conduct of the opposing candidate, William Fernando.

In the result I am in agreement with the order made by Sirimane, J., that the appeals should be dismissed with costs.

Appeals dismissed.

[1] *(1913) 16 N. L. R. 312.*

[2] *39 Indian Appeals 197.*