

**PILAPITIYA v. MUTTETTUWEGAMA
AND OTHERS**

SUPREME COURT

SAMARAKOON, C.J., THAMOTHERAM J., AND WANASUNDERA, J.

SPECIAL LEAVE TO APPEAL APPLICATION NO. 15 OF 1979.

MAY 7, 1979.

Election petition - Interlocutory order made by Court of Appeal during hearing of petition - Application for special leave to appeal to Supreme Court - Has the petitioner right of appeal from such interlocutory order - Articles 118 (c), 130 (b), 101 (2) and 128 (2) of the Constitution - Ceylon (Parliamentary Elections) Order in Council, section 82A.

The petitioner was elected to the National State Assembly from the Electoral District of Kalawana at the General Election held in 1977. An election petition was filed against him and was taken up for hearing before the Court of Appeal. While this petition was pending he vacated his seat by reason of absenting himself from the sittings of Parliament during a continuous period of three months without the prior approval of Parliament-vide Article 66 (f) of the Constitution. The petitioner was then nominated by his party to fill the vacancy so created. In the Court of Appeal, Counsel on his behalf raised certain preliminary objections arising from his nomination. These were over-ruled and he filed this application in the Supreme Court seeking special leave to appeal from the order of the Court of Appeal. Counsel for the respondents contended that section 82A of the Ceylon (Parliamentary Elections) Order in Council did not permit an interlocutory appeal of this kind.

Held :

Article 128 (2) of the Constitution overrides section 82A of the Ceylon (Parliamentary Elections) Order in Council. This Article gives the Supreme Court a wide discretion and empowers it to grant leave to appeal from interlocutory orders of the Court of Appeal as well. An application for special leave to appeal is therefore entitled to be made in these circumstances. However, since the Court of Appeal is entitled to hear and determine the election petition and since the rights of the petitioner in this application are not prejudiced, there is no reason why special leave to appeal should be granted.

APPLICATION for special leave to appeal from an Order of the Court of Appeal

C. Thiagalingam, Q.C. with A.C. Gooneratne, Q.C., Bimal Rajapakse, P. Karalasingham and I Mohamed, for the 1st respondent-petitioner.

H.L. de Silva, with K. Shanmugalingam and Sidat Nandalochana, for the petitioner-respondent

3rd respondent-respondent in person.

Cur. adv. vult.

May 25, 1979.

SAMARAKOON, C. J.

The petitioner in this application was elected to the National State Assembly from the Electoral District of Kalawana at the General

Elections held in July, 1977. On 15.8.1977 an election petition was filed by the respondents to this petition in accordance with the law prevailing at the time of the institution of the petition. The High Court was seized of the matter and would normally have heard and determined the matter but for the fact that a change in the law occurred by reason of the promulgation of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the Constitution). Article 169 (10) of the Transitional Provisions, Chapter XXI, of the Constitution caused such petition to be removed to the Court of Appeal for hearing and determination. Article 169 (10) reads as follows:-

"169. Unless Parliament otherwise provides-

.....

(10) all election petition proceedings relating to the election of any person to the membership of the National State Assembly pending in the High Courts established under the Administration of Justice Law, No. 44 of 1973, on the day preceding the commencement of the Constitution, shall stand removed to the Court of Appeal and the Court of Appeal shall have the same jurisdiction to take cognizance of, hear and determine or to continue and complete the same, and the judgments and orders of the Supreme Court established by the Administration of Justice Law, No. 44 of 1973, and the High Courts aforesaid delivered or made before the commencement of the Constitution in such election petition proceedings shall have the same force and effect as if they had been delivered or made by the Supreme Court and the Court of Appeal established by the Constitution, as the case may be. The President of the Court of Appeal is hereby vested with the power to nominate a Judge of the Court of Appeal to hear and determine any election petition in respect of which the Court of Appeal is vested with jurisdiction by the Constitution;"

The President of the Court of Appeal nominated Justice Abdul Cader to hear and determine this petition. While the said petition was pending the petitioner vacated his seat by reason of absence from sittings of the Parliament without prior leave from Parliament (Vide Article 66(f) of the Constitution). This vacancy was filled by

nomination in terms of Article 161 (d) of the Constitution.

The petition sought a determination that the petitioner in this application was not duly elected or returned and also a declaration that the election was void in law. When the hearing commenced Counsel for this petitioner took two preliminary objections to the Court hearing the petition. First that the petitioner is a nominated member and not a person deemed to have been elected as a Member of Parliament and secondly that the Court should not stultify itself by proceeding with the hearing where an order, even if made in terms of the prayer to the petition, would be of no consequence and would be rendered nugatory. The Court of Appeal held against the petitioner and he has now made this application for special leave to appeal.

Counsel for the respondents has taken a preliminary objection, viz., that the petitioner has no right of appeal at this stage. He relies on section 82A of the Ceylon (Parliamentary Elections) Order in Council (Cap. 381) which reads as follows:-

"82A. (1) 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 31, or

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

Counsel contends that this does not permit an interlocutory appeal of this kind. Article 118(e) of the Constitution confers jurisdiction by way of appeal on the Supreme Court in all election petitions. Article 130(b) of the Constitution gives the Supreme Court power to "make such orders as provided for by law on" on any appeal from an order or judgment of the Court of Appeal in an election case. Parliament has reserved to itself the power to make laws in respect of elections and has set out in Article 101(1) (a) to (i) the matters on which such laws could be made. To meet the transitional period Article 101(2) provides as follows:-

"Until Parliament by law makes provision for such matters the Ceylon (Parliamentary Elections) Order in Council, 1946 as amended from time to time, shall, subject to the provisions of the Constitution, *mutatis mutandis* apply."

Cap. 381 is therefore applicable "subject to the provisions of the Constitution". Therefore section 82A of Cap. 381 must be read with the provisions of the Constitution which give the Supreme Court powers to act in appeal. Besides the power given in Article 130 (b) which I have referred to above, there is also Article 128(2) which reads as follows:-

"The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance."

This article gives the Supreme Court a wide discretion and applies to interlocutory orders of the Court of Appeal. Being a provision of the Constitution it overrides the provisions of section 82A of Cap. 381. I am therefore of the opinion that in circumstances such as this, a petitioner would be entitled to make an application asking for special leave.

We have heard Counsel for petitioner on the objections he has taken before the Court of Appeal. There appears to be no disputed interpretation of the Constitution between the parties. If such there be the Court of Appeal would necessarily act in terms of Article 125. In view of the provisions of Article 169 (10) the Court of Appeal is entitled to hear and determine this election petition and this would enable all parties to present their cases before that Court and also of coming before us, if necessary, at a later stage. Since the petitioner's rights are in no way prejudiced, I see no reason why special leave to appeal should be granted at this stage, from what purports to be an interlocutory order of the Court of Appeal. The application is therefore refused with costs.

THAMOTHERAM, J. — I agree.

WANASUNDERA, J. — I agree.

Application refused.