1942 *Present* : **Moseley S.P.J. and Soertsz J.**

In re GOONESINHA.

IN *re* APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL.

Privy Council—Application for conditional leave—Judgment of Supreme Court refusing to issue writ of certiorari *against Election Judge—Question of great general or public importance—Discretion of Supreme Court—Action—Appeals (Privy Council) Ordinance (Cap. 85), s. 3.*

The petitioner applied to the Supreme Court for a writ of *certiorari* to quash the order of a judge of an Election Court reporting the petitioner to the Governor in accordance with the provisions of Article 79 of the Ceylon (State Council Elections) Order-in-Council. The application was refused on the ground that the Supreme Court had no jurisdiction to issue a writ against an election Judge.

Held (on an application for leave to appeal to the Privy Council from the order of the Supreme Court), that the question involved was one which by reason of its great general or public importance should be submitted to His Majesty in Council and that the Supreme Court should use the discretion vested in it by granting leave to appeal.

Held, further, that an application for a writ of *certiorari*, being an application for relief or remedy obtainable through the Courts' power or authority, constitutes an action and comes within the ambit of section 3 of the Appeals (Privy Council) Ordinance.

THIS was an application for conditional leave to appeal to the Privy Council.

R. L. Pereira, K.C. (with him *A. R. H. Canekaratne, K.C., C. V. Ranawake, V. F. Gunaratne,* and *S. R. Wijayatilake*).—This is an application under section 1 (*b*) of the Privy Council Appeals Ordinance (Chapter 85, Legislative Enactments) for conditional leave to appeal from the order of the Chief Justice refusing an application for a writ of *certiorari* to quash the order made by the Election Judge against the present applicant. The granting of this application is within the discretion of this Court. The question involved in the appeal is one which ought to be submitted to His Majesty in Council for decision as it is caught up by all the conditions contemplated by the section—namely, "great general or public importance or otherwise".

There is no appeal to the Privy Council from a judgment or order of an Election Judge. The present appeal is not from an order made by the Election Judge. It questioned the correctness of the decision made by the

Chief Justice in refusing the application for a writ of *certiorari* on the ground that he had no power to do so as the Election Court as at present constituted is not an inferior Court. The Chief Justice holds that the Election Court is a Branch of the Supreme Court and therefore the writ does not lie. The jurisdiction of an Election Court was referred to by Garvin J. in *Tillekewardene v. Obeysekera*[1] when he observed that "the answer involves the consideration of questions of considerable difficulty". He was, however, of the opinion that "the jurisdiction exercised by the Election Judge created by the Order in Council is of a very special nature. Whether it is an extension of the ordinary jurisdiction of the Supreme Court or a separate and distinct jurisdiction vested in the Chief Justice and exercisable not by the Supreme Court or any Judge thereof but only by him or by a Judge of the Supreme Court specially appointed by him must first be determined". Shortly after Garvin J's judgment this question came up again in *Wijesekera v. Corea*[2] and Drieberg J. held that "The Ceylon (State Council) Order in Council, 1931, Art. 75, in dealing with election petitions, did not bring them within the jurisdiction of the Supreme Court: it in no way extended the jurisdiction of the Supreme Court. What it did was to create a special tribunal for the purpose, called the Election Judge, who is the Chief Justice, or any Judge of the Supreme Court nominated by him for the purpose". The Solicitor-General argued on similar lines in the course of an application made to inspect the marked registers in the election petition inquiry—*Saravanamuttu v. De Silva*[3], when he pointed to the fact "that under the Parliamentary Election Act of 1868 the Court is expressly given the powers, jurisdiction and authority at the trial as a Judge of the Superior Courts and as a Judge of Assize and *Nisi Prius*,—in Scotland the powers of a Judge of the Court of Session for the trial of a civil case without a Jury,—whereas in Ceylon no such provision had been made, and Article 75 (3) had conferred on an Election Judge the powers, jurisdiction and authority of a District Court, for the purpose of summoning or compelling the attendance of witnesses".

It was submitted that the writ could issue from a High Court to a branch of the High Court where the latter exercises limited jurisdiction. *Hailsham Vol. 9, page 830-381. James v. South Western Railway Co.*[4]. But it was rejected on the ground that the case referred to dealt with a writ of prohibition and, therefore, has no bearing on the facts of this case. The principles governing these writs are the same and there can be no such distinction.

The Chief Justice's judgment is at variance with both the judgment of Drieberg J. and the observation of the Solicitor-General. This matter, therefore, being in a state of doubt, should be submitted to the Privy Council for its decision.

The Election Judge's order in refusing to give the petitioner an opportunity to call witnesses on his behalf was not only contrary to the principles of natural justice but also contrary to the provisions laid down by the Order-in-Council, Article 79 (2). Moreover, after the learned

[1] *33 N. L. R. 193.*
[2] *33 N. L. R. 349.*
[3] *43 N. L. R. 77 at 79.*
[4] *7 Exchequer Cases 287.*

Judge's determination that the return of Joseph Silva was void he had no jurisdiction to make any order against the applicant. He, therefore, became *functus officio*.

The Privy Council has given special leave in cases where the defendant has not been given a hearing; *In re Pollard*[1] the appellant had been summarily punished for a contempt and in the case of *Chang Han Kiu et al. v. Sir Francis T. Piggott and Another*[2], where the appellants had no opportunity of showing cause before sentence, special leave to appeal was granted.

It is a matter of importance not only to the applicant personally but also to the public generally in that an important point of constitutional law is in question which has a bearing on their civic rights.

It is submitted that an appeal lies to the Privy Council from an order refusing to grant an application for a writ of *certiorari*. In *Eshugbayi Eleko v. Officer Administering the Government of Nigeria and Another*[3] there was an appeal to the Privy Council from an order of the Full Court affirming the report of a Judge of the Supreme Court refusing to entertain an application for a writ of *habeas corpus*.

H. H. Basnayake, C.C., on notice, as *amicus curiae* :—Section 3 of the Privy Council Appeals Ordinance governs the Rules under which this application is sought to be made. The Rules made under this Ordinance apply only to litigation *between parties*. There is neither a "civil suit" nor an "action". The word "action" does not include proceedings in connection with mandates. *Settlement Officer v. Vander Poorten et al.*[4] is in point. There, an application for leave to appeal to the Privy Council was refused, on the ground that the order from which leave to appeal is asked was not made in a civil suit or action in the Supreme Court, within the meaning of these words in section 3.

R. L. Pereira, K.C., in reply :—*Settlement Officer v. Vander Poorten et al*, (*supra*) and other cases referred to in that judgment have no application. In all those cases the Court concerned was sitting as a special tribunal and not exercising jurisdiction conferred on it by the Courts Ordinance. Moreover, no appeal to the Supreme Court was provided by the Waste Lands Ordinance or the Land Settlement Ordinance. In those circumstances there was no "civil action or suit in the Supreme Court". In the present case the application for leave to appeal is from the order of the Supreme Court exercising the jurisdiction conferred on it by the Courts Ordinance.

The word "action" in this Ordinance must be given the same meaning given to it in the Civil Procedure Code, section 5, which defines "action" as "a proceeding for the prevention or redress of a wrong". An application for a writ of *certiorari* will be covered by this definition. The definition of "action" in section 6 as "every application to a Court for relief or remedy . . . . ." is still wider. In *Subramaniam Chetty v. Soysa*[5] Bertram C.J. observed that it would be highly inconvenient if the word "action" in this Ordinance were given a different meaning from that which is given to it in the Civil Procedure Code.

[1] *P.C. Appeal Cases 106.*
[2] *(1909) A. C. 312.*
[3] *(1928) A. C. 459.*
[4] *43 N. L. R. 436.*
[5] *25 N. L. R. 344.*

H. H. Basnayake, C.C., in reply—Under Section 5, Civil Procedure Code, an "action" contemplates a "wrong". The order of a judge cannot be a "wrong". His judgment must be presumed to be correct. The proceedings of an action must be either "summary" or "regular"—Section 7. An application for a writ of *certiorari* is neither.

Cur. adv. vult.

November 19, 1942. MOSELEY S.P.J.—

This application for leave to appeal to the Privy Council is a sequel to circumstances arising in connection with the hearing of an election petition by a Judge of this Court. At the conclusion of the hearing the Election Judge reserved his order and subsequently declared the election to be null and void and, in accordance with the provisions of Article 78 of The Ceylon (State Council Elections) Order-in-Council, 1931, certified his determination to the Governor. On the same date the present petitioner, who had given evidence at the hearing of the election petition, was served with a notice issued out of this Court calling upon him to show cause why he should not be reported to the Governor in accordance with the provisions of Article 79 of the Order-in-Council. The matter came up for inquiry before the Election Judge, at which the petitioner was refused an opportunity of calling evidence. On March 18, 1942, the learned Judge delivered an order stating that the offences alleged against the petitioner had been made out and that a report would be sent to the Governor. The petitioner then applied to the Supreme Court for a writ of *certiorari* to quash the order made by the Election Judge on March 18, 1942. For reasons set out in his judgment (43 N. L. R. 337) the learned Chief Justice held that the Supreme Court has no power to issue such a writ against a Judge of the Court who has been nominated under the provisions of Article 75 (1) of the Order-in-Council to try an election petition. It is against this judgment, dated June 1, 1942, that the petitioner now prays for leave to appeal.

It is not contended that an appeal lies as of right. The petitioner, however, asks us to grant leave to appeal, using the discretion which is vested in us, on the ground that the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision. It cannot be controverted that, to quote from the judgment of the learned Chief Justice (*43 N. L. R. at 347*), "the action taken against the petitioner under Article 79 of the Order-in-Council has involed him in grave consequences in regard to his political career." Nor does it seem to me that the matter is lacking in general and public importance. There is certainly an important question of procedure for decision. It has, however, to be considered whether or not the matter comes within the ambit of section 3 of the Appeal (Privy Council) Ordinance. That section deals with the regulation of "the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council against the judgments and orders of such Court . . . ."

Mr. Basnayake, who appeared as *amicus curiae*, contended that the Appeals (Privy Council) Ordinance (Cap. 85) and the rules made thereunder apply only to litigation *between parties*. It does not seem to me

that the mere use of the plural, as it appears from the extract from section 3 which I have quoted above, effectively rules out the possibility that the word "action" may embrace the proceedings in connection with the various mandates, of which a writ of *certiorari* is one which may be issued by this Court. Counsel further drew our attention to the use of the words "matter in dispute" which appear in rule I (*a*) of the rules made under the Ordinance and contended that in the present case there is no matter in dispute. But those words do not appear in rule I (*b*) under which this application is made, although they might well have been employed had that been the intention of the legislature, whereas in their place appear the words "question involved in the appeal". The mere fact that there is a change of phraseology would seem to support the view that rule I (*b*) contemplates a class of case wider than a dispute between parties. It does not seem to me that the authority cited by Mr. Basnayake, viz. *Settlement Officer v. Vander Poorten et al.* (*supra*) has any bearing on the present case. There the application was made under rule I (*a*) and the authorities there considered seem to me equally inapplicable. Similarly I do not see that the authorities cited by Counsel for the petitioner are particularly helpful.

In *Eshugbayi Eleko v. Officer Administering the Government of Nigeria and Another* (*supra*) the point as to whether an appeal lay does not appear to have been considered. Moreover, the appeal was against a judgment of a Full Court affirming the refusal of a Judge of the Supreme Court to entertain an application for a writ of *habeas corpus*, a writ which seems to be in a class apart from the other prerogative writs. There is, further, no indication in the report as to the manner in which the appeal reached the Privy Council, whether by leave of the Supreme Court of Nigeria or by special leave of the Privy Council. In the case of *In re Edward Hutchinson Pollard, one of Her Majesty's Counsel at the Colony of Hong Kong v. The Chief Justice of the Supreme Court of Hong Kong* (*supra*) the appellant had been summarily punished for contempt. It was therefore a criminal matter and the case seems to have no application. The same observation applies to the case of *Chang Hang Kiu and others v. Sir Francis T. Piggott and Another* (*supra*) in which the appellant had been summarily committed to prison for perjury.

It may be argued that the word "suit" implies the existence of two parties. Can the same be said of "action?" The word is not defined in Cap. 85, but as Bertram C.J. observed in *Subramaniam Chetty v. Soysa*[1] it would be highly inconvenient if the word "action" in this Ordinance were given a different meaning from that which is given to it in our Code of Civil Procedure. "But", the learned Chief Justice went on to say, "there is a further reason. The principal sections of this Ordinance replaced and re-enacted certain repealed sections of our Code of Civil Procedure, and there is a very strong inference that the words used in an enactment so passed should have the same meaning as they bore in the sections which the enactment replaced".

So, in section 5 of the Civil Procedure Code (Cap. 86), we find "action" defined as "a proceeding for the prevention or redress of a wrong". Learned Crown Counsel's observation in regard to this aspect of the matter

[1] *25 N. L. R. 344.*

was that the judgment of the learned Election Judge could not be considered as a "wrong". It seems to me unnecessary to pursue that argument in view of the further definition which occurs in section 6 of the Civil Procedure Code, viz.: "Every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action". Crown Counsel's argument was that section 6 is qualified by section 7, which provides that "the procedure of an action may be either regular or summary," and contended that the procedure upon an application for a writ of *certiorari* is neither regular nor summary. A somewhat similar argument had been advanced in *Subramaniam Chetty v. Soysa* (*supra*) in which the question for decision was whether proceedings to set aside a sale constituted an action. That view was rejected by Bertram C.J., who conceived, for the purposes of the case before him, the possibility of "an action within an action". That, of course, is not the case here, but, at all events, Bertram C.J. does not appear to have considered that the classification of actions in section 7 as regular or summary is exhaustive. With that view I would, with respect, associate myself. Sharing that view I have little difficulty in arriving at the conclusion that an application for a writ of *certiorari*, being an application for relief or remedy obtainable through the Court's power or authority, constitutes an action, and therefore comes within the compass of section 3 of Cap. 85.

In view of the opinion which I have already expressed as to the importance, general, public and otherwise, of the matter I would grant leave to appeal on the usual conditions.

SOERTSZ J.—I agree.

Appeal allowed.