1953 *Present :* **Rose C.J., Nagalingam S.P.J. and Gratiaen J.**

K. RAMALINGAM, Appellant, *and* V. KUMARASWAMY, Respondent

ELECTION PETITION APPEAL NO. 2 OF 1953—CHAVAKACHCHERI ELECTION PETITION NO. 16 OF 1952

*Election Petition—Right of appeal—Scope—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82A, 82B, as amended by Parliamentary Elections (Amendment) Act, No. 19 of 1948.*

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. In the appeal preferred by the petitioner, the respondent raised the preliminary objection that appeal did not lie against the order of the Election Judge.

*Held,* that there was no right of appeal. One pre-requisite for an appeal under section 82 A (1) of the Parliamentary Elections (Amendment) Act, No. 19 of 1948, is that it must be against the " determination " of an Election Judge under section 81. In the present case, there had been no " determination " within the meaning of section 81 of the Act.

APPEAL in Chavakachcheri Election Petition No. 16 of 1952.

*S. J. V. Chelvanayakam, Q.C.*, with *C. S. Barr Kumarakulasinghe, G. T. Samerawickreme* and *G. Candappa,* for the petitioner appellant.

*H. V. Perera, Q.C.*, with *E. B. Wikramanayake, Q.C., H. Wanigatunga* and *E. A. D. Atukorale,* for the respondent.

*Cur. adv. vult.*

November 13, 1953. ROSE C.J.—

In this matter the petitioner appeals from an order of the Election Judge dismissing his petition on the ground that notice of the presentation of the petition was not served on the respondent as required by Rule 15 of the Parliamentary Election Rules, 1946.

The election for the Chavakachcheri electoral district held on the 26th May, 1952, and its result was published in the *Government Gazette Extraordinary* No. 10,404 dated 31st May, 1952. The last date on which



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a petition could properly have been filed was the 21st June, 1952, and it was on this day that the petitioner filed his petition. In accordance with the provisions of Rule 15 notice of the presentation of this petition should have been served by the petitioner on the respondent within 10 days of the 21st June, 1952. The relevant rules read as follows :—

" 10. Any person returned as a Member may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him on his behalf, appointing a person entitled to practise as a proctor of the Supreme Court to act as his agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within the City of Colombo at which notices addressed to him may be left, and if no such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the office of the Registrar. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force. "

" 15. Notice of the presentation of a petition, accompanied by a copy thereof, shall within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the agent appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned or if no agent has been appointed, nor such address given, by a notice published in the *Government Gazette* stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."

A notice of the presentation of the petition was in fact published in the *Gazette* on the 27th June, 1952, but the learned Election Judge came to the conclusion, after hearing evidence, that an agent had in fact been appointed by the respondent under Rule 10, and that therefore the publication in the *Government Gazette* as provided in Rule 15 was not appropriate in the case of the present petition and could not avail the petitioner. It is against this order of the learned Election Judge that the petitioner now appeals. The respondent raises the preliminary objection that no appeal lies against the present order.

Section 81 of the Ceylon (Parliamentary Elections) Order in Council in its unamended form reads as follows :—

" 81. At the conclusion of the trial of an election petition the election judge shall determine whether the Member whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor. Upon such certificate being given, such determination shall be final ; and the return shall be

confirmed or altered, or the Governor shall within one month of such determination by notice in the *Government Gazette* order the holding of an election in the electoral district concerned, as the case may require, in accordance with such certificate. "

It will be seen that the determination of an Election Judge under that section is final and is not subject to any appeal. It is interesting to recall that after the 1947 general election in Ceylon one candidate who lost his seat as a result of a successful election petition against him endeavoured to appeal to the Privy Council from the Order of the Election Judge. The matter is reported in 50 N. L. R. at page 481. (*G. E. de Silva v. Attorney General and others*). At page 483 Lord Simonds, the present Lord Chancellor, says,

" It is no doubt true, as counsel for the petitioner urged, that the prerogative right to entertain an appeal is ' taken away only by express words or the necessary intendment of a statute or other equivalent act of state ' (see *Renouf v. A. G.*) (1936) A. C. 445 at 460, but, as was pointed out in *Theberge v. Laudry*, the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case as in that it appears to their Lordships that the peculiar nature of the jurisdiction demands that this question should be answered in the negative . . . . . Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted. It is for these reasons that their Lordships have humbly tendered their advice to His Majesty that the petition ought not to be granted.

That, then, was the position under the Order in Council as unamended. By the Parliamentary Elections (Amendment) Act, No. 19 of 1948, section 81 of the Order in Council was repealed and the following Section substituted :—

" 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. Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided. "

Section 82 was also repealed and in its place appear new sections 82, 82A, 82B, 82C, 82D.

The new section 82A provides, in certain circumstances, a right of appeal to the Supreme Court from a determination of an Election Judge. The relevant sub-section reads as follows :

> 82A (1) : " An appeal to the Supreme Court shall lie on a question of law, but not otherwise, against the determination of an election judge under Section 81. "

It will be seen that there are two pre-requisites for an appeal. First, it must be a question of law ; secondly, it must be against the determination of an Election Judge under Section 81. In order to ascertain what is meant by " determination " it is helpful to refer to Section 81 itself, which sets out what it is that the Election Judge has to determine ; namely—in the case of a contested election—whether the member whose election is complained of was duly elected, or whether the election was void. It is relevant to note that when an election Judge has made such a determination it is his duty to certify such determination in writing under his hand. In any case where no appeal is preferred against the determination of the Election Judge or where an appeal is preferred but the Election Judge's determination is confirmed, such certificate has to be transmitted to the Governor-General under section 82C. Upon the transmission to the Governor-General of this certificate certain legal results follow, which are set out in Section 82D.

In the present matter the learned election Judge has not issued a certificate for the reason, no doubt, that he considered that his dismissal of this petition was not a determination under Section 81 of the Act. He evidently took the view, with which I am in agreement, that before it became necessary for him to determine the matters which are contemplated in Section 81, certain conditions precedent had to be fulfilled ; such as the proper giving of security as required by Rule 12, and the due service of notice as required by Rule 15. Such requirements are not unusual in this type of matter and it was held in an old English case, *Williams v. The Mayor of Tenby and others* [1], that it is a condition precedent to the trial of a municipal election petition that, within five days after the presentation of it, the petitioner should in the prescribed manner serve on the respondent a notice of the presentation of the petition.

Learned Counsel for the appellant contends that an appeal lies under section 82A (1) to the Supreme Court on any question of law and that an election Judge should regard section 81 as requiring him to issue a certificate in all cases, even where the petition is rejected on the ground of a non-compliance with one of the conditions precedent to its determination, on the footing that any rejection of a petition on such grounds necessarily implies a determination that the respondent member has been duly returned or elected.

[1] *L. R. 5 C. P. D. (1879 and 1880) p. 135.*

Apart from the fact that such an interpretation, in my opinion, does violence to the language of section 81, the matter seems to me to be put beyond all doubt by section 82B, which prescribes the powers of the Supreme Court in appeals under the Act. Sub-section (1) of the Section reads as follows :—

> " The Supreme Court may, upon any appeal preferred under Section 82A, affirm or reverse the determination of the Election Judge ; and where it reverses the determination, the Court shall decide whether the Member whose return or election was complained of in the election petition, or any other and what person, was duly returned or elected, or whether the election was void, and a certificate of such decision shall be issued by the Court. "

It is to be noted that where the Supreme Court reverses a determination, as we are invited to do in this case, it has to make a decision as to whether the member whose election was complained of was duly elected, or whether the election was void ; moreover, sub-section (3) provides that this decision is final and conclusive.

It would seem to follow from this that this Court has no power to remit a matter to the Election Judge for further consideration or for disposal of the remaining issues. Such a conclusion would perhaps seem to be self-evident, but if an instance is required in an analogous case it is provided in *Abdul Fareed v. The Tribunal of Appeal, Motor Transport and another* [1] where it was held that the Tribunal of Appeal under the Omnibus Service Licensing Ordinance, No. 47 of 1942, has no power to remit the matter for decision by the Commissioner, or even for the re-consideration of any particular points by the Commissioner. Under sub-sections (2) and (3) of section 14 of the Ordinance, the Tribunal of Appeal can do one of two things only, namely, either confirm the Commissioner's refusal of a licence or order that the licence be issued.

Quite apart from the fact that the provisions of the Sections of the Parliamentary Elections (Amendment) Act, which I have been considering, seem to me to afford no ambiguity, I would in any event be reluctant to accord them an interpretation which would result in the causing of that very type of delay which it is so clearly in the public interest to obviate.

Finally, it would hardly seem to be necessary to repeat what has already been pointed out by Swan J. in *Cooray v. Fernando* [2] that when an election petition is presented the petitioner should serve notice of it on the respondent within the prescribed time. The failure to do so is a fatal defect. The fact that the respondent had knowledge of the presentation of the petition does not amount to notice and does not dispense with the requirement as to service of notice.

[1] *(1950) 51 N. L. R. 211.*

[2] *(1953) 54 N. L. R. 400.*

For these reasons I am of opinion that no appeal lies to the Supreme Court against this Order of the Election Judge. The appeal is therefore rejected. The appellant will pay the costs of the respondent in the sum of Rs. 1,050.

NAGALINGAM S.P.J.—I agree.

GRATIAEN J.—

Section 81 of the Order-in-Council, in its original as well as in its amended form, does not operate until the completion of all the steps preliminary to the investigation of the grounds on which an election is challenged. The petitioner must first satisfy the conditions precedent to his right to have the petition tried on the merits—*Williams v. The Mayor of Tenby* [1]. It is then only that the trial can properly commence for the " determination " of the vital question " whether the Member . . . . or any other . . . . person, was duly returned or elected, or whether the election was void ". The right of appeal conferred by the new section 82A (1) is not unlimited ; it is restricted to appeals on questions of law against an Election Judge's " determination " (under section 81) which, but for such appeal, would have resulted in a final and conclusive decision as to the validity of the election.

The limitations placed on an aggrieved party's right of appeal under section 82A (1) are implicit in the language of the section itself ; they are further emphasised in section 82B which prescribes the duties imposed on this Court whenever it is called upon to exercise its appellate jurisdiction. For, in disposing of an appeal, this Court has power only to *affirm or reverse* the earlier " determination " of the election judge. If that " determination " is affirmed, sections 82C (1) and 82D (1) (*a*) are brought into operation. If, on the other hand, it is reversed, the Court " *shall* " immediately proceed to decide " whether the Member . . . . or any other and what person, was duly returned or elected, or whether the election was void ". *The Election Judge's findings upon any issues of fact which may be relevant to the validity of an election must, unless completely vitiated by misdirection or by a total absence of evidence, supply the material which (interpreted in the light of correct legal principles) forms the basis of the ultimate decision of this Court.* A certificate of this decision is then issued, and the provisions of sections 82C (2) and 82D operate to give effect to it.

It is quite apparent from the language of the relevant sections that, upon the termination of an appeal, *a final decision was intended by Parliament to follow one way or the other as to the validity of the return or election of the " Member ", so that no middle course is open to the Court.* This rules out Mr. Chelvanayakam's contention that a right of appeal is also conferred against an Election Judge's decision (at an earlier stage) upholding an objection to the petitioner's right to have his allegations against the " Member " investigated on the merits. In the first place, such a decision is not a " determination " of the issues specified in section

[1] *(1879) 5 C. P. D. 135.*

81 ; it amounts only to a *ruling* that the petitioner has forfeited the right to have his allegations investigated at all. In the second place, the argument assumes quite wrongly that this Court enjoys some unexpressed but inherent statutory power, if it disagrees with an Election Judge's decision upholding a preliminary objection, to ignore the express and imperative directions of section 82 by ordering him instead to commence an election trial under section 81 which has not yet taken place. Mr. Chelvanayakam very properly did not suggest, as an alternative solution, that the section requires us, in such a case to assume an *original jurisdiction* to hear evidence for the first time in order to " determine " for ourselves the vital issue whether or not the return or election should be set aside.

A recognition of the importance, in the public interest, of reaching finality as early as possible in the disposal of complaints concerning the validity of parliamentary elections is implicit in the entire scheme of the Order-in-Council which, in its original form, made no provision for appeals against an Election Judge's decisions (right or wrong). There are always two conflicting considerations in a matter of this kind—on the one hand, the desirability of providing reasonable safeguards against the possibility of human error in the judicial decision of important issues ; on the other, the avoidance of delay in ascertaining who precisely are the persons duly elected to represent the people in Parliament. How that conflict should best be resolved, is for the Legislature alone to decide.

It is in that context that we must interpret the amending Act, and the invitation that we should discover in the new sections a vesting of such inherent powers as those suggested by Mr. Chelvanayakam is, to my mind, an invitation to indulge in " a naked usurpation of the legislative function under the thin guise of interpretation "—*Magor & St. Mellons R. D. C. v. Newport Corpn.*[1] What is still worse, this suggested " judicial " legislation would be calculated to add to the delays which, in the public interest, Parliament was concerned to minimise.

We have been asked to consider the consequences of an election judge making a manifestly erroneous preliminary order rejecting an election petition, or arriving at a determination under section 81 (upholding an election) which is largely influenced by his refusal to admit a large volume of relevant and admissible evidence. In all these hypothetical cases, the argument continues, justice requires that the appellate jurisdiction of this Court should include a power to remit the case for further proceedings according to law. The short answer to this submission is that no such jurisdiction has been conferred on us, and that the arguments should be addressed to the legislature and not to us. This Court, in the present context, must strictly confine its judicial functions within the sphere of the limited jurisdiction which it does possess, and cannot travel outside those limits in order to exercise over election judges some form of unregulated supervisory control.

I agree that the petitioner has no right of appeal against the order of which he complains, and I agree that costs should be fixed as directed by my Lord the Chief Justice.

*Appeal rejected.*

[1] *(1952) A. C. 189 at 191.*