

1931

Present: Garvin S.P.J. and Drieberg and Akbar JJ.

TILLEKEWARDENE v. OBEYESEKERE.

IN THE MATTER OF THE AVISSAWELLA ELECTION PETITION.

Election petition—Dismissal of petition—Right of appeal—Finality of decision—Ceylon (State Council Elections) Order in Council, 1931, Article 78.

There is no appeal from the determination of an election judge as to the validity of an election.

A PPEAL from an order on an election petition in which the Judge held that the respondent, whose election was disputed, had been duly elected.

H. V. Perera, for respondent.—As a preliminary objection, the petitioner has no right of appeal. A party has no right of appeal as a general rule from the determination of any tribunal, even if it is an inferior tribunal, unless such right of appeal is expressly given by law. (*The King v. Hanson*¹ reported in *106 English Reports 1027*; *The Queen v. Stock*² reported in *112 English Reports 392*.) The Order in Council does not expressly give the right of appeal. So that, even apart from the words “such determination shall be final”, no appeal would lie, because the right has not expressly been given (*Furtado v. The City of London Brewery Co.*³; *The Attorney-General v. Sillem*⁴ reported in *17 English Reports 1200*). The Order in Council says that the determination shall be final. That concludes the matter. Certain consequences follow automatically on the determination. It is inconceivable that a party should be allowed to hold up these proceedings. For meaning of “final” see *Queen v. Hunt*⁵ reported in *119 English Reports 918*. The word “final” not only shuts out an appeal but even prevents a party from applying for a writ of *certiorari* to a Court having power to grant it.

An appeal must be to a Superior Court. The Order in Council states that an election petition must be presented to the Supreme Court. Although the petition is to be tried by the Chief Justice or a Judge specially nominated by him for the purpose, yet any interlocutory matter can come up before any Judge of the Supreme Court. The Supreme Court has no jurisdiction to entertain this appeal. The Supreme Court is the creature of legislation and its powers are limited. Appeals can be heard from the decisions of a single Judge of the Supreme Court only as provided for by sections 39, 40, and 41 of the Courts Ordinance. The election court is a special creation. Even the prerogative of the King to hear appeals from his subjects is expressly taken away in this case by his Majesty's own Order in Council.

¹ (1821) 4 *Barnwall and Alderson* 519.

² (1838) *Adolphus and Ellis* 405.

³ (1914) 1 *K. B.* 709.

⁴ (1864) 10 *House of Lords Case* 704.

⁵ (1856) 6 *Ellis and Blackburn* 408.

B. F. de Silva (with him *E. B. Wikramanayake* and *Charavanamuttu*), for appellant.—The right of appeal is claimed on three grounds: (i.) Where there is no rule in the Order in Council the English practice and procedure must be followed. (ii.) There is always a right of appeal unless it is expressly taken away by Statute. (iii.) The Courts Ordinance gives a right of appeal.

Clause 75 of the Order in Council creates an election judge. His powers are those of a District Judge (*vide* sub-section (3).).

[GARVIN S.P.J.—Does the election judge sit in his capacity as a Judge of the Supreme Court or is that character only incidental to him?]

He sits in a special capacity.

In England the Judicature Act, 1925, provides for the constitution of the Courts. The High Court has got an original and an appellate jurisdiction. There is an appeal from its original to its appellate jurisdiction (*Queen v. Hall*¹).

[GARVIN S.P.J.—The powers of the Supreme Court in Ceylon are not those of the Appellate Court in England. Is there in Ceylon a right of appeal to the Supreme Court from a judgment of a Judge of the Supreme Court?]

Yes. Section 3 of the Courts Ordinance defines "Court". An original Court includes the Supreme Court sitting in its original jurisdiction. Section 21, sub-section (2), gives the Supreme Court in its appellate jurisdiction the power to correct any errors committed by any original Court as hereinafter specified. The second portion of the sub-section extends the power to the correction of any errors of any Court.

[DRIEBERG J.—The second portion merely explains that the appellate jurisdiction of the Supreme Court is sole and exclusive. It does not enlarge the provisions of the earlier portion.]

Only the first portion is governed by the words "as hereinafter specified".

[GARVIN S.P.J.—Is there any instance where an appeal was entertained from a decision of the Supreme Court in the matter of a *mandamus* for example?]

There is an appeal in England.

[GARVIN S.P.J.—But the Judicature Act provides for that.]

The second portion of section 21, sub-section (2) of the Courts Ordinance gives the Supreme Court the right to entertain such an appeal.

Clause 78 of the Order in Council is the same as section 11, sub-section 13 of 31 & 32 *Vic. c. 125*. The word "final" means that the rights of the parties have been determined as far as the inquiry went. It is opposed to interlocutory. It is only when an order is final that there is no right of appeal. (*Lyme v. Warren*.²) In England the use of the word "final" has not prevented the High Court from giving leave to appeal.

[GARVIN S.P.J.—The word final must be read in connection with its context. There is no provision in Ceylon as in England for leave to appeal.]

¹ (1881) 7 Q. B. D. 575.

² (1884) 14 Q. B. D. 548.

L. M. D. de Silva, D.S.-G. (with him *Basnayake, C.C.*), for the Attorney-General on notice.—There is no appeal to the Supreme Court from a decision of a single Judge of such Court except in the case provided for in section 40 of the Courts Ordinance¹. An election judge is a Judge of the Supreme Court and article 76 and the form given in rule 4 of the rules in the 5th Schedule indicate that an election court is a branch of the Supreme Court, exercising original jurisdiction. Section 21 (2) of the Courts Ordinance defines the appellate powers of the Supreme Court. The powers in revision are the same as those in appeal. The use of the word "final" in Article 78 of the Order in Council concludes the matter. There is no appeal unless it is expressly provided for. "Final" means not subject to appeal. The English provision on this subject is substantially the same and in England there is no appeal from a "final" decision of an election court. Even if the word "final" did not exist in an enactment such as this, there would be no appeal to a higher tribunal unless it were expressly provided for *Strickland v Grima*²:

December 8, 1931. GARVIN S.P.J.—

At the conclusion of the trial of an election petition the election judge held that the respondent whose election was complained of had been duly elected, and as required by section 78 of the Ceylon (State Council Elections) Order in Council certified such determination to the Governor. A petition addressed to this Court was filed by the petitioner praying that the determination of the election judge be reversed and that the respondent whose election was complained of be declared not to have been duly elected. It was objected by the respondent that there was no right of appeal from such a determination by the election judge and that this Court had no jurisdiction to entertain such a petition. It became necessary therefore to decide in the first instance whether these objections were well founded.

The Order in Council gives no right of appeal in express terms from a decision of the election judge made under the provisions of section 78, nor is there reference either to a right of appeal or to an appellate jurisdiction in the rules contained in the 6th Schedule. It was urged however by Counsel for the petitioner that this was a *casus omissus* and that we should therefore be guided by the corresponding provisions of the law in England.

* The extent to which we may have recourse to the law of England is set out in section 83 (4) of the Order in Council which provides that "if any matter of procedure or practice on an election petition shall arise which is not provided for by this Order or by such rules, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with this Order or any such rules and is suitable for application to the Island be followed and shall have effect". The rules referred to are the rules regulating the procedure and practice on election petitions contained in the 6th Schedule. The power from time to time of making, amending, rescinding, or supplementing such rules is vested in the Governor by section 83 (2), but no such rules have been made by him in the exercise of this power since the publication of the Order in Council.

¹ 29 N. L. R. 52.

² (1930) A. C. p. 235.

It is only in any "matter of procedure or practice" for which no provision has been made that the procedure and practice in England on the same matter may be followed.

Now the terms "procedure" and "practice" ordinarily have reference to the rules and practices which regulate the manner in which a matter should be brought before a tribunal and the mode of proceeding within that tribunal until finality is reached—for example the procedure and practice of the District Court, or the procedure and practice of the Court of Appeal. But the right to carry a matter in appeal from the determination of one Court to another and the creation of a tribunal of appeal are not matters of procedure and practice. It is to be noted that the rules in the 6th Schedule prescribe the form of an election petition, the manner of its presentation and generally the mode of proceeding up to and including the trial and determination of such a petition and the taxation and recovery of costs awarded by the election judge; they do not contemplate an appeal and consequently do not prescribe the steps to be taken in the presentation or prosecution of an appeal. This is in accordance with the view that the creation of a right of appeal and of an appellate jurisdiction are matters for the legislature and are not mere matters of procedure and practice for the regulation of which rules may be made under the provisions of section 83 (2). Since a right of appeal is not a matter of procedure or practice and can not therefore be created by rules made under section 83 (2), the absence of all reference to such a right in the Order in Council so far as it relates to election petitions does not justify us in admitting an appeal even if under the law of England an appeal lies from the determination of an election petition. But I may here observe that Counsel for the petitioner has not been able to refer us to a single case in which an appeal was admitted from the determination of an election judge by any higher tribunal in England.

It is a well established principle that there is no right of appeal unless it be expressly given—see *Attorney-General v. Sillem*¹ and *In re Wijesinghe*². There are no words in any of the provisions of the Order in Council relating to the trial and determination of election petitions which can be construed to mean that a right of appeal lies from the determination of the election judge as to the validity of an election. On the contrary there is to be found throughout these provisions strong indications that such a determination was to be a final determination of the matter of the complaint.

It is hardly necessary to refer to the various provisions which indicate that this jurisdiction was created for the speedy and final determination of a complaint that a person returned was not duly elected, since the language of section 78 is of itself decisive. The election judge is required to determine whether the person was duly returned or elected or not and to certify such determination to the Governor. The section then proceeds as follows:—"Upon such certificate being given, such determination shall be final; and the return shall be confirmed or altered, or the Governor shall by notice under Article 23 appoint another date

¹ 10 H. L. C. 704.

² (1913) 16 N. L. R. 312.

for the election of a member for the electoral district concerned, as the case may require, in accordance with such certificate ”.

The concluding words of this Article requiring the Governor to confirm or alter the return in accordance with the certificate or to appoint a date for a new election are a sufficient indication of an intention that the question whether a return or election was validly made should be finally and conclusively determined upon the issue by the election judge of his certificate. It is extremely unlikely that the Governor would have been required to take the steps he is required to take upon such a certificate with all the embarrassments which must result if the decision of the election judge be reversed by a higher tribunal, unless the determination of the election judge was to be regarded as finally concluding the matter.

But apart from this indirect indication, the earlier words of Article 78 state expressly and explicitly that upon the certificate being given by the election judge, his determination shall be final. The word “ final ” in the clause must be given a meaning. A determination which is declared to be final, if any meaning at all is to be given to the word “ final,” must mean a determination from which there is no appeal.

This is decisive of the matter before us and the objection that no appeal lies must as we said at the conclusion of the argument be upheld.

It is hardly necessary in view of the conclusion at which we have arrived to express any opinion as to whether or not the appellate jurisdiction of this Court is wide enough to include the hearing and determination of appeals from an election judge acting under Article 78 if a right of appeal did in fact exist. The answer involves the consideration of certain other questions of considerable difficulty. 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.

These are questions which must be left to be determined when they arise. I need only say that if this special tribunal is not an “ original court ” within the meaning of the Courts Ordinance, the appellate jurisdiction of the Supreme Court does not extend to its decisions. -If on the other hand this jurisdiction is to be regarded as part of the jurisdiction of the Supreme Court the appellate jurisdiction of this Court which does not extend to decisions of a Judge of this Court, save in the one case referred to in section 40 of the Courts Ordinance, does not therefore extend to a determination made under section 78 of The State Council's Order in Council, 1931.

DRIEBERG J.—I agree.

AKBAR J.—I agree.