# In Re Stephen Perera

332/1966

Present: Sri Skanda Rajah, J.

IN BE K. STEPHEN PERERA et al.

Election Petition No. 21 of 1965-Electoral District Balangoda

*Jurisdiction -Right of a de facto Judge to hold office-Validity of his acts as Judge- Mode of challenging the validity of a Judge's appointment.*

*Election Petition-Ceylon (Parliamentary Elections) Order in Council, 1546-Persons called upon to show -cause unaer s. 82 (b) -Their liability to be cross-examined- " Treating " under a. 55-Immunity of persons treated.*

Where, in proceedings in which certain persons were called upon to show cause, if any. why they should not be reported under the provisions of section 82(6) of the Ceylon (Parliamentary Elections) Order in Council, objection was taken in regard to the jurisdiction of the Judge and the validity of bis appointment-

Held, that the right of a de facto Judge to hold office, when he has at least a colourable title to his office, cannot be questioned in a collateral proceeding. If the Judge is recognized de facto, his authority can be questioned only in proceedings which directly challenge the validity of his appointment or which seek to prevent him from hearing a case.

Held further, (i) that the parties who were called upon to show cause were liable to be cross examined.

(ii) that a person who is corruptly treated by another and who gives evidence regarding it cannot be reported to the Governor-General. Such a person cannot be said to have acted " corruptly " within the

meaning of section 55 of the Ceylon (Parliamentary Elections) Order in Council.

ORDERmade in the course of proceedings under section. 82 (b) of the Ceylon (Parliamentary Elections) Order in Council.

Nihal Jayawickreme, for the parties noticed.

Izadeen Mohamed, with S. C. Crossette-Thambiah,for the Respondents.

J. G. T. Weeraratne, Deputy Solicitor-General, with Ananda de Silva, as amicus curiae.

Cur. adv. vult.

February 9, 1966. SRI SKANDA RAJAH, J.-

An objection was taken in regard to the Jurisdiction of this Court to call upon the present respondents to show cause, if any, why they should not be reported under the provisions of Section 82 (b) of the Ceylon (Parliamentary Elections ) Order in Council, 1946.

The Deputy Solicitor-General, who appeared on notice as amicus curiae, pointed out that such objection cannot be taken in these proceedings, and he cited two cases and passages from two text books.

In Toronto Railway Corporation v. City of Toronto [1 (1919) 46 Canadian Dominion Law Reports 457. ] it was held that the status of a de facto Judge, having at least a colourable title to his office, cannot be attacked in a collateral proceeding ; the proper proceeding to question his right to his office would be by quo warranto information. Numerous authorities were cited in that case in support of this view. That case went up in appeal to the Privy Council. The appeal was allowed on some other ground. The above view was not disapproved of by the Privy Council. The judgment of the Privy Council is reported in (1920) A. C. 446.

In Parameswaren Pillai Baskaran Pillai v. State Prosecutor [2 A. I. R. (38) 1951 Travancore-Cochin 46.] the above view was adopted. Koshi, J. said, " The right of a de facto Judge to hold office is not open to question, nor is his jurisdiction subject to attack in a collateral proceeding ". At page 48, a portion of the judgment of Meredith, C. J., in the Toronto Corporation case is quoted as follows :- " That it is not open to attack, in a collateral proceeding, the status of a de facto judge, having at least a colourable title to his office, and that his acts are valid, is clear, I think, on principle and authority ".

Koshi, J, went on to add : " Later it is seen and observed that the rule is founded on good sense ; for it would be an intolerable state of things if all the acts that the tribunal did were to be treated as invalid . . He quoted further: " There are numerous other cases in the courts of the United States of America to the same effect as those which I have mentioned. The rule to be deduced from the case in the United States is stated in 23 Cyc. 621, as follows :-" The right of a de facto judge to hold his office is not open to question, nor are his acts subject to attack in a collateral proceeding ; these being matters which can only be inquired into in a proceeding to which he is a party .... Nor can his title be determined in an action tried before him, nor hi certiorari proceedings to review a conviction had before him, nor on an appeal by a person who had been tried and convicted before him ; and cases are referred to in support of each of the propositions stated. " It is not necessary to quote further passages.

Marcose in his work on Judicial Control of Administrative Action in India, referring to the Travancore-Cochin case cited above, says this at page 357 :-

" Shortly stated it was this : the Chief Justice was the de facto holder of a judicial office. Therefore, whether his appointment was de jure perfect or not, its legality cannot be the subject of a collateral attack ". Then he further states, " After referring to the case, the petition was dismissed. This decision it is stated with respect is perfectly in line with the authorities on the point and

sound in principle. When a judicial office is filled by some colour of authority and its duties are properly dis charged, it would be an intolerable state of things, if all the acts of such tribunal (of which one of the members is alleged to be labouring under a defective appointment) are to be treated as invalid ".

Suffice it to say that these cases were not brought to the notice of the Court in the case of The Queen v. Liyanage[1 (1962) 64 N. L. R. 313.]relied on by Mr. Jayawickreme, in which the power of nomination of the Bench was vested in a Minister, a member of the Government which the defendants were alleged to have conspired to overthrow by unlawful means and who participated in the investigation and interrogation of some of the defendants-a clear case of political interference with the judiciary, quite unlike the present case.

Amnon Kubinstein in his book on " Jurisdiction and Illegality ", at pages 205 and 206, says this :-

" Under certain conditions, even the acts of a de facto Judge or officer, i.e., a person not legally competent, may acquire validity. The mere fact that the acts and decisions were made by a tribunal which has not been legally appointed is not sufficient to render them nullities. If the judge is recognized de facto, his authority can be questioned only in proceedings which directly challenge his appointment or which seek to prevent him from hearing a case. Any other method of attack is doomed to failure .... The Corpus Juris Secundum summarises the many cases on the point: A Judge de facto is one acting with a colour of right and who is regarded as, and has the reputation of, exercising the judicial function he assumes; he differs, on the one hand, from a mere usurper of an office who undertakes to act without any colour of right; and on the other, from an officer de jure who is in all respects legally appointed and qualified to exercise the office. In order that there may be a de facto judge, there must be an office which the law recognizes, and when a court has no existence, there can be no judge thereof, either de jure or de facto. There cannot be a de facto judge when

there is a de jure judge in the actual performance of the duties of the office ". At page 208, he says this :-

" The rule is that acts of de facto officers cannot be collaterally impeached, but collateral proceedings have in this context a particularly wide meaning ; every proceeding which does not seek to remove the judge, including any attack upon the decision, is deemed collateral".

I am a de facto Judge of the Supreme Court and a de facto Election Judge under statutes, and, therefore, I am, under colour of office or of right at the lowest-not an usurper. Therefore, my jurisdiction cannot be challenged in these proceedings.

I would refer to some other matters too as they have cropped up in these proceedings. It is a mistake to think that when a person who is noticed under Section 82 gives evidence, it should be accepted on its face value. It is the duty of the Court to probe his evidence and test it to find out if there is any truth in it. In order to do that, the petitioner's counsel may be permitted, even if he has no right, to cross-examine the witness. But in re Amarasena[1 (1948) 50 AT. L. R. 52, 3 at 525. ] Dias, J. said, " In a proceeding under Section 82 (2), now 82 (b), where a person, not being the candidate or a party to an election petition, shows cause, is the counsel for the petitioner (or the respondent as the case may be) entitled to be heard ? This question was answered in the affirmative in the case of The Borough of Worcester[2 (1906) 5 O 'M. & H. at 216.]. I think we should follow the same rule in Ceylon ".

I shall quote from 5 O 'M. & H. atpp. 215 and 216 : " One of the persons charged with bribery was called upon to show cause why he should not be reported. He denied the charge. Mr. Gill, on behalf of the Petitioner, applied for leave to cross-examine him on the ground that this evidence constituted a reflection upon the witness called by the Petitioner. Mr. Coventry, for the person charged, objected to any cross-examination by Mr. Gill, on the ground that judgment had been given, and therefore, Mr. Gill had no locus standi. As to this, Mr. Justice Lawrence said:-" I do not see why this

gentleman should not be subjected to the same thing as every other witness. We allow Mr. Gill to cross-examine ".

It may be observed that this is another instance of a case in which notice to show cause was issued after judgment in the election petition was given.

Still another matter should be mentioned. A person who is corruptly treated by another and who gives evidence regarding it should not be reported to the Governor-General because it cannot be said that he also acted "corruptly" under the provisions of Section 55 of the Ceylon (Parliamentary Elections) Order in Council. That is why Siripala, Karunaratne and Punchimahathmaya who were treated by Stephen Perera were discharged.

Objection as to the jurisdiction of the Court overruled.