

## WADIGAMANGAWA AND OTHERS

v.

## WIMALASURIYA

SUPREME COURT

SAMARAKOON C. J., ISMAIL J.,  
WEERARATNE J., SHARVANANDA J.,  
WANASUNDERA J., WIMALARATNE J.,  
RATWATTE J.

S. C. ELECTION PETITION

APPEALS 1/81 to 3/81

JUNE 1, 2 and 3, 1981.

*Election Petition – Security – Does appeal from interlocutory order lie ? Section 82A(1)(b) and 101(2) of the Ceylon (Parliamentary Elections) Order in Council – Special leave to appeal – Article 128(2), 127 and 130 of the Constitution*

The questions being (1) whether an appeal from an order of the Election Judge overruling an objection to security would be governed by Section 82A (1)(b) of the Ceylon (Parliamentary Elections) Order in Council or Articles 128, 127 and 130 of the Constitution (2) whether the procedure to be followed in appealing is to be found in the provisions of the Order in Council or in Articles 127 and 128 of the Constitution –

Held

An election case is a civil matter or proceeding in which the civil appellate jurisdiction of the Supreme Court could be invoked. Article 130(b) of the Constitution has superseded Section 82A (1) of the Ceylon (Parliamentary Elections) Order in Council 1946 in regard to the scope of the right of appeal in election petition cases and the jurisdiction vested in the Supreme Court under Article 130(b) of the Constitution does not suffer from the limitations imposed by s.82A(1) of the Order in Council. Jurisdiction in respect of election petitions dealt with in Article 130 is thus referable to Article 118(e) and is in the nature of a special jurisdiction.

Article 130 gives a right of appeal from an order or judgment of the Court of Appeal in an election petition. The word 'order' is an appropriate term for interlocutory orders and is used in Article 130 unqualified and without any limitations and is much wider in scope than s. 82A of the Order in Council. The present matter involves a question of law and could have had the effect of finally disposing of the election petition if the objection had been upheld. The present case falls within the provisions of Article 130(b) of the Constitution. This Article does not contain the limitations found in s. 82A(1)(b) of the Order in Council.

Held further (Samarakoon C. J. Weeraratne J. and Sharvananda J. dissenting) on the question of procedure (in contradistinction to appellate jurisdiction itself), sections 82A, 82B and 82C of the Order in Council continue to apply rather than Articles 127 and 128 of the Constitution and as the appeals were not preferred under section s.82A(2) which is the only mode of access to the Supreme Court the appeals have to be rejected.

## Cases referred to

- (1) *Minister of Home Affairs v. Fisher* [1973] All. E.R. 21, 26
  - (2) *In re Goonesingha* (1942) 44 NLR 75
  - (3) *Rao v. Baskararao* A1R 1964 AP 185
  - (4) *Senanayake v. Navaratne* (1954) 56 NLR 5
  - (5) *De Silva v. Senanayake* (1972) 75 NLR 265
  - (6) *De Silva v. Attorney-General* (1949) 50 NLR 481
  - (7) *Pilapitiya v. Muttettuweqama* S.C. Application No. 15 of 1979, S.C. Minutes of 25.5 1979
  - (8) *Ramalingam v. Kumarasamy* (1953) 55 NLR 145
- (9) *Dissanayake v. Abeysinghe* (1972) 75 NLR 12

**APPEALS** from the orders of the Court of Appeal in Election Petitions 1/81, 2/81 and 3/81

*K. N. Choksy with V. Basnayake, H. Jayamaha, S. Ruthramoorthy, R. Perera, S. Peiris and A. Kasturiaratchi for 1st respondent-petitioner in Appeal No. 1/81 who is 1st respondent-respondent in Appeals Nos. 2/81 and 3/81.*

*N. Satyendra with D. Pelpola and P. Sunderalingam for 2nd and 3rd respondent-respondents in Appeal No. 1/81 who are respectively 2nd respondent-petitioner in Appeal No. 2/81 and 3rd respondent-petitioner in Appeal No. 3/81*

*K. Shanmugalingam with L. B. R. Fernando and G. Dayasiri for petitioner-respondent.*

*Cur. adv. vult.*

July 13, 1981

### **SAMARAKOON, C. J.**

This is a matter that arises out of an Election Petition filed in the Court of Appeal. A bye-election was held on 7th May, 1980, to elect a member of Parliament for the Electoral District No. 104 — Anamaduwā. At the said bye-election the 1st Respondent-Petitioner (hereinafter referred to as 1st Respondent) was declared elected. That election was challenged in the Court of Appeal in these proceedings by the Respondent-Petitioner (hereinafter referred to as the Petitioner) on various charges. Charges were also laid against the 2nd and 3rd Respondent-Respondents (hereinafter referred to as 2nd and 3rd Respondent respectively). At the hearing before the Court of Appeal the Respondent took objection to the sufficiency of the security deposited by the Petitioner. The details of such objection are not relevant for the present inquiry. Suffice it to state that the Court of Appeal held that the security deposited by the Petitioner was sufficient in law. The 1st Respondent appeals to this Court from that decision. The 2nd and 3rd Respondents support the contention of the 1st Respondent. The Petitioner has by way of a preliminary objection challenged the right of the 1st Respondent to appeal from the order and the right of this Court to hear and determine an appeal on an interlocutory

order. Counsel for the Petitioner contends that the provisions of section 82(1) (b) of the Ceylon (Parliamentary Elections) Order in Council (Chapter 381) do not permit such an appeal. Counsel for the 1st Respondent and Counsel for the 2nd and 3rd Respondents both contend that the provisions of the Constitution which govern this appeal permit the appeal. It is necessary therefore to decide which of the provisions referred to, apply to this appeal.

The provisions of the Order in Council 1946 as amended by Act No. 19 of 1948 (Chapter 381) permitted appeals in election petitions to the Supreme Court constituted under the Courts Ordinance (Chapter 2). The petition itself was heard by a single Judge of the Supreme Court who was nominated by the Chief Justice (and referred to as 'Election Judge') and an appeal lay to the Supreme Court in terms of section 82A. The Administration of Justice Law No. 44 of 1973 which came into operation in 1973 vested the jurisdiction to hear and determine election petitions in the High Court. (*Vide* section 22 Administration of Justice Law No. 44 of 1973). Appeals from the decision of the High Court continued to be filed in terms of section 82A of the Order in Council in the Supreme Court which by then had been constituted under the Administration of Justice Law. That Supreme Court was abolished by the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978 (hereinafter referred to as the Constitution). The Constitution vested jurisdiction to hear Election Petitions in a newly created Court of Appeal. The President of the Court of Appeal nominated the Election Judge to hear a particular petition. The Supreme Court created under the Administration of Justice Law ceased to exist and a new Supreme Court came into being under the Constitution. The Application for special leave to appeal has been filed in this case in terms of Article 128(2) of the Constitution. Counsel for the Petitioner contends that this Article is not applicable to this election petition and that the provisions of section 82A of the Order in Council must be observed.

Section 82A (1) and (5) of the Order in Council read 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 81, or
- (b) any other decision of an Election Judge which has the effect of finally disposing of an election petition.

(5) Every appeal under this section shall be heard by three Judges of the Supreme Court and shall, as far as practicable, be given priority over other business of that court. The court may give all such directions as it may consider necessary in relation to the hearing and disposal of each appeal."

It is clear from these provisions that --

- (a) an appeal lies only on a question of law,
- (b) on a determination under section 81 (which is a final order),
- and (c) on any other decision which has the effect of finally disposing of the Election Petition.

It is also clear that the decision now appealed from is neither one under section 81 nor a decision which finally disposes of the petition. If, section 82A applies this appeal must be dismissed. Counsel for 1st Respondent, supported by Counsel for the other Respondents, contends that Article 128(2), 127 and 130 of the Constitution govern the matter and therefore the appeal is properly made and constituted in law. Article 128 reads as follows:

"128.(1) An appeal shall lie to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings;

(2) 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."

Article 130 which confers appellate jurisdiction on the Supreme Court in Election Petitions reads as follows:

“130. The Supreme Court shall have the power to hear and determine and make such orders as provided for by law on:

- (a) any legal proceeding relating to the election of the President;
- (b) any appeal from an order or judgment of the Court of Appeal in an election petition case.

Provided that the hearing and determination of a proceeding relating to the election of the President shall be by at least five Judges of the Supreme Court of whom, unless he otherwise directs, the Chief Justice shall be one.”

This follows Article 118(e) which confers a general jurisdiction in the Supreme Court in election petitions. Which, then, is the enactment that prevails — the Order in Council or the Constitution?

Article 101 of the Constitution empowers Parliament to make provision in respect of elections. They are specified in Article 101 (1) (a) to (b). Article 101 (1) (i) reads as follows:

“(i) the manner of determination of disputed elections and such other matters as are necessary or incidental to the election of Members of Parliament.”

This permits rules to be made for the hearing and final disposal of Election Petitions. Article 101(2) makes provision for the interim period as follows:

“101(2) 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.”

Counsel for 2nd and 3rd Respondents laid great stress on the words “subject to the provisions of the Constitution.” It is therefore clear from this sub-section that until Parliament expressly makes provision for such matters as are set out in Article 101(1) the provisions of the Order in Council must be read, with the necessary alterations, so as to make it workable and have legal effect. This Article must be read together with Article 169(2) which reads as follows:

"169(2) the Supreme Court established by the Administration of Justice Law, No. 44 of 1973, shall, on the commencement of the Constitution, cease to exist, and accordingly the provisions of that Law relating to the establishment of the said Supreme Court, shall be deemed to have been repealed.

Unless otherwise provided in the Constitution, every reference in any existing written law to the 'Supreme Court shall be deemed to be a reference to the Court of Appeal."

We are then faced with an apparent difficulty. Whereas it is possible to read "Court of Appeal" instead of "Supreme Court" in section 79 and section 82 it is impossible to read "Court of Appeal" in section 82A, section 82B, section 82C and in section 82D for the simple reason that appeal is permissible under Article 130 of the Constitution only to the Supreme Court created by the Constitution. Counsel for the Petitioner who contended for section 82A of the Order in Council continuing intact argued that the provisions of Article 169(2) by including the words "unless otherwise provided in the Constitution" saved the operative effect of section 82A of the Order in Council because the Constitution itself by Article 130 conferred such jurisdiction on the Supreme Court created by it. Counsel for the 1st Respondent contended that the provisions of Article 130 impliedly repealed section 82A. He stated that section 82A "goes out of the law" and that it has now "no place in law. In its place is Article 130." Counsel for the 2nd and 3rd Respondents did not go to that extent. He said that section 82A must be read subject to the Constitution.

In considering this matter one must be mindful of the fact that the Court of Appeal and the Supreme Court are both new Courts created by the Constitution. The Supreme Court that hitherto existed ceased to exist. New jurisdictions have been conferred on each of them with the primary object of affording a litigant the choice of a second appeal to the Supreme Court. The Court of Appeal has not been granted power to entertain appeals from the judgments of its own Judges. One cannot therefore read "Court of Appeal" instead of "Supreme Court" in section 82A of the Order in Council. Furthermore appellate jurisdiction in election cases which is conferred only on the Supreme Court by the provisions of Article 130 of the Constitution is entirely different to the jurisdiction conferred by section 82A of the Order in Council. In its original form section 82A is at complete variance with the Constitution. Section 82A(1)(b) permits an appeal from any decision of an Election Judge (other than that referred to in section 81)

only if that decision finally disposes of the petition. This appeal is not from a decision of that kind. The Constitution has made the Supreme Court the final Appellate Court (Article 118(c)) and it is the final Court of Civil and Criminal appellate jurisdiction in the Republic (Article 127(1)). It has sole and exclusive cognisance by way of appeal "from any order judgment, decree or sentence made by the Court of Appeal" (Article 127(2)). Whereas section 82A permits an appeal only from an order finally disposing of an Election Petition, Article 127(2) grants a right of appeal, *inter alia*, from any order. Interlocutory orders are therefore appealable in terms of Article 127(2). There is another fundamental and vital difference. Section 82A of the Order in Council grants a right of appeal direct to the Supreme Court. The Constitution has prescribed the converse — it is indirect. An appeal lies from a final order, judgment, decree or sentence of the Court of Appeal only if that Court grants leave to appeal to the Supreme Court (Article 128(1)), or else, where the Court of Appeal has refused to grant such leave the Supreme Court may grant special leave to appeal (Article 128(2)). Article 128(2) refers expressly to an interlocutory order as well, a type of order not referred to in Article 128(1). It is clear therefore that the Constitution took away and did not countenance a direct right of appeal to the Supreme Court. That this was deliberate necessarily stems from the fact that the Constitution sought to make available a second right of appeal where none existed under the law existing at the time of enactment of the Constitution. This contention is fortified by the fact that Article 128(4) makes provision for a right of direct appeal to the Supreme Court in the future. It reads thus —

"128(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament."

Such legislation has now been passed by Parliament (*Vide* section 102 of Parliamentary Elections Act No. 1 of 1981). It seems to me that in this confrontation the Constitution must prevail. As was stated by Lord Wilberforce in *Minister of Home Affairs v. Fisher* (1973) (3 A.E.R. 21 at 26)<sup>(1)</sup> a Constitution is a document *sui generis* "calling for principles of interpretation of its own, suitable to its character . . . ., without necessary acceptance of all the presumptions that are relevant to legislation of private law." One of the salient facts is that this Constitution sought to efface the existing structure with regard to appeals and created in its stead a new one by the creation of two different Courts and at the same time removing altogether a direct right of appeal to the Supreme Court. There is also the admonition contained in Article 101(2) that the provisions of the Order in Council must be read

subject to the Constitution. The Constitution is the "Supreme Law of the Democratic Socialist Republic of Sri Lanka" (*Vide* preamble to the Constitution). That supremacy cannot tolerate confrontation by subordinate legislation. Such legislation if not in harmony with the Constitution must necessarily give way to the Constitution. Section 82A of the Order in Council and the Constitution cannot stand together. The only appellate jurisdiction in Election cases existing at the relevant time was that conferred on the Supreme Court by Article 130 of the Constitution. The manner of exercising that jurisdiction was set out by Article 128 of the Constitution. One cannot accept the former and disregard the latter.

Counsel for the Petitioner contended that the provisions of the Constitution were not applicable to an appeal in an Election Petition because an election case was not a civil matter within the meaning of Article 127 or Article 128. Article 128 refers to a right of appeal from any final order etc. in any matter or proceedings "whether civil or criminal." It seems to me to grant power in the widest possible terms by the use of the words "any matter or proceedings." Where there is a final order, judgment, decree or sentence of the Court of Appeal an appeal lies to the Supreme Court. Its object is to permit an aggrieved party the right to canvas any determination of the Court of Appeal of the kind referred to provided it is done in the manner set out in that Article. As I see it the words "whether civil or criminal" are parenthetical, are not intended to be an exhaustive enumeration, and cannot therefore detract from the plenitude of power given by that Article. For the purposes of the appeals (Privy Council) Ordinance (Chapter 85) an application to the Supreme Court for a Writ of *Certiorari* to quash the order of an election Judge was held to be a civil suit or action within the meaning of section 3 of the Ordinance. The Supreme Court called in aid the definition of "action" in section 3 and section 6 of the Civil Procedure Code (Chapter 86). *In re Goonesinha* (44 N.L.R. 75)<sup>(2)</sup>. The words used in the Constitution are "civil matter or proceeding." These are of wider import than "civil suit or action." In terms of section 81 the Election Judge has to determine whether the 1st Respondent was duly returned or whether his election was void. The right to be elected, like the right to vote, is a right of a civil nature and the judgment in an election case decides the rights of parties derived from the Constitution. *Vide Rao v. Bhaskararao* (1964 A.I.R. 185 A.P.)<sup>(3)</sup>. The Election Judge is not deciding criminal liability. In fact the Order in Council requires a prosecution to be launched for any alleged offence disclosed at the hearing of an election case, and that can only be done with the sanction of the Attorney-General.

I am of the opinion that an election case is a civil matter or proceeding in which the civil appellate jurisdiction of the Supreme Court could be invoked.

I overrule the objection taken by the Petitioner and hold that the 1st Respondent's appeal is properly constituted and therefore maintainable in this Court. The Respondents will be entitled to the costs of this inquiry.

**WEERARATNE, J.** — I agree.

**SHARVANANDA, J.**

I agree with the judgment of the Chief Justice.

Since the interpretation of certain provisions of the Constitution is involved in the question to be decided, I am setting down below my own judgment on the matters in issue.

The 1st respondent-petitioner contested the Anamaduwa seat in Parliament at the bye-election held on the 7th of May 1980 and was declared to be elected by a majority of 1,787 votes to represent the Electoral District of Anamaduwa in Parliament.

The petitioner-respondent presented an election petition in the Court of Appeal challenging the validity of the said bye-election and the election of the petitioner to the said seat on several grounds set out in his petition. A sum of Rs. 25,000/- was tendered on behalf of the petitioner-respondent as security for the payment of all costs, charges and expenses that may become payable by him. The 1st respondent-petitioner filed a statement objecting to the petition being entertained by the Court of Appeal and praying for its dismissal *in limine* on the grounds that —

(a) the said petition had not been filed within the prescribed time; and

(b) the security furnished was insufficient in terms of the Ceylon (Parliamentary Elections) Order-in-Council 1946 and the rules made thereunder.

The 2nd and 3rd respondents were also made parties to his petition by the petitioner-respondent. They also filed statements of objection on the same grounds.

By its order dated 8th October 1980, the Court of Appeal rejected the preliminary objections and held that the said petition had been filed within time and that the security that had been furnished was adequate.

The 1st respondent-petitioner and the 2nd and 3rd respondents each filed applications for special leave under Article 128(2) of the Constitution to appeal to the Supreme Court from the said order of the Court of Appeal dated 8th October 1980. By its order dated 21st January 1981, this Court granted special leave to appeal, but reserved to the petitioner-respondent the right to raise any preliminary objection to the jurisdiction of this Court to hear the appeal from the aforesaid order made by the Court of Appeal dated 8th October 1980.

When, in pursuance of the leave granted by this Court, the 1st respondent-petitioner's appeal came up for hearing on 1st June 1981, Counsel for the petitioner-respondent raised a preliminary objection to the hearing of the appeal by this Court on the ground that Article 130 of the Constitution does not enable this Court to entertain and hear this appeal, as the order appealed from was not an order from which an appeal lay to the Supreme Court under section 82A of the Ceylon (Parliamentary Elections) Order-in-Council 1946. According to him, under Article 130 the Supreme Court had the power to hear and determine only an appeal from an order or judgment of the Court of Appeal as specified in section 82A of the Ceylon (Parliamentary Elections) Order-in-Council 1946, and since the said section 82A provided only for an appeal on a question of law against the decision of an Election Judge which had the effect of finally disposing of an election petition, no appeal lay to this Court from the order made by the Court of Appeal in this case, as the said order did not have the effect of finally disposing of the election petition. The burden of his argument was that the jurisdiction of this Court to hear appeals in election petitions was confined to the determination or a decision referred to in the said section 82A and that Article 130 of the Constitution did not enlarge that jurisdiction.

The preliminary objection raised by Counsel for the petitioner-respondent involves consideration of certain sections of the Ceylon (Parliamentary Elections) Order-in-Council 1946 (hereinafter referred to by the number of the section) and certain Articles of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to by the number of the Article).

Section 82A provides as follows:

“(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 81, or

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

(2) Any such appeal may be preferred either by the petitioner or by the respondent in the election petition before the expiry of a period of one month next preceding the date of the determination or decision against which the appeal is preferred.

(5) Every appeal under this section shall be heard by three Judges of the Supreme Court.”

Section 82B(5) declares that the decision of the Supreme Court on any appeal shall be final and conclusive.

Article 101(1) provides for Parliament making provision in respect of elections, including, *inter alia*, the manner of determination of disputed elections and such other matters as are necessary or incidental to the election of Members of Parliament.

Article 101(2) states that “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.

Article 169(2) reads as follows:

“The Supreme Court established under the Administration of Justice Law, No. 44 of 1973, shall, on the commencement of the Constitution, cease to exist. . . . Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal.”

Thus, when sections 82A and 82B are read with Article 169, ‘Court of Appeal’ has to be substituted for the ‘Supreme Court’ in the said sections 82A and 82B, and it would appear that the appellate jurisdiction that was vested in the outgoing Supreme Court stands transferred to the present Court of Appeal. But, according to the scheme of the Constitution, the appellate juris-

dition of the Court of Appeal is confined only to the correction by way of appeal of all errors committed by a court of first instance (*vide* Art. 138) and does not extend to the correction of any error committed by itself when trying election petitions under Article 144.

Article 130 has vested the Supreme Court with the appellat jurisdiction in election petitions.

Article 118 spells the jurisdiction of the Supreme Court. It states that the Supreme Court shall be the highest and final superior court of record in the Republic and shall, subject to the provisions of the Constitution, exercise, *inter alia*, final appellate jurisdiction and jurisdiction in election petitions. Articles 127 and 128 deals with the appellate jurisdiction of the Supreme Court. Article 130 sets out the jurisdiction of the Supreme Court in election petitions. It states: "The Supreme Court shall have the power to hear and determine and make such orders as provided for by law on —

- (a) a legal proceeding relating to the election of the President;
- (b) any appeal from an order or judgment of the Court of Appeal in an election petition case.

'Law' is defined in Article 170 to mean any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution. The Constitution which was enacted prior to the commencement of the Constitution but came into force on 7th September 1978, the day appointed by the President by Proclamation (Art. 170 and 172) comes within the ambit of the definition of 'law' and since it is the Supreme Law of the Republic (*vide* the Preamble to the Constitution), its provisions supersede all earlier law. Accordingly, on the terms of Article 130, "the power to hear and determine and make such orders as provided by law" can refer only to the appellate jurisdiction of the Supreme Court set out in Articles 127 and 128. Articles 118, 127, 130 and 138 taken together make manifest that the Supreme Court established by the Constitution alone is endowed with appellate jurisdiction in election petitions and not the Court of Appeal. Article 130 sets out the amplitude of such jurisdiction. This jurisdiction is not limited to appeal "on any question of law, but not otherwise, against the determination of an Election Judge or any other decision of an Election Judge which has the effect of finally disposing of an election petition" as provided by section 82A. The appellate jurisdiction under Article 130 embraces

appeals from any order or judgment of the Court of Appeal in an election petition case. This jurisdiction does not suffer from the limitations imposed by section 82A(1). The 'order' referred to in Article 130 thus includes an order such as the order appealed from, namely an order overruling the preliminary objection with respect to the sufficiency of security for costs. For the above reasons, the objection raised by Counsel for the petitioner-respondent cannot be sustained. However, the matter does not end there. Though Article 130 spells the appellate jurisdiction of the Supreme Court in election petitions, it does not indicate how such jurisdiction is to be invoked by an aggrieved party. For an answer to that question, one has to look to Article 128 which enacts how the appellate jurisdiction vested in the Supreme Court can be invoked and how the right of appeal to the Supreme Court is to be exercised. Article 128 is the gateway through which a party aggrieved by an order or judgment of the Court of Appeal must pass to get the Supreme Court to exercise its appellate jurisdiction, whether under Article 127 or under Article 130(b), on an appeal from an order such as the one appealed from in the present case. In terms of Article 128(2), the petitioner will have to obtain the leave of the Supreme Court to appeal. The petitioner does not have an absolute right to appeal; it is only a conditional right. This Court may, in its discretion, grant special leave to appeal only when in its opinion the case or matter is fit for review by the Supreme Court, when it is satisfied that the question to be decided is of public or general importance. Thus, though the Supreme Court, may, under Article 130, have plenitude of appellate jurisdiction from any order or judgment of the Court of Appeal in an election petition, whether on a question of law or otherwise yet, since that jurisdiction can be reached only via Article 128, the petitioner must satisfy the conditions prescribed by this Article to enable him to appeal to the Supreme Court. Under the provisions of Article 128, until Parliament passes a new law specifically making such provision, no appeal lies direct to the Supreme Court; it is only with the leave of the Court itself or with the leave of the Court of Appeal that an appeal lies to that Court. Since in the context of the Constitution 'Parliament' must mean the Parliament constituted under the provisions of the Constitution (*vide* Art. 62, 162(1), 75), when Article 128(4) states that an appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament, the 'law' there can have reference only to a new law passed by Parliament after the coming into operation of the Constitution. The earlier provisions of Article 128 prescribing the condition of obtaining leave to appeal to that Court would thus continue to operate as condition precedent in all cases of appeal to that Court

until a new law such as the Parliamentary Elections Act, No. 1 of 1981 (certified on 22.1.1981) which provides for direct appeal to the Supreme Court in election petitions came into operation. Article 128(4) militates against the contention that under existing law, such as the amended Ceylon (Parliamentary Elections) Order-in-Council 1946, an appeal will lie direct to the Supreme Court. Only a new law enacted by Parliament established by the Constitution can provide for a departure from the mandatory leave steps. The appeal provisions of the Ceylon (Parliamentary Elections) Order-in-Council 1946 which are inconsistent with Article 128 have to yield to the provisions of the Constitution (Art. 101(2)). Thus, it was nothing but proper for the 1st respondent-petitioner to have obtained the leave of this Court to appeal to it. It was not competent for him to have directly appealed to this Court. The impact of Article 102(2) on the appeal-provisions of the Ceylon (Parliamentary Elections) Order-in-Council 1946 was to render inoperative sections 82A, 82AA and 82B of the Order-in-Council. When the limited appellate jurisdiction of the Supreme Court established under the Courts Ordinance/Administration of Justice Law was abolished, the rules prescribed to invoke that jurisdiction *ipso facto* became defunct and could not be deemed to survive to regulate the enlarged jurisdiction of the new Supreme Court, especially when the Constitution has made the new Supreme Court the final court exercising appellate jurisdiction in respect of any order or judgment of the Court of Appeal in election petitions and prescribed the procedure for the invocation of such appellate jurisdiction. An appellant invoking such jurisdiction therefore must conform to that procedure.

Article 127(1) sets out the width of the appellate jurisdiction of the Supreme Court. Counsel for the petitioner-respondent vehemently contended that Articles 127 and 128 confines the area of the Supreme Court's appellate jurisdiction to civil and criminal appellate jurisdiction only. He submitted that election jurisdiction is *sui generis* and is not embraced within "civil and criminal jurisdiction" of the Court. In support of his submission, he referred us to the judgments of the Privy Council in *Senanayake v. Navaratne* (56 N.L.R. 5)<sup>(4)</sup>, *De Silva v. Attorney-General* (50 N.L.R. 481)<sup>(6)</sup> and to the judgment of the Court of Appeal in *De Silva v. Senanayake* (75 N.L.R. 265)<sup>(5)</sup>. In refusing special leave to appeal to Her Majesty in Council in the cases reported in 56 N. L. R. 5(4) and 50 N.L.R. 481(6), the Privy Council based its decision on the fact that section 82B of the Parliamentary Elections Order-in-Council made the decision of the Supreme Court final and conclusive and stated that Her Majesty's prerogative to entertain an appeal would not be exercised when it was not the intention of

the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown. The Privy Council did not go into the question whether election jurisdiction partook of the nature of civil or criminal jurisdiction, but was concerned only with the question whether Her Majesty's prerogative to grant leave to appeal should be exercised when the Order-in-Council made manifest that the judgment of the Supreme Court should be final in election matters.

The Court of Appeal as it existed in 1972, by its judgment reported in 75 N.L.R. 265(5) when rejecting an application for leave to appeal to that Court, laid stress on the provision in section 82B(5) that the decision of the Supreme Court on any appeal shall be final and conclusive and further held that an Election Judge in determining an election petition was not dealing with a civil cause or matter within the meaning of section 8(1) of the Court of Appeal Act, No. 4 of 1971. In my view, the words in Article 127, "the Supreme Court shall be the final Court of civil and criminal appellate jurisdiction", are not words of limitation restricting the jurisdiction of the Supreme Court, but are words of amplitude descriptive of the comprehensive jurisdiction of the Court. In the context in which they are used, the two categories of jurisdiction, civil and criminal, were intended to comprehend all jurisdictions of whatever nature. It is to be noted that Article 118 states that "the Supreme Court shall be the highest and final superior court of record and shall exercise final appellate jurisdiction." In my view, the Constitution intended the dichotomy of "civil and criminal jurisdiction" to be exhaustive and that between them embraced all proceedings of whatever nature. An election proceeding is, in any event, a civil proceeding, as was held by the Full Bench of the Andhra Pradesh High Court in *Rao v. Bhaskararao* (A.I.R. (1964) Andh. Pra. 185) (3). Rights of a civil nature are in issue in an election petition.

Article 127(2) sets out what the Supreme Court can do in the exercise of its appellate jurisdiction.

I agree with the view expressed by Samarakoon C.J. with the concurrence of Thamotheram J. and Wanasundera J. in rejecting a similar preliminary objection as was raised in this appeal on an application for leave to appeal in the Kalawana Election Petition case in *Pilapitiya v. Muttettuwagama* (S. C. Application No. 15 of 1979; S. C. Minutes of 25th May 1979)<sup>(7)</sup> that Article 128 applies to interlocutory orders of the Court of Appeal in election petitions.

For the reasons set out above, I overrule the preliminary objection of Counsel for the petitioner-respondent and I hold that an appeal lies under the Constitution to this Court from the order of the Court of Appeal and that the respondent-petitioner had correctly applied for and obtained the leave of this Court to appeal to this Court and that it was not competent for him to have preferred an appeal direct to this Court.

The petitioner-respondent will pay the 1st respondent-petitioner in S.C. Appeal 1/81 and the 2nd and 3rd respondent-petitioners in S.C. Appeal 2/81 and 3/81 the costs of the inquiry into the preliminary objections.

### **WANASUNDERA, J.**

These three petitions of appeal before us are by the 1st, 2nd and 3rd respondents to the election petition (hereinafter called respondents), filed against them by the petitioner-respondent in respect of the Anamaduwa Seat (Electoral District No. 104). They are consolidated and taken up for hearing together. The respondents had earlier come before this Court and sought special leave, in terms of Article 128 (2) of the Constitution, to canvass an order made by the Election Judge relating to the adequacy of security. At the hearing of the application for special leave, counsel for the petitioner-respondent indicated to Court that he wished to take up a preliminary objection. He submitted that the jurisdiction of the Supreme Court to hear appeals in election matters is restricted to the grounds set out in section 82A of the Ceylon (Parliamentary Elections) Order in Council 1946 and that there is no right of appeal in regard to an interlocutory order of the Court of Appeal which does not have the effect of finally disposing of an election petition. This Court, on that occasion, while granting special leave to the respondents reserved the right to the petitioner-respondent to raise this point when the appeals are taken up for hearing. Our grant of leave was therefore conditional.

Mr. Shanmugalingam has now taken up this objection again before us. He has submitted that jurisdiction in respect of election matters is in the nature of a special jurisdiction conferred on the courts. The powers of the present Supreme Court in respect of election matters, he points out, are to be found in the provisions of Article 118 (e) and Article 130 (b) of the Constitution. These provisions, he submits, relate to the forum for hearing the appeal, but do not deal with the right of appeal as such. His position is that we must look to the provisions of section 82A of the Ceylon

(Parliamentary Elections) Order in Council 1946 to find out the extent of the right of appeal given to an aggrieved person. This provision, he states, sets out in detail the precise kind of order from which an appeal will lie to the Supreme Court. Under section 82A, an appeal is granted only on a question of law against –

- (a) the determination of an Election Judge under section 81, or
- (b) any other decision of an Election Judge which has the effect of finally disposing of an election petition.

He developed his arguments by referring to the provisions of Article 101 of the Constitution which provides for keeping alive the provisions of the Ceylon (Parliamentary Elections) Order in Council 1946. He stated that the operation of the provisions of Article 169 (2) of the Constitution, when applied to the Ceylon (Parliamentary Elections) Order in Council, merely substitutes one forum for another and should not be read so as to imply any alteration in the conditions of appeal laid down in section 82A. Mr. Shanmugalingam submitted that the general appellate provisions contained in Articles 127 and 128 of the Constitution have no application to an election petition proceeding, because an election petition proceeding is neither a civil nor a criminal matter, but a proceeding *sui generis*.

Mr. Choksy for the 1st respondent has submitted that Articles 118, 127, 128 and 130 of the Constitution are interconnected and they set out various aspects of the jurisdiction of the Supreme Court, which is a general jurisdiction. He has submitted that, since the previous Supreme Court has ceased to exist, the provisions of section 82A of the Ceylon (Parliamentary Elections) Order in Council, which applied to that Supreme Court, have now been superseded by the provisions of Article 130 of the present Constitution. That Article 130 (b) contains no limitations on the right of appeal unlike 82A of the Ceylon (Parliamentary Elections) Order in Council. Mr. Choksy contends that an appeal will now lie to the Supreme Court from any order or judgment of the Court of Appeal in an election petition case. Such an order can be any interlocutory order and is not confined to the kind of order that section 82A contemplated. His position is that, while the jurisdiction of the Supreme Court is contained in Article 118 (e) and Article 130 (b) of the Constitution, the provisions relating to the exercise of that jurisdiction, namely the manner of appealing and the nature of the powers of the Supreme Court in regard to such appeals, are found in Articles 127 and 128 of the Constitution. He submits that an election proceeding is a civil matter and distinguished a number of local cases which suggested a contrary view. He submitted that the procedure to come to this Court by way of

Article 128 (2) of the Constitution taken by him is the proper manner of preferring an appeal.

Mr. Satyendra who appeared for the 2nd and 3rd respondents stressed the primacy of the constitutional provisions over the Ceylon (Parliamentary Elections) Order in Council and submitted that Article 118 merely contains a general statement of jurisdiction area-wise or function-wise and that that jurisdiction is specifically vested in the Supreme Court by Article 130. Though jurisdiction over election petitions are contained in Article 118 (e) and Article 130, it is necessary to look to Articles 127 and 128, as Mr. Choksy had already pointed out, to find out as to how that jurisdiction can be invoked. He relied on the Indian decision of *Rao v. Bhaskararao* (1964 A.I.R. 185, A.P.)<sup>(3)</sup> to show that an election proceeding, whether in its original capacity or in appeal, is a civil suit or action so as to bring it within the wording of Articles 127 and 128. Alternatively, he submitted that whether or not the provisions of section 82A of the Ceylon (Parliamentary Elections) Order in Council continued in force, the Supreme Court is vested by the Constitution with the power to grant Special Leave under Article 128 (2), where the conditions set out there are satisfied, and that this overriding power cannot be taken away or affected by anything contained in the Ceylon (Parliamentary Elections) Order in Council, which must be regarded as ordinary legislation.

Upon a consideration of these arguments, it seems to me that there are two main issues that arise for our consideration. The first is whether Article 130 (b) of the Constitution has superseded section 82A (1) of the Ceylon (Parliamentary Elections) Order in Council as regards the kinds of orders from which an appeal can be brought before the Supreme Court. The second question is as regards the procedure to be followed in appealing and whether we have now to look to the provisions of the Ceylon (Parliamentary Elections) Order in Council or to Articles 127 and 128 of the Constitution for this purpose. Both these questions are matters of considerable complexity.

The Ceylon (Parliamentary Elections) Order in Council 1946 was part and parcel of the constitutional documents relating to the devolution of independence on this country. Much of the provisions relating to elections in this enactment followed earlier legislation, which provided for a disputed election to be challenged by way of an election petition before an Election Judge. Neither the earlier law nor the Ceylon (Parliamentary Elections) Order in Council 1946, when originally enacted, gave a right of appeal from a determination of an Election Judge. Not balking by this, parties who lost at the trial and believed they had a lawful grievance, tried

every effort to get redress. The ingenuity of their legal advisers had suggested writ proceedings and applications for leave and special leave to the Privy Council to canvass the determination of the Election Judge, but none of these methods had succeeded. The decided cases were to the effect that the jurisdiction given to the courts to entertain election petitions was of a peculiar nature and that the relevant legal provisions did not evince an intention on the part of the legislature of creating a tribunal with the ordinary incident of giving a right of appeal or review from its orders. *G.E.De Silva v. Attorney-General* (50 N.L.R. 481)(6)

By Act No. 19 of 1948, however, a right of appeal on a question of law from the final determination of an Election Judge was conceded for the first time when it appeared to the legislature that a party to an election petition may be unjustly treated in consequence of an erroneous decision on a question of law by the Election Judge. Later, in consequence of the decision in *Ramalingam v. Kumaraswamy* (55 N.L.R. 145)(8) which called for remedial action, amendment No. 19 of 1959 was enacted, bringing in the provisions of section 82A (1)(b) which widened the appellate powers by providing an appeal also on a question of law from any other decision of an Election Judge, which has the effect of finally disposing of an election petition, i.e. from a particular kind of interlocutory order.

The effect of this provision was one of the matters that was debated in the case of *Dissanayake v. Abeysinghe* (75 N.L.R. 12)(9). This case dealt with the adequacy of security given by a petitioner. The Election Judge held that the security was adequate and then proceeded to hear the petition and declared the election of the respondent void. The appeal was argued on the basis that an interlocutory appeal did not lie in that case. At the conclusion of the trial and after the determination under section 81, the respondent in his appeal to the Supreme Court under section 82A (1)(a) sought also to canvass the interlocutory decision regarding the adequacy of the security. Sirimane and Samarawickrema JJ., in a majority judgment, held that an incorrect decision of the Election Judge at the preliminary stage that the security is sufficient has nothing to do with the determination at the conclusion of the trial referred to in section 82 (1)(a) from which alone an appeal lay, and denied the appellant the opportunity of canvassing that matter in the appeal.

G. P. A. Silva, S. P. J., in a strong dissent, took a different view, He said that when an appeal from a determination under section 82A (1)(a) is before the appellate court, the Supreme Court is

empowered to look into any errors of law committed by the Election Judge culminating in the determination, particularly if they are of a jurisdictional nature. He referred to Rule 12 (3), which contained a prohibition against further proceedings in an election petition if the required security has not been given by a petitioner.

The constitutional changes of 1972 brought no further changes except for one brought about by the Administration of Justice Law, which was an enactment altering the structure of the courts in terms of the Republican Constitution of 1972. The jurisdiction to try election petitions came to be vested in the new High Court established under the Administration of Justice Law and was to be exercised by a High Court Judge nominated by the Chief Justice — *vide* section 22, Administration of Justice Law, No. 44 of 1973. The appellate powers remained where they were.

When we look at the present Constitution, we see that it contains a number of provisions relating to election law. By Article 144, the Court of Appeal is now vested with the jurisdiction to try election petitions. The appellate jurisdiction is vested in the present Supreme Court by Article 118 (e). Article 130 has spelt out that jurisdiction. Article 101 (2) keeps alive the Ceylon (Parliamentary Elections) Order in Council 1946 until Parliament makes provisions in respect of elections. This provision reads —

“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.”

It has been submitted that the statement in Article 130 that “the Supreme Court shall hear and determine and make such orders as provided for by law. . .” and the last two lines of Article 144, which states that the Court of Appeal shall exercise its jurisdiction to try election petitions “in terms of any law for the time being applicable in that behalf,” are referable to the Ceylon (Parliamentary Elections) Order in Council.

By Article 101 (1), the Constitution has expressly reserved the power to Parliament to substitute new legal provisions for the matters provided in the Ceylon (Parliamentary Elections) Order in Council. Parliament has recently enacted Parliamentary Elections Act, No. 1 of 1981, covering that same ground. This new Act is prospective in operation and does not touch the present case.

Counsel have also referred to Article 169 (2). This appears in the chapter relating to Transitional Provisions. It is worded as follows:—

“(2) the Supreme Court established by the Administration of Justice Law, No. 44 of 1973, shall, on the commencement of the Constitution, cease to exist, and accordingly the provisions of that Law relating to the establishment of the said Supreme Court, shall be deemed to have been repealed. Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal.”

This provision appears tautologous in so far as its application to the present case. The Constitution has, in express terms, vested jurisdiction in regard to election petitions in two new courts created by the Constitution — the original jurisdiction in Appeal Court and the appellate jurisdiction in the new Supreme Court. To that extent the question of the forum for the hearing of appeals from such petitions can be said to be “otherwise provided in the Constitution.” Article 169 (2) thus has little bearing on this matter.

On a careful examination of all these provisions, it seems to me that our present Constitution has vested the Supreme Court, in express terms, with jurisdiction in respect of appeals from election petitions. This is one of the several jurisdictions given to the Supreme Court and itemised in Article 118 (e) and later expressed more elaborately in Article 130. An examination of Article 118 will show that seven different and varied kinds of jurisdiction have been vested in the Supreme Court, among which is this jurisdiction in election petition proceedings. That these are several jurisdictions is made evident by the fact that the term ‘jurisdiction’ is used in each and every one of the items (a) to (g) in Articles 118. There is no common denominator as it were in respect of these different jurisdictions. They are varied in nature, though vested in one institution, and appear to be separate facets of the authority of the Supreme Court. These different jurisdictions itemised in Article 118 are separately spelled out in greater detail in the succeeding Articles in sequence, so that each of these Articles is clearly referable to the items set out in Article 118 in that same order: Jurisdiction in respect of election petitions dealt with in Article 130 is thus referable to Article 118 (e) and is in the nature of a special jurisdiction.

It is only item (c) of Article 118 that was traditionally associated with the jurisdiction of the Supreme Court. The others are

additions of recent times by virtue of express provision, and items (b) and (d) show that the adding of new jurisdictions has continued under the present Constitution. When we consider the historical background, we find that the original section 82A (1) merely introduced a right of appeal to the Supreme Court and section 82A (5) enjoined three Judges of the Supreme Court to hear such appeals. This was because the Courts Ordinance or the prevailing enactments that dealt with the structure of the courts did not expressly provide for an election petition jurisdiction as part of the ordinary jurisdiction of the courts. This appellate power was thus in the nature of a special reference to three Judges of the Supreme Court.

The position then is that the jurisdiction in respect of appeals from an Election Judge in contradistinction to the manner or method of exercising that right of appeal must now be found in Article 130 of the Constitution. Article 130 pre-empts the entire field of jurisdiction and there is no room to drive a wedge to separate the forum from its jurisdiction as Mr. Shanmugalingam sought to do. Article 130 gives a right of appeal "from an order or judgment of the Court of Appeal in an election petition." In contrast, the terminology in section 82A (1) is different and uses the terms 'determination' and 'decision.' The 'decision' however is of the limited kind that is described there. The word 'judgment' is not found in Part V of the Ceylon (Parliamentary Elections) Order in Council, but is presumably intended to include the 'determination' mentioned in section 80C, 81 and 82A. The other word 'order' is an appropriate term for interlocutory orders and is used in Article 130 unqualified and without any limitations. This is a significant innovation which counsel for the respondents rightly stressed. There can be little doubt that Article 130 is a constitutional pronouncement in regard to the appellate jurisdiction of the Supreme Court in election petition proceedings. It has brought about a significant change in the law and appears to be much wider in scope than section 82A of the Ceylon (Parliamentary Elections) Order in Council.

In my opinion, a ruling on the precise ambit of Article 130 is not called for in the present case. It would be sufficient to observe that the present matter involves a question of law from an interlocutory order which could have had the effect of finally disposing of the election petition if the objection had been upheld. The present case falls within the provisions of Article 130 (b), which on the face of it does not contain the limitations found in section 82A (1)(b). The wording of Article 130 is probably the result of the decision in *Dissanayake v. Abeysinghe (supra)*, where several

shortcomings in section 82A (1) were pointed out by the Judges. G. P. A. Silva, S. P. J., referred to "the palpable injustice of one party to a suit being given a right of appeal against an erroneous decision, while the other party is denied such a right." On the other hand, Sirimane J. asked pertinently, "if, at the conclusion of a trial, it has been conclusively proved that a candidate has been guilty of bribery, intimidation and other corrupt and illegal practices, would it not be an anomaly if he is entitled to sit in Parliament, if it could be successfully argued in appeal that the trial Judge had erred on the question of security."

Admittedly, the previous state of the law had room for improvement. When one considers the history of election law, one finds that the evolution of appellate rights in election petition proceedings has been both a piecemeal and a trial and error process. One answer to the criticism contained in *Dissanayake's* case (*supra*) was to give either party to an election petition a right of appeal to the Supreme Court both from an interlocutory order and also from the final determination. It may therefore not be accidental that the wording of Article 130 of the Constitution and section 102.(1) of the new Parliamentary Elections Act is suggestive of this.

In fact, the new Parliamentary Elections Act, No. 1 of 1981, referred to more fully later, sets out the jurisdiction of the Supreme Court in terms very similar to those contained in Article 130. The language used in section 102 (1) of the new Parliamentary Elections Act shows that Parliament itself has understood Article 130 in the same manner as I have done and proceeded to legislate on that basis. The task of interpreting the law and the Constitution is, no doubt, assigned to this Court and though we are not bound by the views of Parliament on a matter of construction, we can legitimately have regard to its views when such views can be shown to have some relevance, as I shall show later in this judgment. For these reasons I am of the view that the objection raised by Mr. Shanmugalingam in the manner he has formulated it, is not entitled to succeed.

The second question before us relates to the procedure of appealing in contradistinction to appellate jurisdiction itself. Is the prevailing procedure to be found in Articles 127 and 128 of the Constitution or, do sections 82A, 82B and 82C of Ceylon (Parliamentary Elections) Order in Council continue to apply? The appellants have had recourse to the appellate procedure provided in Article 128 of the Constitution. In the course of his arguments, Mr. Shanmugalingam referred in passing to the fact that if the

provisions of Article 128 do not apply to the manner of filing an appeal, then the appellants have misconceived their remedy and consequently there is no valid petition of appeal before Court. Although this point has not been specifically stated in the initial objections, it has emerged before us in the course of the hearing. It is in a way consequential to the preliminary objection and is also a question of law of a fundamental nature. This court, I think, is obliged to consider it and make a pronouncement.

I have earlier referred to the fact that jurisdiction vested in the Supreme Court in respect of election petitions is a separate and special jurisdiction and should not be subsumed under a concept of a general appellate jurisdiction. Both Mr. Choksy and Mr. Satyendra contended in favour of such a common jurisdiction and submitted that Articles 127 and 128 provided the manner of the exercise of that common jurisdiction. They were accordingly at pains to show that an election petition is a civil or criminal matter so as to bring election petition proceedings within the wording of Articles 127 and 128.

It seems to me to be profitless to embark on an inquiry to ascertain whether or not an election petition proceeding could be designated as a civil or criminal matter, because it is made on an assumption which does not appear to be sound. I am inclined to the view both according to the canons of interpretation and on historical ground that the appellate power given to the Supreme Court in election petition proceedings is a special and separate jurisdiction. The real question is, having regard to the nature of the special jurisdiction involved, whether it was also not intended that the special provisions relating to the manner of appealing contained in the Ceylon (Parliamentary Elections) Order in Council should apply as against the more general provisions of Articles 127 and 128 of the Constitution which are undoubtedly referable to the final appellate jurisdiction of the Supreme Court in respect of its ordinary civil and criminal jurisdiction. When the arrangement and the sequence of the Articles in Chapter XVI of the Constitution are examined, one sees that Articles 127 and 128 are referable to item (c) of Article 118 and not to item (e) which deals with election petition jurisdiction.

There are other grounds for discounting the application of Articles 127 and 128 to election petition proceedings. If Article 130, which is substantive in nature, is subordinated to Article 128, which is of a procedural kind, then the plenary jurisdiction set out in Article 130 would be whittled down considerably. In place of the free and full right of appeal promised by Article 130, an

aggrieved person would be given only a limited and conditional right. Article 130 gives no indication that a petition of appeal should be conditional on a prior application for leave. No such constraint obtained in election petition appeals until now and an aggrieved party had always come before the court of appeal as a matter of right. More significantly, the application of Article 128 to Article 130 means the raising of the qualifying threshold for an appeal. To satisfy Article 128 it would now be necessary to have a substantial question of law or a grave miscarriage of justice whereas Article 130 contains no such requirement and the Ceylon (Parliamentary Elections) Order in Council gives a right of appeal on a bare question of law.

Since Article 130 deals with jurisdiction and is the controlling Article, the subordination of this Article to a procedural Article like 128 is also impermissible unless there is an indication to that effect in the Constitution. I have found no such indication. On the contrary, when we contrast Article 127, which corresponds to Article 130 but deals with the vesting of the ordinary civil and criminal jurisdiction in the Supreme Court, we find an express statement that Article 127 should apply "subject to the Constitution." It is this reservation that attracts Article 128 to Article 127 and the absence of such reservation in Article 130 makes the vital difference. It is also difficult to believe that the legislature intended any such limitations in regard to appeals from election petitions when the trend in recent times has been for a progressive liberalisation of election petition procedure. To subordinate Article 130 to Article 128 would undoubtedly be a retrograde step.

The grant of a direct appeal to the Supreme Court, provided by the Ceylon (Parliamentary Elections) Order in Council, is not something that does violence to the constitutional provisions relating to the arrangement of the appellate procedures. In fact, the Constitution recognises the possibility of having direct appeals as a method of access to the Supreme Court. Article 128. (4) states —

"An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament."

In my view, an appeal to the Supreme Court in election petition proceedings is one instance of such direct appeals which has been kept alive by Article 101 (2) of the Constitution. The new Act, which deals with the identical matter and which the Constitution contemplated, provides for such a direct appeal.

I have earlier referred to the opening words of Article 130. Article 130 begins –

“The Supreme Court shall have the power to hear and determine and make such orders as provided for by law . . .”

I do not agree with counsel for the respondents that the words “as provided for by law” qualifies only the word ‘orders’. I am inclined to take the view on grammatical considerations that it qualifies also the words ‘hear and determine’. Again, the word ‘law’ here, having regard to the definition of that term in Article 170, is another pointer to the provisions of the Ceylon (Parliamentary Elections) Order in Council. It certainly cannot include the Constitution. The expression ‘law’ is defined as follows :—

“ ‘law’ means any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council.”

I think Mr Satyendra overtaxed his ingenuity when he submitted that the word ‘law’ here can include the Constitution. I confess that I find it difficult to imagine how the Constitution can be regarded at one and the same time also as a separate and independent law which has been enacted prior to this selfsame Constitution. His submission was based on an erroneous view and a failure to recognise the distinction between, what may be termed, the constituent powers of Parliament and its ordinary legislative powers.

An examination of the provisions of section 82A (2) and the succeeding sections up to section 85 shows that the Ceylon (Parliamentary Elections) Order in Council contains a complete code of provisions in regard to the “hearing, determining and for the making of orders in respect of election petitions.” There are no equivalent provisions in the Constitution covering this same ground and what exists in the Constitution seems inadequate or inappropriate to deal comprehensively with an election petition appeal, in particular, with the kinds of orders which are peculiar to election petition proceedings.

It was Mr. Choksy who brought to our notice the Parliamentary Elections Act, No. 1 of 1981, enacted this year. This is in fact the legislation contemplated by Article 101 (1) of the Constitution in respect of Parliamentary elections, which is intended to replace the existing Ceylon (Parliamentary Elections) Order in Council 1946. This new Act No. 1 of 1981 has provision for the repeal of

the Ceylon (Parliamentary Elections) Order in Council and for the new Act to take its place. The case before us however continues to be governed by the former law. Mr. Shanmugalingam, I rather think, objected to our looking at this new material for the purpose of interpreting the provisions of the Constitution.

As stated earlier, the function of interpreting the Constitution is vested solely in this Court and in this task we must primarily go by the wording of the Constitution itself. It should be borne in mind that the new Act is specifically envisaged by the Constitution and has been enacted in furtherance of that legislative plan. Further, the Constitution and this new Act are interconnected and have an interacting effect. The language of the new Act in its ordinary meaning appears to reflect a certain understanding or construction of the provisions of the Constitution. The fact that this legislation has been validly enacted and is final and conclusive and cannot be called in question, would tend to give that understanding some relevance if an issue arises as to whether or not any of its provisions is in accord with the provisions of the Constitution. In fact it is incumbent on us *prima facie* to regard this new Act as being in consonance with the provisions of the Constitution and to interpret its provisions so that they are in harmony with the Constitution.

Accordingly, the provisions of this new Act could have some bearing on both the issues which I formulated in the course of this judgment. Regarding the first issue, the fact that section 102 (1) of the new Act No. 1 of 1981 declares the jurisdiction of the Supreme Court in very much the same terms (though not in the identical words) as in Article 130 (b) and without the limitations contained in section 82A of the Ceylon (Parliamentary Elections) Order in Council is an item in favour of Mr. Choksy's submission. If the jurisdiction of the Supreme Court is contained in section 82A, as contended by Mr. Shanmugalingam, or if Article 130 (b) has to be construed in the light of the limitations contained in section 82A, then what was the need for a provision like section 102 (1) of the new Parliamentary Elections Act, No. 1 of 1981? On the other hand, section 102 (1) appears to reflect what is contained in Article 130 of the Constitution and blends harmoniously with it. This goes to fortify the conclusion I have already arrived at, that the right of appeal from a decision of an Election Judge is no longer subject to the limitations contained in section 82A of the Ceylon (Parliamentary Elections) Order in Council.

The bearing this new legislation has on the second issue seems to be even more decisive. We find in this new Act No. 1 of 1981 a

reproduction, practically in their entirety, of the provisions of the Ceylon (Parliamentary Elections) Order in Council that relate to the time limit for appealing, procedures for appealing, parties to such appeal, the grant of security, the kind of orders that can be made, etc. If, as contended by the respondents, these matters are all now governed by the Constitution (in fact there is no reference whatsoever to many of these matters in the Constitution), then what was the necessity for reproducing them in the new law when those provisions of the Ceylon (Parliamentary Elections) Order in Council had already been superseded by the Constitution? A more relevant question is, could the legislature have enacted the new Act as ordinary legislation (and it has been duly enacted in terms of the Constitution), if the matters contained therein are already embodied in the Constitution and enjoy the dignity of constitutional provisions? Would it not be more reasonable to take the view that what is now enacted in Act No. 1 of 1981 was never a part of the constitutional provisions and therefore it was competent for Parliament to legislate for these matters in the form of ordinary legislation?

The above views give further support to my earlier conclusions which were based on a pure analysis and construction of the constitutional provisions. In my view, we have to look to the provisions of the Ceylon (Parliamentary Elections) Order in Council for the appropriate procedures for appealing. These provisions provide for a direct appeal to the Supreme Court and for other subsidiary matters. This, as I have shown earlier, is a procedure that was within the contemplation of the draftsman of the Constitution. In the present case these procedures have not been followed due to misapprehension of the law.

Before I conclude, I should like to say one word about the judgment in *Pilapitiya v. Muttettuwagama* (S.C. 15 of 1979)<sup>(7)</sup>. The application for Special Leave under Article 128.(2) of the Constitution was refused by Court and I concurred in that judgment. One of the matters referred to in the judgment is the right of an aggrieved party in an election petition proceeding to come to this Court by way of Article 128 (2). But as far as I can recall, the matter was not argued as fully as in the present case and in any event that judgment is not binding on this bench.

In the result, the respondents have failed to comply with the provisions of section 82A (2) of the Ceylon (Parliamentary Elections) Order in Council, which was the only mode of access to this Court. The purported appeal before us is therefore invalid. We have then no option but to reject this petition of appeal, even though

the preliminary objection taken by Mr. Shanmugalingam related to a question of the appellate jurisdiction of this Court and did not specifically deal with this matter.

The appeals are therefore rejected. I would order that half costs of appeal be paid to the petitioner-respondent by the 1st, 2nd and 3rd respondents jointly.

ISMAIL, J. — I agree.

### WIMALARATNE, J.

Article 101(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka ordains that 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. These appeals relate to the extent to which the Constitution has superseded those provisions of the Ceylon (Parliamentary Elections) Order-in-Council, in the matter of appeals in election petition cases. I have had the benefit of reading the judgments prepared by My Lord the Chief Justice and by my brother Wanasundera, J. They have both taken the view that Article 130 of the Constitution has superseded section 82A(1) of the Order-in-Council in the matter of the scope of the right of appeal in election petition cases. Whereas that section is limited in scope in that it gives a right of appeal only from a determination of an election judge under section 81, or from any other decision which has the effect of finally disposing of an election petition, Article 130 is wider in scope and empowers the Supreme Court to hear and determine an appeal from any order or judgment of the Court of Appeal in an election petition case. As observed by Wanasundera, J, this expansion of the scope of the right of appeal may be due to the anomaly resulting from the decision in *Dissanayake v. Abeyasinghe* (75 NLR 12)<sup>(9)</sup>. I am in respectful agreement with the view expressed in both judgments that in the context of Article 130, there could be no doubt that the Supreme Court is now empowered to hear and determine any appeal from any order, final or interlocutory, made by an election judge. As to the repercussions this extension would have on the speedy hearing and conclusion of election petitions is another matter, to which I shall revert later.

There is disagreement between the Chief Justice and Wanasundera, J. with regard to the procedure in appeal. The Chief Justice, has taken the view that section 82A of the Order-in-Council and

the Constitution cannot stand together. As regards section 82B, C & D he states that when the term "Court of Appeal" is substituted for the term "Supreme Court" in compliance with Article 169(2), we are faced with further difficulty. The procedure in appeal and the powers of the Supreme Court in appeal, in his judgment, are now contained in Articles 127, 128 and 130 of the Constitution. Wanasundera, J. takes the view that the procedure in appeal from a judgment or order of an election judge is still contained in sections 82A(2) to (5), 82B, C & D, and that those provisions are not inconsistent with the Constitution. That is to say, a party dissatisfied with an order of an election judge has to prefer an appeal to the Supreme Court in terms of section 82A(2) of the Order-in-Council. When an appeal is so preferred the powers of the Supreme Court are exercised in terms of Section 82B. The remedy of an aggrieved party therefore is not to invoke the powers of the Supreme Court under Article 128(2) by seeking leave to appeal, but to prefer an appeal in terms of section 82A(2).

I regret I am unable to agree with My Lord the Chief Justice on this aspect of the appeals. I am in entire agreement with the conclusion reached in the judgment of Wanasundera, J. In view, however, of the importance of the issue raised I wish to add a few observations of my own to the cogent reasons given for his conclusion that as no appeals have been preferred by the appellants according to law, these appeals should therefore be rejected.

The Ceylon (Parliamentary Elections) Order-in-Council governed the hearing of appeals in election petition cases from the time a right of appeal was first granted by Act No. 19 of 1948, for a period of about a third of a century. Notwithstanding changes in the Constitution and in the laws establishing the several Courts and vesting jurisdiction in them, namely, the Courts Ordinance (Cap. 6) and the Administration of Justice Law, No. 44 of 1973, the Order-in-Council was the law which, with amendments from time to time, set down the scope of the right of appeal, the procedure in appeal and the procedure to be followed after the conclusion of an appeal. It was a special law, with a special procedure, a special set of rules, and imposing consequences of a special nature. Whenever amendments were considered to be necessary, for example, extending the scope of the right of appeal, they were effected not by amending the basic law or the law vesting jurisdiction prevalent at the particular time, but by amending the Order-in-Council. That the present Parliament also desires to pursue the same appeal procedure is apparent when one peruses the provisions of the Parliamentary Elections Act, No. 1 of 1981, which has been certified by the Speaker on 22.1.81 and which is

to come into operation on such date as may be specified by the President by Order published in the Gazette. Section 130 of that Act expressly repeals Part VI of the Order-in-Council, in which Part is contained provisions relating to election petitions and appeals. On such date as the Order-in-Council is so repealed, almost identical provisions containing appeal procedure are to replace the present appeal procedure. It is my view that until Act No. 1 of 1981 comes into force, the provisions of the Order-in-Council pertaining to procedure in appeals will continue to apply. It is necessary to emphasise in particular the consequences that will inevitably ensue if the provisions of the Order-in-Council relating to appeals are not strictly complied with. Sections 82A(2) and the subsequent sub-sections constitute the special provisions relating to the procedure in appeal. Section 82B contains the powers of the Supreme Court in such appeals. It is only upon an appeal preferred under section 82A that sub-section (2) of section 82B empowers the Supreme Court to decide "whether the member whose return or election was complained of, or any other and what persons, was duly returned, or whether the election was void." It also requires the Supreme Court "to issue a certificate of such decision." These are special powers and duties. One cannot but note the absence of such special powers and duties in the appeal procedure and powers contained in the Articles of the Constitution or in the Supreme Court Rules, 1978. What is more, section 82C provides that where the Supreme Court either allows or reverses the determination of the election judge, "the Court shall transmit to the President the Certificate of the decision issued under section 82B." This "follow up" procedure is contained in section 82D, which gives effect to the certificate so transmitted. It is only on such transmission that the decision of the Supreme Court takes effect. It is only on such transmission of the Certificate that His Excellency is empowered to order by notice published in the Gazette, the holding of a fresh election within one month of the receipt by him of the Certificate, and "in accordance with such certificate." Such certificate could be issued by the Supreme Court, only by virtue of the powers vested in it by section 82B; and these powers could be exercised by the Supreme Court only in the event of an appeal being preferred under section 82A. If, then, these special provisions contained in the Order-in-Council are not strictly complied with, a member who is unseated by the decision of the Supreme Court in appeal, may yet find himself not unseated. If the certificate contemplated in section 82C is not transmitted to the President, His Excellency may not be empowered to order the holding of a fresh election, in the event of such step becoming necessary.

It is probably to overcome these difficulties that Mr. Choksy argued that in Article 130 the words "as provided for by law" qualified only the word "Orders" but not the words "hear and determine"; that is, that whilst the Supreme Court is empowered to make "orders" under sections 82B and C, yet the hearing and determination of the appeal has to be in compliance with Article 128(2). I am unable to agree. The context in which the words appear leave no room for doubt in my mind that not only the orders made, but also the hearing and determination of an appeal have all to be "as provided for by law". "As provided for by law" can have no other meaning in the context than "as provided for by the Ceylon (Parliamentary Elections) Order-in-Council, 1946 as amended" ; because "law" is defined in Article 170 as meaning "any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution, and includes an Order-in-Council".

Mr. Satyendra's contention that "law" in the context means "the Constitution" would, if accepted, lead to startling results. One such result that immediately comes to mind is that if "law" is equated to "the Constitution", then any "question relating to the interpretation of the Constitution" would not be different from any "question relating to the interpretation of the law" and such questions may be decided by any of the Courts in the hierarchy of Courts. But the Constitution vests that jurisdiction of interpretation of the Constitution exclusively in the Supreme Court.

Mr. Shanmugalingam's explanation for the necessity for Article 130 in the Constitution, when that power is already vested by the Order-in-Council, is that otherwise an absurdity would arise as a result of the application of Article 169(2) to section 82A. There seems to be some force in this submission, but it does not provide an explanation as to why in Article 130 the powers of the Supreme Court in appeal have been enlarged so as to enable the Court to entertain an appeal from any order, final or interim.

Reverting to this enlargement of the scope of the right of appeal I wish to state that the very laudable object in the form of an exhortation that "every endeavour shall be made to conclude the trial of such petition within a period of six months from the date of presentation of such petition" and introduced as section 80C(2) by an amendment dated 1.3.70, would be almost impossible to achieve, even with the best of endeavours on the part of the election judge, if a right of appeal is permitted from every interim order made by him. This exhortation is repeated in section 99(2) of Act No. 1 of 1981 as well.

In this connection it must be remembered that the election judge is a judge of a Superior Court; and a solution to the anomaly arising from the decision in *Dissanayake v. Abeysinghe* (9) would be to give an aggrieved party a right of appeal to the Supreme Court from any interim order, but to be exercised only at the conclusion of the trial of the petition. That, of course, is a matter for the legislature, not the Courts. We can only point out such anomalies for consideration by the legislature.

I am, therefore, of the view that whilst section 82A(1) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946 as amended, is inconsistent with Article 130 of the Constitution, the other provisions of the Order-in-Council relating to appeals, namely, sections 82A(2) to (5) 82B, 82C and 82D are not inconsistent. As there are no appeals preferred in compliance with section 82A(2) I agree with the judgment of Wanasundera, J. that the three appeals should be rejected.

#### RATWATTE, J.

I have had the advantage of reading the Judgments prepared by my Lord the Chief Justice and by my brothers, Sharvananda, J., Wanasundera, J., and Wimalaratne, J. The two main questions that arise for consideration on these three appeals have been succinctly formulated, if I may say so with respect, by Wanasundera, J. in his Judgment. In respect of the first question, that is, whether Article 130(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the Constitution) has superseded Section 82A(1) of the Ceylon (Parliamentary Elections) Order in Council 1946 (hereinafter referred to as the Order in Council), as regards the kinds of orders made by an Election Judge from which an appeal can be taken to the Supreme Court, I am in respectful agreement with the views expressed in the Judgments of the Chief Justice, Sharvananda, J., Wanasundera, J. and Wimalaratne, J. They have taken the view that Article 130(b) of the Constitution has superseded Section 82A(1) of the Order in Council as regards the scope of the right of appeal in election petition cases, and that the jurisdiction vested in the Supreme Court under Article 130(b) of the Constitution does not suffer from the limitations imposed by Section 82A(1) of the Order in Council, and that therefore the Supreme Court is empowered to hear and determine an appeal from an order of an Election Judge even though such an order does not have the effect of finally disposing of an election petition.

As regards the second question formulated by Wanasundera, J., that is, in regard to the procedure to be followed when one

appeals in election petition cases, the Chief Justice and Sharvananda, J. have come to the conclusion that the procedure to be followed is contained in Article 127 and 128 of the Constitution and that the three Applications for Special Leave to appeal to the Supreme Court filed in terms of Article 128(2) by the three Respondents to the election petition, have been properly filed and that the appeals are maintainable. I regret I am unable to agree with this view.

On this question I am in respectful agreement with the view expressed by Wanasundera, J. and Wimalaratne, J. that the procedure in appealing against a judgment or order of an Election Judge is still contained in Sections 82A(2) to (5), 82B, 82C and 82D, and that those provisions are not inconsistent with the provisions of the Constitution and that therefore the remedy of an aggrieved party in an election petition case is not to invoke the powers of the Supreme Court by asking for Special Leave to appeal in terms of Article 128(2) of the Constitution, but by filing an appeal in terms of Section 82A(2) of the Order in Council. When that is done the Supreme Court can exercise its powers under Section 82D. Wanasundera, J. and Wimalaratne, J. have given cogent reasons for their views and I have nothing further to add.

As there are no appeals preferred in compliance with Section 82A(2) of the Order in Council, I agree with the Judgments of Wanasundera, J. and Wimalaratne, J. that the three appeals should be rejected. I also agree with Wanasundera, J. that there should be no costs.

*Appeals rejected.*