1951 *Present :* **Nagalingam J.**

G. S. N. KODAKAN PILLAI, Petitioner, *and* P. B. MUDANAYAKE (Registering Officer) *et al.*, Respondents

S. C. 522—Application for conditional leave to appeal to the Privy Council

Privy Council—Conditional leave to appeal—Certiorari—"*Civil suit or action*"—*Appeals (Privy Council) Ordinance (Cap. 85), s. 3.*

A mandate in the nature of a writ of *certiorari* affecting a civil right is an action within the meaning of section 3 of the Appeals (Privy Council) Ordinance.

APPLICATION for conditional leave to appeal to the Privy Council.

S. J. V. Chelvanayakam, K.C., with *S. Nadesan* and *N. Nadarasa*, for the petitioner.

Walter Jayawardene, Crown Counsel, for the 1st and 2nd respondents.

Cur. adv. vult.

October 25, 1951. NAGALINGAM J.—

This is an application by the petitioner for conditional leave to appeal to His Majesty in Council. It is conceded on the petitioner's behalf that the application is not one that is made as of right but that it is made with a view to securing the exercise of the Court's discretion in granting leave on the basis that the questions involved in the appeal are such that by reason of their great general or public importance they ought to be submitted to His Majesty in Council for decision.

Learned Crown Counsel who appeared on behalf of the 1st and 2nd respondents while submitting that he could not very well combat that questions of great general and public importance are involved in the appeal within the meaning of Rule 1 (*b*) of the Schedule to the Appeals (Privy Council) Ordinance (Chapter 85) contended that neither part (*a*) nor (*b*) of Rule 1 had any relation to the application made by the petitioner. It was urged that before the Rule could be applied it must be shown that the appeal was permitted by the provisions of the Ordinance itself, and it was particularly emphasised that section 3 of the Ordinance conferred the right of appeal only on parties to civil suits or actions. It was further said that the order appealed from was not one which could properly be regarded as one made between parties to civil suits or actions, as a mandate in the nature of a Writ of Certiorari is properly an information rather than a civil suit or action. In support of his contention Mr. Jayawardena cited cases which, far from supporting his contention, established the contrary.

The case of *Bradlaugh v. Clarke* [1], the first case cited by him, was decided in the House of Lords, and considered among other matters what was the proper meaning to be attached to the term "action". It was contended that as the Statute that was under consideration there prescribed that a penalty imposed by it could be "recovered by action in one of Her Majesty's Superior Courts at Westminster" and as the King could only proceed in the Court of Exchequer for recovery of penalties, and that by way of information and not by action, the use of the term "action" in connection with the words, "in one of Her Majesty's Superior Courts at Westminster" indicated that the right to recover the penalty was not vested in the King but in a common informer. Earl of Selborne L.C. in rejecting this contention observed that :

> "the word 'action' is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the Crown, and, therefore, not furnishing any sufficient ground for implying a right of action in a common informer."

Lord Blackburn in the same case made this interesting observation :—

> "In the popular use of the words an information by the Attorney-General to recover a debt due to the Crown is spoken of as an information and not as an action, which in popular language would be taken to mean an action by a subject. But in legal phraseology 'action' includes every suit, whether by a subject, or in the name of the Sovereign, or *by an information* by the Attorney-General on behalf of the Crown."

It would thus be seen that the term "action" has been expounded by the House of Lords in the widest possible sense as including even an information in the technical sense of the term.

The other case relied upon by learned Crown Counsel is that of *Subramaniam Chetty v. Soysa* [2] (Divisional Bench). The question that arose there was whether an appeal lay as of right to the Privy

[1] *L. R. 8 A. C. 354.*

[2] *(1923) 25 N. L. R. 344.*

Council from an order of this Court setting aside a sale in execution. That the subject matter itself was over Rs. 5,000 in value was not in dispute. But there, as here, it was sought to be argued that the order made by this Court was not in regard to a civil suit or action as the question that arose was between the purchaser and the judgment creditor and therefore no appeal lay within the meaning of section 3 of the Appeals (Privy Council) Ordinance. In reference to this contention Bertram C.J., after referring to the definition of the term "action" in section 5 of the Civil Procedure Code referred to the extended meaning given to that term by section 6 thereof, and, observing that "it would be highly inconvenient if the word 'action' in this Ordinance (Privy Council) were given a different meaning from that which is given to it in our Code of Civil Procedure", reached the conclusion that the application to set aside a sale in execution proceedings was one which fell within the description of an action as the application to set aside the sale was, in the language of section 6 of the Civil Procedure Code, an application to the Court for relief or remedy obtainable through the exercise of the Court's power or authority or by otherwise inviting its interference. This case, again, is therefore no authority for the argument advanced by learned Crown Counsel.

In the case of *Rex v. Woodhouse* [1], Fletcher Moulton L.J. had occasion to indicate the nature, scope and extent of a Writ of Certiorari :—

> "The writ of certiorari is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to 'judicial acts' but the cases by which this limitation is supposed to be established shew that the phrase 'judicial act' must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial'. For instance, it is evidently not limited to bringing up the acts of bodies that are ordinarily considered to be Courts. From very early times the common law courts considered that they had jurisdiction to examine into rates by certiorari. The procedure of certiorari applies in many cases in which the body whose acts are criticised would not ordinarily be called a court, nor would its acts be ordinarily termed 'judicial acts'. The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts."

In the present case, the facts are that the petitioner applied to the Registering Officer to have his name included in the relevant Voters' List but the application was refused, whereupon an appeal was lodged with the Revising Officer, who ordered the inclusion of the petitioner's name, reversing the order of the Registering Officer. Thereupon the Registering Officer applied to this Court for a Writ of Certiorari to quash the order of the Revising Officer. That, undoubtedly, was a remedy which was sought by the Registering Officer by invoking the aid of this

[1] *(1906) 2 K. B. 501.*

Court, and it is common ground that there was no other remedy open to the Registering Officer in the circumstances. The application of the Registering Officer for a Writ of Certiorari was a remedy for relief obtainable by inviting this Court to exercise its power or authority and would, therefore, fall within the meaning of the term " action " as defined in the Civil Procedure Code.

Learned Crown Counsel, alternatively, sought to argue that the term " action " need not necessarily receive the same meaning as that given to it in the Civil Procedure Code but must be given its ordinary meaning.

Justinian [1] defines the term " action " thus :—

" Actio autem nihil aliud est, quam jus persequendi in judicio, quod sibi debetur "—An action is nothing else than the right of suing before a Judge for that which is due to us.

In England, too, there is the high authority of Bracton [2] who defines the term " action " thus :—

" Actio nihil aliud est quam jus prosequendi in judicio quod aliquo debetur "—An action is nothing else than the right of suing in a Court of justice for that which is due to someone.

" That which is due to us or someone " is wide enough to include the case of a declaration of status.

Even on the basis of these general concepts of the term " action " the order made upon the application for a Writ of Certiorari cannot but be regarded as one relating to an action.

Similar questions as in the present case were raised and considered in the cases of *In re Goonesinghe* [3] and *Controller of Textiles v. Mohamed Miya* [4]. In the former of these two cases the question that arose was whether an order of this Court refusing an application for a Writ of Certiorari to quash the order of an Election Judge was one which was a civil suit or action within the meaning of section 3 of the Appeals (Privy Council) Ordinance. Moseley J. in delivering the judgment of the Court expressed himself as having " little difficulty in arriving at the conclusion that an application in the nature of a Writ of Certiorari being an application for relief or remedy obtainable through the Court's power or authority constitutes an action, and therefore comes within the compass of section 3 of Cap. 85 of the Legislative Enactments." In the latter case which was an application for leave to appeal to the Privy Council from an order of this Court granting a mandate in the nature of a Writ of Certiorari quashing an order of the Textile Controller revoking two licences, this Court held that an appeal lay as of right to

[1] *Bk. IV Tit. VI, Sanders' translation p. 426.*
[2] *Bk. 3, Chapter 1.*
[3] *(1942) 44 N. L. R. 75.*
[4] *(1948) 49 N. L. R. 105 at 107.*

the Privy Council. In delivering the judgment of the Court, Canekeratne J. made certain observations in regard to the considerations that would weigh with a Court in granting an application. The learned Judge said,

> "There are many other circumstances which would properly influence the decision of a Court as to the propriety of allowing an application such, for instance, as was once remarked, a constitutional right . . . . An order designed to create or to dissolve a status, would affect the civil right of a person—an order that a man should not be permitted to exercise the franchise may, perhaps, be one."

I am of the view that both on principle and precedent the application of the petitioner is one which falls within the scope of section 3 of the Appeals (Privy Council) Ordinance.

I therefore allow the application of the petitioner on the usual conditions. The 1st respondent will pay to the petitioner the costs of argument.

Application allowed.