

[IN THE PRIVY COUNCIL]

1949 *Present* : Lord Simonds, Lord du Pareq and Lord Normand

G. E. DE SILVA, Petitioner, and ATTORNEY-GENERAL *et al.*,
Respondents

APPLICATION FOR SPECIAL LEAVE TO APPEAL TO THE
PRIVY COUNCIL

Election Petitions Nos. 4 and 5 of 1947

Privy Council—Election petition—Special leave to appeal—Determination of Election Court is final—No appeal to Privy Council—Parliamentary Elections Order in Council, 1946—Sections 75, 81 and 82.

No appeal will be entertained by the Privy Council from an order of an Election Judge under Section 81 of the Parliamentary (Elections) Order in Council, 1946.

APPPLICATION for special leave to appeal to the Privy Council from an order of the Election Judge in Election Petitions Nos. 4 and 5 of 1947. The order of the Election Judge is reported in (1948) 49 *N. L. R.* 169.

Sir Valentine Holmes, K.C., with *R. K. Handoo*, for the petitioner.

Frank Graham for the Attorney-General.

April 11, 1949. *Delivered by* LORD SIMONDS—

Their Lordships have humbly advised His Majesty that in their opinion this petition for special leave to appeal should be refused with costs. These are their reasons.

The petitioner George Edmund de Silva prays for special leave to appeal from a determination of Windham J., a Judge of the Supreme Court of the Island of Ceylon acting as Election Judge under the provisions of the Order in Council hereafter mentioned, whereby the election of the petitioner as member of the House of Representatives for the Kandy Electoral District was declared to be void for certain reasons into which it is unnecessary to enter. When their Lordships had partially considered the case on its merits, it appeared that a question of jurisdiction arose upon which they desired the assistance of Counsel for the Attorney-General of Ceylon. Having now heard full argument upon the question

they are satisfied that the matter in dispute is one in which the Prerogative right to entertain an appeal does not exist and that the petition must be refused accordingly.

By an Order in Council called the Ceylon (Parliamentary Elections) Order in Council, 1946, which was made under the authority of the Ceylon (Constitution) Order in Council, 1946, provision was made for the election of members to serve in the House of Representatives for Ceylon. The said Order in Council after making all the usual and appropriate provisions in regard to qualification of electors and the holding of elections and other relevant matters and having defined corrupt practices and prescribed that every person who should be guilty of a corrupt practice should on conviction be liable to certain penalties, by s. 76 enacted that the election of a candidate as a member should be avoided by his conviction for any corrupt or illegal practice, and by s. 77 that the election of a candidate as a member should be declared to be void on an election petition on any of a number of grounds therein stated which might be proved to the satisfaction of the election judge. Part V of the Order deals with Election Petitions. By section 75 (1) it is provided that every election petition shall be tried by the Chief Justice or by a judge of the Supreme Court nominated by the Chief Justice for the purpose, and by section 75 (3) that, for the purpose of summoning or compelling the attendance of witnesses at the trial of an election petition, the election judge shall have the same power, jurisdiction and authority as are possessed and exercised by the Judge of a District Court in the trial of a civil action and witnesses shall be sworn in the same manner as near as circumstances will admit as in the trial of such an action and shall be subject to the same penalties for the giving of false evidence. Section 81 is as follows " At the conclusion of the trial of an election petition the election judge shall determine whether the member whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor. Upon such certificate being given, such determination shall be final : and the return shall be confirmed or altered or the Governor shall within one month of such determination by notice in the *Government Gazette* order the holding of an election in the electoral district concerned, as the case may require, in accordance with such certificate "

By s. 82 (1) the election judge was also required to report in writing to the Governor whether any corrupt or illegal practice had or had not been committed by or with the knowledge and consent of any candidate at the election or by his agent, and by s. 82 (3) when an election judge reports that a corrupt or illegal practice has been committed by any person, that person shall be subject to the same incapacities as if at the date of the said report he had been convicted of that practice.

At an election held on August 23, 1947, for the election of a member for the Kandy Electoral District the petitioner headed the poll with 7,942 votes, being closely followed by Mr. Ilangaratne (a respondent to this petition) with 7,737 votes. Shortly after two election petitions were filed in the Supreme Court of Ceylon questioning the validity of

the election on a number of grounds, and after a protracted trial Windham J., a Judge of the Supreme Court, who had been nominated by the Chief Justice to try them, on February 24, 1948, declared the election of the petitioner as member for the Kandy Electoral District to be void and the petitioner to be subject to the incapacities set out in section 58 (2) of the Order in Council and thereupon certified his determination to the Governor-General who ordered a fresh election to be held. It was duly held and Mr. Mangaratne was elected.

It was under these circumstances that the petitioner sought special leave to appeal from the declaration and determination of Windham J. and that the Attorney-General for Ceylon opposed, contending that an appeal is not competent.

It appears to their Lordships that for them the question is concluded by authority. In *Theberge v. Laundry*¹, where the combined effect of the Quebec Controverted Elections Act, 1875, and the Quebec Election Act of the same year was to create a position in all relevant respects similar to that of the petitioner under the Ceylon Order in Council, it was held that no appeal lay to His Majesty in Council and the observations made by Lord Cairns L.C. in delivering the opinion of their Lordships are exactly applicable to the present case. It is no doubt true, as counsel for the petitioner urged, that the prerogative right to entertain an appeal is "taken away only by express words or the necessary intendment of a statute or other equivalent act of state" (see *Renouf v. A.G.*²), but, as was pointed out in *Theberge v. Laundry*, the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case as in that it appears to their Lordships that the peculiar nature of the jurisdiction demands that this question should be answered in the negative. It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election judge to hear election petitions is not substituted for that of the legislative body itself but is created *de novo* upon the establishment of that body. But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of *Strickland v. Grima*³. Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted. It is for these reasons that their Lordships have humbly tendered their advice to His Majesty that the petition ought not to be granted.

Petition dismissed.

¹ (1876) 2 A.C. 102.

² (1936) A.C. 445 at 460.

³ (1930) A. C. 285.