

1967/20

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IN THE PRIVY COUNCIL

No. 38 of 1966

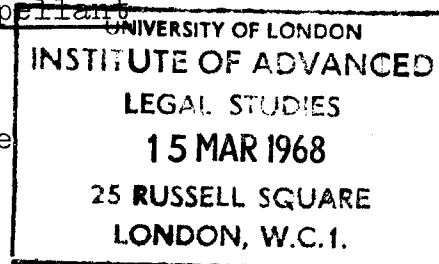
ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

MOHAMED SAMSUDEEN KARIAPPER  
(Petitioner) Appellant

- and -

1. S.S. WIJESINHA (Clerk to the House of Representatives)
  2. S.N. SENEVIRATNE (Assistant Clerk to the House of Representatives)
- (Respondents) Respondents



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CASE FOR THE APPELLANT

Records

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1. This is an appeal from the judgment and decree, dated the 9th of May 1966, of the Supreme Court of Ceylon refusing the Appellant's application for a mandate in the nature of a writ of mandamus against the Respondents above-named, who are the Clerk and Assistant Clerk respectively of the House of Representatives, to compel them to recognise the Appellant as a Member of Parliament and to pay him his salary and allowances as such Member. The principal ground of the application was that the Imposition of Civic Disabilities (Special Provisions) Act No. 14 of 1965 was ultra vires the Ceylon (Constitution) Order in Council, 1946, (Cap. 379, Vol. XI of the Legislative Enactments of Ceylon, 1956 Edition) and that the refusal to recognise the Appellant as a Member of Parliament was therefore illegal.

p.11 1.32-  
p.32 1.17  
p.32 1.18-  
p.33 1.23  
p.1 1.1-  
p.10 1.22  
  
p.72 1.18-  
p.76 1.25

2. On the 11th of September 1959, the Governor-General appointed a Commission of Inquiry under the Commissions of Inquiry Act (Cap. 393 of the Legislative Enactments of Ceylon, Vol. XI, 1956 Edition) to investigate and report on the following matters :-

p.12 11.25-  
40, p.73  
11.1-9

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- (a) Whether during the period commencing on the 1st of January 1943, and ending on the 11th of September 1959, any gratification had been offered, promised, given or paid directly or indirectly to any person who then was or had been a Member of the Senate, or the House of Representatives, or of the State Council, in order to influence his judgment or conduct in respect of any matter with which he in that capacity was concerned whether as of right or otherwise; 10
- (b) whether during that period any such gratification had been solicited or received, directly or indirectly, by any such person as a reward for any service rendered by him in that capacity whether as of right or otherwise.

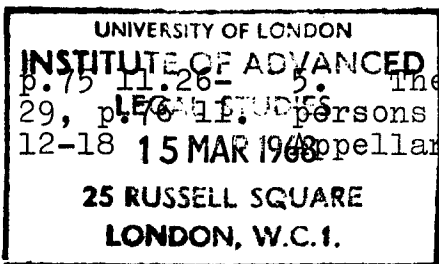
The said Commission was not "a competent court", or "a Commission appointed with the approval of the Senate or the House of Representatives", or "a Committee thereof" within the meaning of section 13(3)(k) of the Ceylon (Constitution) Order in Council, 1946 (hereinafter called "the Constitution"). 20

p.13 ll.1-7, 3. The said Commission issued an interim report  
 p.73 ll.10-12 by which it found three persons guilty of having received gratifications as contemplated by its terms of reference. By its final report it found the Appellant and two other persons also guilty. 30

p.12 l.20, p.72 4. The Imposition of Civic Disabilities  
 l.30, p.73 l.1 (Special Provisions) Act No. 14 of 1965 (herein-  
 p.72 ll.34-37 after called "the impugned Act") received the Royal Assent on November 16, 1965. The object of the impugned Act appears in its long title: 40

AN ACT TO IMPOSE CIVIC DISABILITIES ON CERTAIN PERSONS AGAINST WHOM ALLEGATIONS OF BRIBERY WERE HELD BY A COMMISSION OF INQUIRY TO HAVE BEEN PROVED AND TO MAKE PROVISION FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

p.75 ll.26-29, p.76 ll.1-12 5. The impugned Act was applicable to the six persons named in the Schedule thereto, namely the appellant and the other five persons who were



found guilty by the said Commission, and to them alone. It purported to impose on the Appellant and the other five persons the following disabilities :-

- (a) Disqualification for registration as voters (Section 2);
- (b) Disqualification for voting at Parliamentary and local government elections (Section 3);
- 10 (c) Disqualification for being a candidate at Parliamentary and local government elections (Section 4);
- (d) Disqualification for being elected as a Senator or a Member of the House of Representatives or for sitting or voting in these Chambers (Section 5);
- (e) Disqualification for being a member of any local government authority (Section 6);
- 20 (f) Disqualification for employment as a public servant or for being a member of any scheduled institution as defined in the Bribery Act (Section 8);
- (g) Vacation of office if any of the said persons held office in the public service or in the said institutions on the day immediately prior to November 16, 1965 (Section 9).

30 Section 7 of the impugned Act imposed penalties in the following terms :-

"Where, on the day immediately prior to the relevant date, a person to whom this Act applies was a Senator, or a member of the House of Representatives or of any local authority, his seat as a Senator or such member, as the case may be, shall be deemed, for all purposes, to have become vacant on that date."

40 Section 10(1) of the impugned Act read as follows :-

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"Where any provisions of this Act are supplementary to, or inconsistent or in conflict with, any provisions of the Ceylon (Constitution) Order in Council, 1946, the said provisions of this Act shall be deemed, for all purposes and in all respects, to be as valid and effectual as though the said provisions of this Act were in an Act for the amendment of that Order in Council enacted by Parliament after compliance with the requirement imposed by the proviso of sub-section (4) of section 29 of that Order in Council."

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p.2 l.26,  
p.7 l.10,  
p.12 l.12

6. At the time the impugned Act was passed, the Appellant was the lawfully elected Member of Parliament for Kalmunai and was entitled to the civic rights of which Sections 2 - 7 of the impugned Act purported to deprive him. He was also eligible for appointment to the offices referred to in Section 8 in the event of his lawfully ceasing to be a Member of Parliament.

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p.4 l.13-  
p.5 l.9

7. After the impugned Act received the Royal Assent, and in pursuance of its provisions, the Respondents have refused to recognise the Appellant as a Member of Parliament and to pay to him the salary and allowance lawfully due to every Member of Parliament.

8. Section 28 of the Constitution provides:

"(2) there shall be a Clerk to the House of Representatives who shall be appointed by the Governor-General."

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"(6) The Clerk to the Senate and the Clerk to the House of Representatives shall not be removable except by the Governor-General on an address of the Senate, or of the House of Representatives, as the case may be."

Section 3 provides:

" 'public officer' means any person who holds a paid office, other than a judicial office, as a servant of the Crown in respect of the Government of the Island, but does not include -

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(a). . . . .

(b) . . . . .

(c) the Clerk to the Senate, the Clerk to the House of Representatives or a member of the staff of the Clerk to the Senate or the Clerk to the House of Representatives."

10 The Clerk to the House of Representatives (and in his absence, the Assistant Clerk) is the Head of the staff of the House of Representatives, and other members of the staff are appointed by him in consultation with the Speaker (Section 28(4)). His duties include the payment of salaries and allowances to Members of Parliament and the duty (under Section 24(2)) to inform the Governor-General whenever the seat of a Member of Parliament falls vacant under the provisions of Section 24 except upon a dissolution of Parliament.

20 9. On the 11th of January 1966, the Appellant applied to the Supreme Court for a mandate in the nature of a writ of Mandamus to compel the Respondents to recognise him as a Member of Parliament and to pay him the salary and allowances withheld as a result of the impugned Act.

p.1 1.1-  
p.10 1.22

The Appellant pleaded that

30 (a) The said Act or the relevant provisions thereof are void and in contravention of the Ceylon (Constitution) Order in Council and are in excess of the powers conferred on Parliament by the Ceylon (Constitution) Order in Council, 1946, and do not constitute the exercise of legislative power but are an unwarranted assumption or exercise of Judicial and/or Punitive power in the guise of legislation against certain specified individuals of whom the Appellant is one.

p.5 11.15-  
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40 (b) The said Act or the relevant provisions thereof do not constitute or effect a lawful amendment of the said Ceylon (Constitution) Order in Council within the meaning of Section 29 thereof.

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- (c) The said Act and/or the relevant provisions thereof are not law within the meaning of Section 29 of the said Ceylon (Constitution) Order in Council.

10. At the hearing of the application before the Supreme Court (Sansoni, C.J., and Silva, J.) the Respondents opposed the application on three grounds :-

- (a) That the impugned Act was a valid amendment of the Constitution; 10
- (b) That even if it were not an amendment of the Constitution, sections 5 and 7 thereof were a valid exercise of the disciplinary power of the House to expel or disqualify a Member, or of the power given by section 13(3)(k) of the Constitution to adjudge a Member guilty of bribery;
- (c) That there is no legal duty on the Clerk of the House to pay the Appellant his remuneration and allowances, and that the Clerk, when he pays Members of Parliament their remuneration and allowances, acts as a servant or agent of the Crown and Mandamus does not lie against a servant or agent of the Crown to compel him to perform a duty which he owes to the Crown. 20

p.12 1.9                      On the 30th of April 1966, the Supreme Court made order refusing the Appellant's application with costs, and decree was entered accordingly on the 9th of May 1966. 30

p.32 1.18-  
p.33.1.23

11. The reasons for the decision that the impugned Act was a valid amendment of the Constitution, may be summarized as follows :-

- (a) That the Bill was treated by Parliament as one for the amendment of the Constitution and that the certificate of the Speaker to the effect that it was passed by no less than two-thirds of the Members of the House was endorsed on the Bill as required by Section 29(4) of the Constitution; 40
- p.15 11.17-  
24, p.17 11.  
23-28

Record

- (b) That the impugned Act, being in effect an amendment of the Constitution by necessary implication, became "a part of the Constitution, entitled to all the obedience due to any other part of the Constitution"; p.19 11.15-18
- 10 (c) That Parliament must be taken to intend the removal of any Constitutional limitation upon its power when it enacts anything contrary to such limitation, and if there is a certificate of the Speaker under Section 29(4) of the Constitution, the enactment is good law notwithstanding the absence of any prior removal of the limitation by express amendment; p.29 11.14-33
- 20 (d) That the decision of the Board in Liyanage v. The Queen (1966, 2 W.L.R. 682) does not apply because that case was decided on the footing that the Act impugned there interfered with the Judicature; p.27 11.22-30, p.28 11.22-26
- 30 (e) That "on a lower plane", the impugned Act is referable to an implied intention to amend Section 13(3)(k) of the Constitution so as to extend the power of Parliament to control the membership of the House of Representatives. This part of the judgment proceeded on the footing that Sections 5 and 7 of the Act are severable and would survive even if other provisions of the Act are void. p.20 11.6-32
- 40 12. The reason for the decision that Sections 5 and 7 were a valid exercise of the disciplinary power of the House, or of the power given by Section 13(3)(k) of the Constitution, was that if such a disqualification as is provided for by sections 5 and 7 can result from a decision of even a Committee of the House, a fortiori, an ordinary Act of Parliament could result in such disqualification. p.25 11.2-4
13. The reasons for the decision that in any event Mandamus was not available against the Respondents may be summarized as follows :-

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- p.16 11.23-32 (a) That although the Clerk to the House of Representatives is a servant of the House in so far as he has duties to perform in the House, he is a servant of the Crown, who is answerable to the Crown in making payments of public money provided by the Appropriation Act;
- p.15 1.37-10  
p.16 1.6 (b) That the Clerk owes no legal duty to Members of the House in regard to the payment of their salaries and allowances
- p.33 1.24-  
p.37 1.22 14. The Appellant applied to the Supreme Court for leave to appeal from the said decree of the Supreme Court to Her Majesty in Council.  
p.37 1.23- Conditional Leave to Appeal was granted on the  
p.38 1.24 21st of June 1966, and Final Leave was granted on  
p.40 1.12- the 26th of July 1966.  
p.41 1.14
15. It is respectfully submitted that the impugned Act is ultra vires the Constitution and in excess of the powers of Parliament, and is therefore null and void for the following reasons :-
- (a) its declared object is to impose disabilities and punishments, to which they were not previously liable, on six named individuals for alleged offences, and its operation is spent upon them only and has no relation to the community in general or to any future offences of a like character; 30
- (b) it "is rather a sentence than a law"; it is a legislative judgment or a judicial edict or decree equivalent to a Bill of Attainder or a Bill of Pains and Penalties. It is a purported exercise of the functions of the judiciary, and is therefore a clearer infringement of the Constitution than the Acts which were held in R v. Liyanage (1966) 2 W.L.R. 682 to be an interference with the functions of the judiciary and which were characterised by the Board as "a grave and deliberate incursion into the judicial sphere"; 40



- 10 (c) Parliament has only legislative power, conferred by Section 29(1) of the Constitution, which is subject to the irremovable limitations imposed by Section 29(2) of the Constitution (Bribery Commissioner v. Ranasinghe (1965) A.C. 172), and can amend the Constitution only "in the exercise of its powers under this section" (i.e. under Section 29(1)). An amendment of the Constitution can therefore be effected only by an Act of Parliament which is legislative in nature and form. The impugned Act, being in pith and substance an exercise of judicial power, cannot amount to an amendment of the Constitution although it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to two-thirds of the total number of Members of the House. The impugned Act is a violation of the Constitution, and remains a violation even though the Speaker endorses on the impugned Bill that two-thirds of the Members of the House voted in favour of it;
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- 30 (d) the impugned Act would have been valid only if it had been preceded by a legislative act of Parliament, conforming to the requirements of Section 29(4), conferring judicial power on the Parliament of Ceylon, for before Parliament can exercise judicial power it must first acquire judicial power;
- 40 (e) even if the decisions of the Board in McCawley v. The King (1920) A.C.691 and Bribery Commissioner v. Ranasinghe (1965) A.C. 172 recognise that an amendment of the Constitution by necessary implication is possible in an "uncontrolled" Constitution, the learned Judges of the Supreme Court wrongly thought that those decisions sanction the application of this principle to every type of case. In particular, that principle cannot apply

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to a case, such as the present, of an assumption of a power which Parliament does not have, since the intention to amend can only be inferred from a legislative provision;

(f) the impugned Act does not purport to be, and recognises that in fact it is not, "a Bill for the amendment or repeal of any of the provisions" of the Constitution. It does not indicate the provisions of the Constitution which it amends or purports to amend, nor does it indicate the manner in which such provisions are affected. The impugned Act does not possess the degree of precision and formality which an amendment of the Constitution demands. It would therefore render the text of the Constitution uncertain since no member of the public can ascertain what the Constitution is, inasmuch as the Certificate, if any, endorsed by the Speaker on the face of a Bill only appears in the two originals thereof; 10 20

(g) Section 10 of the impugned Act does not, in any event, support the finding of the learned Judges of the Supreme Court that the impugned Act was a valid amendment of the Constitution. On the contrary, Section 10, as well as Section 2(1) of the Bribery Act No. 11 of 1954, amounts to legislative recognition that a specific amending Act is contemplated by Section 29(4) of the Constitution, negatives any intention to amend the Constitution, and merely creates a legal fiction which cannot operate if it conflicts with the Constitution. 30

16. It is respectfully submitted that the impugned Act cannot be regarded as an exercise of the disciplinary powers of the House of Representatives or of the power conferred by section 13(3)(k) of the Constitution, because 40

(a) the House of Representatives does not have the power of regulating its own

membership which each Chamber of the "High Court of Parliament" of the United Kingdom possesses as part of, and by virtue of, its jurisdiction as a Court of Law. The House of Representatives has only a share in the legislative power of Parliament;

- 10 (b) the limited judicial power conferred by Section 13(3)(k) of the Constitution on a Committee of the House of Representatives is in the nature of an exception to the principle of the separation of powers recognised by the Constitution, and must therefore be construed strictly as being exercisable only in accordance with the provisions thereof;
- 20 (c) the form, nature and manner of enactment of an Act of Parliament is entirely different from the mode of proceedings, and the nature and form of an order, of a body acting under Section 13(3)(k); the impugned Act, or any portion thereof, cannot therefore be regarded as equivalent to the exercise of the power conferred by Section 13(3)(k).

17. It is respectfully submitted that the writ of Mandamus lies against the Respondents because

- 30 (a) by virtue of the Constitution and the independence and dignity of Parliament, the Respondents are not public officers or servants or agents of the Crown but are servants of the House of Representatives and can only act as such, and are answerable to the House alone;
- 40 (b) the annual Appropriation Act by which Parliament votes money for the payment of salaries and allowances for Members of Parliament, imposes a public and statutory duty upon the Respondents to make the said payments to Members of Parliament

Record

- (c) the Respondents by virtue of their position owe a public and statutory duty to each Member of Parliament to pay the salary and allowances due to him, at least when the money voted by Parliament comes into their hands;
  
- (d) the salary of a Member of Parliament is different from that of a civil servant in that there is, in the case of a Member of Parliament, a right to the salary arising out of the Constitution. It is not remuneration due from the Crown under a contract with the Crown. When Parliament passes the necessary head of expenditure, the Treasury as a Department of the Crown would make the moneys available to the Clerk of the House. Once the moneys are made available to the Clerk, the Clerk holds the moneys in his capacity as Clerk and is under a public and statutory duty to pay Members' salaries; 10  
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- (e) the principle that the writ of Mandamus does not lie against a servant of the Crown does not operate to protect servants of the Crown who refuse to comply with public and statutory duties, but is limited to cases where the writ would have the effect of compelling the Crown in a field in which the prerogative operates. 30

18. In any event, it is respectfully submitted that the Appellant is entitled to a mandate in the nature of a writ of Mandamus compelling the Respondents to recognise the Appellant as the Member of Parliament representing the Kalmunai Electoral District.

In the Appellant's respectful submission, this appeal ought to be allowed, with costs throughout, for the following among other 40

R E A S O N S

- 1. BECAUSE the declared object, intention and effect of the impugned Act is purely to

punish certain individuals, and not legislative;

2. BECAUSE the impugned Act is a legislative judgment and an exercise of judicial power, rather than an exercise of legislative power, and is therefore null and void;
3. BECAUSE Parliament has only legislative power, and can amend the Constitution only by an Act of Parliament which is legislative innature and form;
4. BECAUSE the impugned Act, being in pith and substance an exercise of judicial power, is a violation of the Constitution, and cannot under any circumstances amount to an amendment of the Constitution;
5. BECAUSE the impugned Act would have been valid only if it had been preceded by a legislative act of Parliament, conforming to the requirements of Section 29(4), conferring judicial power on the Parliament of Ceylon;
6. BECAUSE even if section 29(4) of the Constitution permits an amendment of the Constitution by necessary implication, that principle cannot apply to a case, such as the present, of an assumption of a power which Parliament does not have, since the intention to amend can only be inferred from a legislative provision;
7. BECAUSE the impugned Act, and in particular section 10, does not purport to be, and recognises that in fact it is not, an amendment of the Constitution, and does not possess the degree of precision and formality which an amendment of the Constitution demands;
8. BECAUSE the House of Representatives has no power of regulating its own membership, and the impugned Act cannot be regarded as an exercise of a disciplinary power of the House or of the power conferred by section 13(3)(k) of the Constitution;

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9. BECAUSE the power conferred by section 13 (3)(k) of the Constitution on a Committee of the House must be construed strictly as being exercisable only in accordance with the provisions thereof;
10. BECAUSE the Respondents are not servants or agents of the Crown and the Writ of Mandamus lies against them;
11. BECAUSE the Respondents owe a public and statutory duty to Members of Parliament to pay the salary and allowances due to them; 10
12. BECAUSE the principle that the writ of Mandamus does not lie against a servant of the Crown does not operate to protect servants of the Crown who refuse to comply with public and statutory duties, but is limited to cases where the writ would have the effect of compelling the Crown in a field in which the prerogative operates.
13. BECAUSE the Appellant is entitled to a mandate in the nature of a writ of Mandamus compelling the Respondents to recognise the Appellant as the Member of Parliament representing the Kalmunai Electoral District. 20

E.F.N. GRATIAEN

WALTER JAYAWARDENA

M.I. HAMARI HANIFA

MARK FERNANDO

No. 38 of 1966

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2. S.N. SENEVIRATNE (Assistant  
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Respondents

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CASE FOR THE APPELLANT

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HATCHETT JONES & CO.,  
90, Fenchurch Street,  
LONDON, E.C.3.