Privy Council Appeal No. 38 of 1966

Mohamed Samsudeen Kariapper – – – – – *Appellant*

v.

S. S. Wijesinha and S. N. Seneviratne – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY 1967

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
LORD PEARCE
SIR DOUGLAS MENZIES
SIR ALFRED NORTH
[*Delivered by* SIR DOUGLAS MENZIES]

This is an appeal from a judgment and decree of the Supreme Court of Ceylon (Sansoni C. J. and G. P. A. Silva J.) refusing the appellant's application for a mandate in the nature of a writ of mandamus requiring the respondents who are the Clerk to the House of Representatives, Ceylon, and the Assistant Clerk to the House respectively to recognise the appellant as a member of Parliament and to pay him his remuneration and allowances as a member.

The appellant was elected to the House of Representatives, on 22nd March 1965 and was sworn as a member thereof on 5th April following. His term of office was for five years. He continued as a member of the House until 15th November 1965 and the principal question with which the Board is concerned is whether his seat was vacated by the coming into operation on 16th November 1965 of the Imposition of Civic Disabilities (Special Provisions) Act hereinafter called "the Act". It was, if the Act was within the competence of the Parliament of Ceylon, for, in the circumstances, the effect of section 7 was to vacate the appellant's seat.

The unusual procedure which the appellant adopted to obtain a decision upon the validity of the Act—which, not surprisingly, has turned out to be a source of difficulty—was followed because, strangely enough, it seemed the only way to bring the question of the validity of the Act directly before the Supreme Court. Other proceedings seeking a declaration and an injunction in connection with related matters were, so their Lordships have been informed, commenced in the District Court and those proceedings there lie dormant. With them, the Board is not concerned although their Lordships do appreciate that their conclusions here will, as Counsel for the appellant frankly stated, have a vital bearing on the proceedings in the District Court.

The Act, as its preamble indicates, followed, but at a distance of five years, the reports made in 1959 by a Commission of Inquiry constituted under section 2 of the Commissions of Inquiry Act. This Commission, upon inquiry, found that allegations of bribery against

certain persons, members of the Senate, House of Representatives or State Council of Ceylon, had been proved. The appellant was one of those persons. The preamble to the Act recorded "And whereas it has become necessary to impose civic disabilities on the said persons consequent on the findings of the said Commission". The Act consequently imposed disabilities upon any person "to whom the Act applies" and "a person to whom this Act applies" was defined to mean "each person specified in the Schedule to this Act in regard to whom the relevant Commission in its Reports found that any allegation or allegations of bribery had been proved". The Schedule named six persons including the appellant. The disabilities imposed by the Act extended to disqualification for seven years from registration as an elector and from voting at elections; disqualification for seven years from being a candidate for election to the House of Representatives or to any local authority; disqualification for seven years from being elected or appointed as Senator or member of the House of Representatives or a member of any local authority or sitting and voting as such; and disqualification for all time from being employed as a public servant. Section 7 of the Act is the one with which the Board is immediately concerned. It is in these 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."

If this section is valid the appellant's application, wherein he asserted his continued membership of the House of Representatives, was rightly refused by the Supreme Court.

The attack upon the validity of the Act asserted two propositions with regard to it. First, that it was inconsistent with the Ceylon (Constitution) Order in Council 1946, *i.e.*, the Constitution of Ceylon, and, secondly, that although it purported to have been enacted as an amendment of the Constitution in the manner provided by section 29 (4) thereof, it was not an effective amendment. Three reasons were advanced for this second proposition:

(1) That the Act was not a law. Instead of being the exercise of legislative power it was the usurpation of judicial power.

(2) That even if the Act were an exercise of legislative power it cannot be regarded as an amendment of the Constitution because it does not, upon its face, have that character.

(3) That if, upon its proper construction, the Act were both an assumption by the Parliament of judicial power and the exercise of that power, the Act attempted too much for judicial power would need to be acquired by Parliament under an amendment of the Constitution before it could be exercised by Parliament. This would require two Acts of Parliament.

On two important matters there was no controversy before the Board.

The appellant's first proposition, that there was inconsistency between the provisions of the Act and the Constitution of Ceylon, was not disputed. By section 24 of the Constitution provision is made for the vacation of the seat of a member of Parliament in specified circumstances which have no relevance to the appellant. These include section 24 (1) (*d*) viz. "if he (*i.e.*, a member of Parliament) becomes subject to any of the disqualifications mentioned in section 13 of this Order". Section 13 (3) (*k*) is as follows:

> "if during the preceding seven years he has been adjudged by a competent court or by a Commission appointed with the approval of the Senate or the House of Representatives or by a Committee thereof to have accepted a bribe or gratification offered with a view to influencing his judgment as a Senator or as a Member of Parliament."

The appellant was not adjudged to have accepted a bribe, etc., by a court or by such a Commission. There is therefore no doubt that, if the Act is valid, the appellant's seat was vacated upon a ground not to be found in the Constitution as it stood before the Act came into force.

The second matter not in controversy before the Board was that the Constitution of Ceylon embodies the doctrine of the separation of legislative, executive and judicial power, at least to the extent that it commits judicial power to the Courts to the exclusion of the Parliament. This was decided by the Privy Council in *Liyanage v. The Queen* [1967] A.C. 259. Their Lordships after referring to a number of the provisions of the Constitution of Ceylon said at pages 287 and 288:

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature."

Later at page 289, after referring to the contention of the Solicitor-General that the Supreme Court was wrong in finding in the Constitution of Ceylon a separation of powers rather than merely a separation of function, their Lordships said:

> ". . . that decision was correct and there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature."

The Board is now in a position to consider the first question for its determination, viz., whether the Act is what it purports to be, a law made by Parliament; or, is rather, an exercise of judicial power.

Counsel for both the appellant and the respondents were content to accept, so far as it goes, the description of "judicial power" adopted by the Judicial Committee in *Shell Company of Australia Limited v. Federal Commission of Taxation* [1931] A.C. 275 at pages 295 and 296 in a passage referring to the Constitution of the Commonwealth of Australia:

> "What is 'judicial power'? Their Lordships are of opinion that one of the best definitions is that given by Griffith C. J. in *Huddart, Parker & Co. v. Moorehead* 8 C.L.R. 330, 357, where he says 'I am of opinion that the words "judicial power" as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.'"

This description was adopted, however, in a case where the question at issue was whether or not a Taxation Board of Review was exercising judicial power in the sense of ascertaining and applying an established standard of liability and it is not so pertinent in a case such as this where the problem is rather to ascertain the true character of an enactment which is in form legislation altering legal rights by its own force. This observation does however point to what appears to their Lordships as the appellant's fundamental difficulty, *i.e.*, that what is claimed to be a judicial determination is in form legislation altering the law as it stood. Counsel for the appellant have naturally fastened upon certain observations in which bills of attainder and bills of pains and penalties have been referred to as "an exercise of the judicial power of

Parliament in a legislative form ", *e.g.*, Halsbury's Laws of England, 3rd Ed., Vol. 28, page 398, and have sought to establish that the character of the Act is that of a bill of attainder or a bill of pains and penalties. Reference was also made to observations in *Liyanage v. The Queen* (supra) at page 291 to describe the Acts there successfully impugned viz.:

> " One might fairly apply to these Acts the words of Chase J., in the Supreme Court of the United States in *Calder v. Bull*:
>
> > ' These acts were legislative judgments; and an exercise of judicial power.'
>
> Blackstone in his Commentaries said:
>
> > ' Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only and has no relation to the community in general; it is rather a sentence than a law.'
>
> If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges."

Moreover by reference to decisions of the Supreme Court of the United States of America it was sought to support the conclusion that the Act would, in the United States of America, fall within the category of an act of attainder.

It is unwise in the sphere of constitutional law to go beyond what is necessary for the determination of the case in hand and because the Board is of the opinion that the character of the Act is not that of an act of attainder or a bill of pains and penalties it is not necessary here to attribute a particular character to what has, as has already been seen, been described an " exercise of the judicial power of Parliament in a legislative form ". The Act is not an act of attainder or a bill of pains and penalties because it does not condemn the appellant for any action, *i.e.*, it contains no declaration of guilt, and because the disabilities which it imposes have not the character of punishment for guilt.

At this point it is convenient to say a little more about the United States cases upon which Mr. Gratiaen so greatly relied. They were all cases involving the construction and application of Article 1, Section 9, clause 3 or Article 1, Section 10 of the Constitution of the United States of America which together prohibit Congress or a State from passing a bill of attainder or *ex post facto* law. As early in the constitutional history of the United States as 1866 it was decided that " a bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings v. The State of Missouri* IV Wall. 277 at page 323. In the same case the Court described such laws as follows:

> " In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms of safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence."

Mr. Gratiaen seizing upon the description of the enactment of the bill of attainder as an assumption of judicial magistracy went so far as to submit that Article 1, Section 9, clause 3 of the Constitution of the United States of America was plainly superfluous because the separation of powers, so clearly embodied in that Constitution, carried with it as a necessary consequence the limitation that Congress could not pass a law truly described as an exercise of judicial magistracy. He went on to

contend that what was to be found by express prohibition in the Constitution of the United States was, upon the authority of the American decisions, to be found by implication in the Constitution of Ceylon. Their Lordships, however, would express no opinion upon the hypothetical question of the American law, *i.e.*, whether or not the Congress of the United States could, in the absence of Article 1, Section 9, clause 3 of the Constitution, pass an Act of attainder, and the Board is not prepared to base any reasoning in relation to the powers of the Parliament of Ceylon upon the assumption that Congress could not do so.

In considering the argument that the Act is in truth a bill of attainder or a bill of pains and penalties their Lordships have, of course, been greatly assisted by the judgments of the justices of the Supreme Court to which their attention has been drawn and they have found particularly valuable guidance in the judgment of Frankfurter J. in the *United States v. Lovett* 328 U.S. 303 notwithstanding that in the result that learned judge was one of the minority. Frankfurter J. said " All bills of attainder specify the offense for which the attainted person was deemed guilty and for which punishment was imposed ". In rejecting the contention that the Act thereunder consideration was a bill of attainder His Honour said " no offense is specified and no declaration of guilt is made. . . . Not only does section 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. . . . Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony . . . or because he is no longer qualified. . . . 'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.' " *Cummings v. State of Missouri*, 4 Wall. 277, 320, 18 L. Ed. 356, pages 322, 323 and 324.

The two elements found by Frankfurter J. to be absent from the law under consideration in *United States v. Lovett* (supra) the Board find to be absent from the Act. First, it contains no declaration of guilt of bribery or of any other act. As has already been observed it applies to " each person specified in the Schedule of this Act in regard to whom the relevant Commission in its Reports found that any allegation or allegations of bribery had been proved." It is the Commission's finding that attracts the operation of the Act not any conduct of a person against whom the finding was made. Parliament did not make any finding of its own against the appellant or any other of the seven persons named in the Schedule. The question of the guilt or innocence of the persons named in the Schedule does not arise for the purpose of the Act and the Act has no bearing upon the determination of such a question should it ever arise in any circumstances. Secondly, the disabilities imposed by the Act are not, in all the circumstances, punishment. It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good. Their Lordships have already summarised the disabilities imposed by the Act and what has just been said applies to all disabilities so imposed. The particular task of the Board is, however, to decide whether the law vacating the appellant's seat is a valid law and in their Lordships' opinion it would be wrong to describe that law as one for the punishment of the member whose seat is vacated. Reference has already been made to earlier legislation vacating the seats of persons convicted of bribery by a Court or found by certain Commissions to have been guilty of bribery. The Act is a

law of the same character as this legislation notwithstanding that it operates in respect of particular persons against whom findings of bribery have been made. Unforeseen cases may always arise calling for the special exercise of Parliament's power to protect itself. Thus if a member of Parliament were to act in a way not previously proscribed but obviously unfitting him to remain in Parliament a new law vacating his seat would not, in essence, be a law punishing him for his conduct. The case now under consideration is, of course, substantially different from the case of *The Queen v. Richards e.p. Fitzpatrick and Browne* 92 C.L.R. 157 but it may be observed that in a judgment, approved by the Judicial Committee, Dixon C. J. speaking for the High Court of Australia did emphasise the tendency to treat the powers and privileges attached to the House of Commons for its own protection as incidents of the legislative function. His Honour said:

> " It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically—perhaps one might even say, scientifically—they belong to the judicial sphere."

It was no doubt the recognition of this tendency that influenced G. P. A. Silva J. to say:

> " a Court will be slow to invalidate any law passed by the Parliament imposing certain disabilities or disqualifications on Members of Parliament in view of the power the Parliament has to control its own proceedings and impose its own discipline."

Speaking generally, however, their Lordships would observe that it is not readily to be assumed that disciplinary action, however much it may hurt the individual concerned, is personal and retributive rather than corporate and self-respecting. The distinction between discipline and punishment is one which the High Court of Australia has drawn recently in *The Queen v. White and Others e.p. Byrnes* 109 C.L.R. 665. The question was whether the chief officer of a Commonwealth Department who in the exercise of powers conferred by section 55 of the Public Service Act found an officer of his department guilty of an " offence " in refusing to have obeyed a lawful order and imposed a fine therefore exercised " judicial power ". Section 55 made wilful disobedience to a lawful order an " offence " for which punishment was provided. The Court having observed the difficulty discovered in the case was apparent rather than real and arose from the choice of language that had been made said at page 670:

> " Section 55, in creating so-called " offences " and providing for their " punishment ", does no more than define what is misconduct on the part of a public servant warranting disciplinary action on behalf of the Commonwealth and the disciplinary penalties that may be imposed or recommended for such misconduct; it does not create offences punishable as crimes."

For the foregoing reasons their Lordships therefore reject the argument that the Act is legislation of the same character as an act of attainder or a bill of pains and penalties.

Their Lordships however going beyond this merely negative conclusion, are of opinion that the Act is an exercise of legislative power and not the usurpation of judicial power. The Act is an Act of Parliament purporting to change the law and providing in terms that in the event of inconsistency with existing law the Act shall prevail. Section 10. In determining whether the Act should be regarded as a usurpation of

judicial power weight must be given to the consideration that it is in form legislation and that it is enacted:

> ". . . by the Queen's Most Excellent Majesty by and with the advice and consent of the Senate and the House of Representatives of Ceylon in this present Parliament assembled, and by the authority of the same. . . ."

The Act is subject to the ordinary incidents of legislation, viz., it can be repealed or amended. Furthermore, for the reasons already stated the Act does not declare guilt or impose punishment. Moreover, although the Act has a strictly limited operation in that it applies only to "each person specified in the Schedule . . . in regard to whom the revelant Commission in its Reports found that any allegation or allegations of bribery had been proved", its terms show that reference to the Reports—which do not form part of the Act—will or may be necessary in its application. It does not speak like a court order. Finally, although the operation of the Act is made to depend upon past events that operation is prospective for the disabilities are imposed from the date of its commencement for the periods defined.

Having come to the conclusion that the Act is legislative in character it now becomes necessary to consider the contention that being inconsistent with the provisions of the Constitution it is invalid because it was not enacted in accordance with the requirements of section 29 (4) of the Constitution. Section 29 (1) and (4) of the Constitution are as follows:

> "(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island."
>
> "(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:
>
> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless 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 not less than two-thirds of the whole number of Members of the House (including those not present)."

Here it may be observed that subsections (2) and (3) forbidding laws interfering with religious freedom and rendering void any laws in contravention of this prohibition do not require consideration.

The bill for the Act when presented for the Royal Assent did have endorsed upon it the certificate of the Speaker required by the proviso to section 29 (4) and that certificate was in accordance with the actual voting in the House. The critical question is, therefore, whether something more was required to bring the Act within the power of Parliament conferred by section 29 (1) and (4). Counsel for the appellant argued that there was and that the Act, being inconsistent with the Constitution as it stood, was invalid for the reason that it was not in form an express amendment of the Constitution.

As long ago as 1920 the Judicial Committee in *McCawley v. The King* [1920] A.C. 691 decided that an uncontrolled constitution could like any other Act of Parliament be altered simply by the enactment of inconsistent legislation. Their Lordships' statement of the proposition which was rejected was as follows:

> "The constitution of Queensland is a controlled constitution. It cannot, therefore, be altered merely by enacting legislation inconsistent with its articles. It can only be altered by an Act which in plain and unmistakable language refers to it; asserts the intention

of the Legislature to alter it; and consequently gives effect to that intention by its operative provisions."

The reason for the rejection of this proposition was thus stated:

"The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal."

The power of the Parliament of Ceylon to amend or repeal the provisions of the Constitution is restricted in the manner provided by section 29. There is, therefore, a most material distinction between the Constitution of Ceylon and that of Queensland which is made apparent by the following citations from the judgment of Lord Birkenhead L. C. His Lordship said:

"The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature."

Nevertheless, notwithstanding the distinction that renders the decision in *McCawley's* Case inapplicable here their Lordships do rely upon a passage from the judgment of the Lord Chancellor. It is as follows:

". . . Narrow constructions were placed by colonial judges upon the instruments creating constitutions in colonial Legislatures. Causes of friction multiplied, and soon a conflict emerged, analogous to that which is the subject of discussion to-day, between those who insisted that the constitutions conceded to the colonies could be modified as easily as any other Act of Parliament, and those who affirmed that the statute defining such constitutions was 'fundamental' or 'organic' and that therefore the constitution was controlled. These controversies became extremely grave, and were reflected in an opinion, cited in the course of the argument and given in 1864 by the law officers of the day, Sir Roundell Palmer and Sir Robert Collier. These distinguished lawyers were of opinion, and the Board concurs in their view, that when legislation within the British Empire which is inconsistent with constitutional instruments of the kind under consideration comes for examination before the Courts, it is unnecessary to consider whether those who were responsible for the later Act intended to repeal or modify the earlier Act. If they passed legislation which was inconsistent with the earlier Act, it must be presumed that they were aware of, and authorized such inconsistency."

Although this passage has no bearing upon the ultimate question here, *i.e.*, whether the manner and form required by section 29 for a constitutional amendment were actually observed, it has an important bearing upon the question to which a good deal of argument was addressed, namely, whether an inconsistent law should be regarded as an amendment of a controlled constitution in the absence of an expressed intention to amend. The expression of opinion of the law officers concurred with by the Board is that, as a general rule, an inconsistent law amends. This is, of course, but an instance of the fundamental principle that it is from its operation that the intention of a statute is to be gathered. As the law officers said in the opinion already referred to:

"'If the colonial Registration Act was *ultra vires* of the Legislature of South Australia, it can only be so on the ground that it altered the

> electoral law contained in the Constitutional Act, No. 2 of 1855. Assuming this to have been its effect, we cannot accede to the argument, which seems to have found acceptance with two South Australian Judges, that it was not passed "with the object" of altering the Constitution of the Legislature. It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the *object*, the *purpose* and the *intention* of the enactment, is the same; it need not be expressed in any recital or preamble; and it is not (as we conceive) competent for any Court judicially to ascribe any part of the legal operation of a Statute to inadvertence.' "

In the *Bribery Commissioner v. Ranasinghe* [1965] A.C. 172 the Judicial Committee had occasion to consider *McCawley's* case with reference to the Constitution of Ceylon and explained the essential difference between *McCawley's* case and the case then under consideration. Lord Pearce giving the judgment of the Board said:

> "It is possible now to state summarily what is the essential difference between the *McCawley* case and this case. There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as *pro tanto* an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result."

Accordingly, therefore, upon general principles and with the guidance of earlier authority their Lordships have come to the conclusion that the Act, inconsistent as it is with the Constitution of Ceylon, is to be regarded as amending that Constitution unless there is to be found in the constitutional restrictions imposed on the power of amendment some provision which denies it constitutional effect. This brings the Board to the actual terms of section 29 (1) and (4).

Section 29 (1) confers full legislative power upon Parliament subject only "to the provisions of this Order", *i.e.*, the Constitution. Subsection (4) indicates that the power conferred by subsection (1) extends to amending or repealing "any of the provisions of this Order". The exercise of this power is however restricted by the proviso. As has already been explained, their Lordships do read the words "amend or repeal" in the earlier part of section 29 (4) as covering an amendment or repeal by inconsistent enactment. Indeed were these words "amend or repeal" not to be regarded as covering an alteration by implication it might be that a law effecting such an alteration could be enacted under section 29 (1) without any restriction arising from subsection (4). Their Lordships however do not so read the statutory provisions and have no doubt that the Parliament of Ceylon has not uncontrolled power to pass laws inconsistent with the Constitution. Apart from the proviso to subsection (4) therefore the Board has found no reason for not construing the words "amend or repeal" in the earlier part of section 29 (4) as extending to amendment or repeal by inconsistent law. Attention was,

however, directed to the words in the proviso " Bill for the amendment or repeal " and it was argued that only a bill which provided expressly for the amendment or repeal of some provision of the Order would fall within these words. Their Lordships would find it difficult to restrict the plain words of the earlier part of the subsection by reference to an ambiguity in the proviso, if one were to be found, but they find no ambiguity and they reject the limitation which it has been sought to introduce into the proviso. A bill which, if it becomes an act, does amend or repeal some provision of the Order is a bill " for the amendment or repeal of a provision of the Order ". It would have been inexact to refer in the proviso to a bill to amend or repeal a provision of the Order, but a bill which when passed becomes an amending Act falls exactly within the description under consideration. The bill which became the Act was a bill for the amendment of section 24 of the Constitution simply because its terms were inconsistent with that section. It is the operation that the bill will have upon becoming law which gives it its constitutional character not any particular label which may be given to it. A bill described as one for the amendment of the Constitution which contained no operative provision to amend the Constitution would not require the prescribed formalities to become a valid law whereas a bill which upon its passing into law would, if valid, alter the Constitution would not be valid without compliance with those formalities. In his judgment in the Supreme Court Sansoni C. J. quoted aptly from the judgment of Isaacs and Richards JJ. in *McCawley's* case—the minority judgment in the High Court approved by the Privy Council—as follows: " The effect of the repealing Act must therefore depend on what it *does*, and not on the label it affixes to itself." See 26 C.L.R. at page 63. Their Lordships also agree with Silva J. when he said " I do not think that when the proviso to section 29 (4) proceeded to set out the manner of presentation of a constitutional amendment it also intended to prescribe a particular form to be present on the face of it ".

In the course of argument a good deal was made of the doubts and complexities that must follow if the Constitution can be amended by laws which do not, as it were, show their colours, and the point was forcibly emphasized by reference to the very law under consideration. The Board is thoroughly aware of the difficulties that are likely to result from altering the Constitution except by laws which plainly and expressly amend it with particularity. Considerations of this sort, powerful as they ought to be with the draftsman, cannot in a court of law weigh against the considerations which have brought the Board to its conclusions that a bill, which upon its passage into law would amend the Constitution, is a bill for its amendment. In association with the considerations to which reference has just been made attention was drawn to section 10 of the Act. This section is far from clear and their Lordships have not felt able to base any affirmative reasoning upon it. All that can be gathered from it is that Parliament was aware that the Act might be regarded as amending the Constitution in some particulars. The introduction of such a provision does little to obviate the complexities to which legislation such as the Act must inevitably give rise in the future if and when it becomes necessary to set out the Constitution as amended.

Finally upon the merits of the case their Lordships would observe that in view of their conclusion that the Act is a law and not an exercise of judicial power it has not been necessary to consider the question, which was fully argued on both sides, whether Parliament can by a law passed in accordance with the proviso to section 29 (4) both assume judicial power and exercise it in the one law.

Their Lordships have thought it proper to deal with the appeal upon its merits before considering whether the procedure actually adopted to bring the question of the validity of the Act before the Supreme Court, *i.e.*, an application for a mandate in the nature of a writ of *mandamus* to the Clerk and the Assistant Clerk of the House of Representatives, was appropriate. In the Board's opinion it was not. In the end it was practically conceded by Mr. Gratiaen that it had not been shown that the

respondent or either of them were under a duty to the appellant to pay him his parliamentary salary and allowances even if he continued to be a member of Parliament. Furthermore in their Lordships' opinion it was not shown that the respondents or either of them owed any duty to the appellant to "recognise" him as a member of Parliament even if a sufficiently precise meaning to found *mandamus* could be accorded to the vague word "recognise". The duties upon which reliance was placed arose under the Standing Orders of the House of Representatives and although they were no doubt duties in respect of members of the House they were duties owed to the House itself or to the Crown as the employer of the respondents. On the question of the competence of the proceedings in the Supreme Court their Lordships have therefore come to the same conclusion as did Sansoni C. J.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

38019—1 Dd. 178074 200 8/67

In the Privy Council

MOHAMED SAMSUDEEN KARIAPPER

v.

S. S. WIJESINHA AND S. N. SENEVIRATNE

DELIVERED BY
SIR DOUGLAS MENZIES

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1967