In the Privy Council.

Appeal No. 7 of 1952.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

BETWEEN

GOVINDA SELLAPPAH NAYAR KODAKAM PILLAI APPELLANT

AND

PUNCHI BANDA MUDANAYAKE, VICTOR LLOYD WIRASINGHA and NAMASIVAYAMPILLAI SIVAGNANASUNDERAM ... ... RESPONDENTS.

CASE FOR THE SECOND RESPONDENT

RECORD

1.—This is an Appeal from the Judgment and Order of the Supreme Court of the Island of Ceylon dated the 28th day of September, 1951, granting a Mandate in the nature of a Writ of Certiorari under Section 42 of the Courts Ordinance No. 1 of 1889 quashing an order made by the second Respondent dated the 2nd July, 1951, that the Appellant's name be included in the Register of electors for the Electoral District 84, Ruwanwella, for the year 1950.

2.—The issue for determination in this Appeal is whether the Supreme Court were right in holding that Sections 4 and 5 of the Citizenship Act, No. 18 of 1948, and Section 3 (1) (a) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 were not invalid or whether as contended on behalf of the Appellant and as held by the third Respondent, these Sections were made in contravention of Section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council, 1945 and 1947.

The material sections of the aforesaid Acts and Orders in Council are set out in full in the judgment of the Supreme Court. pp. 40–45

3.—On the 22nd January, 1951, the Appellant filed a claim in the prescribed form pursuant to the Ceylon (Parliamentary Elections) Order in Council, 1946, to have his name inserted in or retained on the register of p. 7

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electors for the Ruwanwella electoral district. In a letter annexed to the said claim he averred that he was a resident in the said electoral district and had been so resident for a continuous period of over six months in the 18 months immediately prior to the 1st June, 1950 ; that he was, and had at the relevant period been, a British subject ; that he was in no way disqualified to be an elector ; that his name had been included in the register prepared in the year 1949 ; and that at the revision undertaken in the year 1950 his name had been included in List A on the ground that he had become disqualified to be an elector, and omitted from List B. List A was the list of names to be removed from the 1949 register. List B was the list of names not appearing in the 1949 register which were to be included in the 1950 register. The said letter also included the following passages :—

p. 9, l. 9

" 9. I claim that the alternatives in the qualification to be " an elector effected by Act 48 of 1949 are not valid and are of no " effect in law in as much as the said Act was *ultra vires* the " Legislature.

" 10. I claim that the qualifications to be an elector should " be determined according to the Ceylon (Parliamentary Elections) " Order in Council 1946 without the same being modified or " amended by Act 48 of 1949. According to the said Order in " Council as unamended by the said Act 48 of 1949 I am qualified " to be an elector."

p. 9, l. 29

4.—On the 26th February, 1951, the first Respondent as Assistant Registering Officer held an inquiry into the said claim at which the Appellant gave oral evidence. In answer to the first Respondent he stated (*inter alia*) as follows :—

p. 10, l. 18

" I was born in British India. Both my parents and all my " other relations were born in British India. All my wife's relations " are in India except my brother-in-law who lives with me. I " have not sought registration under the Citizenship Act No. 18 of " 1948 or under the Indian and Pakistani Residents Citizenship " Act, No. 3 of 1949."

At the end of the inquiry the first Respondent made the following order :—

p. 10, l. 31

" I have rejected this claim as the claimant is not a citizen " of Ceylon within the meaning of the Citizenship Act No. 18 of " 1948, and have communicated my order to Mr. Canagarayar " who represented the claimant at this inquiry. I accept the " statements of fact made by the claimant before me at this " inquiry."

p. 11

5.—On the 8th March, 1951, the Appellant filed a Petition of Appeal to the third Respondentas Revising Officer for Ruwanwella praying that the order of the Registering Officer be set aside and that the Appellant's name be included in the register of electors. The grounds of appeal included the following :—

" (b) the Registering Officer erred in requiring the new p. 12, l. 6
" qualifications sought to be imposed by Act 48 of 1949 and in
" rejecting the petitioner's contention that the said Act No. 48
" of 1949 was void and of no effect in law in as much as it was
" *ultra vires* the legislature ;

" (c) the said Act of 1949 is bad in law in as much as it p. 12, l. 11
" contravened the provisions of Section 29 (1) 29 (2) (b), 29 (2) (c)
" and 29 (4) of the Ceylon (Constitution) Order in Council, 1946.

" (d) Section 3 of the said Act 48 of 1949 is further bad in law p. 12, l. 14
" and inoperative as it is based on Act 18 of 1948 which is itself
" void in law as it contravenes Section 29 of the Ceylon
" (Constitution) Order in Council, 1946."

6.—By an affidavit dated the 15th May, 1951, the Appellant deposed p. 25, l. 31
(*inter alia*) that his name together with the names of practically the entirety of the residents of the electoral area who belonged to the Indian Community had been deleted from the Register. Paragraphs 6 and 9 of the said affidavit are as follows :—

" 6. The names of thousands of persons belonging to the
" Indian Community who have been domiciled in Ceylon have been p. 26, l. 10
" deleted from the Electoral Districts in Ceylon outside the
" Northern and Eastern Provinces by the simple expedient of
" deleting practically all non-Singhalese names and thereby great
" hardship has been caused to the Indian Community.

" 9. The vast majority of the present Indian Immigrant
" population came to Ceylon long after the year 1852 and though p. 26, l. 22
" a large number of the members of the Community have been
" born in Ceylon yet their parents were not born in Ceylon. In
" the case of the Indian Community unlike in the case
" of the Singhalese and Ceylon Tamil Communities, the
" fathers of the persons who belong to this community have not
" been born in Ceylon as Immigration of Indian Labour commenced
" only in 1852. Hence the Ceylon Citizenship Act while it confers
" the status of a Ceylon Citizen on all the members of the Singha-
" lese and Ceylon Tamil Communities fails to confer that status on
" by far the vast majority of the members of the Indian Community
" settled in Ceylon."

7.—The third Respondent held an inquiry on the 16th, 29th and pp. 27–35
30th May, 1951, at which the Appellant was represented by Mr. Advocate Nadesan and Mr. Advocate Kanagarayar and the second Respondent by the Attorney-General and Mr. Walter Jayawardene, Crown Counsel. On the 16th May Mr. Advocate Nadesan moved to file the Appellant's aforesaid p. 27, l. 39
affidavit dated the 15th May, 1951. The Attorney General objected to p. 28, l. 1
paragraphs 6 and 9 thereof. He raised, however, no objection to the affidavit

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being filed provided that, if in the course of the argument it became necessary for him either to lead evidence or to file a counter-affidavit he should be allowed to do so. Mr. Advocate Nadesan had no objection and the third Respondent accordingly admitted the affidavit subject to those conditions. Mr. Advocate Nadesan stated that he did not propose to call any evidence at this stage of the inquiry, and that it would be a matter of legal argument. No further evidence was called.

p. 31, l. 36 8.—At the resumed hearing on the 29th May the Attorney-General tendered an affidavit dated the 28th May, 1951, sworn by the Registering Officer for the Ruwanwella Electoral District, in which he stated (*inter alia*) that the Lists A and B under Section 18 of the Ceylon (Parliamentary Elections) Order in Council, 1948, as amended by Act No. 48 of 1949, had been prepared in accordance with his directions and under his supervision. He further deposed that the Appellant's statement in his affidavit of the 15th May that an expedient was adopted of deleting all non-Singhalese names was incorrect and that the names included in List A were the names of persons who, according to the information gathered by enumerators duly appointed by him under the Ceylon (Parliamentary Elections) Order in Council, 1946, were not citizens of Ceylon either by descent or by registration.

p. 31, l. 38 Mr. Advocate Nadesan asked that paragraph 4 of the said affidavit should be clarified. The Attorney-General admitted the position that several non-Singhalese names had been excluded from the electoral register but stated that it was not as a result of any expedient adopted by the Registering Officer nor was it on the ground that they were non-Singhalese.

9.—In the course of his judgment dated the 2nd July, 1951, the second Respondent said :—

p. 14, l. 16 " In order to answer the questions arising in this case it is " necessary to see what has been the development of the Franchise " Law in this country."

p. 14, l. 30 He then cited five passages from the report of the Soulbury Commission in 1945 dealing with the position of Indians and minorities in Ceylon and proposing that the Ceylon Parliament should be prohibited from making any law rendering persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions were not liable or conferring upon persons of any community or religion any privileges or advantages which were not conferred on persons of other communities or religions. The third Respondent regarded these extracts.

p. 15, l. 40 " not as evidence of the facts then found but as indicating the " materials which the Government of Ceylon had before them " before promoting in the legislature the statutes now impugned."

p. 15, l. 44 The third Respondent then recited the material sections of the Citizenship Act, 1948, and the Ceylon (Parliamentary Elections) Amendment Act, 1949,

and, having stated the changes made by the two Acts in the qualifications for the franchise, proceeded as follows :— RECORD

" It is important to note that the Citizenship Act is not p. 17, l. 22
" directed against any particular community and that it contains
" no express words excluding persons of any community from being
" entitled to the status of citizenship. But considering the history
" of the Indian Community in this Island ; the fact that they
" came in at various periods before they became domiciled, it
" cannot be denied that most of the Indians, if not practically all
" of them, will not pass the test of the Citizenship Act. If the
" effect of the Act is examined on the footing that it becomes
" operative, some remarkable facts emerge. A large number of
" the Indian Community would be disfranchised ; thereby
" reducing the electoral power of that Community to send members
" to the Legislature to voice their interests. To examine the effect
" of the legislation ' the court must take into account any public
" general knowledge of which the court would take judicial notice
" and may in a proper case require to be informed by evidence
" ' as to what the effect of the legislation will be : ' Per Lord
" Maugham in *A.G. for Alberta* vs. *A.G. for Canada*—1939 A.C. 117, 130.

" The Constitutional history of Ceylon leading up to the Acts
" in question will show that the question of franchise was very
" much in the forefront from the days of Donoughmore Constitu-
" tion, 1931, and leaves little doubt that the Acts are an attempt
" to regulate and control the franchise to the advantage of the
" indigenous communities and to the disadvantage of the Indian
" Community. ' The subject matter with which the legislature
" ' was dealing, and the facts existing at the time with respect to
" ' which the legislature was legislating, are legitimate topics to
" ' consider, to show the object and purpose of the legislature in
" ' passing the Act." Per Lord Halsbury, L.C., in *Herron* vs. *R. & R. Improvement Commissioners*, 1892 A.C. 498, 502."

The second Respondent then considered whether the two Acts offended p. 18, l. 22
against Section 29 (2) (b) of the Ceylon (Constitution and Independence) Orders in Council.

" The substance of the Acts may be within the power of p. 18, l. 23
" Parliament, but do they under the guise of dealing with one
" matter in fact encroach upon the forbidden field of Section
" 29 (2) ? "

In answering this question the second Respondent arrived at the following conclusions :—

" The Acts are designed to effect one and the same purpose,
" namely, to restrict the franchise, and their operation would

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" without doubt disfranchise a large number of persons of the " Indian Community. It cannot be denied that a large number " of persons of the Indian Community who had the franchise " before, do not possess the qualifications required by Section 4 " of the Citizenship Act although they are domiciled in Ceylon, " while on the other hand the electoral power of the indigenous " communities is hardly affected as they possess the qualifications " required by Section 4 of the Citizenship Act. The Act has " therefore the effect of making ' persons of the Indian Community " ' liable to disabilities or restrictions to which persons of other " ' communities are not made liable, and conferring on the persons " ' of the indigenous communities a privilege or an advantage " ' which is not conferred on persons of the Indian Community.'

* * * * *

p. 20, l. 23 " There is no escape from the conclusion that instead of being " in any true sense legislation to create the status of citizenship, " the Citizenship Act together with Act 48 of 1949 is part of a " legislative plan to reduce the electoral power of the Indian " Community."

p. 23, l. 13 The third Respondent was therefore of opinion that the appeal should be allowed and he directed the Registering Officer to include the name of the Appellant in the Register. On the 3rd July he made a formal order to this effect.

p. 1 10.—By an application in writing dated the 16th July supported by an affidavit the second Respondent applied to the Supreme Court of the Island of Ceylon under Section 42 of the Courts Ordinance for a mandate in the nature of a Writ of Certiorari quashing the said decision made by the first Respondent. On the same day a similar application also supported by an affidavit was filed by the first Respondent. The two applications came before the Court and were adjudicated upon together.

11.—The Appellant's proctor tendered three affidavits sworn on the 21st August, 1951, which the Appellant moved to have read in evidence on the hearing of the application. These affidavits, which purported to deal (*inter alia*) with the history of Indian immigration into Ceylon and the position of Indian residents under the Citizenship Act and the Ceylon (Parliamentary Elections) Amendment Act, 1949, were sworn by Sangaralingam Muniyandipillai Subbiah and Periannan Sundatom respectively. The question of the admissibility of these affidavits was argued, and decided, together with the main issues before the Court.

p. 36, l. 44 12.—The learned Judges of the Supreme Court held that it was unnecessary for them to consider whether the decision of the third

Respondent in this appeal (who was first Respondent before them) was subject to review by means of certiorari because counsel for the present Appellant (who was second Respondent before them) had conceded that it was. They nevertheless held that certiorari lay not only where the inferior Court had acted without jurisdiction or in excess of its jurisdiction but also where the inferior Court had stated on the face of the order the ground on which it had made it, and it appeared that in law these grounds were not such as to warrant the decision to which it had come. RECORD

13.—The learned Judges next proceeded to deal with the Appellant's motion to produce affidavits and arrived at the following conclusion :—

" Even if the evidence which the 2nd Respondent now seeks p. 39, l. 30
" to place before us by way of supplementing the affidavit P1 is
" relevant to the question before us we are of opinion that it could
" and it should have been placed before the 1st Respondent at the
" hearing of the appeal by summoning the officers who were in
" charge of the registers. If we admit the evidence, we will have
" to adjudicate on it, which will amount to re-trying the case. We
" are of opinion that the affidavits are inadmissible and cannot be
" justified as falling under any of the heads stated by Lord Sumner.
" However that may be, we are of opinion that they are not
" relevant to the question that arises for decision in this case for
" the reasons given below. We would, accordingly, refuse the
" motion."

(The reference was to the judgment of Lord Sumner in *Rex* v. *NatBell Liquors* (1922) A.C. 128 at p. 160).

14.—The learned Judges next considered whether the third Respondent's decision as to what was the law which laid down the qualifications of voters was *ex facie* erroneous. In order to decide this question they examined the relevant legislative provisions and arrived at the following conclusions :— p. 39, l. 42

" It will be seen that any Bill relating solely to the franchise p. 42, l. 20
" was not regarded as coming within the category of Bills which the
" Governor is instructed to reserve for the signification of His
" Majesty's pleasure. Such a Bill can be passed by Parliament by
" a bare majority."

* * * * *

" It appears to us to be fairly clear from the English decisions p. 46, l. 1
" that the scope and effect of a legislative measure must be ascer-
" tained by an examination of its actual provisions and it is only
" when expressions used in it are ambiguous that reference can be
" made to extraneous materials."

* * * * *

p. 52, l. 7

" When the language of Section 4 and 5 is examined it is " tolerably clear that the object of the legislature was to confer " the status of citizenship only on persons who were in some way " intimately connected with the country for a substantial period " of time. With the policy of the Act we are not concerned, but " we cannot help observing that it is a perfectly natural and " legitimate function of the legislature of a sovereign country to " determine the composition of its nationals. Section 3 (1) (a) of " the Ceylon (Parliamentary Elections) Amendment Act No. 48 " of 1949, links up with the Citizenship Act and says that anyone " who is not a citizen or has not become a citizen is not qualified " to have his name entered or retained in the register. It restricts " the franchise to citizens. Can it be said that these two provisions " the words of which cannot in any shape or form be regarded as " imposing a communal restriction or conferring a communal " advantage, conflict with the prohibition in s. 29 of the " Constitution ? This is the simple question for our decision. In " approaching the decision of this question it is essential that we " should bear in mind that the language of both provisions is free " from ambiguity and therefore their practical effect and the " motive for their enactment are irrelevant. What we have to " ascertain is the necessary legal effect of the statutes and not the " ulterior effect economically, socially or politically.

" Section 29 (2) was enacted for the first time in the Ceylon " (Constitution) Order in Council, 1946. The Attorney-General " conceded, we think rightly, that the Indians are a contemplated " community and that citizenship and the franchise are contem- " plated benefits. The language of the section is clear and precise " and it is, therefore, not permissible for us to travel outside it to " ascertain the object of the legislature in enacting it. We are of " opinion that, even if it was the intention of the Soulbury " Commission to make s. 29 (2) a safeguard for minorities alone, " such intention has not been manifested in the words chosen by " the legislature. In *Brophy* v. *The Attorney-General of Manitoba* " the Lord Chancellor said :—

> " ' The question is not what may be supposed to have " ' been intended but what has been said,'

" Section 29 (3) declares any law made by Parliament void if it " makes

" (1) persons of any community liable to disabilities or restrictions ;

" (2) to which persons of other communities are not made liable

" The conditions for the avoidance of a law under this provision " are both (1) and (2). If (1) is satisfied in any particular case but " not (2) the law is not void. Both conditions must exist to render

" the law void. If a law imposing disabilities and restrictions
" expressly or by necessary implication applies to persons of a
" particular community or communities and not to others, then
" such a law would undoubtedly be void, because in such a case
" both conditions (1) and (2) would be satisfied. If, however, a law
" imposes disabilities and restrictions when certain facts exist
" (or certain facts do not exist) and these disabilities and restric-
" tions attach to persons of all communities when these facts exist
" or do not exist as the case may be) then condition (2) is not
" satisfied for the reason that the disabilities and restrictions are
" imposed on persons of all communities. The same reasoning
" applies to s. 29 (2) (c) if the law is regarded as conferring privileges
" or advantages on persons of any community or communities
" because the law confers privileges and advantages on persons of
" any other community in the same circumstances. We think it
" is irrelevant to urge as a fact that a large section of Indians now
" resident in Ceylon are disqualified because it is not the necessary
" legal effect which flows from the language of the Act. Hence
" condition (1) is not satisfied. Even if this argument can be
" urged, it is clear to us that persons of other communities would be
" similarly affected, because the facts which qualify or disqualify
" a person to be a citizen or a voter have no relation to a com-
" munity as such but they relate to his place of birth and to the
" place of birth of his father, grandfather or great grandfather
" which would equally apply to persons of any community. Hence
" condition (2) is not satisfied." p. 53, l. 21

The learned Judges held that the third Respondent had made a fundamental error in travelling outside the language of the statutes to ascertain their meaning. With reference to the third Respondent's judgment they said :

" It is important to note that no materials were placed before p. 53, l. 45
" him, assuming that such materials were relevant to the issues
" which he had to try, as to how many of the persons whose names
" were arbitrarily expunged were entitled to be restored to the
" register. He has overlooked the fact that when an enactment
" is put into force one community may be affected by it more
" adversely than another. A high income or property qualification
" may affect more adversely the voting strength of one community
" than another. Would that be discrimination ? If the effects
" of a controversial piece of legislation are weighed in a fine
" balance not much ingenuity would be needed to demonstrate
" how, in its administration, one community may suffer more
" disadvantages than another. To embark on an enquiry every
" time the validity of an enactment is in question, into the extent
" of its incidence, whether for evil or for good, on the various
" communities tied together by race, religion, or caste would be
" mischievous in the extreme and throw the administration of

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" Acts of the legislature into confusion. The 1st Respondent " appears to hold the view that the Indians who were qualified " for the franchise under the laws prior to the Ceylon (Parlia- " mentary Electoral) Amendment Act, No. 48 of 1949, had acquired " a vested right to continue to exercise the franchise and that if " any legislation, in its administration, had the effect of taking " away the franchise from large sections of the community, such " legislation would for that reason be discriminatory. This view " cannot be supported. The Parliament of Ceylon has the power " to alter the electoral law in any manner it pleases if it thinks it " necessary to do for the good government of the country subject " to the narrow limitation of S. 29. It has the power to widen or " to narrow the franchise. If it widens the franchise the more " advanced communities may feel that they are affected, on the " other hand if it narrows the franchise the less advanced " communities may also feel that they are adversely affected. " If it is open to a person to say that as a result of the alterations " the voting strength of his community has been reduced, as the " Attorney-General remarked Parliament will only have the power " to pass legislation as to what the polling hours or the polling " colours should be."

p. 53, l. 5 The learned Judges therefore quashed the order made by the second Respondent and remitted the record to him so that he might make a fresh determination on the basis that neither Section 4 and 5 of the Citizenship Act, No. 18 of 1948, and S. 3 (1) (a) of the Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949, were void under Section 29 (3) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947. They ordered that the present Appellant should pay the petitioners one set of costs in the Supreme Court.

p. 55 16.—The Appellant, being dissatisfied with the said decision of the Supreme Court of the Island of Ceylon has preferred this Appeal therefrom to His Majesty in Council.

17.—The first Respondent humbly submits that this Appeal should be dismissed with costs for the following amongst other

REASONS

1. BECAUSE the Supreme Court were right in holding that Section 4 and 5 of the Citizenship Act, No. 18 of 1948, and Section 3 (1) (a) of the Ceylon Parliamentary Elections Act No. 48 of 1949 did not contravene Section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council, 1945 and 1947 and were therefore *intra vires* the legislature.

2. BECAUSE the aforesaid Acts did no more than lay down the qualifications for citizenship of Ceylon and for the exercise of the franchise and nothing in the said Orders in Council prohibits such enactments.

3. BECAUSE neither of the aforesaid Acts makes persons of any particular community or religion liable to disabilities or restrictions or confers on persons of any particular community or religion any privilege or advantage.

4. BECAUSE the Supreme Court were right in holding that in passing the said Acts Parliament legislated on matters within its competence and that the said Acts were not *ultra vires* even if they incidentally affected more persons of one community and less persons of other communities.

5. BECAUSE the Supreme Court were right in holding that since the language of Section 29 (2) of the said Orders in Council was clear and precise it was not admissible to travel outside it in order to ascertain the object of the legislature in enacting this section.

6. BECAUSE the Indian residents in Ceylon are not a community within the meaning of Section 29 (2) aforesaid.

7. BECAUSE the Supreme Court were right in their decision not to admit fresh evidence at the hearing before them of the applications for a mandate in the nature of a writ of Certiorari.

8. BECAUSE in all other respects the judgment of the Supreme Court was right and should be upheld.

HARTLEY SHAWCROSS.
FRANK SOSKICE.
L. M. D. de SILVA.
DINGLE FOOT.

In the Privy Council.

No. 7 of 1952.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

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AND

PUNCHI BANDA MUDANAYAKE, VICTOR LLOYD WIRASINGHA, and NAVASIVAYANPILLAI SIVAGNANASUNDERAM ... RESPONDENTS.

CASE FOR THE SECOND RESPONDENT

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