KUMARANATUNGE
v.
JAYAKODY AND ANOTHER

COURT OF APPEAL
H D TAMBIAH, J (ELECTION JUDGE).
ELECTION PETITION No. 7 OF 1983.
ELECTORAL DISTRICT No 17 – MAHARA.
JANUARY 30, 1984, FEBRUARY 1, 2, 3, 6, 7 AND 8, 1984.

Election Petition – Election held pursuant to Article 168 (1) (d) (iii) – Petition to invalidate election on the ground inter alia of the corrupt practice of making false statements of fact in relation to the personal character and conduct of the petitioner – Section 58 (d) read with section 77 (d) of the Ceylon (Parliamentary Elections) Order-in-Council 1946 – Article 35 of the Constitution – Presidential immunity – Difference between interpretation and application of a statute.

The election for the Mahara seat in Parliament was held on 18th May, 1983, pursuant to Article 168 (1) (*d*) (iii) (as amended by the Fifth Amendment) of the Constitution. The petitioner and the 1st respondent were among the candidates. The 1st respondent won the election defeating the petitioner by 45 votes. The petitioner then filed an election petition on 9.6.1983 seeking to have the election declared void on the grounds inter alia that the 2nd respondent as agent of the 1st respondent made false statements of fact in relation to the personal character and conduct of the petitioner for the purpose of affecting the return of the petitioner at the said election – a corrupt practice under section 58 (*d*) read with section 77 (*c*) of the Ceylon (Parliamentary Elections) Order-in-Council 1946.

It was admitted that the 2nd respondent held the office of President of the Republic of Sri Lanka.

The defence pleaded Presidential immunity and that in any event the statements complained of did not constitute statements relating to the personal character or conduct of the petitioner within the meaning of the said section 58 (*d*) of the Order in Council. Further, the affidavit was bad.

Held –

(1) The mere reliance on a constitutional provision by a party need not necessarily involve interpretation of the Constitution. Interpretation is the process of reducing the Statute applicable to a single sensible meaning – the making of a choice from several possible meanings. Application on the other hand is the process of determining whether the facts of the case come within the meaning so chosen. The language of Article 35 (1) of the Constitution is so clear and unambiguous that the need for interpretation of this Article does not arise. This Article clearly confers absolute personal immunity on the President, during the tenure of his office, from being proceeded against in respect of anything done or omitted to be done by him either in his official or private capacity in any Court or Tribunal. It is not an immunity for all time but limited to the duration of his office.

There are two aspects to Article 35 (1) : The President is immune from all proceedings and the Court is barred from entertaining and continuing any proceedings against him.

There are only three exceptions to Presidential immunity and they are set out in Article 35 (3).

(i) Proceedings in relation to the exercise of any ministerial function which he assigns to himself under Article 44 (2) of the Constitution.

(ii) Impeachment proceedings under Article 38 (2) read with Article 129 (2) of the Constitution.

(iii) Election petition proceedings relating to the election of the President himself under Article 130 (*a*) of the Constitution.

Under the 1972 Constitution the President enjoyed immunity from civil or criminal proceedings. But under that Constitution the President was a constitutional figurehead. He had no executive powers, he was not a member of the Cabinet and could not engage in politics. Under the 1978 Constitution the President is an executive President and the head of the Cabinet and he could engage in political activities. Hence his range of immunity was widened to protect him from proceedings of any description in any court or tribunal.

The Ceylon (Parliamentary Elections) Order-in-Council 1946 has not been elevated to constitutional status by the Fifth Amendment nor made part of the Constitution. The requirements of joinder of parties set out in section 80A (1) (*b*) of the Order-in-Council cannot supersede Article 35 (1) of the Constitution but must yield to it.

A particular enactment like Article 35 (1) is an exception to and prevails over a general provision like section 80A(1) (*b*). Hence no petition can be instituted impleading the President as a respondent.

Per Tambiah, J.–

"The language of Article 35 is clear and unambiguous. Article 35 (1) embraces all types of proceedings and confers a blanket immunity from such proceedings, except those specified in Article 35 (3). The fact that the immunity will be misused is wholly irrelevant."

The sole and only question in the case was whether the President committed the corrupt practice of making a false statement. The 1st respondent is only made vicariously responsible.

If the allegation of a corrupt practice by the 2nd respondent goes out, there is nothing further in the election petition to inquire into. It is an empty petition and has to be dismissed

(2) An objection that even if the false statement alleged was made it does not constitute a false statement in relation to the personal character or conduct of the candidate can be considered preliminarily.

The sense in which the alleged statements were understood by persons present at the meeting is irrelevant. It is for the Court to interpret the alleged statements. The statements alleging that the petitioner was taken into custody because of his plans to create disturbances in the country, because he was a Naxalite and because of his declaration that the President would be hanged, disembowelled and killed and his blood trod on reflect the petitioner's public and political conduct and his political philosophy. The reference to him and his associates is as politicians, the disturbances planned were political and the assasination envisaged was political. To call a person a Naxalite is not a reference to his personal character and conduct. Hence no corrupt practice is in any event disclosed.

(3) The affidavit filed does not state which facts are based on personal knowledge and which based on information. It is obvious that the words alleged to have been uttered by the 2nd respondent at the meeting are what the petitioner gathered from others who had been present at the meeting. The petitioner has failed however to disclose the sources of his information and the grounds of his belief. The affidavit filed by the petitioner therefore fails to perform its functions of verifying and confirming the facts stated in the petition and is bad.

Cases referred to :

(1) *Billimoria v. Minister of Lands (1978-79) 1 S.L.R. 10, 16.*
(2) *Wijewardena v. Senanayake, (1970) 80 CLW 1, 3, 4.*
(3) *Wijewardena v. Senanayake, (1971) 74 N.L.R. 97 (S.C.)*
(4) *Rajapakse v. Kathiragamanathan (1965) 68 N.L.R. 14.*
(5) *Shiv Chand v. Ujagar Singh and Another (1978) 4 SCC 152, 155, 156 ; AIR 1978 S.C. 1583, 1584.*
(6) *Kesavananda Bharati Sripadagalrani v. State of Kerala, AIR 1973 SC 1461 paras 548, 666, 918, 968.*
(7) *Kobbekaduwa v. J. R. Jayewardene and Others – S.C.No. 3/82 (S C. Minutes of 10.1.1983).*
(8) *North Louth Case, (1911) 6 O'M & H. 103.*
(9) *Cockermouth Case, (1901) 5 O'M & H. 155, 159, 160.*
(10) *Sarla Devi v. Birendrasingh, AIR 1961 M.P. 127.*

Nimal Senanayake, S. A. with *W. P. Goonetilleke, Saliya Mathew, Miss A. B. Dissanayake, L. M. Samarasinghe* instructed by *Nimal Siripala de Silva* for the petitioner.

K. N. Choksy, S. A. with *George Candappa, S. A., Mark Fernando, Ben Eliyatamby, Daya Pelpola, M Zanoon, Lakshman Perera, Ronald Perera* and *Nihal Fernando* instructed by *Herman Perera* for the 1st respondent.

2nd respondent absent and unrepresented.

K. M. M. B. Kulatunge, S. A. (Solicitor-General) with *Sarath Silva,* Deputy Solicitor-General and *Ananda Kasturiaratchi.* State Counsel, as amicus-curiae for the Attorney-General.

Cur. adv. vult.

March 15, 1984.

TAMBIAH, J.

When the Constitution of the Democratic Socialist Republic of Sri Lanka (1978) was enacted, the National State Assembly elected under the Constitution of Sri Lanka (1972) was already functioning. So it was necessary to enact Article 161 (*a*) ((1978) Constitution) which states that the Members of the National State Assembly shall be deemed to have been elected as Members of the first Parliament. The first Parliament was to continue, unless dissolved earlier, for six years from 4th August, 1977, i.e., until August, 1983 (Article 161 (*c*)), but the 4th Amendment to the Constitution, which became law after it was approved by a Referendum of the People, extended the life of the first Parliament by a further six years, i.e., until August, 1989.

The Members of the first Parliament were elected under the Ceylon (Parliamentary Elections) Order-in-Coucil, 1946, as amended ; the election was not according to the principle of Proportional Representation. Article 99 which provides for Proportional Representation applies to future Parliaments. On the date of the enactment of the 1978 Constitution, the Elections Order-in-Council, 1946, was in force and it was kept alive by Article 168 (1). Inter-alia, Part IV (Elections) and Part V (Election Petitions) of the Elections Order-in-Council were repealed by s. 130 of the Parliamentary Elections Act, No. 1 of 1981, which became law on 22nd January, 1981.

Article 161, which specifically deals with the 1st Parliament, in sub-paragraph (*d*) (iii) sets out the manner of filling vacancies when they occur : on being informed by the Secretary-General of Parliament, the Commissioner of Elections shall require the Secretary of the political party to which such member belongs to nominate a member

of such party to fill such vacancy On receipt of such nomination, the Commissioner shall declare such person to be Member for the electoral district in respect of which the vacancy occurred.

The 5th Amendment to the Constitution was enacted and it became law on 25th February, 1983. S. 2 of the 5th Amendment added a proviso to Article 168 (*d*) (iii), in terms of which, where the Secretary of a political party fails to nominate a person to fill the vacancy, the Commissioner of Elections is required to inform the President who shall within 30 days of the receipt of such information, order the Commissioner to hold an election for the electoral district in respect of which such vacancy has occurred. The proviso thereby filled a lacuna in Article 161 (*d*) (iii).

As the 1st Parliament was elected not on the basis of Proportional Representation, and as election on the basis of Proportional Representation would only apply to future Parliaments, the 5th Amendment resuscitated, inter alia, those provisions of the Elections Order-in-Council, 1946, which dealt with the conduct of Elections and Election Petitions (Parts IV and V). This the 5th Amendment did by stating that the aforesaid parts, notwithstanding their repeal, shall "be deemed to be in force". The 5th Amendment further stated that the aforesaid parts shall apply to Elections and Election Petitions, "mutatis mutandis, and except as otherwise expressly provided in the Constitution".

The election for the Mahara Electorate, held on the 18th of May, 1983, was pursuant to Article 168 (1) (*d*) (iii), as amended. At the said election, the petitioner and the 1st respondent, amongst others, were candidates and the 1st respondent polled 24,944 votes, the petitioner 24,899 votes, and the 1st respondent was returned by a majority of 45 votes.

The present election petition was filed on 9.6.83 by the petitioner and he seeks to have the election declared void on the ground that the 2nd respondent, as agent of the 1st respondent, committed the corrupt practice of making false statements of fact in relation to the personal character and conduct of the petitioner for the purpose of affecting the return of the petitioner at the said election, in terms of s. 58 (*d*) read with s. 77 (*c*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

The petitioner alleges –

(1) That on 8.5.83, at public meetings held at Malwathuhiripitiya and Narammala, in support of the 1st respondent's candidature, the 2nd respondent uttered the following words – "It is with my full knowledge that certain individuals belonging to opposition political parties were taken into custody after Presidential Elections and the Referendum. There had been plans made by those individuals to create various disturbances in this country. After Tyrrel Gunatillake was entrusted to hold an inquiry on these people we released the Naxalites, but after the inquiry report on 21st we will suitably punish those people who are guilty." (Para 4 A of the petition).

(2) That on 8.5.83, at public meetings held at Malwathuhiripitiya and Narammala, in support of the 1st respondent's candidature, the 2nd respondent uttered the following words – "Vijaya Kumaranatunga is supposed to be saying that he was taken into custody. He was not just taken into custody but with my full knowledge. Those who are creating disturbances cannot be allowed to play with the people. If you vote for Vijaya Kumaranatunge the people of this seat will only find themselves abandoned. Therefore when voting vote with due consideration." (Para 4B of the petition).

(3) That on 8.5.83, at a public meeting held at Malwathuhiripitiya, in support of the 1st respondent's candidature, the 2nd respondent uttered the following words – "The candidate for Sri Lanka Freedom Party for the seat has announced that we kept him in custody. He was kept in custody according to my order. Why is that ? At Mr. Kobbekaduwa's meetings some persons have said that if they win, J. R. will be hanged, J.R.'s intestines will be taken out. Another person had said that I will be killed and they will walk on my blood to President's House. We got C I D Tyrrel Gunathilleke to make inquiries to find out the purpose behind these statements. Vijaya Kumaranatunga was taken into custody to inquire into that. We will get that report before the 21st It will be decided accordingly whether the suspects will be prosecuted or not." (Para 4C of the petition).

Mr. Senanayake, for the petitioner, concedes that at all times material to this petition, including the date on which this petition was filed, the 2nd respondent held office as President of the Republic of Sri Lanka.

On behalf of the 1st respondent, four objections, in limine, have been raised and the 1st respondent has asked this Court, to reject and/or dismiss the petition. The objections are :

(1) the 2nd respondent could not have been made a party-respondent in these proceedings ; his joinder contravenes Article 35 (1) of the Constitution ; the petition could not have been instituted ; the Court could not have entertained this petition ; no process could have issued on the petition, and the petition should now be rejected. I, as the Election Judge, will not proceed with the petition and make order either dismissing or rejecting it.

(2) Rs. 10,000 paid as security is inadequate and in terms of Rule 12 (3) of the 3rd Schedule to the Elections Order-in-Council, 1946, the petition should be dismissed.

(3) there is no proper affidavit in support of the allegation of corrupt practices pleaded in the petition and therefore there is no valid petition before Court in terms of s 80B (*d*) of the Order-in-Council. The petition, therefore, cannot be proceeded with.

(4) the statements alleged to have been made by the 2nd respondent do not in law constitute false statements of fact in relation to the personal character or conduct of the petitioner and these statements do not fall within the provisions of s. 58 (1) (*d*) of the Order-in-Council. If so, the petition does not disclose the Commission of corrupt practices and there is nothing upon which this Court could proceed to inquire into.

On the question of inadequacy of security, the petitioner, on the day he presented his petition (on 9.6.83) deposited Rs. 20,000 with the Commissioner of Elections, and on the next day, deposited a further sum of Rs. 10,000, totalling Rs. 30,000. In view of this, Mr. Choksy stated that he was not proceeding with his objection in regard to security.

I shall reproduce Article 35 of the Constitution in full :

"35. (1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (*a*) relating to the election of the President :

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General".

Let me summarise the submissions that have been made on these matters, by all learned Counsel.

Mr Choksy submitted

(1) the sole ground for avoidance of the election is the allegation that the 2nd respondent, as agent of the 1st respondent, committed corrupt practices under s. 58 (1) (*d*) read with s. 77 (*c*) of the Elections Order-in-Council. There is no allegation against the 1st respondent ; he is only made vicariously liable for the acts of the 2nd respondent. A determination whether the election is void or not under s. 81 depends on a finding against the 2nd respondent whether he has or has not committed the alleged corrupt practices. The returned candidate must always be impleaded. S 80A (*b*) enjoins a petitioner to implead any other person against whom is alleged the commission of a corrupt practice. Such person is

a statutory party. In substance, an election petition is a proceeding against three parties, the electorate, the returned candidate and the person against whom it is alleged that he committed a corrupt practice. A finding against the 2nd respondent carries severe penalties - forfeiture of his civic rights as well as a criminal prosecution.

The election petition is a proceeding against the 2nd respondent within the meaning of Article 35 (1).

(2) Article 35 (1) precludes the President being made a party to any proceedings. Section 80A (1) (*b*) of the Elections Order-in-Council, requires his joinder in election petition proceedings. The Constitution is supreme law. The legislature, by the 5th Amendment, revived, inter alia, parts (IV) and (V) of the Elections Order-in-Council, "mutatis mutandis and except as otherwise expressly provided in the Constitution", that is, with the necessary changes and modifications in order to bring them into conformity with the provisions of the Constitution and subject to the express provisions of the Constitution. Article 35 (1) applies to all proceedings including Election Petition proceedings. S. 80A (1) (*b*) contained in part (V) is subject to the express provision in Article 35 (1). No election petition can be instituted, impleading the President as respondent. Assuming that parts of the Elections Order-in-Council have been given constitutional status by the 5th Amendment, Article 35 (1) is a special provision which must prevail over s. 80 A (1) (*b*), which is a general provision.

(3) There are 2 aspects in Article 35 (1) - (*a*) a blanket immunity conferred on the holder of the office of President "in respect of anything done or omitted to be done by him either in his official or private capacity". (*b*) ouster of the jurisdiction of the Court. It precludes the conduct of the President being adjudicated upon, except in the circumstances specified in Article 35 (3). Article 35 (1) precludes the Court from entertaining an Election Petition where the conduct of the President is in question. It follows, no process can issue, the Court cannot inquire into the facts stated in the petition, the Court cannot proceed to judgment ; then, it cannot determine that the election is void. This Court would also be violating the principles of natural justice if the President's conduct is examined in his absence.

Mr Senanayake submitted as follows :

(1) Article 35 (1) is concerned with proceedings which seek some relief or impose a liability on the holder of the office of President may be a criminal or a civil liability. The article will not apply to a large number of matters which come up before the regular Courts of our Country, for example, testamentary proceedings can be instituted with the President as a respondent, if he is an heir or a beneficiary ; in a partition action, if the President is a co-owner, he can be cited as a respondent ; in a mortgage action, if the President has an interest in or a puisne mortgage on, the mortgaged property, he has to be noticed. These are not proceedings against him personally, and no relief is claimed against him.

In arriving at a determination under s. 81 of the Elections Order-in-Council, the Election Judge is not deciding any right or liability against the 2nd respondent. The petitioner has filed his petition to avoid the election. True that a Court has to make a Report thereafter. The petitioner has nothing to do with the Report of the Election Judge, issued under s. 82, which may or may not be made. In issuing the Report, the Election Judge has no power to impose any liability ; the Election Judge is not depriving the person reported of his civic rights. The law takes its course once the Report is made and consequences flow from the Report. The election petition is not instituted against the 2nd respondent for the purpose of getting relief or imposing a criminal or civil liability. The election petition proceeding is not a proceeding against him ; it is a proceeding against the elected candidate

(2) If Article 35 is capable of applying to election petitions, then Article 35 must be read to be in harmony with other provisions of the Constitution, namely, Articles 3 and 4 (*e*) which state that Sovereignty is in the people and Sovereignty includes, inter alia, the franchise and the franchise shall be exercisable at the election of the Members of Parliament. Article 35 (1) must be read to give effect to the principles enshrined in Articles 3 and 4 (*e*). An election petition is a proceeding in which the Electorate is interested, it is a means of testing the purity of elections. The electorate is entitled to have a fresh election, if the election is impure. If a President cannot be impleaded, it will follow that a

President can abuse his position and powers and can with impunity commit all the election offences. To say an election cannot be avoided because of Article 35 (1), is to negate the freedom of the franchise which is the taproot of a democratic system of Government. Between the extended meaning contended for by Mr. Choksy, and the restricted meaning contended for by him, this Court must choose a meaning which will ensure the free franchise. Articles 3, 4 (*e*) and 35 (1) can be read in harmony – An election petition is not a proceeding against the President except where the Presidential Election is challenged on an election petition.

(3) The preamble states that the 5th Amendment is an Act to amend the Constitution. The 5th Amendment restored the Elections Order-in-Council, 1946, in regard to all elections and election petitions and parts (IV) and (V) are part of the Constitution. Article 35 (1) is a general provision and applies to all classes of proceedings ; the Constitution provides for Proportional Representation ; the 5th Amendment brought in elections according to the Elections Order-in-Council which is a special proceeding ; the 5th Amendment being the later Act, takes precedence over Article 35 (1).

(4) The expression "as otherwise expressly provided in the Constitution" in the 5th Amendment means if there is provision in the Constitution relating to election petitions, such provision will supersede the Elections Order-in-Council. Thus s. 78 conferred jurisdiction on the High Court to try an election petition and the High Court Judge was nominated by the Chief Justice. The Constitution now vests jurisdiction in the Court of Appeal and the Judge is nominated by the President of the Court of Appeal (Articles 144, 146 (2) (iv)). Except for these modifications, the Elections Order-in-Council will apply, and under s. 80A (1) (*b*), the 2nd respondent has to be joined.

(5) The expression used in the 5th Amendment is "mutatis mutandis, and except as otherwise expressly provided in the Constitution" and not "subject to the provisions of the Constitution, and mutatis mutandis" as in Article 168 (6). If "subject to" was used in the 5th Amendment, then Article 35 (1) would apply, provided these are proceedings against the President.

(6) The 5th Amendment is an amendment to Article 161 (*d*) (iii). Article 161 commences with "Notwithstanding anything to the contrary in any other provision of the Constitution", that is, notwithstanding Article 35 (1). The requirement of joinder of parties, in s. 80A (1) (*b*) was brought in by the 5th Amendment, that is, notwithstanding Article 35, the requirement of joinder has been brought in.

The learned Solicitor-General, who appeared as amicus curiae, at the invitation of Court, pointed out that –

(1) My task is to apply the plain and obvious provisions of Article 35 of the Constitution and that no question of interpretation of the provisions of the Constitution is involved. Nor did Counsel for the petitioner or the 1st respondent make any request for a reference to the Supreme Court for a decision.

(2) Mr. Senanayake's submission that the immunity conferred by Article 35 (1) on the President be limited to cases where a criminal or civil liability arises would be an attempt to read into Article 35 (1) so many words. In the instances referred to by Mr. Senanayake – testamentary, partition, and mortgage actions – there is no relief claimed against the President, and no civil or criminal liability arises. These are not proceedings against the President. The election of the 1st respondent is sought to be set aside on the sole ground of a corrupt practice alleged to have been committed by the 2nd respondent, the President. If this is proved against the 2nd respondent serious consequences would flow against him. By sheer application of the expression "proceedings against" it is competent for this Court to hold that the present proceedings are against the President.

(3) As regards concepts of Sovereignty, Democracy, Franchise and Purity of Elections, the Court's duty is to safeguard these concepts within the law.

(4) Article 35 (1) not only expressly confers immunity on the President from proceedings but debars the Court from entertaining such proceedings.

(5) The President is Head of State and of the Executive and of the Government and the Commander-in-Chief of the Armed Forces. (Art. 30). He has wide powers and functions (Art. 33) for the exercise of which he is responsible to Parliament (Art. 42). The President may assign to himself any subject or function (Art. 44 (2)) and in relation to the exercise of power pertaining to such subject or function, he is not immunised from proceedings, provided such proceedings are instituted against the Attorney-General (Art. 35 (3)). The President is not immunised from proceedings in the Supreme Court under Article 129 (2) where the Speaker refers to the Supreme Court for inquiry and report any allegation against the President, contained in a resolution presented by a Member of Parliament, inter alia, of any offence under any law, involving moral turpitude under Article 38 (2) (v). The corrupt practice of making a false statement is an offence which involves moral turpitude and on reference by the Speaker, five Judges of the Supreme Court have to inquire and report (Art. 129 (3)). If the jurisdiction to hear proceedings against the President is so clearly and expressly defined and the procedure and Court are clearly indicated, can an Election Judge assume the same jurisdiction which deprives the President of his civic rights ?

(6) The expression "Notwithstanding anything to the contrary in any other provision of the Constitution" in Article 161 is intended to resolve conflicts between the sub-paragraphs of Article 161 and any other provision of the Constitution.

(7) The Elections Order-in-Council was repealed by Act No. 1 of 1981. s. 97 (1) (*b*) in Act No. 1 of 1981 is identical with s. 80A (1) (*b*) of the Elections Order-in-Council. The Act No. 1 of 1981 is not part of the Constitution. Article 35 must necessarily supersede s. 97 (1) (*b*) o Act No. 1 of 1981. Election petitions filed under Act No. 1 of 1981 can only be against members of the 2nd Parliament. Does it mean that Article 35 (1) takes effect as from the commencement of the 2nd Parliament and only a future President can claim immunity conferred by Article 35 (1) ? Is it conceivable that no such immunity can be claimed where election petitions are filed against members elected to the Parliament, at by-elections held under the Elections Order-in-Council, 1946 ?

There is a clear distinction between "application" and "interpretation" of a provision of a Statute.

"Interpretation may be defined as the process of reducing the Statute applicable to a single sensible meaning – the making of a choice from several possible meanings. Application, on the other hand, is the process of determining whether the facts of the case come within the meaning so chosen . . . . . The meaning of a statute is not doubtful merely because its application in a particular case is doubtful. Even though the statute is so plain and explicit as to be susceptible of only one sensible meaning, and even though the meaning is ascertained as a matter of interpretation, it often remains in doubt whether the facts are within or without the penumbra of a single meaning. To determine this question, then, is what is meant by application." (Bindra on Interpretation of Statutes, 6th Edn. at p.4)

"Interpretation is the act of making intelligible what was before not understood, ambiguous, or not obvious. It is the method by which the meaning of the language is ascertained." (Bindra, at p.3)

"The mere reliance on a constitutional provision by a party need not necessarily involve the question of interpretation of the Constitution." (per Samarakoon, C.J. in *Billimoria v. Minister of Lands* (1).

The provisions of the Constitution relevant to the decision of the question raised in the present case are Article 35 and Article 161, as amended by the 5th Amendment to the Constitution.

The language of Article 35 (1) is so clear and unambiguous that the need for interpretation of this Article does not arise. On a mere reading of Article 35 (1), it is clear that absolute personal immunity is conferred on the President, during the tenure of his office, from any proceedings in any Court or Tribunal in respect of anything done or omitted to be done by him either in his official or private capacity. It is not an immunity for all time but limited to the duration of his office. Article 35 (1) says "No proceedings", that is every type of proceedings, without limitation or qualification. The Article further says no proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by him in his official or private capacity. If that is so, he cannot be impleaded, he

is above the process of any Court to bring him to account as President in respect of anything done in his official or private capacity. The President, while in office, has been put beyond the reach of the Court. As was pointed out by both Mr. Choksy and Mr. Kulatunga, there are two aspects in Article 35 (1) – immunity of the President from all proceedings, and the bar to the Court entertaining and continuing with the proceedings. The only three exceptions to the immunity of the President from proceedings are those expressly provided for in Article 35 (3) – proceedings in relation to the exercise of any ministerial function which he assigns to himself under Article 44 (2), impeachment proceedings under Article 38 (2) read with Article 129 (2), and election petition proceedings relating to the election of the President himself under Article 130 (*a*).

Mr. Choksy explained the rationale underlying the immunity granted to the President. It is not necessary for me to go into this matter. My task is merely to apply Article 35 (1) to the facts of this case.

I find that in the Constitution of Sri Lanka, 1972, the immunity conferred on the President by s. 23 (1) was in these terms : "while any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity. Article 23 (2) is in terms identical with Article 35 (2) of the present Constitution. The exceptions to immunity found in Article 35 (3) do not find a place in the 1972 Constitution.

As was submitted by Mr. Choksy, there is a reason for the granting of wider immunity to the President by the use of words "any proceedings" in Article 35 (1).

The President under the 1972 Constitution was like the Governor-General under the Soulbury Constitution but under a new nomenclature. He was a constitutional figurehead. He had no executive powers and was not a member of the Cabinet. The Prime Minister was the Head of the Cabinet. The President could not participate in politics.

The General Elections took place in 1977. Prior to the passing of the 1978 Constitution, by virtue of the 2nd Amendment to the 1972 Constitution, which was certified on 20.10.77 and became operative from 4th March, 1978, the Prime Minister became the first Executive President and could engage in political activities. S. 7 of the 2nd

Amendment to the 1972 Constitution amended s. 23 of the Constitution ; it continued the concept of immunity from civil or criminal proceedings conferred by s. 23 (1) but stated the immunity shall not apply to any civil or criminal proceedings in relation to the exercise of any powers pertaining to any subject or function assigned to the Prime Minister or remaining in his charge under s. 94 (2).

Election petition proceedings are proceedings sui generis – neither civil or criminal. Courts have described them as quasi-criminal proceedings. Therefore, a President under the 1972 Constiution, as amended, would have been left unprotected from or exposed to Election Petition proceedings.

The 1978 Constitution recognised the President as Head of State, Head of the Executive and of the Government, and as the Commander-in-Chief of the Armed Forces (Article 30 (1). There is nothing in the Constitution to debar him from being the leader of a political party, from participating in politics, and from actively campaigning for his party candidates during Parliamentary Elections. He could attend, address, and send messages to Parliament, and is entitled to all the privileges, immunities and powers of a Member of Parliament and is not liable for any breach of the privileges of Parliament or of its Members. He is only debarred from voting in Parliament (Article 32 (3)).

With the change effected in the character of the President – from a constitutional figurehead to the Executive Head of the Government and an active politician – the necessity arose to widen the field of immunity granted to the President. So the words "civil or criminal proceedings" in s. 23 (1) in the 1972 Constitution were omitted and replaced by wider words "no proceedings" in Article 35 (2) of the present Constitution. There is another important consideration. In Article 35 (2) the words used are "proceedings of any description". The use of this phrase shows the width of the proceedings contemplated in Article 35 (1).

There is yet another important consideration. Article 144 vests the jurisdiction to try election petitions in respect of election to the membership of Parliament in the Court of Appeal. The framers of Article 35 (1) were aware of Article 144, and yet while creating an exception in regard to election petition proceedings relating to the election of the President, did not likewise create an exception as regards Parliamentary Election Petition proceedings.

In the proceedings earlier had before the President of the Court of Appeal, it would appear that Mr. Senanayake argued that Election Petition jurisdiction is an extension of the jurisdiction of Parliament and if this were so, whether this Court is a "Court or Tribunal". No such argument was advanced by him before me to the effect that this forum is not a Court. In fact, he could not have argued so as Article 144 vests the jurisdiction to try an election petition in the Court of Appeal.

Mr. Senanayake referred to testamentary, partition and mortgage actions and posed the question, "cannot testamentary, partition or mortgage proceedings be instituted with the President as one of the respondents ?" The answer to this, as Mr. Choksy correctly pointed out, is contained in Article 35 (1) itself. In each of these instances relied upon by Mr. Senanayake, it is not a proceeding instituted "in respect of anything done or omitted to be done by him" in his private capacity. In the instances given, they are proceedings in which no act done or omitted to be done by the President, is in dispute. They are not proceedings against the President, on the contrary, they are proceedings which seek to confer a benefit on the President. In the petition before me, the sole and only question is whether the President committed the corrupt practice of making a false statement.

S. 80 (A) (1) states :

"A petitioner shall ioin as respondents to his election petition –

(*a*) where the petition in addition to claiming that the election of any of the returned candidates is void or was undue, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates, other than the petitioner, and where no such further declaration is claimed, all the returned candidates and,

(*b*) any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition."

The ground for avoiding an election on the basis of the commission of a corrupt practice is stated as follows in s. 77 (*c*) :

"The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely :

(*c*) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by an agent of the candidate."

In *Wijewardene v. Senanayake* (2) Samarawickrame J. after referring to the above provision said :

> " In view of the above provision, I am of opinion that it is necessary to join as respondents to the petition, persons alleged to be agents and other persons acting with the knowledge or consent of the candidate who was returned. . . . Upon a trial of an election petition such persons are liable, if they are found guilty, to be reported to the Governor-General, and to lose civic rights for a period of seven years This provision (80 A (1) (*b*)) has been enacted to give effect to a fundamental principle that a person ought to be a heard before a finding adverse to him and involving penalties is made."

Samarawickrame, J. held that the provision of s. 80A (1) (*b*) is mandatory and that the failure to comply with the said section must result in the dismissal of the petition.

The judgment was affirmed in appeal in *Wijewardena v. Senanayake* (3) and H. N. G. Fernando, J. observed (p.98, 99) :

> "The purpose of joining a person alleged to have committed a corrupt practice is to afford to him a full opportunity to defend himself and to avoid a finding which will involve deprivation of his civic rights. . . . . In the case of *Rajapakse v. Kathiragamanathan,* (4) decided in 1965, Tambiah, J. held that the successful candidate must be joined in an election petition, and dismissed a petition in which he was not joined. The legislature in expressly requiring such joinder by the new s. 80A, enacted in 1970, has endorsed that decision. And when the new s. 80A further required the joinder of any person alleged to have committed a corrupt practice, it placed such a person in the same position as a sucessful candidate. Thus non-compliance with the further requirement must entail the same consequence of dismissal as does non-compliance with the requirement to join the successful candidate."

S. 82 (*b*) of the *Representation of the People Act, 1951 (India)* states :

> "A petitioner shall join as respondents to his petition any other candidate against whom allegations of any corrupt practice are made in the petition."

In *Shiv Chand v. Ujagar Singh and Another* (5) one of the candidates, one Shri Mal Singh, against whom the petitioner made allegations constituting a corrupt practice was not joined as a respondent. The Supreme Court of India observed (pg. 155, 156) –

"It is fairly clear that Shri Mal Singh was a necessary party since a corrupt practice was imputed to him. . . . It is obvious that s. 82 (*b*) requires the presence of every candidate against whom a corrupt practice is alleged. What is imperative is the presence as a respondent of such a candidate, not how or at whose instance he has been joined as a respondent. The purpose is obvious and twofold. When injurious averments are made against a candidate natural justice necessitates his being given an opportunity to meet those charges, because the consequence of such averments being upheld may be disastrous for such candidate. Secondly, in the absence of the party against whom charges have been levelled the reality of the adversary system will be missed. Above all, the constituency is vitally concerned with the investigation into the proof or disproof of corrupt practices of candidates at elections. Thus, the public policy behind s. 82 (*b*) is the compulsive presence of the candidate against whom corrupt practice has been imputed."

From what I have quoted, it is clear that a person against whom a corrupt practice is alleged is a necessary party to an election petition ; that such a person is placed in the same position as a successful candidate and his presence is imperative as a respondent. In the election petition before me, the sole ground on which the election of the 1st respondent is sought to be set aside, is the corrupt practice alleged against the 2nd respondent. There is no direct allegation of a corrupt or illegal practice against the 1st respondent ; he is only made vicariously liable for the acts of the 2nd respondent. The petition, in truth and in substance, is one against the 2nd respondent.

S 81 provides that "at the conclusion of the trial of an election petition the Election Judge shall determine, " inter alia, whether the election was void". S. 82 provides that "at the conclusion of the trial of an election petition the Election Judge shall also make a report" whether a corrupt practice has or has not been proved to have been committed by the candidate or by his agent. The words "at the conclusion of the trial" are significant. The report under s. 82 should be made at the same time as the determination under s. 81. An Election Judge has, therefore, dual functions which must be performed simultaneously and both are mandatory functions. The duty of an Election Judge does not end with declaring the election void under s. 81 ; he must also record a finding whether any corrupt

practice has or has not been committed by an agent of the candidate and the nature of that corrupt practice. Both findings, under s. 81 as well as under s. 82, are judicial findings.

Where the effect of a report under s. 82 is that a corrupt practice has been committed by an agent of the candidate he suffers the same incapacities as if he had been convicted of that practice (s.82D (2) (*b*)) that is, he is disqualified for membership and for voting at Parliamentary Elections (s. 58 (2)). The name of the person against whom the report declared that a corrupt practice was committed will be deleted from the register of electors by the registering officer (s. 82D (3)) and such a person becomes disqualified to be an elector at an election of the President or to vote at a Referendum (Article 89 (*e*) (iii)), and also disqualified for election as President (Article 92). The law gives effect to the adverse finding under s. 82 by imposing severe penalties.

Mr. Senanayake says that the petitioner is only concerned with having the election of the 1st respondent avoided and that he is unconcerned with the 2nd respondent and with the adverse consequences that will flow, if the allegation against the 2nd respondent is proved ; that he has nothing to do with the Report. If the petitioner fails to prove the allegation against the 2nd respondent, how does he hope to get the relief prayed for against the 1st respondent ? The success of the election petition depends entirely on proof of the allegation against the 2nd respondent.

Further, the law casts on me, as Election Judge, to perform a twofold duty, to be performed at one and the same time – to make a determination under s. 81 whether the 1st respondent's election was void, and to arrive at a finding whether the 2nd respondent has committed the alleged corrupt practice. And if so found, the consequences would be more disastrous to the 2nd respondent than to the 1st respondent.

How could it be said that the present petition is not a proceeding against the 2nd respondent ? For the reasons given, I am of opinion, that the election petition proceedings before me are proceedings against the 2nd respondent also.

I shall now deal with Article 161, as amended by the 5th Amendment The 5th Amendment, having revived the Elections Order-in-Council, 1946, with regard to, inter alia, Elections and

Election Petitions by the use of the words, "deemed to be in force" also used the expression "mutatis mutandis, and except as otherwise expressly provided in the Constitution."

Mr Senanayake argued that Parts (IV) and (V) of the Elections Order-in-Council have been elevated to the status of constitutional provisions and that s. 80A (1) (*b*) which is in Part (V) must supersede Article 35 (1) of the Constitution as the 5th amendment is a later Act. The 2nd respondent has to be joined as respondent to the petition.

I cannot agree that the parts of the Elections Order-in-Council, 1946, that have been revived have constitutional status. Let me state the reasons.

(1) The 5th Amendment itself indicates that the Elections Order-in-Council is not a part of the Constitution. The words "except as otherwise expressly provided in the Constitution" convey the idea that the Elections Order-in-Council, 1946, is not part of the Constitution. It is inherent in the words that the Constitution prevails over the Elections Order-in-Council. The use of the words "the law applicable to election petitions" suggest that the Elections Order-in-Council is a law apart from and outside the Constitution.

(2) As the 1st Parliament was not elected on the basis of Proportional Representation, it became necessary for the legislature to indicate the law under which by-elections would be held and the law relating to election petitions. The 5th Amendment indicated that the law would be the Elections Order-in-Council, 1946. This does not give the Elections Order-in-Council a constitutional flavour.

Article 101 (1) (*e*) – (*f*) enables the Parliament to make laws regarding Elections and Election Petitions. Act 1 of 1981 was passed providing for Proportional Representation and Election Petitions. Does it mean such provisions of Act 1 of 1981 acquire constitutional status ?

Likewise Article 40 (3) enables the Parliament to make laws relating to the election of the President and to matters incidental thereto. The Parliament enacted the Presidential Election Act, No. 2 of 1980.

So also, Article 156 (1) enables the Parliament to make laws for the establishment of an Ombudsman which it has done by Act No. 17 of 1981. Article 155 (1) refers to the Public Security Ordinance.

Does it mean that these various laws referred to in the Constitution become part of the Constitution or achieve constitutional status ?

(3) Article 168 provides that existing laws shall, "mutatis mutandis, and except as otherwise provided in the Constitution",continue in force ; when the 1978 Constitution was enacted, the Elections Order-in-Council, 1946, was an existing law. When the 5th Amendment resuscita ed it, it used the same expression, "mutatis mutandis, and except as otherwise provided in the Constitution." The 5th Amendment revived the Elections Order-in-Council, 1946, and placed it on par with other existing laws, as Article 168 (1) used the same expression. The object of the legislature was to continue the Elections Order-in-Council, as a subordinate law.

Article 168 (2) states that existing laws are not and shall not in any manner be deemed to be provisions of the Constitution. The 5th Amendment does not say that the Elections Order-in-Council are provisions of the Constitution.

(4) The 5th Amendment revived the Elections Order-in-Council for the purpose of the by-elections to the 1st Parliament. Its operation comes to an end when the 1st Parliament is either dissolved or its term expires. If the Order-in-Council is a provision of the Constitution, it must operate for ever.

(5) S. 97 (1) of the Parliamentary Elections Act, No. 1 of 1981, is in terms, identical with s. 80 A (1) (*b*) of the Elections Order-in-Council, 1946. None can contend that s. 97 (1) is a constitutional provision. In an election petition filed under Act No. 1 of 1981, against a candidate elected to the 2nd Parliament, can it be contended that s. 97 (1) supersedes Article 35 (1) of the Constitution ? Is it conceivable that the requirement of joinder of parties supersedes Article 35 (1), only where election petitions are filed against candidates elected at by-elections to the 1st Parliament ?

(6) Article 125 (1) grants the Supreme Court the exclusive jurisdiction to interpret the Constitution. Can it be said that Article 125 (1) applies to the provisions of the Elections Order-in-Council ? In *Election Petition No. 3 of 1983, Mahara,* relating to the same election, all Counsel, including Mr Senanayake, indulged in a process of interpretation of s. 80 A (1) (*b*). If the requirement of joinder is a constitutional provision, then I could not have heard arguments on the matters raised in limine which were based on the interpretation of s.

80 A (1) (*b*). Then, was I required to refer the matter to the Supreme Court ? Mr Senanayake does not say so. Isn't this a test to determine whether s. 80 A (1) (*b*) is a constitutional provision ?

There is no doubt that the Elections Order-in-Council, 1946, is subordinate law and if a conflict arises between Article 35 (1) of the Constitution and s. 80 A (1) (*b*), the latter must yield to the former.

Let me assume that Mr Senanayake is correct that s. 80 A (1) (*b*) is a constitutional provision, then, there is an apparent conflict between s. 80 A (1) (*b*) and Article 35 (1).

> "Whenever there is a particular enactment and a general enactment in the same Statute, and the latter, taken in its most comprehensive sense, would override the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the Statute to which it may properly apply." *(Halsbury's Laws of England, 3rd Edn., Vol. 36, p. 397, para 597).*

> "One way in which repugnancy can be avoided is by regarding two apparently conflicting provisions as dealing with distinct matters or situations..... Collision may also be avoided by holding that one section, which is *ex-facie* in conflict with another, merely provides for an exception from the general rule contained in that other." *(Maxwell on Interpretation of Statutes, pages 187, 188). S. 80 A (1) (b)* contains the general rule that all persons against whom allegations of corrupt practice are made in the petition must be joined as respondents. Article 35 (1) is a particular provision dealing with a particular situation – immunity of the President from proceedings – and is an exception to the general rule contained in S. 80 A (1) (*b*).

Mr. Senanayake referred to the expression "notwithstanding anything to the contrary in any other provision of the Constitution" in Article 161 and argued that Article 35 (1) will not apply to Election Petitions filed against candidates returned at the by-elections held by virtue of the 5th Amendment. Therefore in terms of s. 80 A (1) (*b*), the 2nd respondent has to be joined.

I cannot accept this contention. The marginal note to s. 161 says " First Parliament ". A reading of Article 161 and its sub-paragraphs show that the prime object was to make special provisions to the membership of the 1st Parliament. The provisions are directed to membership of the 1st Parliament.

Article 161 (*a*) states that the 1st Parliament shall consist of 168 members and the members of the National State Assembly are deemed to have been elected as Members of Parliament. Article 62 (1) says the Parliament shall consist of 196 members. Thus, notwithstanding Article 62 (1) the 1st Parliament shall consist of 168 members.

Article 161 (*b*) (1) (ii) states that the Elections Order-in-Council, 1946, shall apply to by-elections and election petitions in relation to such elections. Article 101 says that Parliament may make provision in respect of elections and election petitions and accordingly Act No. 1 of 1981 was enacted. Thus notwithstanding Article 101, the Elections Order-in-Council, 1946, will govern by-elections and election petitions.

Article 161 (*d*) states that a vacancy in the membership of the 1st Parliament, except where the election is avoided on an election petition, shall be filled by nomination by the Secretary of the political party. Article 99 (3) (*b*) provides that the vacancy shall be filled, under Proportional Representation, by the person, whose name appears first in order of priority in the relevant nomination paper, after excluding those already elected. Thus notwithstanding Article 99 (3) (*b*) the vacancy will be filled by nomination.

Article 161 (*e*) states that the duration of the 1st Parliament is six years from 4.8.77, i.e., until 1983. Article 62 (2) provided for six years from the date of its 1st meeting, i.e., the 1st Parliament would have carried on until 1984. Thus, notwithstanding Article 62 (2), Article 161 (*e*), which provided for a shorter period, will apply.

It is clear therefore that the framers of the Constitution used the expression "notwithstanding anything to the contrary in any other provision of the Constitution," to resolve conflicts between Article 161 and its sub-paragraphs, and other provisions of the Constitution.

The 5th Amendment used both expressions – "mutatis mutandis" and "except as otherwise expressly provided in the Constitution."

"Mutatis Mutandis" means "with necessary alterations in point of detail." (*per* Samarakoon, *C.J. in S. C Application No. 47 of 1983, quoting from* Wharton's Law Lexicon).

Black's Law Dictionary (4th Edn. 1951, at p. 1172) defines the phrase thus–

> "With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered, as to names, office and the like."

"Except where otherwise expressly enacted, it means unless some inconsistent provision is expressly made. The word merely serves to emphasize the generality of the main provision by making it clear that no case is outside that provision unless that is the necessary result of the operation of another enactment according to the intention it manifests." *(Bindra's Interpretation of Statutes, 6th Edn. at p. 919)*

The 5th Amendment used both devises –

(1) The Order-in-Council, 1946, relating to election petitions is to apply with alterations in point of detail, necessitated by the Constitution.

(2) The Order-in-Council is to apply to election petitions, unless some inconsistent provision is expressly made in the Constitution.

As examples of the former, rule 3 (1) in the 3rd Schedule to the Order-in-Council required the election petition to be filed in the Supreme Court and to be tried by a Judge of the Supreme Court nominated by the Chief Justice (s. 78 (1)). Article 144 vests election petition jurisdiction in the Court of Appeal and the petition is to be tried by a Court of Appeal Judge, nominated by the President of the Court (Article 146 (iv)). The Certificate of the Election Judge under s. 81 and the Report under s. 82 were transmitted to the Governor-General (s. 82 (*c*)). Now they will have to be transmitted to the President of the Republic.

Where there is conflict and inconsistency between a provision in the Order-in-Council and an express provision in the Constitution, to resolve such conflict, the device of "mutatis mutandis" is unhelpful. So, in order to make it clear that in case of conflict and inconsistency, the express provision of the Constitution must prevail, the legislature used the words "except as otherwise expressly provided in the Constitution". Thus, a person is disqualified to be elector and to stand for election during the period he is subject to civic disability imposed on him by a resolution of Parliament in pursuance of a

recommendation by the Special Presidential Commission of Inquiry in terms of Article 81. (Articles 89 (h), and 91 (*a*)). If such a person delivers his nomination paper to the returning officer, it cannot be rejected by the Returning Officer under the Order-in-Council on the ground that he is subject to civic disability (s. 31), but the Constitution debars him from tendering his nomination paper. So the provisions of the Order-in-Council in regard to nominations will have to yield to the express provision in the Constitution.

S. 80A (1) (*b*) in part (V) of the Order-in-Council was revived by the 5th Amendment and deemed it to be in force, unless some inconsistent provision is made in the Constitution. Article 35 (1) is an express provision of the Constitution which expressly says that no proceedings will be instituted against the President while in office. The preamble describes the Constitution "as the Supreme Law of the Democratic Socialist Republic of Sri Lanka". S. 80A (1) (*b*) must give way to Article 35 (1). S. 80A (1) (*b*) therefore will apply to the generality of cases except where an election petition is instituted against the President. The result is, no petition can be instituted impleading the President as a respondent.

Mr. Senanayake asked me to take into account the basic features of the constitution – democracy, purity of elections, the right of franchise – and said that I must give a meaning that will ensure the free franchise. He posed the question – "what if a President commits all the election offences. Should that election be allowed to stand ?"

Just as much as Articles 3 and 4 (e) are provisions in the Constitution, so is Article 35. Article 35 (1) has no qualifying words such as "subject to" Articles 3 and 4 (e). The same legislature which enacted Articles 3 and 4 (e) also enacted Article 35 and has chosen in Article 35(3) to only except Presidential Election Petition proceedings and not Parliamentary Election Petition proceedings from the immunity granted to the President, and this, as I stated earlier, despite Article 144 which vested the Court of Appeal with the jurisdiction to try election petitions. This is a clear indication that the words "No proceedings" in Article 35 (1) were intended to cover Parliamentary Election Petition proceedings. I cannot read into Article 35 (3) or imply a further exception, namely, proceedings in the Court of Appeal under Article 144, relating to the election of members of Parliament. Perhaps, the answer to the query of Mr. Senanayake – "What if the

President commits all the election offences ?" – is found in Article 38 (2) (iv) read with paragraph (2) of Article 129. It is a matter, not for this Court, but for one that sits in another chamber of this Country.

> "It is not for the Courts to enter into the wisdom or policy of a particular provision in the Constitution or statute. That is for the Constitution makers or for the Parliament or the legislature. . . . . .If the nature of the power granted is clear and beyond doubt the fact that it may be misused is wholly irrelevant. . . . . Where the language of an Act is clear and explicit, effect is to be given to it whatever may be the consequences. The words of the Statute speak the intention of the legislature. . . . . If power is conferred which is in clear and unambiguous language and does not admit of more than one construction there can be no scope for narrowing the clear meaning and width of the power by considering the consequences of the exercise of the power and by so reading down the power." *Kesavananda Bharati Sripadagalvaru v. State of Kerala, (6).*

The language of Article 35 is clear and unambiguous. Article 35 (1) embraces all types of proceedings and confers a blanket immunity from such proceedings, except those proceedings specified in Article 35 (3). The fact that the immunity will be misused is wholly irrelevant. Effect must be given to the clear and explicit language in Article 35 (1) whatever may be the consequences, and there can be no scope for further narrowing and reading down the immunity granted. It is not for me to question the policy or wisdom of Article 35. I will leave it to the legislature.

Let me now apply Article 35 (1) to the facts of the present case :-

(1) The Election Petition filed is a proceeding.

(2) The proceeding is instituted in a Court.

(3) The proceeding is instituted also against the President, while he holds office as President.

(4) The proceeding is instituted in respect of an act done by the President in his private capacity. If so, Article 35 (1) is attracted and is a bar to my entertaining the petition and having further proceedings on it. If this Court were to inquire into the allegation against him, in his absence, it will be violating the principle of

audi alteram partem, and any determination under s. 81, and any adverse finding under s. 82 of the Order-in-Council, will be a nullity.

The sole ground on which the election of the 1st respondent is sought to be set aside is the allegation of a corrupt practice by the 2nd respondent, as agent of the successful candidate. If this allegation goes out, there is nothing further in the election petition for me to inquire into. It is an empty petition.

I uphold the 1st objection of the 1st respondent and on this ground alone, the petition has to be dismissed.

In regard to the charge relating to the making of false statements, Mr. Choksy's position was that assuming but not conceding and/or admitting, that the 2nd respondent made the alleged statements and that such statements did refer to the petitioner, nevertheless the said statements do not in law constitute false statements of fact in relation to the personal character or conduct of the petitioner, and therefore do not disclose a corrupt practice within the meaning of s. 58 (1) (*d*) of the Elections Order-in-Council, 1946.

The alleged words were uttered in Sinhala, and Mr. Senanayake tendered an English translation which was accepted as correct by Mr. Choksy.

Mr. Choksy said he was entitled to raise this matter in limine, while Mr. Senanayake said, he cannot. It was Mr. Senanayake's position that evidence is necessary to show that the alleged statements refer to the petitioner, what is meant by the form "Naxalites", and whether the said statements related to the personal or public character and conduct of the petitioner ; what the people of Mahara understand when a person is referred to as a 'Naxalite' might be quite different to what a political study class will understand when a person is called a 'Naxalite'

I find that in Election Petition, *Kobbekaduwa v. J. R. Jayewardene & Others* (7) an objection in limine was taken that assuming that the alleged false statements were made, the statements do not constitute false statements of fact in relation to the personal character or conduct of the candidate and that, therefore, the petition does not disclose any corrupt practice, within the meaning of section 80 (*c*) of Act No. 15 of 1981 (same as s. 58 (1) (*d*)). The Supreme Court held

that the false statement alleged is merely a criticism of the candidate's public conduct and does not come within the mischief envisaged by the Law, and that the Election Petition is untenable.

An essential requirement for a statement to come within s. 58 (1) (*c*) of the Election Order-in-Council is that it must be in relation to the personal character or conduct of a candidate, as distinguished from statements relating to political or public conduct.

> "The false statement of fact need not be defamatory at common law, so long as it is a statement which is calculated to influence the electors, as, for instance, a statement made in a hunting country that the candidate has shot a fox or a statement made to promoters of total abstinence that the candidate has taken a glass of wine ; but it is essential that it should relate to the personal rather than the political character or conduct of the candidate. The words of the statement will be interpreted according to their real and true meaning, and not according to their literal sense. The question to be determined is what in the circumstances is the true meaning which the reader would place upon the statements. The true meaning will depend on the occasion of the publication, the persons publishing, the person attacked and the readers intended to be addressed." *(Halsbury's Laws of England, 4th Edn., Vol. 15, para 790, and footnote 10, pp 431, 432.*

This statement of law was quoted with approval by the Supreme Court in *Kobbekaduwa's case* (supra).

> "What the passage meant to convey" is the test. *(See* footnote 10, ibid).

It is clear from the petition that the occasions were public meetings held during the Mahara by-election. The person publishing, it is alleged was the 2nd respondent. Mr. Choksy has assumed, for the purpose of his argument, that the 2nd respondent made the statements, and that the person attacked was the petitioner. There is no controversy that the persons addressed were the voters of the Mahara electorate.

In the *North Louth Case* (8) one of the charges was the publication of false statements in relation to the personal character and conduct of Mr. Healy, a candidate at the election. Mr. Healy, in his evidence, conceded that the charge related to political misconduct. Mr. Justice Madden said (p. 171) :

"Mr. Henry relies on a passage in Mr. Healy's evidence in which he refers to the charge made against him as one of political midconduct. The interpretation of the Act of Parliament, and its application to the documents before us, is for this Court, irrespective of the views of any witness".

So, it seems to me, that the sense in which the alleged statements were understood by persons present at the meeting, is irrelevant. It is for this Court to interpret the alleged statements and not for witnesses to say that they understood the statements in one way or the other ; otherwise the petitioner's witnesses would say "this is how we understood", and the respondent's witnesses would say "we understood it differently", and the Court will be none the wiser.

According to Mr. Senanayake, the offensive passages which relate to the personal character and conduct of the petitioner are –

(1) "Certain individuals belonging to opposition parties were taken into custody. There had been plans made by those individuals to create various disturbances in this Country. We released the Naxalities". (Para 4A of the petition).

(2) "Vijaya Kumaranatunga is supposed to be saying that he was taken into custody. Those who are creating disturbances cannot be allowed to play with people". (Para 4B).

(3) At Mr. Kobbekaduwa's meetings, some persons have said that if they win, J. R. will be hanged. J. R.'s intestines will be taken out. Another person had said that I will be killed and they will walk on my blood to President's House. (Para 4C).

In regard to (1) above, Mr. Senanayake stated that the allegation was that the petitioner was taken into custody because of plans on his part to create disturbances in the Country ; the petitioner was also referred to as a Naxalite. So also in regard to (2) above, the statement says that the petitioner was taken into custody because he was creating disturbances. As regards (3) above, he submitted that for a man to say, a person will be hanged, disembowelled, killed and on his blood they will tread, he must have such thoughts. A man's character is assessed from the language he uses, though he be a politician ; to think and say such things reveals the personal character and conduct of the man.

Mr. Choksy, on the other hand, contended that paragraphs 4A and B of the petition contain references to the petitioner's public and political conduct ; the Naxalite movement is a political movement which seeks to achieve its political goal by resort to violence ; to characterise the petitioner as a Naxalite, is a reference to his political philosophy. In regard to paragraph 4C, he stated that the reference again is to the petitioner's public and political conduct ; it is a reference to the political ideas of the opposition party ; what it would have done, if they won the Presidential Election – take over the Presidency by committing violence on the incumbent of the office.

"Now it must be noted that what the Act forbids is this : you shall not make or publish any false statement of fact in relation to the personal character or conduct of such candidate ; if you do, it is an illegal practice. It is not an offence to say something which may be severe about another person, nor which may be unjustifiable, nor which may be derogatory, unless it amounts to a false statement of fact in relation to the personal character or conduct of such candidate, and I think the Act says that there is a great distinction to be drawn between a false statement of fact, which affects the personal character or conduct of the candidate, and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind this Statute would simply have prohibited at election times all sorts of criticism which was not strictly true, relating to the political behaviour and opinions of the candidate. That is why it carefully provides that the false statement, in order to be an illegal practice, must relate to the personal character and personal conduct." (*Darling, J. in the Cockermouth Case (9) quoted with approval by the Supreme Court in Kobbekaduwa's Case (supra))*.

"The principle underlying this provision of law appears to us to be that the public character or conduct of a public man or politician is public property and the risk of persons being misled regarding a candidate by a false statement relating to his public or political character and conduct is therefore slight, and is outweighed by the paramount necessity of allowing free and unfettered public criticism of the public or political acts of public men and politicians. Whilst on the other hand facts relating to the personal character or conduct of such men are, in the nature of things, not generally known and a false statement relating to the personal character or conduct of a candidate may be calculated seriously to mislead the electors to the prejudice of such candidate." (*Kobbekaduwa's Case, supra*).

"If the socio-economic policy of the party to which the candidate belongs is falsely criticised and it is suggested in strong words that the said policy would cause the ruin of the country, that clearly would be criticism, though false, against the public character of the candidate and such would be outside the purview of the Statute." (*Kobbekaduwa's Case, supra*).

"A statement that a candidate is a communist is not within the provision. THe words "radical traitors" were held to be not within the provision, as being a statement of opinion rather than of fact." (*Halsbury's Laws of England, 4th Edn. p. 432, para 790, note 8*).

"Statements that the candidates were communists were not false statements as to personal character". (*English & Empire Digest, Vol. 32, p. 182, para 2241*).

In *Sarla Devi v. Birendrasingh* (10) a newspaper contained statements : (1) That the workers of the "Hut Symbol" party have been so foolish as to threaten to shoot even Pandit Jawaharlal Nehru, the great leader of the Country ; (ii) that the Praja Socialist Party is by coming to an understanding with the Muslim League, following exactly the footsteps of Mir Jafar, Jaya Chand and Mohammad Ali Jinnah and making common cause with Pakistanis ; and (iii) that to vote for such party was to sell the Country and nothing but treason. The "hut" was the symbol of the Praja Socialist Party. The question was whether these statements related to the personal conduct or character of the candidate who came forward as the Praja Socialist Party candidate. The Court observed (*p. 188, para 59*) –

"Now, examining the statements, we find that the first statement refers to the workers of the 'hut symbol' party and the second to the Praja Socialist Party itself. Any imputation against the workers of a political party, or the political party itself, cannot be taken to be an imputation in relation to the personal character or conduct of a candidate who belongs to that party. In the first place, the alleged false statement is not in relation to any particular candidate, and, secondly, in so far as it is against the workers of a political party or the party itself, which included the candidate, it can best be said to be against the public or political character or conduct of the candidate and not against his personal character or conduct."

In regard to the 3rd statement, the Court held it was not a statement of fact but only an opinion and did not fall under s. 123 (4) of R. P. Act, 1951.

Mr Choksy, for the purpose of his argument, assumed that the statements referred to the petitioner, and stated that if the objection raised by him fails, he was free to contest the matters that are being assumed by him for the purpose of his argument.

It would appear from the petition that the alleged statements in paragraphs 4 (A) and 4 (C) were uttered at one and the same public meeting held at Malwathuhiripitiya, and in the course of the same speech. The petitioner has however sought to split it up into two statements and converted them into two separate corrupt practices. I shall, therefore, consider paragraphs 4 (A) and 4 (C) together.

The reference is to the petitioner as belonging to an opposition political party, and that he and some members of the opposition political parties were taken into custody after the Presidential Election and the Referendum, as they had plans to create disturbances in the Country. Much the same thing is said in paragraph 4B. The petitioner is described as a Naxalite. He is referred to as a candidate for the Sri Lanka Freedom Party, and that he, with some others, at public political meetings in support of Mr. Kobbekaduwa's candidature, spoke and made certain statements as to what they would do to the incumbent of the office of President, in case Mr Kobbekaduwa was elected President. There is a reference to a police inquiry that was initiated to find out why such statements were made and that the petitioner was taken into custody for the purpose of the inquiry

There is no reference to the petitioner as a private individual ; the reference to him and his associates is as politicians and what was said was no more than an account of what these persons said at public political meetings and what they planned to do as politicians. The disturbances planned by them were political disturbances and the statements uttered relate to a political assasination. It is a comment as to their political conduct and not as to their personal conduct ; of their public and not of personal acts.

If to label a candidate as a communist, even if it is false, is not a reference to his personal character and conduct, I fail to see how to call a candidate a Naxalite, relates to his personal character and conduct.

I uphold the objection that the petition does not disclose a corrupt practice within the meaning of s. 58 (1) (*d*) of the Elections Order-in-Council, 1946. The three charges set out in the petition are all laid under s. 58 (1) (*d*), I dismiss the petition on this ground also.

I finally come to the objection that the petition is not accompanied by a proper and adequate affidavit, and the petitioner has therefore failed to comply with the mandatory provisions of s. 80B (*d*) of the Elections Order-in-Council, 1946.

The affidavit is filed by the petitioner and in paragraph 2 he states that the "particulars of commission of corrupt practices set out therein are made from my own personal knowledge and observation, or from personal inquires conducted by me in order to ascertain the details of the incident referred to in the petition." The rest of the paragraphs in the affidavit are a word to word repetition of what is contained in the petition.

The affidavit in this case is in terms identical with the affidavit filed by the petitioner in *Election Petition No. 3 of 1983, Mahara.* Both Mr. Choksy and Mr. Senanayake fully argued matters relating to this objection in the latter case, and they said they were adopting the arguments adduced by them and not re-arguing the matter.

In my order in *Election Petition No. 3 of 1983,* I have held –

(1) that though the legislature has failed to prescribe the form of affidavit, an election petition must always be accompanied by an affidavit.

(2) that an affidavit can be one based on personal knowledge or on information and belief, and if the latter, the deponent must disclose the sources of information and the grounds for his belief.

(3) the function of an affidavit is to verify and support the allegations of corrupt practice made in the petition. An affidavit that fails to perform this function, is not an affidavit in the eye of the law.

(4) the facts deposed to may be based partly on knowledge and partly on information and belief, but the deponent must make it clear which facts are true to his knowledge and which of them he verily believed to be correct on the basis of information gathered from others.

(5) that an affidavit that does not comply with these requirements has the result of invalidating the election petition itself and has to be dismissed for non-compliance with s. 80 B (*d*) of the Elections Order-in-Council.

The petitioner does not say which facts in the petition are based on personal knowledge and which of them are based on information. The affidavit is a verbatim reproduction of what is stated in the petition. The words are alleged to have been uttered at two public meetings held at two different places on the same day, to support his opponent's candidature. The petitioner, himself a candidate, could not have attended his rival's meetings. Obviously, then he must have gathered information from others who were present at these meetings. What was the difficulty in disclosing the sources of his information and the grounds for his belief ? The affidavit filed by the petitioner, has failed to perform its function – of verifying and confirming the facts stated in the petition. For reasons I have given in my Order in *Election Petition No. 3 of 1983*. I uphold this objection and dismiss the petition on this further ground also.

I dismiss the Election Petition filed by the petitioner and order him to pay to the 1st respondent Rs. 1,500 as costs of proceedings in this Court.

I thank the Solicitor-General and all Counsel for the assistance given to me in these proceedings.

Petition dismissed.