[IN THE PRIVY COUNCIL]

1953 *Present :* **Lord Normand, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen**

G. S. N. KODAKAN PILLAI, Appellant, *and* P. B. MUDANAYAKE *et al.*, Respondents

PRIVY COUNCIL APPEAL No. 7 OF 1952

S. C. 368—Application for Writ of Certiorari

Citizenship Act, No. 18 of 1948, ss. 4 and 5—Parliamentary Elections Amendment Act, No. 48 of 1949, s. 3, amending Parliamentary Elections Order in Council, 1946, s. 4 (1) (a)—Discriminatory legislation ?—Constitution Order in Council, 1946, s. 29 (2) (b)—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Judicial notice of reports of Parliamentary Commissions—Maxim Omnia praesumuntur rite esse acta*—Applicability to Act of a legislature.*

Sections 4 and 5 of the Citizenship Act, No. 18 of 1948, and section 3 of the Parliamentary Elections Amendment Act, No. 48 of 1949, which amends section 4 (1) (*a*) of the Parliamentary Elections Order in Council, 1946, constitute legislation on citizenship and cannot be said to be legislation making persons of the Indian Tamil community liable to a disability to which persons of other communities are not made liable. They do not, therefore, offend against section 29 (2) (*b*) of the Constitution Order-in-Council, 1946.

Judicial notice may be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Citizenship Act and the Parliamentary Elections Amendment Act were passed.

There may be circumstances in which legislation though framed so as not to offend directly against a constitutional limitation of the power of the legislature may indirectly achieve the same result. In such circumstances, the legislation would be *ultra vires*.

The maxim *omnia praesumuntur rite esse acta* is as applicable to the Act of a legislature as to any other acts and the court will not be astute to attribute to the legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a Statute, which is upon its face *intra vires*, that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.

APPEAL from a judgment of the Supreme Court reported in (*1951*) *53 N. L. R. 25.*

D. N. Pritt, Q.C., with *Frank Gahan, Q.C.*, *S. Canagarayer* and *Sirimevan Amerasinghe*, for the appellant.

Sir Hartley Shawcross, Q.C., with *Sir Frank Soskice, Q.C.*, *Dingle Foot, Walter Jayawardene* and *Biden Ashbrooke*, for the second respondent (Commissioner of Elections).

Cur. adv. vult.

2——J. N. B 26327-1,592 (4/53)

May 11, 1953. [*Delivered by* LORD OAKSEY]—

This is an appeal from the judgment of the Supreme Court of Ceylon dated the 28th day of September, 1951, granting a Mandate in the nature of a Writ of Certiorari 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.

The issue for determination in this appeal is whether the Supreme Court of Ceylon were right in holding that sections 4 and 5 of the Citizenship Act, No. 18 of 1948 (hereinafter referred to as the Citizenship Act), and section 4 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 (hereinafter referred to as the Franchise Act) were valid or whether as contended on behalf of the appellant and as held by the third respondent (hereinafter referred to as the Revising Officer), these sections were made in contravention of section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.

It is convenient to set out here the provisions of section 29 of the Constitution Order-in-Council, sections 4 and 5 of the Citizenship Act and section 4 (1) (*a*) of the Franchise Act.

Ceylon (Constitution and Independence) Order-in-Council, 1946, as amended :—

" 29. (1) Subject to the provisions of the Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall—

(*a*) prohibit or restrict the free exercise of any religion ; or

(*b*) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable ; or

(*c*) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions ; or

(*d*) alter the constitution of any religious body except with the consent of the governing authority of that body : Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

(3) Any law made in contravention of sub-section (2) of this section shall, to the extent of such contravention, be void. "

Citizenship Act, 1948.

" (4) (1) Subject to the other provisions of this Part a person born in Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if—

(*a*) his father was born in Ceylon, or

(*b*) his paternal grandfather and paternal great grandfather were born in Ceylon.

(2) Subject to the other provisions of this Part a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if—

(*a*) his father and paternal grandfather were born in Ceylon ; or

(*b*) his paternal grandfather and paternal great grandfather were born in Ceylon.

(5) (1) Subject to the other provisions of this Part a person born in Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon.

(2) Subject to the other provisions of this Part, a person born outside Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon and if, within one year from the date of birth, the birth is registered in the prescribed manner—

(*a*) at the office of a consular officer of Ceylon in the country of birth, or

(*b*) where there is no such officer, at the appropriate embassy or consulate in that country or at the office of the Minister in Ceylon. "

The Franchise Act as amended in 1950 reads as follows :—

" (4) (1) no person shall be qualified to have his name entered or retained in any register of electors in any year if such person—

(*a*) is not a citizen of Ceylon, or if he is by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to any foreign Power or State which is not a member of the Commonwealth ; "

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 electors for the Ruwanwella electoral district. In a letter annexed to his 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 ; and that his name had been included in the register prepared in the year 1949. His letter also included the following passages :—

" 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 inasmuch 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."

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

"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. I do not own any property in India . . . . I do not own any property in Ceylon either."

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

"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. . . . . I accept the statements of fact made by the claimant before me at this inquiry."

On the 8th March, 1951, the appellant filed a petition of appeal to the Revising Officer praying that the order of the Registering Officer be set aside and that the appellant's name be included in the register of electors.

By an affidavit dated the 15th May, 1951, the appellant deposed (*inter alia*) as follows :—

"9. The vast majority of the present Indian Immigrant population came to Ceylon long after the year 1852 and though 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 members of the Singhalese 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."

The Revising Officer held an inquiry on the 16th, 29th and 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 affidavit dated the 15th May, 1951. The Attorney-General objected *inter alia* to paragraph 9 thereof. He raised, however, no objection to the affidavit 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 Revising Officer 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.

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 but did not contradict the allegations of paragraph 9 of the appellant's affidavit.

On the 2nd July, 1951, the Revising Officer gave judgment holding the Acts in question *ultra vires* on the ground that the Citizenship Act was in no true sense legislation to create the status of Citizenship but was with the Franchise Act part of a legislative plan to reduce the electoral power of the Indian community.

On the 16th July the Attorney-General applied to the Supreme Court of Ceylon for a mandate in the nature of a Writ of *Certiorari* quashing the decision of the Revising Officer.

The appellant tendered three affidavits sworn on the 21st August, 1951, 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 Franchise Act but these affidavits were not admitted by the Supreme Court.

The Supreme Court of Ceylon unanimously granted the application for *certiorari* and quashed the order of the Revising Officer holding firstly that the evidence tendered to them ought not to be admitted and in any event was irrelevant; secondly that a Court should not search among State papers and other political documents for the substance or the true nature and character of an impugned statute without permitting the language of the Statute to speak for itself where such language is clear and unambiguous; and thirdly that the Statutes in question do not upon their faces make the Indian Tamil community liable to any disability to which other communities are not liable.

At their Lordships' Board it was contended on behalf of the appellant that the Citizenship Act and the Franchise Act make persons of the Indian Tamil Community of which the appellant is a member liable to a disability or restriction within the meaning of section 29 (2) (*b*) of the Constitution Order-in-Council and are therefore *ultra vires*.

It was conceded for the appellant that these Acts do not upon their faces discriminate against the Indian Tamil Community but it was argued that they indirectly have that effect since on the evidence before the Court and as was conceded by the Attorney-General a large number of Indian Tamils cannot become citizens of Ceylon because neither their

fathers nor their grandfathers were born in Ceylon. It was further argued for the appellant that the Acts were what was called colourable and that they disclose when their pith and substance or their true character is ascertained the intention of the legislature to do indirectly what admittedly it cannot do directly, namely to make persons of the Indian Tamil Community liable to a disability to which persons of other communities are not made liable.

The appellant's counsel at first submitted that further evidence ought to be admitted as to the effect of the Acts upon the Indian Tamil Community but in reply he expressly withdrew his application to introduce further evidence and no further evidence was referred to.

In these circumstances and in view of the admission before the Revising Officer of the affidavit of the appellant dated the 15th May, 1951, without objection their Lordships do not find it necessary to decide if and how far evidence is admissible of facts which go to show the actual effect of an Act after it has been passed. It was common ground between the parties and is in their Lordships' opinion the correct view that judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed (cf. *Ladore v. Bennett*[1]) and both parties have referred their Lordships to a number of paragraphs in the report of the Soulbury Commission of 1945.

With much of the reasoning of the Supreme Court of Ceylon their Lordships find themselves in entire agreement but they are of opinion that there may be circumstances in which legislation though framed so as not to offend directly against a constitutional limitation of the power of the legislature may indirectly achieve the same result, and that in such circumstances the legislation would be *ultra vires*.

The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships' Board and a legislature must of course be assumed to intend the necessary effect of its statutes. But the maxim *omnia praesumuntur rite esse acta* is at least as applicable to the Act of a legislature as to any other acts and the Court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a Statute which is upon its face *intra vires* that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.

It was argued that sections 4 and 5 of the Citizenship Act made it impossible that the descendants however remote of a person who was unable to attain citizenship himself could ever be able to attain citizenship in Ceylon no matter how long they resided there, but their Lordships' attention was subsequently drawn to the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, by which an Indian Tamil could by an application obtain citizenship by registration and thus protect his descendants, provided he had a certain residential qualification.

[1] *(1939) A. C. 468 p. 477.*

It was suggested on behalf of the appellant that this Act might itself be *ultra vires* as conferring a privilege upon Indian Tamils within section 29 (2) (*c*) of the Constitution Order-in-Council and that therefore it was inadmissible to rebut the inference that the legislature had intended by the Citizenship and Franchise Acts to make Indian Tamils liable to disabilities within the meaning of section 29 (2) (*b*) but their Lordships cannot accept this argument. If there was a legislative plan the plan must be looked at as a whole and when so looked at it is evident in their Lordships' opinion that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the island.

The cases which have been decided upon the British North America Act, 1867, and the Australian Constitution have laid down the principle which their Lordships think is applicable to the present case although it is true that in those cases the question was as to the construction of legislative subjects assigned to the Dominion or Commonwealth Parliaments on the one hand and to the legislatures of the Provinces or States on the other, whereas in the present case the question is as to the construction of a constitutional limitation upon the general sovereign power of the Ceylon legislature to legislate for the peace, order and good government of Ceylon. But in their Lordships' opinion the question for decision in all these cases is in reality the same, namely, what is the pith and substance as it has been called or what is the true character of the legislation which is challenged (see *Attorney-General for Ontario v. Reciprocal Insurers* [1]; and *Prafulla Kumar v. Bank of Commerce Khulna* [2]).

Is it in the present case legislation on citizenship or is it legislation intended to make and making Indian Tamils liable to disabilities to which other communities are not liable ? It is as the Supreme Court observed a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. Standards of literacy, of property, of birth or of residence are as it seems to their Lordships standards which a legislature may think it right to adopt in legislation on citizenship and it is clear that such standards though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people do not create disabilities in a community as such since the community is not bound together as a community by its illiteracy, its poverty or its migratory character but by its race or its religion. The migratory habits of the Indian Tamils (see paragraphs 123 and 203 Soulbury Report) are facts which in their Lordships' opinion are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community.

For all these reasons their Lordships have come to the conclusion that the Citizenship and Franchise Acts are *intra vires* of the Ceylon legislature and they therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

[1] *(1924) A. C. 328–337.*

[2] *(1947) 34 A. I. R. (P. C.) 60.*