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with a Section in Sinhala

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WITH A DIGEST

HEMA H. BASNAYAKE, Q.C.
(Consulting Editor)

G. P. J. KURUKULASURIYA
Advocate of the Supreme Court
(Editor)

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VARUNA BASNAYAKE

Advocates of the Supreme Court
(Asst. Editors)

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INDEX OF NAMES

The Appellants are a body incorporated by the Maradana Mosque Ordinance (Cap. 347) and charged with the administration, *inter alia*, of Zahira College. Zahira College became on the 30th November 1960 an Unaided School, and as such became subject to Sections 6 and 11 of the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960, and afterwards to the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961. On the 11th August 1961 respresentations were made by groups of teachers to the 2nd Respondent that their salaries were not being paid in accordance with the duty imposed on the Appellants by section 6(*i*) of Act No. 5 of 1960, and that fact showed that Appellants were not in a position to satisfy the duty imposed on them by Section 6(*k*) of the same Act. The 2nd Respondent thereupon informed the Appellants on the 11th August 1961 that it had been brought to his notice that they had contravened section 6(*i*), and asked them to show cause why the School should not be taken over for management by the 2nd Respondent. There was no reference to Section 6(*k*), nor were the Appellants informed that a complaint existed that they were not in a position to satisfy the duty imposed by Section 6(*k*).

The Appellants by a letter dated 15th August 1961 showed cause as requested. On the 21st August 1961 the 2nd Respondent informed the Appellants that the school had been taken over under Section 11 of Act No. 5 of 1960 as section 6(*i*) of the Act had been violated. About two months later, the 1st Respondent made a broadcast speech, which was later published as an official paper by the Government, giving the reasons for the take over of the School. The Minister here stated that the letter of the Appellants of the 15th August 1961 clearly indicated that the appellants had been disregarding section 6(*k*), as well as 6(*i*), and that under these circumstances he had no alternative but to order the take over of the School. The Appellants challenged the validity of the order for the take over of the school made on the 21st August 1961 by way of certiorari on a number of grounds. The two grounds adjudicated on by their Lordships were,

(*a*) that in making the order, the Minister was acting in a judicial or quasi-judicial capacity and was under a duty to observe the rules of natural justice; this he failed to do in that he did not afford the appellants an opportunity of answering the charge against them.

(*b*) that the Minister failed to consider whether the school "is being administered in contravention of any of the provisions of this Act," (which were the words of Section 11) which imply an element of continuance in the contravention of the Act as at the date of the order.

Held: That both arguments were entitled to succeed. With regard to the first argument, the Appellants had no notice of any complaint in regard to the contravention of section 6(*k*), and no opportunity of stating their case in regard to this. In making the order, it was established that the Minister was largely influenced by this alleged contravention of which the Appellants had no notice. With regard to the second argument, in making the order the Minister had not considered the right question which was whether the School was presently being administered in contra-

vention of the Act. The Minister should have concerned himself with the present conduct of the School, and not the past. Since he had not considered the right question, he had no jurisdiction to make the order.

Per **Curiam** — When an applicant applies to quash an Order on the ground of a failure of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence.

BOARD OF TRUSTEES OF THE MARADANA MOSQUE *vs.* MAHMUD & ANOTHER 41

Ceylon (Constitution) Order in Council 1946

Ceylon (Constitution) Order-in-Council 1946 — *Ceylon Independence Act* 1947 — *Scope of the powers of Ceylon Parliament — Whether unable to pass laws contrary to fundamental principles of justice — Colonial Laws Validity Act*, 1865 — *Separation of powers — Whether Acts* 1 *of* 1962 *and* 31 *of* 1962 *constitute an interference with the judicial function — Invalidity of legislation interfering with the judicial function.*

The eleven appellants were each convicted of three offences in respect of an abortive coup d'etat on the 27th January 1962. The trial was before three judges of the Supreme Court sitting without a jury, and, apart from the other provisions the criminal law of Ceylon, was affected by the provisions of the Criminal Law (Special Provisions) Act No. 1 of 1962, and the Criminal Law Act No. 31 of 1962, the relevant provisions of which are set out in the opinion of the Board. The appellants were convicted in April 1965, and they appealed from their convictions. It was agreed between the parties at the appeal that if the legislation referred to above, which affected the mode of trial, the offences, the admissibility of evidence, and the sentences, was invalid, the convictions could not be sustained.

The validity of the convictions was attacked before the Board on three main grounds. Firstly, that the Ceylon Parliament was limited by an inability to pass legislation contrary to the fundamental principles of justice. Secondly, that the legislation was invalid inasmuch as it constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which was outside the competence of the legislature and inconsistent with the severance of power between the legislature, the executive and the judiciary which the constitution ordains. Thirdly, that the language of the 1962 Acts did not suffice in the absence of an express provision to that effect to deprive the appellants of the right to a jury which they had acquired previous to the passing of these Acts.

Held: (1) That with reference to the first argument, there was no such restriction on the competence of the Ceylon legislature. The joint effect of the Ceylon (Constitution) Order-in-Council 1946, and the Ceylon Independence Act 1947, was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State.

(2) With reference to the second argument, that under the Constitution of Ceylon there existed a separate power in the judicature which could not be usurped or infringed by the executive or the legislature. That the pith and substance of both the Acts of 1962 referred to above was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of particular individuals; to legalise their imprisonment while awaiting trial; to make admissible their statements inadmissibly obtained during that period; to alter the fundamental law of evidence so as to facilitate their conviction; and to alter *ex post facto* the punishment to be imposed on them. That in the circumstances of the case, it amounted to an interference with the functions of the judiciary, and the legislation was therefore invalid.

In the circumstances, no opinion was expressed with regard to the appellants' third argument.

Per **The Judicial Committee** — (*a*) "These liberating provisions thus incorporated and enlarged the enabling terms of the Act of 1865, and it is clear that the joint effect of the Order-in-Council of 1946 and the Act of 1947 was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State. (See *Ibralebbe* vs. *The Queen* (1964) A.C. 900)."

(*b*) "Section 29(1) of the Constitution says:— 'Subject to the provisions of this Order Parliament shall have power to make laws for the peace order and good government of the Island.' These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature — e.g. by passing an act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried — if in law such usurpation would otherwise be contrary to the Constitution. There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to section 29(4) of the Constitution purports to usurp or infringe the judicial power it is *ultra vires*."

LIYANAGE & OTHERS *vs.* THE QUEEN 1

Sections 15(5) 45 *and* 51(2).

See HABEAS CORPUS 71

Sections 3, 13, 24, 28(1), 29 *and* 55(1)

Doctrine of Ultra vires — "Peace, order and good government" — Effect of Speaker's certificate on Bill — Usurpation of judicial power.

KARIAPPER *vs.* THE CLERK OF THE HOUSE OF REPRESENTATIVES 97

Ceylon Independence Act, 1947

Joint effect of the Ceylon (Constitution) Order-in-Council, 1946, *and the Ceylon Independence Act*, 1947

gives the Ceylon Parliament the full legislative powers of a sovereign independent State.

Ceylon (Parliamentary Elections) Order in Council

Election Petition Inquiry — Right to obtain certified copies of statements made to police by witnesses for purposes of cross-examination — Law applicable to summoning of witnesses and admissibility of evidence in Election cases — Civil Courts (Special Provisions) Act No. 43 of 1961, section 3 —Ceylon (Parliamentary Elections) Order-in-Council, section 78(A)(3).

Held: (1) That there is no legal objection to the issue of certified copies of statements made to the police by some of the witnesses listed to testify against a party to an election petition, when such party needs them for the purpose of cross-examining these witnesses.

(2) That the provisions of section 3 of the Civil Courts (Special Provisions) Act No. 43 of 1961 and those of section 78(1)(3) of the Ceylon (Parliamentary Elections) Order-in-Council justify the view that in matters relating to the summoning of witnesses and the admissibility of evidence, the law applicable to civil trials before a District Court should be followed in a Election Court, rather than the provisions of the Criminal Procedure Code.

Election Petition — Prayer for security and recount of votes and for declaration that candidate who lost be declared duly elected — Successful candidate not made a respondent — Is the petition badly constituted — Ceylon (Parliamentary Elections) Order-in-Council 1946, Third Schedule, rules 8, 9 and 29 (1).

The petitioner in an election petition, to which only the Returning officer had been made respondent prayed:

(*a*) for a scrutiny in terms of Section 80(b) of the Ceylon (Parliamentary Elections) Order-in Council 1946.

(*b*) for a recount.

(*c*) for a declaration that if either of these showed that the petitioner had polled a majority of the lawful votes, that he be duly elected.

The successful candidate at the election was not made a party to the petition.

Held: (1) That as the successful candidate who is the party vitally interested had not been made a respondent, the petition was badly constituted and should be dismissed.

(2) That an amendment to an election petition is permitted only within the time allowed by law and the Court has no power to add a respondent after this time has lapsed.

(3) That the form of the petition and the rules set out in the Third Schedule to the Ceylon (Parliamentary Elections) Order-in-Council, 1946, also clearly contemplate that a successful candidate should be made a respondent when a declaration is sought that the candidate who lost should be declared duly elected.

Per **Tambiah, J.** — "A clear distinction should be drawn between a recount and a scrutiny. A recount is only ordered when there has been no count according to law and a scrutiny is granted when as a result of bribery, impersonation, etc., a winning candidate has not obtained the votes he is entitled to in law."

Citizenship

Different from "race"

Citizenship Act, No. 18 of 1948, sections 12, 12(4) and 12(6) — Indian citizen marrying Ceylon citizen by descent — Application for registration as citizen of Ceylon — Refusal — Unsuccessful appeal to Minister — Application for Writ of Certiorari and Mandamus— Right to question Minister's decision — Applicability of Universal Declaration of Human Rights.

The petitioner, an Indian citizen came to Ceylon in November, 1958 and in January, 1959 married a citizen of Ceylon by descent. In 1960 she applied for registration as a citizen of Ceylon in terms of Section 12 of the Citizenship Act (Cap. 349).

This application having been disallowed by the Ministry of Defence and External Affairs, her husband appealed to the Minister concerned and on 16/4/64 he was informed that the decision was taken after careful consideration for giving effect to Government policy and that it could not be altered. Thereupon this application for Certiorari and Mandamus was filed.

It was contended in support of the application,

(*a*) that the failure to state the reasons for the Minister's said refusal was contrary to natural justice.

(*b*) that the reason stated viz. that it was giving effect to Government policy was bad as that concept was not the same as public interest.

(*c*) that the provisions of Section 12(6) of the Citizenship Act were unconstitutional.

(*d*) that the said refusal was in breach of the Universal Declaration of Human Rights.

Held: (1) That in view of sub-sections 4 and 6 of Section 12 of the Citizenship Act it was not necessary for the Minister to give reasons for refusing the said application.

(1) That there does not appear to be any conflict between the concepts of Government policy and public interest. The policy of the Government would presumably always be in accordance with the public interest.

(3) That the Parliament has the power to enact a Statute which contains a provision such as Section 12(6).

(4) That while the Universal Declaration of Human Rights is an instrument of the highest moral authority, it has no binding force as it is not a legal instrument forming part of the Law of Ceylon.

Civic Disabilities (Special Provisions) Act

Mandamus — Does not lie against servant or agent of the Crown.

Appropriation Act — Does not create rights or impose legal duties — Payment of allowances to Members of Parliament — No legal duty imposed on Clerk to the House.

Ceylon Constitution — Doctrine of "ultra vires" — Effect of Speaker's Certificate — "Peace Order and Good Government" — Usurpation of Judicial Power — Doctrine of amendment by subsequent inconsistent enactment.

Civic Disabilities (Special Provisions) Act No. 14 of 1965, Sections 5, 7, 10 — Ceylon (Constitution) Order-in-Council 1946, Sections, 3, 13, 24, 28(1), 29, 55(1) — Appropriation Act No. 7 of 1965, Section 2 — Criminal Law (Special Provisions) Act No. 1 of 1962 — Criminal Law Act No. 31 of 1962 — Bribery Act No. 11 of 1954 — Bribery (Amendments) Act No. 40 of 1958.

Interpretation of Statutes — Expressio unius exclusio alterius.

The Petitioner was elected to the House of Representatives from the Kalmunai Electoral District at the General Election held in March 1965. Four years previously, in 1960, a Commission of Inquiry appointed by the Governor-General under the Commissions of Inquiry Act to investigate and report upon the prevalence of bribery among members of the Legislature had found that an allegation of bribery made against the Petitioner was proved. On 16th November 1965, the Imposition of Civic Disabilities (Special Provisions) Act — hereinafter referred to as the impugned Act — received the Royal Assent. The object of this Act was to impose civic disabilities on the persons against whom allegations of bribery had been held to have been proved by the Commission of Inquiry. In terms of its provisions, the Petitioner was deemed to have vacated his seat from the date on which the impugned Act came into operation, and he was further disqualified from being elected or appointed to the Legislature for a period of seven years. The Act contained a provision that wherever necessary, it was to be deemed as having amended the Ceylon (Constitution) Order-in-Council 1946. There was also endorsed on the Bill when it was presented for the Royal Assent, the Certificate of the Speaker that two-thirds of the members of the House of Representatives had voted in favour of it.

The Petitioner contended that inasmuch as the Act was *ultra vires* the Ceylon (Constitution) Order-in-Council, he continued to be a Member of Parliament. He therefore applied for a Writ of Mandamus against the Clerk to the House directing him to recognise him as the Member for Kalmunai, and pay him his remuneration and allowances as such member which had not been paid since the end of October 1965.

It was argued on behalf of the Petitioner that:—

1. Though the Act purported to deprive the electors of the Kalmunai Electoral District of the services of the Member of Parliament whom they had chosen and impose on him penalties, such as vacation of the seat and the disqualification from sitting and voting, no Act of Parliament, even by a constitutional amendment, could do this;

2. The Act was not a law contemplated by section 29(4) of the Ceylon Constitution because it was in effect a judgment or an enactment interfering with judicial power and could not be saved even by the Speaker's Certificate;

3. Before this Bill was placed before the House, the Constitution should have been amended by a separate Act which empowered the Legislature to exercise judicial power and to pass Bills of Attainder;

4. The Bill should have been expressly stated to be a Bill for the amendment or repeal of the Constitution and not one for the imposition of civic disabilities.

Held: (*a*) That a provision of any Act bearing the Speaker's Certificate which is inconsistent with a term of the Constitution operates as a repeal by implication.

(*b*) That an amendment of the Constitution made in accordance with section 29(4) becomes a part of the Constitution and is entitled to all the obedience due to any other part of the Constitution.

(*c*) That it is not open to the Supreme Court to say that a law passed by two-thirds of the members of the House of Representatives does not conduce to peace, order and good government. The Court is not at liberty to declare an Act void because it is said to offend against the spirit of the Constitution though that spirit is not expressed in words.

(*d*) That the *ex post facto* nature of the legislation did not affect its validity.

(*e*) That accordingly, the Imposition of Civic Disabilities (Special Provisions) Act No.

14 of 1965 is *intra vires* the Ceylon (Constitution) Order-in-Council 1946.

Held further: (*f*) That the effect of the Appropriation Act was not to give a third party a right to the money authorised by it to be expended for a particular purpose. Accordingly, there is no legal duty on the Clerk to the House to pay the Petitioner his remuneration and allowances.

(*g*) That the Clerk to the House, when he pays Members of Parliament their remuneration and allowances, acts as a servant or agent of the Crown, and Mandamus does not lie against a servant or agent of the Crown to compel him to perform a duty which he owes to the Crown.

Per **G. P. A. Silva, J.** — "I am therefore of the view that the *ex post facto* nature of the legislation does not affect its validity. The fact that this legislation touches a matter which belongs to the field of conduct of members over which the House has full control would tend to reduce the offensive nature, if any, of such legislation."

Civil Courts (Special Provisions) Act No. 43 of 1961

Section 3 — Applicability of to Parliamentary Election trial.

Civil Procedure Code

Section 671 — After a partnership is dissolved, a court cannot appoint a receiver under section 671.

Section 344 — Sale in execution of mortgage—decree—Application by purchaser to set aside sale on ground of misrepresentation — Auctioneer made a party.

Section 189 — Amendment of error in decree — Inherent power of Court.

Sections 5, 40 and 217.

Revision—Powers of Supreme Court.

See under—COURTS ORDINANCE

Colonial Laws Validity Act 1865

See — LIYANAGE & OTHERS *vs.* THE QUEEN .. 1

Constitutional Law

Written Constitution — Separation of powers.

Is delegation of law making powers to Executive valid

See HABEAS CORPUS 71

Constitution—Repeal by implication—Act bearing Speaker's Certificate — Doctrine of ultra vires — "Peace, order and good Government"

Contempt of Court

Contempt of Court — Order by Supreme Court on administrator on 3rd August 1962 to bring all income of the properties forming the estate of the deceased to Court — Subsequent order on 1st April 1963 with consent of administrator directing him to file final accounts on or before 31st October 1963 and bring into Court the income from the properties in his charge — Failure to comply with both orders — Charge of contempt of Court — Courts Ordinance, section 47.

The respondent, the eldest son of the deceased, who died intestate leaving a widow and six children was granted letters of administration on 9.3.53. The widow and three of her children successfully moved the Court for orders revoking the grant of the said letters and appointing the widow in his place as administratrix. The respondent appealed from these orders as well as from a later order refusing stay of execution.

Pending these appeals, on an application by the respondent to the Supreme Court to stay all testamentary proceedings in the District Court and for the advancement of the date of hearing of the said appeals, on 3.8.62 the Supreme Court made order directing

(i) a stay of further action in the District Court

(ii) that all the income of the properties forming the estate of the deceased be brought into Court to the credit of the testamentary case.

The two appeals came up for hearing on 29.3.63 and on 1.4.63 and after argument the orders appealed against were set aside after recording an agreement of Counsel in the following terms:—

"That the appellant who is the present administrator is directed to file a final account together with vouchers and receipts on or before 31.10.63, and that the account be judicially settled thereafter,

Until the final settlement of the accounts the administrator is directed to bring into Court the income from the properties in his charge."

On a motion and affidavit by the petitioner — one of the sons of the deceased — a rule was issued on the respondent to show cause why the latter should not be punished for the offence of contempt of Court for failing to comply with and for disobeying the directions contained in the said two orders.

It was not denied that no payment as directed by the Court was made by the respondent since the first order on 3.8.62. The final accounts were filed only on 28. 5. 64 after obtaining several dates from the District Judge. The respondent in his affidavit admitted that he had Rs. 40,000/- in his hands as administrator and further stated (a) that a sum of Rs. 248,690/- was spent on litigation and other expenses (b) that Rs. 157,022/71 was lost through thefts by the petitioner and two other brothers, who were acquitted in criminal proceedings in that connection.

Held: (1) That the complaint that the respondent is guilty of contempt of Court in respect of the order made on 3.8.62 should not be pursued in view of the fact that the said order was made pending the appeals which were disposed of on 1.4.63 on an order being made of consent; besides the complaint was a stale one, being made two years after the event.

(2) That the aforesaid order of 1.4.63 contains a clear direction by the Supreme Court (not an undertaking between parties which the respondent hoped he would be able to fulfil) to an administrator who is an officer of Court, disobedience to which amounts to a comtempt of Court.

(3) That the words "income from the properties" mentioned in the said consent order of 1.4.63 should be understood to mean the net income from the properties after deducting the expenses of production thereof. They could not mean that the expenses of duly administering the estate were to be deducted from the gross income without an order of Court.

(4) That as the respondent had failed to bring into Court the net income of the properties, and as he had failed to deposit in Court at least the sum of Rs. 40,000/- admittedly in his hand his conduct amounted to a wilful disobedience of the direction given by this Court and therefore he was guilty of the offence of contempt of Court.

ARUMUGASAMY *vs.* KATHIRKAMANPILLAI .. 67

Contract

Conversion

Co-owners

A co-owner who demolishes a fence erected by another co-owner on co-owned property cannot be convicted of the offence of mischief.

Court of Criminal Appeal Decisions

Court of Criminal Appeal — Charges of unlawful assembly, murder and attempted murder, common intention — Five accused — One accused acquitted — Effect on convictions of others — No misdirection — Verdict not unreasonable — Only one eye-witness — Indivisibility of credibility — Limits of such principle — Identity of fifth man — Surprise — Whether new case set up — No misdirection on common intention — Prosecution failing to call witness — Presumption drawn under Evidence Ordinance (Cap. 14), section 114(f) — Penal Code, sections 32, 140, 146, 296, 300.

The four appellants and one D. S. were indicted on 15 charges; charge 1 that they were the members of an unlawful assemly, the common object of which was to cause hurt to one E. Charges 2 to 8 were based on an imputation of vicarious criminal liability for the acts of one or more members of that unlawful assembly in killing two persons, C. and T, and attempting to kill five persons. Charges 9 to 15 were against the five accused on an imputation that the said acts of killing or attempts to kill the said persons were done in furtherance of the common intention of all.

The Jury by a verdict of five to two found the four appellants guilty on all the charges, and D.S. the fifth accused not guilty of any offence.

Apart from the medical evidence, the evidence of the Government Analyst and Police and other formal evidence, the case of the Crown rested on the sole testimony of a single eye-witness, Irene Rodrigo, the mistress of E. At the trial she purported to identify all five accused as having taken part in the incident, and as having had weapons (first four accused, guns, and the fifth accused, a revolver) in their hands, with the help of bright electric light at the junction where the incident was alleged to have taken place at about 11.30 p.m. She also described the entire incident.

In her evidence she stated that while the firing was going on, the 5th accused D.S. who was a driver employed under the 2nd accused was seen firing three or four times shaking the pistol. In her statement to the Police on the same night (4D3), she had stated that she "did not know the name of the person who fired two or three shots with a pistol," and had described that man as a driver who lived at Katubedde Junction — not even as a driver employed under the 2nd accused.

The trial Judge directed the Jury as follows:—

"Then gentlemen, in regard to these people she says that she knew them; she knew them by name;

but she says in regard to the 5th accused, she knew the man, but she had forgotten his name. Now there, gentlemen, comment has been very legitimately made by the defence, 'Well, in that case why did she not say to the police I know the man, but I have forgotten his name....."

"If, in view of that discrepancy, you think that it was not the 5th accused that she referred to at that time, but some other man, and that later she has brought in the 5th accused saying that it was Podda's (2nd accused's) driver, then, the benefit of that doubt must be given to the 5th accused that she has not correctly identified, and .....if she has made you to come to the conclusion with certainty that she has not correctly identified; I mean it is not just a question of giving the benefit of the doubt to the 5th accused, but you are certain in your mind then you must see the impression on your mind in regard to the other accused; whether you believe her evidence or not."

The main ground of appeal relied on by counsel or all four appellants was that the verdict on the 1st to 5th charges (the unlawful assembly charges) was unreasonable in the light of the acquittal of the fifth accused.

Held: (1) That in view of this direction, the Jury's verdict could fairly be taken as indicating that they merely entertained a reasonable doubt about the identity, but not about the presence, of a fifth man.

The trial Judge further directed the Jury as follows:

"If you think that she did not know the assailants, or if you think that she never saw the assailants because they never got out of the car, then you will remember, if that is your opinion, that you are disbelieving Irene; or in your consideration of the evidence you come to the conclusion that that is possible, then there is no use going further, for then Irene has told a false story in the box."

Later he said: "If Irene's evidence has satisfied you that the 1st, 2nd, 3rd and 4th and another man were there, because if you have doubts in view of Irene earlier having said that it was a man she knows but she did not give the name of the man, or that it was Podda's driver — though she said it was a driver — if that creates a doubt in your mind with regard to the 5th accused, then the 5th accused is out. If you accept Irene's evidence that these five people were there, or that the 1st, 2nd, 3rd, 4th accused and another man were there, then..... we have to consider the Crown charge that there was an unlawful assembly." The Judge also directed the Jury that Irene had never swerved from her position that there were five persons.

Held: (2) (*a*) That the said directions were not unfair in the circumstances, since the Crown had to prove the existence of the unlawful assembly and the identification of the members thereof;

(*b*) That it was not correct to state that the Judge was setting up a new case altogether from that which the prosecution alleged and the defence had to meet.

(3) That in returning the verdicts on the first charges, the Jury were undeniably satisfied that there were five persons, four of whom were the four appellants, and in the light of the directions given by the Judge, it was not permissible to infer that the Jury considered Irene's evidence in respect of her identification of the 5th accused to be false, and the high probability was that they concluded that she was merely mistaken in regard to the identity of the fifth man.

(4) That there was no substance in the argument that the defence was taken by surprise by a case of an allegation of unlawful assembly composed of the appellants and an unidentified man being sprung upon it for the first time during the summing-up of the trial Judge. So long as the Crown was able to establish the presence of the requisite number of persons with a common object, the unlawful assembly was complete. All that was thereafter necessary was identification of those proved to be present.

(5) That while it was true that a doubt in respect of the presence of a named man cannot amount to proof beyond reasonable doubt of the presence of an unnamed man, the verdict in the light of the directions given to the Jury meant that the Jury was quite satisfied that five persons were present doing the acts attributed to them by Irene.

(6) That in directing the Jury on the charges based on common intention, the trial Judge had placed the burden on the prosecution at the highest possible level, and the verdict showed that the Jury was satisfied that the appellants had agreed to kill. The directions were neither inadequate nor unfair.

With regard to the omission to call the witness Gilbert and or other similar witnesses who were present at the time of the shooting, the trial Judge directed as follows: ".....you may infer that the Crown did not call the others because they are not in position to speak to the assailants. You may infer that they are witnesses who do not help the prosecution case.....I think the simple point for you to decide is this: do you accept the testimony of Irene. If you are doubting the evidence of Irene, then you must acquit the accused." It was submitted on behalf of the appellants that the directions to the jury on this point were wrong and contrary to the presumption that could have been drawn under section 114(f) of the Evidence Ordinance.

Held: (7) That the direction put the matter as favourably as possible to the defence.

Per **T. S. Fernando, J.** — "The remark that credibility of witness could not be treated as divisible came to be made in the circumstance related above. We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly in this country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a

person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witness. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true. In the instant case, in the light of the directions given by the trial judge, it is, in our opinion, not permissible to infer that the jury considered Irene's evidence in respect of her identification of the 5th accused to be false."

Court of Criminal Appeal — Misdirection — Burden of proof on prosecution — Evidence of prosecution witnesses uncontradicted by accused — Does this lessen burden on prosecution — Whether duty cast on accused to give evidence on their own behalf in every case — Evidence Ordinance, sections 101, 155.

Five accused were charged in this case with being members of an unlawful assembly and attempting *inter alia* to commit murder in prosecution of its common object. They were also indicted on a charge of attempted murder on the basis that they commited a criminal act in furtherance of the common intention of all.

In the course of his charge, the learned Trial Judge directed the jury as follows:—

".....I want you to bear in mind that in view of the assessment of innocence there is no duty cast on an accused person to give evidence. He can remain silent and the prosecution must prove the guilt of each accused beyond reasonable doubt. But where you have a case where evidence is given which implicates an accused, then when you come to assess that evidence you could take into consideration the fact that there is no evidence given by the accused person contradicting such evidence. On that question then of credibility of the prosecution witness you have their evidence. You have no evidence which contradicts it, given by the persons whom they accuse. You can take that into consideration in assessing the credibility of the prosecution witness Ran Banda and Mudiyanse who say 'We saw these people there. They attacked us.'When you come to decide whether you are going to believe them or not you can ask yourselves of the fact — the fact that none of the accused gave evidence —and of your assessment of the evidence given by these 2 persons."

Held: (1) That the learned trial Judge's direction was wrong in law. The fact that an accused person elects not to give evidence does not render the prosecution evidence more credible on that account and is not a factor to be taken into consideration in evaluating such evidence.

(2) That therefore the conviction must be quashed as it could not be said that the jury were not influenced by this wrong direction in arriving at a verdict.

Criminal Procedure Code, section 121 — *Statements in first information to police not testified to orally in Court — Improper admission of hearsay evidence — Duty of Appeal Court.*

At a trial for murder, it transpired that a witness, *M.*, (who was the wife of the deceased) was the person who carried the first information to the police of the injuries caused to her husband. Her complaint as recorded by the police was produced in document form, in terms of section 121 of the Criminal Procedure Code, as part of the case for the Crown .This complaint was read out to the jury and it contained, *inter alia*, the following statement:—

"He (the appellant) has on several occasions threatened to shoot us."

M. did not in her evidence refer to any previous threat either to shoot or injure in any other way.

Held: (1) That the evidence of previous threats by the appellant to shoot was hearsay and, therefore, inadmissible.

(2) That where such evidence is wrongly admitted the Appeal Court would quash the conviction unless the Crown was able to satisfy it that a reasonable jury, had they been properly directed, would without doubt have convicted the appellant.

Court of Criminal Appeal —Plea of guilt — Culpable homicide and attempt to commit culpable homicide not amounting to murder — Sudden fight — Principles and basis of punishment — Sentence manifestly excessive — Criminal Procedure Code, section 325(2).

In an Assize trial for murder and attempted murder, before the close of the prosecution case, the trial Judge accepted on behalf of the three appellants a plea of guilty of culpable homicide not amounting to murder and of attempting to commit culpable homicide not amounting to murder on the basis that the injuries were inflicted in the course of a sudden fight. The defence had suggested that the appellants went to the assistance of their mother, who had a number of injuries.

The trial Judge sentenced the first and second appellants to 10 years' and 2 years' rigorous imprisonment on the two counts, the sentences to run consecutively and the third appellant to 10 years rigorous imprisonment on the first count. In imposing the sentence, the trial Judge stated that he was satisfied that the appellants were lying in wait to attack the deceased when he was returning from his brother's house, and characterised the causing of the injuries as a cowardly attack.

Held: (1) That it is contrary to principle to accept a plea on one basis and to impose punishment on another, and that the basis on which the plea was accepted must be regarded as the basis also of the appropriate sentence in respect of the offence.

(2) That the sentences imposed in this case were not only contrary to principle, but also manifestly excessive.

(3) That the following sentences should be imposed:—

(*a*) First and second appellants — 4 years' rigorous imprisonment on the first count and 2 years' rigorous imprisonment on the second count, the sentences to run concurrently;

(*b*) Third appellant (who only had a club which evidentl he had not used) — to enter into a bond in a sum of Rs. 500/- with one surety, to be of good behaviour for 2 years, in terms of section 325(2) of the Criminal Procedure Code.

QUEEN *vs.* PREMADASA & OTHERS 76

Courts Ordinance

Sole Testamentary jurisdiction, application for — Minor heirs — Appointment of "guardian-ad litem" — Which District Court has jurisdiction — Courts Ordinance section 69(1).

Held: That where the minor heirs and the property concerned are within the jurisdiction of the District Court of Colombo, a petitioner in an application for conferment of sole testamentary jurisdiction on the said District Court is entitled under section 69(1) of the Courts Ordinance to make an application to that Court for the purpose of appointing a *guardian-ad-litem* in respect of such minors.

In re RATHINANAYAGAM 15

Stay of proceedings — Interlocutory appeal — Refusal by trial judge to stay execution of order allowing evidence on commission — Power of Supreme Court to act in revision — Likely delay in disposal of appeal irrelevant consideration.

Held: (1) That where a District Judge makes orders refusing an application for stay of proceedings pending an interlocutory appeal, section 73 of the Courts Ordinance does not limit in any way the powers of the Supreme Court to revise such an order.

(2) That in an application for stay of proceedings pending an interlocutory appeal, the likely delay in the disposal of the appeal is not a factor that can override the possiblity that the appeal itself, if successful, would be rendered nugatory.

LEBBAYTHAMBY & OTHERS *vs.* ATTORNEY GENERAL & ANOTHER 53

Section 47 — *See under*—CONTEMPT OF COURT

Section 62 — KANDIAH *vs.* POORANESWARY .. 81

Criminal Law

Creation of new offence "Ex post facto" — Validity

LIYANAGE & OTHERS *vs.* THE QUEEN 1

When can Magistrate impose whipping — Maximum sentence Magistrate can impose when convicting a person on several counts.

FLOCKS *vs.* INSPECTOR OF POLICE, MIRIHANA .. 39

Charge of theft and retaining stolen property — Accused cannot be convicted of both charges.

NAGAMUTTU *vs.* INSPECTOR OF POLICE, GAMPOLA .. 56

Criminal Law Act No. 31 of 1962

Invalid.

LIYANAGE & OTHERS *vs.* THE QUEEN 1

See also—KARIAPPER *vs.* THE CLERK OF THE HOUSE OF REPRESENTATIVES 97

Criminal Law (Special Provisions) Act No. 1 of 1962

Invalid.

LIYANAGE & OTHERS *vs.* THE QUEEN 1

See also — KARIAPPER *vs.* THE CLERK OF THE HOUSE OF REPRESENTATIVES 97

Criminal Procedure Code

Sections 298 *and* 299 — *Application of — To maintenance proceedings.*

MISSI NONA *vs.* WEERASURIYA 12

Section 121—SIRINIYAL *vs.* THE QUEEN .. 37

Section 121—QUEEN *vs.* SELLIAH & ANOTHER .. 79

Sections 15 *and* 17 — *Sentence of whipping — When can a Magistrate inflict it — Maximum sentence a Magistrate is empowered to impose when convicting a person on several counts.*

Held: (1) That a Magistrate has jurisdiction to inflict a sentence of whipping only in the case of a person who is under 16 years of age.

(2) That under section 17 of the Criminal Procedure Code a Magistrate could sentence an accused con-

victed on several counts to a maximum of only 12 months.

Decree

Decree, amendment of — Ejectment of tenant from premises — Wrong assessment number given through bona fide error — Error partly due to tenant — Writ returned by Fiscal — Application to amend decree allowed — Appeal — Civil Procedure Code, section 189 — Inherent powers of court.

Of consent, decree was entered to eject a tenant from premises No. 25 Old Matale Road, Kandy. When writ issued, the Fiscal's Officer reported that the premises occupied by the tenant was No. 28 and not No. 25. The Landlord, then realising that she had erred in giving the assessment Number which was partly due to her being misled by the description given in an application by the tenant to the Rent Control Board and the failure to dispute in the answer this obvious misdescription in the plaint, moved for an amendment of the decree, which the learned Commissioner allowed. On an appeal by the tenant —

Held: (1) That the error aforesaid did not fall within the ambit of section 189 of the Civil Procedure Code.

(2) That the said erroneous description does not affect the right of the Landlord to execute the decree after it was duly amended by correcting the error. This was an appropriate case for the Court to use its inherent powers to prevent a miscarriage of justice.

Declaratory decrees — Declaration that plaintiff not married to defendant — Action for jactitation of marriage — Jurisdiction of our Courts in respect of such actions — Civil Procedure, Code, sections 217, 40 and 5 — Limits to the jurisdiction of Court to grant a declaratory order — Plaintiff's cause of action in such a case — Application of maxim "ut magis valeat quam pereat" — Courts Ordinance, section 62.

The plaintiff sued the defendant for a declaration that he was not married to the defendant, and for an order restraining the defendant from boasting that she was married to the plaintiff. The trial Judge held on the evidence that the plaintiff and the defendant were in fact married on the 21st January 1959 according to the custom applicable to the Mukkuwa community to which both parties belonged and dismissed the plaintiff's action.

Held: (1) That with regard to the action to prevent the defendant boasting that she was married to the plaintiff (action for jactitation of marriage), such an action was one within matrimonial jurisdiction, and no authority had been cited which might indicate that the Courts in Holland or Ceylon had entertained such an action.

(2) That the Court had jurisdiction to grant the declaration that the plaintiff was an unmarried man. The cause of action in such a case in terms of section 5 of the Civil Procedure Code was the defendant's denial of the plaintiff's status, which would include the denial of the rights of the plaintiff arising from the status denied. In granting such a declaration, however, the Court would not order either party to perform conjugal duties.

(3) That the power of a Court to grant a declaration would be subject to the following conditions:—

(*a*) The Court would have a discretion in deciding whether to grant the declaration or not.

(*b*) The declaratory jurisdiction could be invoked for the determination of legal disputes, but not for disputes of a moral, social or political character.

(*c*) Theoretical issues could not be determined in such an action.

(*d*) The declaratory jurisdiction could not be invoked to determine the lawfulness of a proposed action, or the rights which might be claimed or denied if and when a person takes such proposed action.

(*e*) Nor could it be invoked if the declaration could have no practical consequences.

(4) That none of these limitations, however, could be invoked in the present case to defeat the plaintiff's action. The Court therefore had jurisdiction to grant the declaration asked for.

(5) That on the evidence the trial judge had erred in finding that the parties had on the 21st January 1959 gone through a ceremony of marriage according to the custom applicable to the parties, or that the plaintiff had intended to contract a marriage with the defendant on that day.

Declaratory Decrees

See under — DECREE 81

Election Petitions

See under — CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCIL

Evidence

Evidence — Charges of obstruction of public servants and escape from lawful custody — Proof of lawful discharge of duties — Investigation consequent to first complaint — Oral evidence inadmissible — First complaint must be produced — Omission fatal to convictions — Criminal Procedure Code, section 121 *— Penal Code, sections* 183 *and* 220*A — Evidence Ordinance, section* 91.

The first appellant was charged with offences, *inter alia*, under Sections 183 and 220A of the Penal Code, and the second appellant with two offences under the said sections. All these charges depended on proof that the police officers who received injuries were acting in the lawful discharge of their public functions. The prosecution alleged that the injuries were received when they went to investigate into a complaint made by a man named H to one of the police officers.

Held: That no evidence of the nature of the complaint made by H could have been led in Court other than through the document itself, that is, the complaint made in terms of section 121(1) of the Criminal Procedure Code, and that oral evidence of the contents of the document was wrongly admitted in the absence of the document and was fatal to the convictions of those charges.

Evidence Ordinance

Excise Ordinance

Charge of possessing fermented toddy against husband and wife — Acquittal of wife and conviction of husband — Absence of husband from home at time of raid.

Held: That the mere fact that a husband is the chief occupant of the house, without any other evidence against him, cannot support the conviction of the husband for the possession of an excisable article.

Execution

Stay of proceedings — Refusal by trial judge — Powers of Supreme Court to act in revision.

Fideicommissum

Fideicommissum — Deed of Gift — Prohibition against alienation — Clause vesting the property in heirs executors administrators and assigns of the donees — Validity of fideicommissum.

By deed P 3, E gifted to the three children of his son M certain interests in a land subject to a life-interest reserved for M and his wife.

After prohibiting the donees from alienating, the deed proceeded to state that "the four portions of land hereby gifted shall vest in the above named three children of my said son and in the children that may be born to him in the future and their heirs, executors administrators and assigns....."

Held: That the deed P 3 did not create a fideicommissum as the persons who were to take in the event of a breach of the prohibition were not clearly designated.

Habeas Corpus

Public Security Ordinance (*Cap.* 40), *section* 5 — *Validity of Ordinance and Regulations made thereunder — Whether delegation of law making powers to Executive valid—Ceylon* (*Constitution*) *Order-in-Council* (*Cap.* 378), *sections* 15(5), 45, 51(2) — *Emergency* (*Miscellaneous Provisions and Powers*) *Regulations — Powers of detention and right to regulate conditions under which persons detained given by Regulation* 26 *— Whether duties other than those referred to in section* 51(2) *of Constitution can be imposed on a Permanent Secretary to a Ministry.*

Writs of Habeas Corpus and Mandamus — Application by brother of person detained under Emergency Regulations — Whether petitioner has status to make an application for a Mandamus — Powers of Court to issue Writ of Habeas Corpus during state of Public Emergency — Regulation 26(1) *of Emergency* (*Miscellaneous Provisions and Powers*) *Regulations.*

The petitioner filed this application for writs of Habeas Corpus and Mandamus, praying for the custody of his brother the 3rd respondent, a captain in the Regular Army, who had been arrested on orders issued by the 1st respondent under regulation 26(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, made by the Governor General under section 5 of the Public Security Ordinance. It was contended for the petitioner (*a*) that the Public Security Ordinance under which the Governor General had purported to make the regulations relevant to the 3rd respondent's arrest and detention was

ultra vires the Constitution; (*b*) that the regulations in question imposed duties upon the Permanent Secretary to the Ministry of Defence and External Affairs which were not contemplated in and in conflict with duties imposed by section 51(2) of the Constitution; (*c*) that a mandamus lay against the 2nd respondent Chairman of the Advisory Committee appointed under regulation 26(4) to inquire into the objections filed by the 3rd respondent; and (*d*) that the 3rd respondent had been denied the rights and privileges to which he was entitled under the Prisons Ordinance (Cap. 54).

Held: (i) That the Public Security Ordinance was *intra vires* the Constitution and so also the Regulations made thereunder, for the reason that Parliament by virtue of sections 2(3) and 5(3) of that Ordinance and 15(3) of the Constitution retained its power and control over the Executive even during a State of Emergency when regulations such as those under the Public Security Ordinance can be made by the Executive.

(ii) That the power of the Court to issue a writ of habeas corpus was, during a state of emergency taken away by Regulation 26(10).

(iii) That section 51(2) of the Constitution empowering each Permanent Secretary to exercise supervision over the department or departments in the charge of his Minister is not exhaustive of the powers and duties which may be conferred on a Permanent Secretary, and additional powers not in conflict with section 51(2) may be conferred.

(iv) That no mandamus would lie because there is nothing to suggest that the 2nd respondent has failed or will fail to do his duty at the appropriate time, apart from the fact that as no duty was owed the petitioner by the 2nd respondent, the petitioner had no status to make the application.

(v) That regulation 26(3) empowers the Inspector General of Police with the sole authority to issue instructions in regard to the conditions under which prisoners are held in detention and it is not for the Courts to adjudicate upon such measures as are taken under regulation 26(3).

Per **Sansoni, C.J.**—"One thing is essential for the validity of a delegation of its law making power, and that is that it should not abandon its legal authority or its control over the Executive Authority to which it has delegated that power. It must not try to transform the Executive into a parallel legislature and abdicate its function. There is nothing in the Public Security Ordinance to indicate that Parliament has adbicated its legislative authority."

Custody of Minor — To what extent is a child's consent relevant in an application for custody.

Income Tax

Income Tax Ordinance, section 85(1) — *Tax in default deemed to be a fine — Not obligatory on Magistrate to impose term of imprisonment in default of payment of fine — Criminal Procedure Code, section* 312(1).

Held: (1) That it is not obligatory on a Magistrate, in every case where tax in default is deemed by section 85(1) of the Income Tax Ordinance to be a fine, to order a term of imprisonment in default of payment of fine.

(2) That although no appeal lies against an order made in pursuance of section 85(1) of the Ordinance, it is open to the Supreme Court to alter such order in the exercise of its power of revision.

Per **T. S. Fernando, J.** — (*A*) "No question of convicting a person arises where proceedings under section 85 of the Ordinance have been taken, Where sufficient cause has not been shown, the tax in default *shall* be deemed to be a fine imposed by a sentence of the Magistrate on the defaulter for an offence punishable with fine only or not punishable with imprisonment."

(*B*) "This Court does not ordinarily interfere with the exercise of a judicial discretion. But the learned Magistrate, in making the order sought to be revised here, acted on the assumption that he was obliged, at the time of imposition of the fine, also to make an order in respect of imprisonment in default of payment. *De Jong's case* had been cited before him, and Weerasooriya J. had there made the observation that the object of the proceedings under section 85(1) would be defeated if the Magistrate merely makes an order that the defaulter should pay the tax as a fine. The learned Magistrate, therefore acted in the instant

case as if he had no discretion in regard to the question whether imprisonment in default of payment should be ordered or not."

PERERA *vs.* COMMISSIONER OF INLAND REVENUE .. 46

Indian and Pakistani Residence (Citizenship) Act

Section 6(2) (iv) (a) *and* 18 — *Effect of — Distinction between 'race' and 'citizenship.'*

PASANGNA *vs.* REGISTRAR GENERAL & ANOTHER .. 27

Interpretation of Statutes

See under — STATUTES.

Judiciary

Is free from legislative or Executive control.

LIYANAGE & OTHERS *vs.* THE QUEEN 1

Nomination by Minister of Justice — Invalid.

LIYANAGE & OTHERS *vs.* THE QUEEN 1

Jurisdiction

Of Court in respect of action for jactitation of marriage — Limits to jurisdiction of courts to grant declaratory order.

KANDIAH *vs.* POORANESWARY 81

Kandyan Law

Kandyan law — Deed of gift — Use of words "as a gift irrevocable" — Revocability of such deed of gift — Kandyan Law Declaration and Amendment Ordinance (Cap. 59), section 5(1).

A donor gifted lands to his son subject to a *fidei-commissum*. It was submitted on behalf of the appellant that the expression "as a gift irrevocable" used in the deed was merely declaratory of the kind of gift the donor was making, but did not amount to an express renunciation of the statutory right to revoke vested on him by section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance. It was further submitted that the case of *Punchi Banda* vs. *Nagasena* (64 N.L.R. 548) was wrongly decided and should not be followed on this point.

Held: That the use of the words "*as a gift irrevocable*" was sufficient to indicate the gift was meant to be irrevocable and to bring it within section 5(1)(d).

DULLEWE *vs.* DULLEWE & ANOTHER 55

Kandyan Law Declaration & Amendment Ordinance

See under — KANDYAN LAW

Landlord and Tenant

Landlord and tenant — Notice to quit — Validity.

THE tenancy in this case was a monthly tenancy and had commenced on 1st February 1964. Only one calendar month's notice was required by law. The notice given by the landlord was dated 20th August 1964 and requested the tenant to vacate "*within a period of three months from the date hereof.*"

It was submitted on behalf of the defendant-appellant that although the notice gave the tenant three months' time, nevertheless it was not a valid notice as it did not run concurrently with a term of the letting and hiring and expire at the end of such a term. The issue as to whether the notice was valid had been raised by plaintiff at the trial and had been answered in the plaintiff's favour.

Held: That although the notice gave the tenant three month's time to vacate the premises, it did not terminate the tenancy at the end of any calendar month of the tenancy. The notice was therefore not valid and the plaintiff's action must fail.

SOORIYAARATCHI *vs.* KULARATNE 16

Legal Maxims

Ut magis valeat quam pereat.

KANDIAH *vs.* POORANESWARY 97

Expressio unius exclusio alterius.

KARIAPPER *vs.* THE CLERK OF THE HOUSE OF REPRESENTATIVES 9

Legislation

Validity of — Empowering Minister of Justice to nominate Judges of the Supreme Court.

LIYANAGE & OTHERS *vs.* THE QUEEN 5

Parliament of Ceylon has full legislative powers of a sovereign independent state.

LIYANAGE & OTHERS *vs.* THE QUEEN 1

KARIAPPER *vs.* THE CLERK OF THE HOUSE OF REPRESENTATIVES 97

Statute enacting that Minister's order "shall be final and shall not be contested in any court" — Validity.

LEELAWATHIE *vs.* MINISTER OF DEFENCE AND EXTERNAL AFFAIRS 112

Delegation of law making powers to Executive — Validity.

WEERASINGHE *vs.* PERMANENT SECRETARY, MINISTRY OF DEFENCE & EXTERNAL AFFAIRS & ANOTHER .. 71

Magistrate

When can Magistrate order whipping — Maximum sentence Magistrate can impose when convicting a person on several counts.

FLOCKS *vs.* INSPECTOR OF POLICE MIRIHANA .. 39

Magistrates' Court has exclusive jurisdiction to entertain application for maintenance of illegitimate child of Muslim parents.

PITCHAI *vs.* FEENA UMMA 56

Maintenance

Maintenance Ordinance (Cap. 91), sections 13, 14, 15, 16 — Criminal Procedure Code, sections 298, 299 — Oral examination required by section 14 in maintenance proceedings — Condition precedent to issue of summons — Procedure to be followed in recording such evidence.

It was submitted by counsel for the applicant, whose application for maintenance the learned Magistrate had refused, that the case should be sent back for re-trial before another Magistrate as there had been a breach of the mandatory provisions of section 14 of the Manitenance Ordinance. Although oral evidence of the applicant had been recorded prior to issue of summons as r equired by that section, it was submitted that section 299 of the Criminal Procedure Code should have been complied with in regard to such evidence and that the entire proceedings were rendered null and void by such non-compliance.

Held: That although an examination under section 14 of the Maintenance Ordinance is a condition precedent to the issue of summons in proceedings under that Ordinance, it is not necessary that the procedure laid down in section 299 of the Criminal Procedure Code should be followed.

MISSI NONA *vs.* WEERASURIYA 12

In respect of illegitimate child of Muslim parents — Magistrates' Court has exclusive jurisdiction.

PITCHAI *vs.* FEENA UMMA 56

Mandamus

Does not lie against servant or agent of the Crown

KARIAPPER *vs.* THE CLERK OF THE HOUSE OF REPRESENTATIVES 97

Marriage

Action for jactitation of marriage — Jurisdiction of our Courts.

KANDIAH *vs.* POORANESWARY 81

Of minor — Registered without consent of parent or guardian — Validity.

DAYAWATHIE *vs.* GUNARATNE 96

Marriage Registration Ordinance

Marriage Registration Ordinance (Cap. 112), sections 42 and 46 — Marriage of minor registered without consent of parent or guardian — Is the marriage void?

Held: That when the marriage of a minor is registered under the Marriage Registration Ordinance, want of consent of parent or guardian does not make the marriage null and void.

DAYAWATHIE *vs.* GUNARATNE 96

Minors

Custody of minor — Application for, by parents (petitioners) — Parents acceding to request of wife's childless sister (3rd respondent) to bring up child — Petitioners and respondents sharing cares and joys of child's upbringing — Substantial contribution by petitioners to child's welfare — Absence of any indication to renounce parental rights — To what extent is a child's consent relevant in such an application.

Child *D* was the daughter of the petitioner and his wife. At the request of the wife's childless sister the child was given to the latter to be brought up in her home, but without any agreement express or implied to renounce parental rights. For many years, the petitioners and the respondents "together shared the cares and joys of child's upbringing." The child was sent or taken on visits to her parents and brothers and sisters and the parents contributed to the welfare of the child in a substantial manner.

In application by the parents for a writ of habeas corpus in respect of the child against the respondents:

Held: (1) That in the circumstances, it could not be said that the parents ever intended to renounce their parental rights to the child. The father was therefore entitled to its custody.

(2) That the child, not having attained the age of discretion was not entitled in law to consent to her continuance in the custody of others. Her wishes were only relevant to the consideration whether the placing in parental custody would be detrimental to health and morals.

FERNANDO *vs.* FERNANDO & OTHERS 91

Marriage of, registered without consent of parent or guardian — Validity.

DAYAWATHIE *vs.* GUNARATNE 96

Misdirection

See under — Court of Criminal Appeal Decisions.

Mortgage

Mortgage action — Sale in execution of decree — Application by purchaser to set aside sale — Misrepresentation — Purchaser misled regarding size and nature of property — Grant of relief by Court — Whether purchaser entitled to make such application for relief.

Auctioneer made party to proceedings — Whether this permissible — Allegations against such auctioneer — Civil Procedure Code, section 344.

Held: (1) That where purchaser at a sale held in pursuance of a decree in a mortgage action is misled in regard to the size and nature of the property the Court should grant relief to such purchaser in the absence of a positive provision of law which stands in the way of such relief being granted.

(2) That, therefore, the learned trial Judge's order setting aside the sale in the present case should be affirmed.

Held further: (3) That there was no provision of law or judicial decision which precluded the entertainment of the application made by the first respondent (the purchaser of the property) or of the grant of relief sought.

(4) That in the circumstances of the case the fourth respondent (the auctioneer) was properly made a party to these proceedings.

DE SILVA *vs.* DE SILVA & OTHERS 17

Motor Traffic Act

Motor Traffic Act (Cap. 203), *section* 149 — *When it applies.*

Held: That section 149 of the Motor Traffic Act applies where an accident is imminent and when a person fails to take such action as may be necessary to avoid such an accident and not where a collision takes place in trying to avoid pedestrians.

JAYASUNDERA *vs.* SINNIAH 114

Natural Justice

Judicial or quasi-judicial act — Failure to consider principles of natural justice — Certiorari.

BOARD OF TRUSTEES OF THE MARADANA MOSQUE *vs.* MAHMUD AND ANOTHER 41

Non-Direction

See under — CORT OF CRIMINAL APPEAL DECISIONS.

Notice

Notice to quite.

See under — LAND LORD & TENANT 18

Parliament

Validity of Statute empowering Minister of Justice to nominate Judges of the Supreme Court.

LIYANAGE & OTHERS *vs.* THE QUEEN 1

Has full powers of a sovereign independent State.

LIYANAGE & OTHERS *vs.* THE QUEEN 1

Delegation of law making powers to Executive — When possible.

WEERASINGHE *vs.* PERMANENT SECRETARY, MINISTRY OF DEFENCE & EXTERNAL AFFAIRS & ANOTHER .. 71

Payment of allowances to members of — No legal duty imposed on Clerk of the House of Representatives.

KARIAPPER *vs* THE CLERK OF THE HOUSE OF REPRESENTATIVES 97

Partition

Partition Ordinance, No. 10 *of* 1863, *section* 5 — *Notice required thereunder — Is the Commissioner required to state in his report whether or not such notice was given?*

Where on a plea taken by a party to a partition action instituted under the repealed Partition Ordinance, No. 10 of 1863, the District Judge held that the final decree was of no force or avail in law because the Commissioner had failed to give due notice as provided by section 5 of the said Ordinance merely for the reason that the Commissioner's report did not state or indicate that the said notice was given —

Held: That the learned District Judge had misdirected himself in coming to that conclusion. There is no provision of law that requires the Commissioner to state in his report whether or not the said notice was given.

HANIFFA *vs.* SAMSUDEEN 14

Partition action — Addition of parties — Whether summons or notice should issue on such added parties — Discretionary power of trial Judge to add parties

at any stage — Partition Act (*Cap.* 69), *sections* 12, 13, 22 *and* 70(1).

Held: (1) That once a person has been added as a party to a partition action he is entitled to be served with summons and the correct procedure would be to issue summons on him.

(2) That under the Partition Act (Cap. 69), a notice should be issued only on a person who is not a party to the action.

(3) That section 70(1) of the Partition Act empowered a trial Judge to add a party at any time and even before the trial stage of the action.

(4) That, in the present case, as the learned trial Judge had ordered a notice and not summons to issue after an order to add the 7th to 13th defendants as parties, all steps taken since that stage (including the interlocutory decree already entered) should be set aside.

Per **Sansoni, C.J.** — "A party to an action can, of course, waive the service of summons and enter an appearance even before summons has been issued. That is because the rule that service of summons is necessary has been laid down in the interest of the party, and to prevent orders being made behind his back. If he appears before the Court and is permitted to take part in the proceedings, he may be said to have dispensed with the need for complying with the rule."

LEELAWATHIE *vs.* WEERAMAN & OTHERS .. 51

Partnership

Partnership — Whether property partnership property or only co-owned property — Section 20, *Partnership Act*, 1890 *— Power to appoint a receiver in respect of partnership property — Civil Procedure Code, section* 671.

The plaintiffs and the defendants purchased S. Estate as co-owners, and they carried on in partnership *the working of the said estate*, and also the purchase of green leaf and the manufacture and sale of tea from 1st February, 1956. The plaintiffs instituted this action on 8th July, 1959, praying, *inter alia*, that the partnership be dissolved. The case was finally fixed for trial on 17th February, 1964, and on that day Court made order dissolving the partnership, and (despite the opposition of the plaintiffs) appointed a receiver to take charge of the estate. The plaintiffs appealed from that part of the order which appointed a receiver.

Held: (1) That the estate was not partnership property, but was property co-owned by the plaintiffs and the defendant. The ultimate test of what is or is not partnership property must be the agreement of the partners. Persons may be entitled jointly or in common to property, and the same persons may be partners, and yet the property may not be partnership property.

(2) That further, after a partnership is dissolved, a Court cannot appoint a receiver under section 671 of the Civil Procedure Code.

PARANIRUPASINGHAM & ANOTHER *vs.* RAMANATHAN CHETTIAR 10

Penal Code

Sections 32, 140, 146, 296 *and* 300.

APPUHAMY & OTHERS *vs.* THE QUEEN.. .. 20

Sections 183 *and* 220A.

THE QUEEN *vs.* SELLIAH & ANOTHER 79

Section 409 *— Co-owner demolishing fence erected by another co-owner on co-owned property — Is he guilty of the offence of mischief.*

PEIRIS *vs.* THOMAS 95

Permanent Secretary

Duties imposed on, by Emergency Regulations — Whether in conflict with section 51(2) *of Constitution.*

WEERASINGHE *vs.* PERMANENT SECRETARY, MINISTRY OF HOME AFFAIRS & ANOTHER 71

Possessory Action

Possessory action — Meaning of the words "ut dominus".

Held: That the learned Judge had misinterpreted the expression "*ut dominus*" to mean "as sole owner". A possessory decree is not based on sole ownership the words "*ut dominus*" in the context ownership. The words means "in his own right".

FERNANDO *vs.* FERNANDO 40

Principal and Agent

Agency — Actual authority of agent to indorse cheques made in favour of principal — Conversion of cheques by agent by payment into his bank account — Action by principal against Bank for conversion.

The Respondents were suppliers of heavy electrical machinery, who appointed the firm of Helios Heavy Electrical Engineering Contracting Co., Private Ltd., as their general agents in Australia for the negotiation and execution of contracts for the supply and installation of electrical machinery. In pursuance of such a contract entered into between the Respondents and Snowy Mountains Hydro-Electric Authority, the Authority handed over to Helios Ltd., a number of cheques made out in favour of the Respondents. Helios Ltd. indorsed the cheques and paid them into its account with the Appellants but did not remit the proceeds of fifteen of the cheques abroad to the Respondents. The Respondents sued the Appellants in conversion in respect of these cheques, and the trial judge held in their favour. In appeal —

Held: That as Helios Ltd. was, *inter alia*, operating the Australian office of the Respondents, acting as importer and holder of the import licences for the equipment supplied by the Respondents, arranging and paying for expenses connected with the performance of the Respondents' contracts, was the holder of a "full credential" form the Respondents to act for them in negotiating contracts, and had of necessity

to devise some method of paying the Respondents in Belgium in respect of payments made to the Respondents in Australia in Australian currency, Helios Ltd., had implied actual authority to endorse the cheques. The Appellants were therefore not liable in conversion.

Privy Council Decisions

Prisons Ordinance

Public Security Ordinance

Validity of Ordinance and regulations made thereunder.

Registration of Births and Deaths

Registration of Births and Deaths Act (Cap. 110) section 10 — Application for alteration of particulars regarding father's and mother's race from "Indian Tamil" in Birth Register under section 28(i)(b) — Applicant, a registered citizen of Ceylon under Indian and Pakistani Residents (Citizenship) Act (Cap. 350) — Effect of sections 6(2)(iv) (a) and 18 — Distinction between "race" and "citizenship."

Interpretation of Statutes — Schedule to Enactment —Preamble — Their importance in interpretation.

The petitioner-appellant applied in terms of section 28(1)(b) of the Births and Deaths Registration Act (Cap. 110) for the alteration of two entries as to the petitioner's race and that of his wife from, "Indian Tamil" to "Citizen of Ceylon Tamil". These entries had been made in cages (4) and (5) respectively in the register of Births in respect of the registration of the birth of the petitioner's son born on 30.9.1960 as required by section 10(1) of the said Act and Form A referred to therein. To the particulars in Form A regarding "race" in each of the cages 4 and 5 is attached a footnote containing the following words:—

> "Tamils or Moors must be described as Ceylon Tamils or Moors or Indian Tamils, or Moors as the case may be."

The evidence led before the District Court showed:

(*a*) that the petioner, his wife and four children were on 18.3.1954 registered as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act.

(*b*) That the petitioner and his wife were born in India and they were Indian Tamils by race and born of parents who lived in India, before he obtained citizenship rights in Ceylon.

The learned District Judge upheld the contention of the respondents (The Registrar General and the Provincial Registrar of Births and Deaths) that the acquisition of citizenship rights by any person did not involve a change in his 'race' and refused the application.

An appeal was taken from this order on the ground *inter alia* that by virtue of the provisions of section 18 of the Indian and Pakistani Residents (Citizenship) Act, a person who is registered as a citizen under the Act becomes entitled to the same rights and subject to the same liabilities as any other citizen of Ceylon and therefore the appellant and his wife were Ceylon Tamils on the day of the birth of the son whose registration was in question.

On account of a difference of opinion between the two Judges before whom the appeal was originally argued, the matter was referred to a Bench of three judges under section 38 of the Courts Ordinance.

Held: (1) That it is a rule of interpretation that what is provided in a schedule referred to in a section of an Act is as important as a provision in the Act itself, and would cease to prevail only in the event of a repugnance to a provision in the main Act itself.

(2) That applying this principle, it is imperative that the schedule referred to in Section 10 of the Births and Deaths Registration Act and containing the Form A, which lays down in clear terms the particulars to be entered should be complied with, there being no conflicting provision in the Act itself.

(3) That, therefore the Registrar was correct in making the entry "Indian Tamil" in both cages 4 and 5 aforesaid.

(4) That there is a distinction between 'race' and 'citizenship' and consequently the renunciation of all the rights to the civil and political status referred to in section 6(2)(iv)(a) of the Indian and Pakistani Residents (Citizenship) Act would not preclude an applicant who is registered as a citizen from calling himself thereafter an Indian Tamil by race. This would not prejudicially affect such a person or any member of the family.

Retrospective Legislation

Revision

Order under section 85(1) of Income Tax Ordinance — Not appealable — Exercise of revisionary powers by Supreme Court.

Privy Council Appeal No. 25 *of* 1965

Present: **Lord Macdermott, Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce, Lord Pearson**

DON JOHN FRANCIS DOUGLAS LIYANAGE AND OTHERS *vs.* THE QUEEN*

From
THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ARGUED ON 27TH, 28TH OCTOBER, 1ST, 2ND AND 3RD NOVEMBER, 1965
DELIVERED THE 2ND DECEMBER 1965

Ceylon (Constitution) Order-in-Council 1946—*Ceylon Independence Act* 1947—*Scope of the powers of Ceylon Parliament—Whether unable to pass laws contrary to fundamental principles of justice—Colonial Laws Validity Act*, 1865—*Separation of powers — Whether Acts* 1 *of* 1962 *and* 31 *of* 1962 *constitute an interference with the judicial function —Invalidity of legislation interfering with the judicial function.*

The eleven appellants were each convicted of three offences in respect of an abortive coup d'etat on the 27th January 1962. The trial was before three judges of the Supreme Court sitting without a jury, and, apart from the other provisions the criminal law of Ceylon, was affected by the provisions of the Criminal Law (Special Provisions) Act No. 1 of 1962, and the Criminal Law Act No. 31 of 1962, the relevant provisions of which are set out in the opinion of the Board. The appellants were convicted in April 1965, and they appealed from their convictions. It was agreed between the parties at the appeal that if the legislation referred to above, which affected the mode of trial, the offences, the admissibility of evidence, and the sentences, was invalid, the convictions could not be sustained.

The validity of the convictions was attacked before the Board on three main grounds. Firstly, that the Ceylon Parliament was limited by an inability to pass legislation contrary to the fundamental principles of justice. Secondly, that the legislation was invalid inasmuch as it constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which was outside the competence of the legislature and inconsistent with the severance of power between the legislature, the executive and the judiciary which the constitution ordains. Thirdly, that the language of the 1962 Acts did not suffice in the absence of an express provision to that effect to deprive the appellants of the right to a jury which they had acquired previous to the passing of these Acts.

Held: (1) That with reference to the first argument, there was no such restriction on the competence of the Ceylon legislature. The joint effect of the Ceylon (Constitution) Order-in-Council 1946, and the Ceylon Independence Act 1947, was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State.

(2) With reference to the second argument, that under the Constitution of Ceylon there existed a separate power in the judicature which could not be usurped or infringed by the executive or the legislature. That the pith and substance of both the Acts of 1962 referred to above was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of particular individuals; to legalise their imprisonment while awaiting trial; to make admissible their statements inadmissibly obtained during that period; to alter the fundamental law of evidence so as to facilitate their conviction; and to alter *ex post facto* the punishment to be imposed on them. That in the circumstances of the case, it amounted to an interference with the functions of the judiciary, and the legislation was therefore invalid.

In the circumstances, no opinion was expressed with regard to the appellants' third argument.

Per THE JUDICIAL COMMITTEE:— (*A*) "These liberating provisions thus incorporated and enlarged the enabling terms of the Act of 1865, and it is clear that the joint effect of the Order in Council of 1946 and the Act of 1947 was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State. (See *Ibralebbe* v. *The Queen* (1964) A.C. 900.) "

(*B*) "Section 29(1) of the Constitution says:— 'Subject to the provisions of this Order Parliament shall have power to make laws for the peace order and good government of the Island'. These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature—e.g. by passing an act of attainder against some person or instructing a judge to bring in a verdict of guilty against some one who is being tried—if in law such usurpation would otherwise be contrary to the Constitution. There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not

* For Sinhala translation, see Sinhala section, Vol. 12 part 1, p. 1

arise here. In so far as any Act passed without recourse to section 29(4) of the Constitution purports to usurp or infringe the judicial power it is *ultra vires.*"

Cases referred to : *Campbell* v. *Hall*, 1 Cowp. 204; 98 E.R. 1045
Abeysekera v. *Jayatilake*, 1932 A.C 260 ; (1931) 33 N.L.R. 291
Ibralebbe v. *The Queen*, 1964 A.C. 900 ; LXV C.L.W. 41 ; (1963) 65 N.L.R. 433
Bribery Commissioner v. *Ranasinghe*, 1965 A.C. 172 ; LXVI C.L.W. 1 ; (1964) 66 N.L.R. 73
Calder v. *Bull*, (1798) Curtis 269
Thambiayah v. *Kulasinghe*, (1949) 50 N.L.R. 25 ; XXXVIII C.L.W. 53
The Queen v. *Liyanage & Others*, (1962) 64 N.L.R. 313 ; LXII C.L.W. 49

E. F. N. Gratiaen, Q.C., with *H. W. Jayewardene, Q.C., Dick Taverne, Q.C., Walter Jayawardena, M. P. Solomon* and *S. J. Kadirgamar* for the appellants.

Victor Tennakoon, Q.C., (Solicitor-General, Ceylon) with *R. K. Handoo* and *V. S. A. Pullenayagam*, for the Crown-respondent.

LORD PEARCE

This is an appeal against the judgment and sentence of the Supreme Court of Ceylon. The eleven appellants were each convicted of three offences in respect of an abortive *coup d'etat* on 27th January 1962. The offences were, first that they conspired to wage war against the Queen, secondly that they conspired to overawe by means of criminal force or the show of criminal force the Government of Ceylon and thirdly that they conspired to overthrow otherwise than by lawful means the Government of Ceylon by law established. Thirteen other defendants who were tried with the appellants were acquitted. Each of the appellants was sentenced to ten years rigorous imprisonment and forfeiture of all his property.

The appellants were not tried by a judge and jury in accordance with the normal criminal procedure, but by three judges of the Supreme Court sitting without a jury. The trial was very long and complicated since so many defendants were involved, playing, as was alleged, different parts in the attempted *coup*. Indeed, the judgment of the Court occupies more than 200 pages of the law reports (*The Queen* v. *Liyanage & Others*, 67 N.L.R. 193). The individual appeals raise many points which demand a very extensive consideration of evidence and factual detail.

All the appeals however share a common submission that, whatever be the details of fact or evidence, these convictions must be quashed owing to the invalidity of certain legislation in 1962 passed especially in order to deal with the trial of those persons who partook in the abortive *coup*. This legislation affected the mode of trial, the offences, the admissibility of evidence and the sentences. It was rightly agreed between the parties that, if this legislation was invalid, the convictions cannot be sustained. Their Lordships therefore decided that before embarking on a detailed investigation of the facts and evidence they should first decide, as a preliminary point, whether the legislation in question was invalid.

The detailed story of the *coup d'etat* of 27th January 1962 and how it was foiled at the very last moment, is set out in a White Paper of the Ceylon Government issued on 13th February 1962. This sets out the names of thirty alleged conspirators and the parts played by them. All the accused were named in it. It alleges that the *coup* was planned by certain police and army officers with the object of overthrowing the Government and arresting, *inter alios*, the Parliamentary Secretary for Defence and External Affairs since he could give orders to the Service Commanders which might frustrate the *coup*. The White Paper stated what the participants intended to do and gave descriptions of their interrogation by Ministers immediately after their arrest. It concluded with the observation "It is also essential that a deterrent punishment of a severe character must be imposed on all those who are guilty of this attempt to inflict violence and bloodshed on innocent people throughout the country for the pursuit of reactionary aims and objectives. The investigation must proceed to its logical end and the people of this country may rest assured that the Government will do its duty by them."

From about 27th January all the accused were in custody (except one who gave himself up on 31st July 1962), and they remained thereafter in very rigorous custody. (See *The Queen* v. *Liyanage & Others*, 67 N.L.R. at 259.) They were questioned both on the night of 27th January 1962 and thereafter while in custody.

On 16th March 1962 there was passed the Criminal Law (Special Provisions) Act, No. 1 of 1962 (for convenience referred to as the "first Act"). That it was directed towards the parti-

cipants in the *coup* is clear. It was given retrospective force and section 19 reads:—

> "The provisions of this Act, other than the provisions of section 17, shall be deemed, for all purposes, to have come into operation on January 1 1962:
>
> Provided, however, that the provisions of Part I of this Act shall be limited in its application to any offence against the State alleged to have been committed on or about January 27, 1962, or any matter, act, or thing connected therewith or incidental thereto."

Part I was directed towards legalising the detention of the persons who had been imprisoned in respect of the attempted *coup*. Under the general criminal law an arrested person has the following protective provisions. Under the Criminal Procedure Code he must without unreasonable delay be taken or sent before a Magistrate (section 36). If he is arrested without a warrant, the reasonable period shall not exceed 24 hours (section 37). The police must report the arrest to the Magistrate's Court (section 38). Part I of the first Act legalised *ex post facto* the detention for 60 days of any person suspected of having committed offences against the State, but the fact of his having been arrested had to be notified to the Magistrate's Court.

In Part II of the first Act section 4 altered the mode of trial for the offences here in question in the following manner. Under section 440A of the Criminal Procedure Code the Minister of Justice could direct that the defendant be tried by three judges without a jury in the case of the offence of sedition and any other offence in which such a mode of trial would be appropriate by reason of civil commotion, disturbance of public feeling or any other similar cause. That clause was amended so as to apply expressly not only to sedition but to any other offence under Part VI of the Penal Code, the part which dealt with offences against the State, the offences with which the appellants were charged. Thus the Minister could direct that the appellants should be tried by three judges without a jury. With this section one may conveniently read section 9 of the first Act whereby in cases in which the Minister directs a trial by three judges without a jury, the three judges should be nominated by the Minister of Justice, and section 17 which provided for the addition of two more judges to the Supreme Court, such provision to come into operation on such date as the Minister might appoint.

Section 5 retrospectively allowed arrest without a warrant for the offence of waging war against the Queen whereas previously a warrant had been necessary.

Section 6 altered the penalty for an offence under section 114 of the Penal Code, namely for waging war against the Queen, by inserting a minimum punishment of not less than ten years' imprisonment. It altered the penalty for an offence under section 115 of the Penal Code, namely for conspiring to wage war against the Queen and overawe the Government by criminal force, by inserting a minimum punishment of ten years' imprisonment and a forfeiture of all property. It also altered the offence itself. Section 115 had read previously as follows:—

> "Whoever conspires to commit any of the offences punishable by the next preceding section, or to deprive the Queen of the sovereignty of Ceylon or of any part thereof, or of any of Her Majesty's Realms and Territories, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of Ceylon, shall be punished with imprisonment of either description which may extend to twenty years, and shall also be liable to fine."

This was amended as follows:—

> "By the substitution, for all the words from "Ceylon, shall" to "to fine.", of the following:—
>
> "Ceylon, or conspires to overthrow, or attempts or prepares to overthrow, or does any act, or conspires to do, or attempts or prepares to do any act, calculated to overthrow, or with the object or intention of overthrowing, or as a means of overthrowing, otherwise than by lawful means, the Government of Ceylon by law established, or conspires to murder, or attempts to murder, or wrongfully confines, or conspires or attempts or prepares to wrongfully confine, the Governor-General or the Prime Minister or any other member of the Cabinet of Ministers, with the intention of inducing or compelling him to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Prime Minister or Cabinet Minister, shall be punished with death, or imprisonment of either description which shall extend to at least ten years but shall not extend to more than twenty years, and shall forfeit all his property."

Thus a new offence was added *ex post facto* to meet the circumstances of the abortive *coup*.

Section 11 of the first Act provided that the Attorney General might before or at any stage during the trial pardon any accomplice with a view to obtaining his evidence.

Section 12 altered the laws of evidence in the case of offences against the State. The general criminal law gave the following protections to an accused person.

It provided that "No confession made to a police officer shall be proved as against a person accused of any offence" (Evidence Code section 25(1)). It further provided that no confession made by an accused in the custody of a police officer could be proved against him, unless made in the immediate presence of a Magistrate. (Evidence Code section 26 (1)). And it forbade that a confession by one of several co-defendants should be used against the other. (Evidence Code section 30). It excluded from admission all statements to a police officer in the course of an investigation (Criminal Procedure Code section 122(3)). Further, the onus of proving a confession to be voluntary was on the prosecution.

The first Act swept these protections away. It allowed statements made in the custody of a police officer to be admitted provided the police officer was not below the rank of Assistant Superintendent (section 12 (1)). It laid on the accused the burden of proving that a statement made by him was not voluntary (section 12(3)). It removed the effect of sections 25, 26 and 30 of the Evidence Ordinance above referred to (section 12(4)).

Section 12(2) provided that "In the case of an offence against the State, a statement made by any person which may be proved under subsection (1) of this section" (i.e. whether or not in the custody of a police officer) "as against himself may be proved as against any other person jointly charged with such person, if, but only if, such statement is corroborated in material particulars by evidence other than a statement proved under that subsection." Thus a vital and age old protective rule of evidence was removed.

Section 12(5) removed the protection of section 122(3) of the Criminal Procedure Code which prohibited the admission of statements made to a police officer in the course of an enquiry. Section 15 removed the right of appeal to the Court of Criminal Appeal in the case of trials before three judges without a jury.

Finally section 21 provided as follows:—,

> "The preceding provisions of this Act, save and except Part I and section 17, shall cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about 27th January 1962, or from one year after the date of commencement of this Act, whichever is later, provided that the Senate and the House of Representatives may, by resolution setting out the grounds therefor, extend the operation of this Act from time to time for further periods not exceeding one year at a time."

In the circumstances the reference to one year after the commencement of the Act cannot be read as indicating any intention that the provisions in question should continue in force beyond the conclusion of the proceedings mentioned. Thus, apart from the increase in the number of judges by s. 17 (which obviously could not be temporary), and apart from Part I (which gives the right to arrest and detain persons suspected of having committed an offence against the State and which in itself is limited to any offence against the State alleged to have been committed on or about 27th January 1962 and matters incidental thereto) the whole of these elaborate provisions for altering the nature of the offence, for providing a trial without a jury, and for allowing the admission of otherwise inadmissible statements and confessions is to end when the proceedings based on the *coup* come to an end. By that time it would have served its purpose which would appear to be the fulfilment of the promise implied in the last two sentences of the White Paper, quoted above.

The Minister of Justice then nominated three judges to try the accused. Preliminary objection was taken that the nomination and the section under which it was made were *ultra vires* the Constitution. In October 1962 the three learned judges of the Supreme Court in a full and careful judgment in which they examined the relevant authorities unanimously upheld the objection (*The Queen* v. *Liyanage & Others* 64 N.L.R. 313). They concluded (at page 359)—

> "For reasons which we have endeavoured to indicate above, we are of opinion that because
>
> (*a*) the power of nomination conferred on the Minister is an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the Ceylon (Constitution) Order in Council, 1946, or is in derogation thereof, and
>
> (*b*) the power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature,
>
> section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, is *ultra vires* the Constitution."

This conclusion was not challenged by an appeal to this Board. But in November 1962 there was passed the Criminal Law Act, No: 31 of 1962 (for convenience referred to as the second Act). This repealed those provisions of the first Act which dealt with section 440A of the Criminal

Procedure Code, and amended that section anew by providing as respects offences under certain sections of the Penal Code, including section 115, for a trial before three judges without a jury; but instead of the nomination by the Minister which had been rejected by the Supreme Court, there was inserted a new subsection whereby the Chief Justice could nominate three judges before whom the trial should be held. It was also provided that the determination should be according to the majority. Further the second Act (section 6) nullified the Minister's earlier direction, information and nomination in the proceedings (setting them out in schedules), and it deemed that the Minister had never had any power to nominate the judges for the trial without a jury, and any action proceeding or thing instituted by virtue of the said direction information or nomination was deemed for all purposes never to have been instituted or commenced.

All the other elaborate provisions of the first Act were left untouched.

The trial proceeded before three judges nominated by the Chief Justice. In April 1965 after a very extensive trial the appellants were convicted and sentenced.

Mr. Gratiaen on behalf of the appellants attacks the validity of the convictions on three main grounds.

The first is that the Ceylon Parliament is limited by an inability to pass legislation which is contrary to fundamental principles of justice. The 1962 Acts, it is said, are contrary to such principles in that they not only are directed against individuals but also *ex post facto* create crimes and punishments, and destroy fair safeguards by which those individuals would otherwise be protected.

The appellants' second contention is that the 1962 Acts offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which is outside the legislature's competence and is inconsistent with the severance of power between legislature, executive, and judiciary which the Constitution ordains.

The appellants' third argument is that the language of the 1962 Acts did not suffice "in the absence of an express provision to that effect" (Interpretation Ordinance section 6(3)) to deprive the appellants of the right to a jury which they had acquired previous to the passing of those Acts.

The first argument starts with a judgment of Lord Mansfield L.C.J. In *Campbell* v. *Hall* 1 Cowp. 204 at 209, 98 E.R. 1045 he laid down as a clear proposition that "if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament he cannot make any new change contrary to fundamental principles". The Crown having, therefore (it is said), no power over Ceylon as a colony to make laws which offended against fundamental principles, could not hand over to Ceylon a higher power than it possessed itself. The Constitution of Ceylon was not laid down as in the case of many other colonies by an Act of Parliament but by an Order in Council (The Ceylon (Constitution) Order in Council 1946) which gave power to the Ceylon Parliament to make laws for the peace order and good Government of the Island. This was followed by the Ceylon Independence Act, 1947, a United Kingdom Act. But Parliament, it is contended, did not in terms transfer to Ceylon the Sovereign right of the United Kingdom Parliament. Therefore the legislative power of Ceylon is still limited by the inability (which it inherits from the Crown) to pass laws which offend against fundamental principles. This vague and uncertain phrase might arguably be called in aid against some of the statutes passed by any Sovereign power. And it would be regrettable if the procedure adopted in giving independence to Ceylon has produced the situation for which the appellants contend.

In the view of their Lordships, however, such a contention is not maintainable. Before the passing of the Colonial Laws Validity Act 1865 considerable difficulties had been caused by the over-insistence of a Colonial judge in South Australia that colonial legislative Acts must not be repugnant to English law (see "The Statute of Westminster and Dominion Status" by K. C. Wheare 4th edition pp. 75—7). That Act was intended to and did overcome the difficulties. It provided that colonial laws should be void to the extent to which they were repugnant to an Act of the United Kingdom Parliament applicable

to that colony, "*but not otherwise*" (section 2 and that they should not be void or inoperative on the ground of repugnancy to the law of England (section 3). "The essential feature of this measure is that it abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial act.....The boon thus secured was enormous; it was now necessary only for the colonial legislator to ascertain that there was no Imperial Act applicable and his field of action and choice of means became unfettered". ("The Sovereignty of the British Dominions" by Prof. Keith 1929 at p. 45).

Their Lordships cannot accept the view that the legislature while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice. The terms of the Colonial Laws Validity Act and especially the words "but not otherwise" in section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy. Moreover their Lordships doubt whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former. Whatever may have been the possible arguments in this matter prior to the passing of the Colonial Laws Validity Act, they are not maintainable at the present date. No case has been cited in which during the last 100 years any judgment (or, so far as one can see, any argument) has been founded on that portion of Lord Mansfield's judgment. And in *Abeyesekera* v. *Jayatilake* (1932) A.C. 260, a case from Ceylon dealing with the validity of a retrospective Order in Council and therefore a fertile field for the germination of arguments about fundamental principles, Lord Mansfield's judgment in *Campbell* v. *Hall* was only referred to in the Board's judgment as authority on a wholly different point.

The Ceylon Independence Act 1947 of the British Parliament provided—:

> "1. —(1) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof.
>
> (2) As from the appointed day His Majesty's Government in the United Kingdom shall have no responsibility for the government of Ceylon.
>
> (3) As from the appointed day the provisions of the First Schedule to this Act shall have effect with respect to the legislative powers of Ceylon."
>
> * * *
>
> "First Schedule
> Legislative Powers of Ceylon
>
> 1. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the appointed day by the Parliament of Ceylon.
>
> (2) No law and no provision of any law made after the appointed day by the Parliament of Ceylon shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of Ceylon shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of Ceylon.
>
> 2. The Parliament of Ceylon shall have full power to make laws having extra-territorial operation."

These liberating provisions thus incorporated and enlarged the enabling terms of the Act of 1865, and it is clear that the joint effect of the Order in Council of 1946 and the Act of 1947 was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State. (See *Ibralebbe* v. *The Queen* (1964) A.C. 900.)

Accordingly the appellants' first argument fails.

Those powers, however, as in the case of all countries with written constitutions, must be exercised in accordance with the terms of the constitution from which the power derives. The appellants' second argument maintains that the powers of Parliament were not so exercised in the passing of the Acts which are here in question.

The learned Solicitor-General in his clear, fair and forceful argument strongly relied on the fact that there is no express vesting of judicial power in the Courts, such as one finds for example in the case of the United States of America or Australia. But that is not necessarily decisive. For in the two latter instances there were no federal Courts apart from the Constitution. Unless such Courts were created and invested with power by the Constitution they had no existence or power.

In Ceylon, however, the position was different. The change of sovereignty did not in itself produce any apparent change in the constituents or the

functioning of the Judicature. So far as the Courts were concerned their work continued unaffected by the new Constitution, and the ordinances under which they functioned remained in force. The judicial system had been established in Ceylon by the Charter of Justice in 1833. Clause 4 of the Charter read "And to provide for the administration of justice hereafter in Our said Island Our will and pleasure is, and We do hereby direct that the entire administration of justice, civil and criminal therein, shall be vested exclusively in the courts erected and constituted by this Our Charter ..... And it is Our pleasure and We hereby declare, that it is not, and shall not be competent to the Governor of Our said Island by any Law or Ordinance to be by him made, with the advice of the Legislative Council thereof or otherwise howsoever, to constitute or establish any court for the administration of justice in any case civil or criminal, save as hereinafter is expressly saved and provided." Clause 5 established the Supreme Court and clause 6 a Chief Justice and two puisne Judges. Clause 7 gave the Governor powers of appointing their successors. There follow many clauses with regard to administrative, procedural and jurisdictional matters. Some half a century later Ordinances (in particular the Courts Ordinance) continued the jurisdiction and procedure of the Courts. Thereunder the Courts have functioned continuously up to the present day.

There was no compelling need therefore to make any specific reference to the judicial power of the Courts when the legislative and executive powers changed hands. "But the importance of securing the independence of judges and maintaining the dividing line between the judiciary and the executive" (and also, one should add, the legislature) "was appreciated by those who framed the Constitution" (see *Bribery Commissioner* v. *Ranasinghe* (1965) A.C. 172 at 190). The Constitution is significantly divided into parts — "Part 2 The Governor-General", "Part 3 the Legislature", "Part 4 Delimitation of Electoral Districts", "Part 5 the Executive", "Part 6 The Judicature", "Part 7 The Public Service", "Part 8 Finance". And although no express mention is made of vesting in the Judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for the appointment of judges by a Judicial Service Commission which shall not contain a member of either House but shall be composed of the Chief Justice and a judge and another person who is or shall have been a judge. Any attempt to influence any decision of the Commission is made a criminal offence. There is also provision that judges shall not be removable except by the Governor-General on an address of both Houses.

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

During the argument analogies were naturally sought to be drawn from the British Constitution. But any analogy must be very indirect, and provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power.

The difficult question as to the separation of powers was carefully argued before the learned judges on the hearing of the interlocutory application which successfully challenged the Minister's nomination of three judges to try the accused. (*The Queen* v. *Liyanage & Others* (64 N.L.R. 313)). The learned Attorney-General there contended that "no separation of powers exists under our Constitution and that if a separation of powers exists *dehors* the written constitution it is a separation after the British method because we have been accustomed to that kind of separation throughout the British occupation of this country " (at p. 348). But he conceded that there was a recognised separation of functions. As the Court itself said (at p. 350). "That a division of the three main functions of Government is recognised in our Constitution was indeed conceded by the learned Attorney-General himself. For the purposes of the present case it is sufficient to say that he did not contest that judicial power in the sense of the judicial power of the State is vested in the Judicature i.e. the established civil courts of this country. There is no dispute that the three of us, as constituting, for the purposes of this Trial at Bar, the Supreme Court are called upon to exercise the strict judicial

power of the State and in fact we have, all three of us, received at one time or another, but in each case before the Supreme Court was so called upon to exercise judicial power, appointment by the Governor-General acting under section 52(1) of the 1946 Order in Council." After a careful review of authorities the three learned judges came to the conclusions quoted previously and decided that the Minister's nomination of judges was an infringement of the judicial power of the State which cannot be reposed in anyone outside the judicature.

The learned Solicitor-General before the Board has contended that the decision was wrong and that there was no separation of powers such as would justify it. But in their Lordships' view that decision was correct and there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature.

Section 29 (1) of the Constitution says:— "Subject to the provisions of this Order Parliament shall have power to make laws for the peace order and good government of the Island." These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature — e.g. by passing an act of attainder against some person or instructing a judge to bring in a verdict of guilty against some one who is being tried—if in law such usurpation would otherwise be contrary to the Constitution. There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to section 29(4) of the Constitution purports to usurp or infringe the judicial power it is *ultra vires*.

But do the Acts of 1962, otherwise than in respect of the Minister's nomination, usurp or infringe that power? It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judges declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January *coup* and that after these had been dealt with by the judges, the law should revert to its normal state.

But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as *ad hominem* and *ex post facto* must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal.

Mr. Gratiaen succinctly summarises his attack on the Acts in question as follows. The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered *ex post facto* the punishment to be imposed on them.

In their Lordships' view that cogent summary fairly describes the effect of the Acts. As has been indicated already, legislation *ad hominem* which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But

in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial.

The trial Court concluded its long and careful judgment with these words (67 N.L.R. 194 at 424).

> "But we must draw attention to the fact that the Act of 1962 radically altered *ex post facto* the punishment to which the defendants are rendered liable. The Act removed the discretion of the Court as to the period of the sentence to be imposed, and compels the Court to impose a term of 10 years imprisonment, although we would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it. It also imposes a compulsory forfeiture of property. These amendments were not merely retroactive: they were also *ad hoc*, applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination. To the Courts, which must be free of political bias, treasonable offences are equally heinous, whatever be the complexion of the Government in power or whoever be the offenders."

Their Lordships sympathise with that protest and wholly agree with it.

One might fairly apply to these Acts the words of Mr. Justice Chase in the Supreme Court of the United States in *Calder* v. *Bull* (1798) 1 Curtis 269 at 272: "These acts were legislative judgments; and an exercise of judicial power."

Blackstone in his Commentaries wrote at p. 44 "Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in general: it is rather a sentence than a law."

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were *ultra vires* and invalid.

The appellants' third argument as to the appellants' right to a jury does not therefore arise and their Lordships express no opinion on the matter.

It may be that section 17 of the first Act can escape from its context and survive under the authority of *Thambiayah* v. *Kulasingham* (50 N. L. R. 25 at 37), but as their Lordships had no argument on this point they prefer to express no opinion.

It was agreed between the parties that if the Acts were *ultra vires* and invalid, the convictions cannot stand. Their Lordships have therefore humbly advised Her Majesty that these appeals should be allowed and that the convictions should be quashed.

Appeal allowed.

Present : **T. S. Fernando, J., and Alles, J.**

P. R. PARANIRUPASINGHAM & ANOTHER *vs.* RAMANATHAN CHETTIAR

S.C. No. 31/64 (*Inty.*)—*D.C. Badulla, No.* 892/*M.*

Argued on : 28th June, 1965.
Decided on : 23rd July, 1965.

Partnership—Whether property partnership property or only co-owned property—Section 20, *Partnership Act*, 1890—*Power to appoint a receiver in respect of partnership property—Civil Procedure Code, section* 671.

The plaintiffs and the defendants purchased S. Estate as co-owners, and they carried on in partnership *the working of the said estate*, and also the purchase of green leaf and the manufacture and sale of tea from 1st February, 1956. The plaintiffs instituted this action on 8th July, 1959, praying, *inter alia*, that the partnership be dissolved. The case was finally fixed for trial on 17th February, 1964, and on that day Court made order dissolving the partnership, and (despite the opposition of the plaintiffs) appointed a receiver to take charge of the estate. The plaintiffs appealed from that part of the order which appointed a receiver.

Held : (1) That the estate was not partnership property, but was property co-owned by the plaintiffs and the defendant. The ultimate test of what is or is not partnership property must be the agreement of the partners. Persons may be entitled jointly or in common to property, and the same persons may be partners, and yet the property may not be partnership property.

(2) That further, after a partnership is dissolved, a Court cannot appoint a receiver under section 671 of the Civil Procedure Code.

Order appointing a receiver set aside.

C. Ranganathan, for the plaintiffs-appellants.

No appearance for the defendants-respondents.

T. S. FERNANDO, J.

The case in which this appeal has arisen has already followed a chequered course. It was filed as long ago as 8th June, 1959, by the plaintiffs alleging that the defendants and they were carrying on business in partnership since 1st February, 1956, and praying that (i) the partnership be dissolved ; (ii) that the defendants who were in control and management of the business of the partnership be ordered to render an account of that business from date of commencement ; (iii) that the defendants be ordered to pay to the plaintiffs the reasonable estimate of their share of the profits which share the plaintiffs valued at Rs. 21,000/- ; (iv) that the defendants be removed from the custody and management of the partnership business ; and (v) that a receiver be appointed to take charge of the management of the business pending a final determination of the case.

It must be mentioned that the 2nd defendant was actually brought in as a party to the case only on 2nd November, 1959, after the 1st defendant had filed answer. On that day certain terms of settlement dated 29th October, 1959, were filed in Court. It appears, however, that these terms did not come to be embodied in an order or decree of the Court at any stage of the proceedings in this case. Nevertheless, term 2 of the said terms of settlement was acted upon and the possession and management of Singarawatte Estate appear to have been handed over on the order of the Court by consent of parties to one Mr. Taylor who has been referred to in the journal entries in this case as a receiver.

On 24th November, 1960, the 1st plaintiff applied to Court for an order removing the said Mr. Taylor from his office of receiver and for a further order that the latter do submit accounts of his management of the business of the Estate. By an order made on the 14th February, 1961, Mr. Taylor's appointment as receiver was cancelled by the Court, with certain rights reserved to Mr. Taylor and the parties. It would also appear from the text of that order that the plaintiffs have been in possession of Singarawatte Estate since November, 1960. In what circumstances they came to resume possession is not clear ; but it must be presumed that, although the defendants were in possession of the estate as

managers of the business of the partnership from 1st February, 1956, the plaintiffs always owned a two-third share of the Estate.

Efforts appear to have been made about March, 1961, by the plaintiffs to have decree entered in accordance with the terms of settlement dated 29th October, 1959, and to obtain the issue of a commission to Messrs. Sambamoorthi & Co., Accountants, to examine the accounts. None of these efforts succeeded and the case was refixed for trial to be held on 17th February, 1964. On that day, after certain issues had been suggested by counsel for both sides, the Court made the following order :—

> " As parties are agreed that the partnership should be dissolved, I declare the partnership dissolved as from today. A receiver should now be appointed ."

Having made this order, in spite of the opposition of the plaintiffs to such a course, the Court appointed a Mr. Wiggin " as receiver to take charge of the custody and control of this estate and who will have all the powers and duties of a receiver as from 1st March, 1964 ". Certain other orders also were made on this day, (i) on Mr. Taylor to render accounts for the period 9th February, 1960 to 14th February, 1961 ; and (ii) on the plaintiffs to render accounts from 14th February, 1961 to 17th February, 1964. The plaintiffs were ordered also to render all facilities to Mr. Wiggin to take over the custody and management of the Estate.

By the present appeal to this Court the plaintiffs canvass the legality of the order appointing Mr. Wiggin as receiver as from 17th February, 1964. No argument was presented against the order for the dissolution of the partnership.

Learned counsel for the plaintiffs contended that Singarawatte Estate was not the property of the partnership that came into existence as from 1st February, 1956. Persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property. The ultimate test of what is or is not partnership property must be the agreement of the partners—see Lindley on Partnership, 11th ed., p. 409.

The recitals in the partnership agreement—document " A "—show that the parties (the two plaintiffs and the two defendants) had purchased Singarawatte Estate as co-owners and had been carrying on in partnership *the working of the said Estate* and also the purchase of green leaf and the manufacture and sale of tea from 1st February, 1956 ; they also show that at the commencement the two defendants had been managing and running the said business on an informal agreement and that as from the date of the written agreement " A "—1st August, 1957—the defendants were to be regarded as the managing partners of the said business. Counsel contended that the ownership (or co-ownership) of the Estate must not be confused with the right to manage the business which is the right to work the Estate and do the other things specified in the agreement as forming part of that business. He referred to the definition of partnership property in section 20 of the Partnership Act of 1890 and contended that Singarawatte Estate was at no time brought into the partnership by the four co-owners, and that its ownership (or co-ownership) remained always in the co-owners as co-owners and not as partners of a business. Indeed, sub-section (3) of that section goes as far as providing that—

> " Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of purchase."

It is a matter for some regret that the defendants who were represented by senior counsel from Colombo at the proceedings in the District Court held on 17th February, 1964, were unrepresented before us. In considering the question raised on this appeal we have, therefore, been without assistance on behalf of the defendants, but we think the contention of plaintiff's counsel is correct.

It was argued before us that, after ordering a dissolution of the partnership, it was not competent for the Court to proceed to appoint a receiver. When the partnership was dissolved the legal title to the shares in the Estate which was throughout in the several co-owners remained with them without those obligations that follow upon the existence of a partnership in respect of the working of the Estate. Any obligation at law on the part of co-owners in possession to account for the shares of the produce that should go to the other co-owners will then accrue only by virtue of the common law and not by virtue of a

partnership. The power of a Court to appoint a receiver in terms of section 671 of the Civil Procedure Code, plaintiff's counsel contended, does not extend to enable an appointment to be made even after a dissolution of the partnership. I think this contention is also correct. The plaintiffs are co-owners, entitled to a two-third share of this Estate, and they should not be dispossessed of their property in favour of a receiver at this stage when the partnership for the working of the Estate has been dissolved by order of the Court.

I set aside that part of the order of the District Court made on 17th February, 1964, which relates to the appointment of a receiver. The case should now be set down for the trial of the remaining issues or any other issues which the Court may permit the parties to raise. The parties will bear their own costs of the proceedings of 17th February, 1964, in the District Court, but the defendants shall pay the plaintiffs the costs of this appeal.

ALLES, J.

I agree.

Order appointing receiver set aside.

Present : **Alles, J.**

SUBASINGHE ARACHCHIGE MISSI NONA

vs.

J. A. WEERASOORIYA *alias* JAYASEKERA KANGANY

S.C. Case, No. 593/1965—*M.C. Colombo, No.* 32234/*AMC.*

Argued on : 15th October, 1965.
Decided on : 28th October, 1965.

Maintenance Ordinance (*Cap.* 91), *sections* 13, 14, 15, 16—*Criminal Procedure Code, sections* 298, 299—*Oral examination required by section* 14 *in maintenance proceedings—Condition precedent to issue of summons—Procedure to be followed in recording such evidence.*

It was submitted by counsel for the applicant, whose application for maintenance the learned Magistrate had refused, that the case should be sent back for re-trial before another Magistrate as there had been a breach of the mandatory provisions of section 14 of the Maintenance Ordinance. Although oral evidence of the applicant had been recorded prior to issue of summons as required by that section, it was submitted that section 299 of the Criminal Procedure Code should have been complied with in regard to such evidence and that the entire proceedings were rendered null and void by such non-compliance.

Held : That although an examination under section 14 of the Maintenance Ordinance is a condition precedent to the issue of summons in proceedings under that Ordinance, it is not necessary that the procedure laid down in section 299 of the Criminal Procedure Code should be followed.

Per ALLES, J.—" Section 16 of the Maintenance Ordinance requires that all evidence shall be recorded in the manner prescribed *for trials* in the Magistrate's Court and section 298 of the Criminal Procedure Code prescribes the procedure for recording evidence at inquiries and trials in District Courts and Magistrate's Courts. Therefore, that portion of the learned Chief Justice's dictum which states that section 298 of the Criminal Procedure Code is applicable to the recording of evidence in proceedings under the Maintenance Ordinance can be supported. But with all respect to the learned Chief Justice that portion of the dictum which states that the provisions of section 299 apply would appear to have been made *per incuriam*. This view is fortified by the observations made by Weerasooriya, J., in *Gunadasa* v. *Pemawathie*, 60 C.L.W. 19, where the learned Judge took the same view which I have taken in this case. "

Cases referred to : *Anna Perera* v. *Emaliano Nonis*, (1908) 12 N.L.R. 263 ; 1 Cur. L.R. 120
Namasivayam v. *Saraswathy*, (1949) 50 N.L.R. 333 ; XXXIX C.L.W. 71.
Sebastianpillai v. *Magdalen*, (1949) 50 N.L.R. 494 ; XLI C.L.W. 2.
Rupasinghe v. *Somawathie*, (1959) 61 N.L.R. 457.
Gunadasa v. *Pemawathie*, (1961) LX C.L.W. 19.
Baby Nona v. *Kahingala*, (1964) 66 N.L.R. 361.

E. St. N. D. Tillekeratne, for the applicant-appellant.

No appearance for the defendant-respondent.

ALLES, J.

This is an appeal by an applicant in maintenance proceedings dismissing her application for maintenance against the defendant in respect of her illegitimate child. In the course of the proceedings, the defendant admitted paternity but submitted that the applicant could not maintain the action.

The proceedings commenced with an application under section 13 of the Maintenance Ordinance for an order of maintenance. In her application made on 14th February, 1964, the applicant said that the child was born on 28th April, 1962, although in her evidence under section 14 of the Ordinance she said she gave birth to the child on 28th April, 1963. In the course of the proceedings, the Birth Certificate was produced marked P 1 according to which the child was born on 28th April, 1962. Since the application was made twelve months after the birth of the child, there should have been evidence that during that period the father had maintained the child—*vide* section 6 of the Ordinance. In her testimony recorded under section 14 she said that the defendant had " failed to maintain the child since it's birth " although in the course of the trial she said that the defendant gave her two sums of money, Rs. 10/- and Rs. 5/- for the child two months after its birth. In view of the discrepancy between the applicant's evidence under section 14 and her subsequent evidence at the trial, the Magistrate quite rightly disbelieved her and her witnesses with regard to these payments and I see no reason to interfere with his finding on this question of fact.

The only matter that arises for consideration in this appeal is whether I should accede to the submission of Counsel for the applicant that the case should be sent back for re-trial before another Magistrate, since in his submission there has been a breach of the mandatory provisions of section 14. Section 14 provides that on an application for maintenance under section 13, the Magistrate shall commence the inquiry by examining the applicant on oath or affirmation and that such examination shall be duly recorded. It is now settled law that it is a condition-precedent to the issue of summons in proceedings under the Maintenance Ordinance that the oral testimony of the applicant must be taken on oath or affirmation, so that the Magistrate may be satisfied that there is sufficient ground for further proceedings ; a non-compliance with these provisions of the law would render a subsequent inquiry null and void —*vide Rupasinghe* v. *Somawathie*, (1959) 61 N.L.R. 457 and *Baby Nona* v. *Kahingala*, (1964) 66 N.L.R. 361.

Counsel in the present case, however, relied on the following passage in the judgment of Basnayake, C.J., in *Rupasinghe* v. *Somawathie*, at page 459 :

> " The deposition of an applicant who is examined under section 14 must be recorded as prescribed in section 298 of the Criminal Procedure Code and read over to the witness as required by section 299 (1) of that Code and the other requirements of that section must be complied with. The requirements of section 14 and the provisions of the Code have not been complied with. That non-compliance is fatal to the order made by the Magistrate and renders it null and void. "

In his submission since the provision of section 299 of the Criminal Procedure Code were not complied with in the present case the entire proceedings are null and void and, therefore, the applicant is entitled to a re-trial.

In *Anna Perera* v. *Emaliano Nonis*, (1908) 12 N.L.R., at 263, a Bench of two Judges consisting of Justice Middleton and Justice Woodrenton (as he then was) held that only those sections of the Criminal Procedure Code which are expressly incorporated into the Maintenance Ordinance are applicable to proceedings under the Ordinance. Woodrenton, J., specifically drew attention to sections 15, 16 and 17 of the Ordinance. The decision in *Anna Perera* v. *Emaliano Nonis* was followed by Basnayake, C.J., in *Baby Nona* v. *Kahingala*. The learned Chief Justice specifically drew attention to the fact that a Magistrate when acting under the Ordinance may exercise only the powers expressly conferred on the Magistrate's Court under the Criminal Procedure Code. He then proceeded to examine the provisions of sections 15, 16 and 17 of the Maintenance Ordinance under which it was possible to invoke the various provisions of the Criminal Procedure Code and concluded by saying that " only those provisions of the Criminal Procedure Code expressly declared to be applicable to the proceedings under the Ordinance, apply ". Section 16 of the Maintenance Ordinance requires that all evidence shall be recorded in the manner prescribed *for trials* in the Magistrate Court and section 298 of the Criminal Procedure Code prescribes the procedure for recording evidence at inquiries and trials in District Courts and Magistrate's Courts. Therefore, that portion of the learned Chief Justice's dictum which states that section 298 of

the Criminal Procedure Code is applicable to the recording of evidence in proceedings under the Maintenance Ordinance can be supported. But with all respect to the learned Chief Justice that portion of the dictum which states that the provisions of section 299 apply would appear to have been made *per incuriam*. This view is fortified by the observations made by Weerasooriya, J., in *Gunadasa* v. *Pemawathie*, 60 C.L.W. 19, where the learned Judge took the same view which I have taken in this case. At the time Weerasooriya, J., delivered his order in *Gunadasa* v. *Pemawathie* he did not have the advantage of the learned Chief Justice's observations in the Divisional Bench case of *Baby Nona* v. *Kahingala* where no reference is made whatsoever to either section 298 or section 299 of the Criminal Procedure Code.

It is not out of place to note that in *Rupasinghe* v. *Somawathie* the reference was made to a Bench of two Judges in view of the conflicting decisions in *Namasivayam* v. *Saraswathy*, 50 N.L.R. 333 and *Sebastianpillai* v. *Magdalen*, 50 N.L.R. 494, as to whether the examination of an applicant on oath or affirmation was a condition-precedent to the issue of summons in maintenance proceedings. The *manner* in which that evidence has to be led was not one of the matters which was referred to the Bench for decision.

Finally, having regard to the purpose for which the evidence of the applicant has to be led under section 14 before the issue of summons, it seems unnecessary that the intricate procedure laid down in section 299 should be strictly complied with. The only object of leading the evidence of the applicant on oath or affirmation under section 14 is to ensure that the Magistrate is satisfied that it is a fit case in which summons should issue, as stated by Basnayake, C.J., in *Namasivayam* v. *Saraswathy*, " the legislature has in its wisdom enacted this provision as a safeguard against a person being summoned on an unsworn allegation to answer charges of neglect of refusal to maintain his wife or child legitimate or illegitimate. " It is unnecessary to follow the procedure laid down in section 299 of the Criminal Procedure Code in order to achieve this object.

I am, therefore, of the view that Counsel's submission that section 299 of the Criminal Procedure Code should be complied with in an examination under section 14 of the Maintenance Ordinance is unnecessary. The appeal is, therefore dismissed.

Appeal dismissed.

Present : **Abeyesundere, J., and G. P. A. Silva, J.**

M. M. HANIFFA *vs.* A. L. M. SAMSUDEEN.

S.C. 4/62—*D.C. Panadura*, 6242.

Argued on : 12th and 13th May, 1965.
Decided on : 13th May, 1965.

Partition Ordinance, No. 10 *of* 1863, *section* 5—*Notice required thereunder—Is the Commissioner required to state in his report whether or not such notice was given ?*

Where on a plea taken by a party to a partition action instituted under the repealed Partition Ordinance, No. 10 of 1863, the District Judge held that the final decree was of no force or avail in law because the Commissioner had failed to give due notice as provided by section 5 of the said Ordinance merely for the reason that the Commissioner's report did not state or indicate that the said notice was given—

Held : That the learned District Judge had misdirected himself in coming to that conclusion. There is no provision of law that requires the Commissioner to state in his report whether or not the said notice was given.

A. C. Gooneratne with *L. W. Athulathmudali* for the plaintiffs-appellants.

D. R. P. Goonetillake, for the defendant-respondent.

ABEYESUNDERE, J.

The plaintiff, instituted this action against the defendant praying for a declaration of title to an undivided seven-eighth shares of the land described as lot A in the plaint, for the ejectment of the defendant and for damages. The learned District Judge who tried the action dismissed it

holding that the defendant is entitled to the interest in the said land claimed by him in the amended answer. The plaintiffs have appealed from the judgment and decree of the learned District Judge.

The title claimed by the plaintiffs is derived from the final decree in partition action, No. TK 1233/10213 of the District Court of Kalutara. The defendant has pleaded that such final decree is of no force or avail in law as against him because the Commissioner appointed for the purpose of the said partition action has failed to give notice of the proposed partition to the public by beat of tom tom as required by section 5 of the now repealed Partition Ordinance under which the said partition action has been instituted and determined. Issues 14 and 15, which relate to the said plea of the defendant, are as follows :—

" 14. Was the final plan in case No. 1233 of this Court made by the Commissioner in the said case after due notice as provided by law ?

" 15. If not, is the said final decree, if any, of any force or avail in law as against this defendant ? "

The learned District Judge answered these issues as follows :—

" 14. The Commissioner in TK 1233 has not given the due notice as required by law.

" 15. No, the final decree is of no force or avail in law as against the defendants."

The reason for the learned District Judge's finding that the Commissioner had not given the said notice is that the Commissioner's report does not state or indicate that the said notice was given. There is no provision of law which requires the Commissioner to state in his report whether or not the said notice was given. The learned District Judge has, therefore, misdirected himself in inferring that the Commissioner had not given the said notice from the fact that the Commissioner's report does not state or indicate that the said notice was given. I hold that the answers of the learned District Judge to issues 14 and 15 are incorrect and that the defendant has failed to prove that the Commissioner had failed to give the said notice.

Issue 5 relates to the question whether the defendant is entitled to the interest in the said land claimed by him in his amended answer. The learned District Judge has answered that issue in the affirmative but he has failed to indicate in his judgment whether the defendant's title to the said interest is based on the deeds produced by him or on prescription. Issue 2 relates to prescriptive rights of parties. Although the learned District Judge has stated that the plaintiffs have not acquired any prescriptive rights, he has not stated in his judgment whether or not the defendant has acquired any prescriptive rights.

I set aside the judgment and decree of the learned District Judge and I direct the District Court of Panadura to try this action afresh. The appellants are entitled to the costs of their appeal.

G. P. A. SILVA, J.

I agree.

Appeal allowed.

Present : **Herat, J., and Abeyesundere, J.**

In the matter of an application under the provisions of section 68 *of the Courts Ordinance, Chapter* 6, *of the Legislative Enactments of Ceylon with respect to the Estate of the late Dr. Sabarathinam Rathinanayagam of No.* 119, *McCarthy Road, Colombo* 7.
S.C. Application, No. 254 *of* 1963.

IN RE RATHINANAYAGAM

Argued and decided : July 29, 1963.

Sole Testamentary jurisdiction, application for—Minor heirs—Appointment of " guardian-ad litem "—Which District Court has jurisdiction—Courts Ordinance section 69 (1).

Held : That where the minor heirs and the property concerned are within the jurisdiction of the District Cour of Colombo, a petitioner in an application for conferment of sole testamentary jurisdiction on the said District Court is entitled under section 69 (1) of the Courts Ordinance to make an application to that Court for the purpose of appointing a *guardian-ad-litem* in respect of such minors.

S. Sharvananda with *S. Basnayake*, for the petitioner.

ABEYESUNDERE, J.

On 5th June, 1963, this Court made order that, as there are three minors mentioned as heirs of the deceased, a *guardian-ad-litem* should be appointed and a minute of consent be obtained from him.

We are now informed by Mr. Sharvananda who appears for the petitioner that there is no District Court which has jurisdiction to deal with an application for the appointment of a *guardian-ad-litem* as this matter relates to an application to this Court for the conferment of sole testamentary jurisdiction on the District Court of Colombo with regard to the estate in Ceylon of a person who has died outside Ceylon. Subsection (1) of section 69 of the Courts Ordinance provides that the care of the persons of minors and the charge of their property shall be subject to the jurisdiction of the District Court. Mr. Sharvananda informs us that the minors and the property concerned are within the jurisdiction of the District Court of Colombo. We are, therefore, of the view that by reason of the aforesaid provision of law the District Court of Colombo can entertain and make an order on an application for the appointment of a *guardian-ad-litem* in respect of the aforesaid minors for the purpose of the application made by the petitioner to this Court. The petitioner should make an application to the District Court of Colombo for the appointment of a *guardian-ad-litem* in respect of the minors and after such guardian is appointed she should obtain a minute of consent from such guardian and renew the application which she has made to this Court.

HERAT, J.

I agree.

Directions for appointment of guardian given.

Present: **Sri Skanda Rajah, J.**

SOORIYAARATCHI *vs.* KULARATNE

S.C. 133/65 *C.R. Kalutara* 5732.

Argued and decided on: 10*th* February, 1966.

Landlord and tenant—Notice to quit—Validity.

The tenancy in this case was a monthly tenancy and had commenced on 1st February 1964. Only one calendar month's notice was required by the law. The notice given by the landlord was dated 20th August 1964 and requested the tenant to vacate "*within a period of three months from the date hereof.*"

It was submitted on behalf of the defendant-appellant that although the notice gave the tenant three months' time, nevertheless it was not a valid notice as it did not run concurrently with a term of the letting and hiring and expire at the end of such a term. The issue as to whether the notice was valid had been raised by plaintiff at the trial and had been answered in the plaintiff's favour.

Held: That although the notice gave the tenant three month's time to vacate the premises, it did not terminate the tenancy at the end of any calendar month of the tenancy. The notice was therefore not valid and the plaintiff's action must fail.

N. S. A. Goonetilleke, for the defendant-appellant.

N. E. Weerasooria (*Jnr.*), for the plaintiff-respondent.

SRI SKANDA RAJAH, J.

The plaintiff purchased the premises in question on the 31st of January, 1964. At the trial tenancy was admitted and it would appear that tenancy commenced on the 1st of February, 1964. One calendar month's notice is the notice that is required to be given under the law. The notice given by the plaintiff to the defendant reads as follows:—

20th August, 1964.

"I am instructed by my client Mr. S. E. Kularatne of 10, Mosque Street, to request you to vacate and hand over peaceful possession of the premises..... within a period of 3 months from the date hereof....."

Though this notice gave 3 months' time to vacate the premises the tenancy was not terminated by this notice at the end of any calendar month. Therefore, the notice was not valid.

Issue No. 1 which was raised by the plaintiff, should have been answered in the negative and the action, therefore, dismissed with costs.

I would, therefore, set aside the judgment of the learned Commissioner and dismiss the plaintiff's action with costs. I would reserve to the defendant the right to recover any excess payment. The appellant will have costs of this appeal.

Appeal allowed.

Present: **Sansoni, C.J. & Silva, J.**

B. S. DE SILVA *v.* G. M. A. DE SILVA AND OTHERS

S.C. No. 58 (*Inty*) 1965 — *D.C. Galle Case No.* 1812/*MB*

Argued on: 25th March, 1966.
Decided on: 6th April, 1966.

Mortgage action — Sale in execution of decree — Application by purchaser to set aside sale — Misrepresentation—Purchaser misled regarding size and nature of property — Grant of relief by Court— Whether purchaser entitled to make such application for relief.

Auctioneer made party to proceedings—Whether this permissible—Allegations against such auctioneer—Civil Procedure Code, section 344.

Held: (1) That where a purchaser at a sale held in pursuance of a decree in a mortgage action is misled in regard to the size and nature of the property the Court should grant relief to such purchaser in the absence of a positive provision of law which stands in the way of such relief being granted.

(2) That, therefore, the learned trial Judge's order setting aside the sale in the present case should be affirmed.

Held further: (3) That there was no provision of law or judicial decision which precluded the entertainment of the application made by the first respondent (the purchaser of the property) or of the grant of relief sought.

(4) That in the circumstances of the case the fourth respondent (the auctioneer) was properly made a party to these proceedings.

Case referred to: *Kala Mea* v. *Harperink* (1909) I.L.R. 36 Calcutta 323

N.E. Weerasooria, Q.C., with *M. T. M. Sivardeen* and *W.S. Weerasooria*, for the plaintiff (respondent)-appellant.

C. Ranganathan, Q.C., with *S. Sharvananda* for the purchaser (petitioner)-respondent.

F. A. Abeywardena, for the 4th defendant-respondent.

N. R. M. Daluwatte, for the 1st defendant-respondent.

G. P. A. Silva, J.

The question that arises for decision in this case is whether the learned District Judge's order setting aside a sale of certain premises in a mortgage action in pursuance of the decree is in order. The plaintiff-appellant, who was the mortgagee of certain land and premises at Ambalangoda situated by the Galle Road, put his bond in suit and, after the decree of Court, obtained a commission in favour of D. G. Ratnapala, Auctioneer to sell the mortgaged premises. The auctioneer, who is the 4th respondent to this appeal, held the sale, after due publication, on the 24th May 1961. At the sale, Mrs. Agnes de Silva the 1st respondent, became the purchaser of the property at a bid of Rs. 60,135/- and paid the 4th respondent a cheque for Rs. 6,013/50 being 1/10th of the purchase money. On the 30th day after the sale when the balance purchase money had to be deposited in Court the 1st respondent made an application for two months time which was refused. Six weeks after this date the 1st respondent filed a petition and affidavit praying that the sale held on the 24th May be set aside and that the 1/10th purchase money deposited by her be refunded on the ground that the 4th respondent auctioneer made a certain misrepresentation which led the petitioner to believe that a strip of land on the west of the property mortgaged extending up to the parapet wall, the parapet wall itself by the Galle-Colombo main road and another strip of land on the southern side extending up to the boundary fence were being put up for sale as part of the mortgaged property. She added that she discovered this misrepresentation regar-

ding the identity of the property about a month later, the result being that the most valuable portion of the land the petitioner purported to buy did not form part of the mortgaged property, and alleged that, had it not been for this misrepresentation, she would not have offered the price she did for the property. After an exhaustive inquiry the learned District Judge upheld the contention of the petitioner and ordered that the sale be set aside and that the amount deposited by her be refunded. The present appeal is from this order on the ground that the said judgment is erroneous in law and that the Judge had misdirected himself on the question of fact that there had been a misrepresentation by the auctioneer.

At the argument in appeal, Counsel for the appellant contended that the oral evidence regarding any misrepresentation by the auctioneer was most flimsy and unsatisfactory and was contradicted by the petitioner's witness himself and that the District Judge should therefore not have acted on that evidence. In order to support his contention he pointed out that the real purchaser was the husband of the petitioner who had decided to buy the property if he was able to obtain it below a certain price and that the bid was made by his agent Hettiarachi who was merely given instructions to bid at the auction sale and that whatever representation was made by the auctioneer, even if such a representation had been made, would not have made a difference to the offer made by the agent. He relied on this fact to contradict the petitioner's contention and in some way to show the mala fides of the application to set aside the sale. He also submitted that the advertisement gave the correct boundaries of the property and that a purchaser should have been guided by the advertisement and that even if any oral representation had been made they were not relevant to the issue. He relied also on the description of the property given in the conditions of sale which gave the correct boundaries.

In support of the 1st respondent the following points were urged.

(1) the absence of any demarcations on the ground apart from the parapet wall and the fence to put any person even on inquiry as to whether the premises that were being auctioned comprised an extent smaller than the land that was enclosed by the parapet wall and the fence,

(1) the oral evidence accepted by the District Judge that the auctioneer announced the sale of the entire land.

(3) the presence of the purchaser at the Fiscal's sale near the premises, who could hear what was stated by the auctioneer even though the bidder, Hettiarachi, was sent by the husband of the purchaser as his agent for the purpose of making a bid.

(4) The absence of a cart road to the house which was put up for sale, if the portions alleged by the appellant to be outside the subject matter of the sale are in fact excluded from the premises which the 1st respondent says was her intention to purchase, (the suggestion being that the 1st respondent would never have given the offer of Rs. 60,135/50 if she did not believe that there was no motorable access.)

(5) the fact that in the report that was made to Court (Document P3) by the auctioneer, dated 10. 4. 61, containing the appraisement of the property to be sold, he had included the parapet wall which was valued at a thousand rupees as well as the coconut trees that stood on the property up to the parapet wall.

The last item on which the 1st respondent placed much emphasis appears to us to be a strong circumstance which supports the oral evidence of the 1st respondent in regard to the representation made by the auctioneer and her own mistaken impression of the size of the property which she purchased at the sale. Coupled with this circumstance it is of very great significance in this case that the only person who could have contradicted the evidence of the 1st respondent and her witness, namely, the auctioneer, who was the 4th respondent at the inquiry into this application, did not choose to give evidence. While these were the points urged by Counsel for the respondent, the learned District Judge has taken into account a number of other factors regarding the conduct of the auctioneer before the sale which have induced him to hold that the 1st respondent was misled in regard to the size and the nature of the property she was bidding for. These factors are that the auctioneer came up to the entrance at the gate near which the petitioner's car was parked and announced that the whole property up to the gate would be sold; that this was followed by tom-tom beating and that the tom-tom beating

was at the entrance to the property which extended up to the parapet wall. What is important in this case is the state of mind of the purchaser and as to whether that state of mind which led her to believe that she was bidding for the entire property was induced by a positive misrepresentation or even by an incorrect representation which the auctioneer believed to be true. Whether such representation was by words or by conduct is in our view immaterial. The question is whether the purchaser was misled into believing that she was buying a larger property with a road frontage abutting it and with a motorable road access and in that belief made an offer for the property which in fact did not possess these attributes and whether, when such matters are represented to the Court for the purpose of obtaining relief, a Court, if satisfied that the complaint is well founded, should refuse to grant relief. We think it is the duty of the Court to grant relief in those circumstances in the absence of a positive provision of law which stands in the way of the Court granting such relief.

The learned District Judge has on a careful analysis of the evidence come to the conclusion that the purchaser was in fact misled. The submissions made on behalf of the appellant do not persuade us to take a contrary view.

The other question for consideration therefore is whether there is any legal barrier against giving the relief desired. Having regard to the provisions of the Civil Procedure Code and the number of judicial pronouncements which have been considered by the learned District Judge, we cannot say that there is any provision of law or any judicial decision which precludes the entertainment of the application of the 1st respondent by the Court or of the grant of the relief sought. On the contrary, it seems to us that the trend of judicial decisions favours the grant of relief in circumstances such as those present in the instant case. It is apposite to quote in this connection the following words of the Privy Council decision in *Kala Mea* v. *Harperink* (1908)—ILR 36 Calcutta 323, which was cited both in the lower court and before this court which should serve as a guide to the Courts' responsibility on the matter of sales which are ordered on their directions;

> "It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud, or deceit *or* misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate, not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be shocking if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this."

For these reasons we see no reason to interfere with the order made by the learned District Judge

It was submitted on behalf of the 4th respondent that there was no provision to make him a party to these proceedings relating to Section 344 of the Civil Procedure Code. It would appear that the 4th respondent raised no objection to his being made a party at the inception of the inquiry. He took part in the proceedings and although the whole point of the inquiry turned on the question of certain representations said to have been made by him he chose to give no evidence. If indeed the allegations were well founded this is a case where much responsibility would have to be taken by the 4th respondent and the rules of natural justice required that he should be given notice of such proceedings. In fact a serious and legitimate complaint could have been made by him if indeed he was not made a party. For that reason alone we think that the petitioner acted correctly when the 4th respondent was made a party to the original proceedings and the learned District Judge's order in this regard merits no criticism.

The appeal is dismissed with costs payable to the 1st respondent.

Sansoni, C.J.

I agree.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: **T. S. Fernando, J.** (*President*), **Abeyesundere, J., and G. P. A. Silva, J.**

S. D. FRANCIS APPUHAMY AND THREE OTHERS *vs.* THE QUEEN

C.C.A. Appeals Nos. 116-119 *of* 1965 (*with Applications Nos.* 140-143 *of* 1965)
S.C. 287—*M.C. Panadura* 80408.

Argued on: 28th February, 1st, 2nd and 7th March, 1966.
Decided on: 7th March, 1966.
Reasons delivered on: 29th March, 1966.

Court of Criminal Appeal—Charges of unlawful assembly, murder and attempted murder, common intention — Five accused — One accused acquitted—Effect on convictions of others—No misdirection—Verdict not unreasonable—Only one eye-witness—Indivisibility of credibility—Limits of such principle—Identity of fifth man — Surprise—Whether new case set up — No misdirection on common intention—Prosecution failing to call witness — Presumption drawn under Evidence Ordinance (*Cap.* 14), *section* 114(f) — *Penal Code, sections* 32, 140, 146, 296, 300.

The four appellants and one D. S. were indicted on 15 charges : charge 1 that they were the members of an unlawful assembly, the common object of which was to cause hurt to one E. Charges 2 to 8 were based on an imputation of vicarious criminal liability for the acts of one or more members of that unlawful assembly in killing two persons, C. and T, and attempting to kill five persons. Charges 9 to 15 were against the five accused on an imputation that the said acts of killing or attempts to kill the said persons were done in furtherance of the common intention of all.

The Jury by a verdict of five to two found the four appellants guilty on all the charges, and D.S. (the fifth accused) not guilty of any offence.

Apart from the medical evidence, the evidence of the Government Analyst and Police and other formal evidence, the case of the Crown rested on the sole testimony of a single eye-witness, Irene Rodrigo, the mistress of E.. At the trial she purported to identify all five accused as having taken part in the incident, and as having had weapons (first four accused, guns, and the fifth accused, a revolver) in their hands, with the help of bright electric light at the junction where the incident was alleged to have taken place at about 11.30 p.m. She also described the entire incident.

In her evidence she stated that while the firing was going on, the 5th accused D.S. who was a driver employed under the 2nd accused was seen firing three or four times shaking the pistol. In her statement to the Police on the same night (4D3), she had stated that she "did not know the name of the person who fired two or three shots with a pistol," and had described that man as a driver who lived at Katubedde Junction — not even as a driver employed under the 2nd accused.

The trial Judge directed the Jury as follows:—

"Then gentlemen, in regard to these people she says that she knew them; she knew them by name; but she says in regard to the 5th accused, she knew the man, but she had forgotten his name. Now there, gentlemen, comment has been very legitimately made by the defence, 'Well, in that case why did she not say to the police I know the man, but I have forgotten his name,'.....

"If, in view of that discrepancy, you think that it was not the 5th accused that she referred to at that time, but some other man, and that later she has brought in the 5th accused saying that it was Podda's (2nd accused's) driver, then, the benefit of that doubt must be given to the 5th accused that she has not correctly identified, and .....if she has made you to come to the conclusion with certainty that she has not correctly identified; I mean it is not just a question of giving the benefit of the doubt to the 5th accused, but you are certain in your mind then you must see the impression on your mind in regard to the other accused; whether you believe her evidence or not."

The main ground of appeal relied on by counsel or all four appellants was that the verdict on the 1st to 5th charges (the unlawful assembly charges) was unreasonable in the light of the acquittal of the fifth accused.

Held: (1) That in view of this direction, the Jury's verdict could fairly be taken as indicating that they merely entertained a reasonable doubt about the identity, but not about the presence, of a fifth man.

The trial Judge further directed the Jury as follows:—

"If you think that she did not know the assailants, or if you think that she never saw the assailants because they never got out of the car, then you will remember, if that is your opinion, that you are disbelieving Irene; or in your consideration of the evidence you come to the conclusion that that is possible, then there is no use going further, for then Irene has told a false story in the box."

Later he said: "If Irene's evidence has satisfied you that the 1st, 2nd, 3rd and 4th and another man were there, because if you have doubts in view of Irene earlier having said that it was a man she knows but she did not give the name of the man, or that it was Podda's driver — though she said it was a driver — if that creates a doubt in your mind with regard to the 5th accused, then the 5th accused is out. If you accept Irene's evidence that these five people were there, or that the 1st, 2nd, 3rd, 4th accused and another man were there, then..... we have to consider the Crown charge that there was an unlawful assembly." The Judge also directed the Jury that Irene had never swerved from her position that there were five persons.

Held: (2) (*a*) That the said directions were not unfair in the circumstances, since the Crown had to prove the existence of the unlawful assembly and the identification of the members thereof;

(*b*) That it was not correct to state that the Judge was setting up a new case altogether from that which the prosecution alleged and the defence had to meet.

(3) That in returning the verdicts on the first eight charges, the Jury were undeniably satisfied that there were five persons, four of whom were the four appellants, and in the light of the directions given by the Judge, it was not permissible to infer that the Jury considered Irene's evidence in respect of her identification of the 5th accused to be false, and the high probability was that they concluded that she was merely mistaken in regard to the identity of the fifth man.

Distinguished: *Mohamed Fiaz Baksh* v. *The Queen* (1958) A.C. 167; (1958) 2 W.L.R. 536
R. v. *Margulas* (1922) 17 Cr. A.R. 3.

(4) That there was no substance in the argument that the defence was taken by surprise by a case of an allegation of unlawful assembly composed of the appellants and an unidentified man being sprung upon it for the first time during the summing-up of the trial Judge. So long as the Crown was able to establish the presence of the requisite number of persons with a common object, the unlawful assembly was complete. All that was thereafter necessary was identification of those proved to be present.

Referred to: *Dalip Singh* v. *State of Punjab* (1953) A.I.R. (S.C.) 366
The King v. *Fernando et al.* (1947) 48 N.L.R. 200
Distinguished: *Jayaram* v. *Saraph* (1954) 56 N.L.R. 22.

(5) That while it was true that a doubt in respect of the presence of a named man cannot amount to proof beyond reasonable doubt of the presence of an unnamed man, the verdict in the light of the directions given to the Jury meant that the Jury was quite satisfied that five persons were present doing the acts attributed to them by Irene.

(6) That in directing the Jury on the charges based on common intention, the trial Judge had placed the burden on the prosecution at the highest possible level, and the verdict showed that the Jury was satisfied that the appellants had agreed to kill. The directions were neither inadequate nor unfair.

With regard to the omission to call the witness Gilbert and or other similar witnesses who were present at the time of the shooting, the trial Judge directed as follows: ".....you may infer that the Crown did not call the others because they are not in position to speak to the assailants. You may infer that they are witnesses who do not help the prosecution case..... I think the simple point for you to decide is this: do you accept the testimony of Irene. If you are doubting the evidence of Irene, then you must acquit the accused." It was submitted on behalf of the appellants that the directions to the jury on this point were wrong and contrary to the presumption that could have been drawn under section 114(f) of the Evidence Ordinance.

Held: (7) That the direction put the matter as favourably as possible to the defence.

Referred to: *The King* v. *Chalo Singho* (1941) 42 N.L.R. 269; XX C.L.W. 21
R. v. *Olivia* (1965) 3 A.E.R. 116 ; (1965) 1 W.L.R. 1028
R. v. *Edwards, Underwood & Edwards* (1848) 3 Cox. C.C. 82; 11 L.T.O.S. 50; 12 J.P. 795

Per **T. S. Fernando, J.** — "The remark that credibility of witnesses could not be treated as divisible came to be made in the circumstances related above. We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly in this country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true. In the instant case, in the light of the directions given by the trial judge, it is, in our opinion, not permissible to infer that the jury considered Irene's evidence in respect of her identification of the 5th accused to be false."

G. E. Chitty, Q.C., with *Eardley Perera* and *A. S. Vanigasooriyar*, for the 1st accused-appellant.

E. R. S. R. Coomaraswamy, with *L. Athulathmudali, Miss Barr-Kumarakulasinghe, Anil Obeysekere, N. M. S. Jayawickrama* and *Kumar Amerasekera*, for the 2nd accused-appellant.

Colvin R. de Silva with *E. R. S. R. Coomaraswamy*, *Eardley Perera* and *Miss Manouri de Silva* for the 3rd and 4th accused-appellants.

Neville Wijeratne, (assigned) for all four appellants.

A. C. de Zoysa, *Crown Counsel*, for the Crown.

T. S. Fernando, J.

The four appellants (as the 1st to the 4th accused) along with another man named Don Stephen (as the 5th accused) stood their trial at the Kalutara Assizes on an indictment consisting of no less than 15 charges. The first eight of these charges were based on the allegation that the five persons accused were members of an unlawful assembly. Of these eight charges, the first was what I might term a charge of unlawful assembly *simpliciter*; the second to eighth charges were based on an imputation of vicarious criminal liability for the acts of one or more members of the aforesaid unlawful assembly in killing two persons and attempting to kill five others. The remaining seven charges, namely the ninth to the fifteenth charges, had been framed, also against all five persons, on an imputation that the killings and the attempts to kill persons referred to above were done in furtherance of the common intention of them all. The jury by a divided verdict of five to two found the four appellants guilty of the offences specified in all fifteen charges. By a similarly divided verdict they found the 5th accused, Don Stephen, not guilty of any offence. Each of the appellants was sentenced to death in respect of the convictions on the charges of murder and to terms of imprisonment in respect of the convictions on the other charges.

Apart from the medical evidence, the evidence of the Government Analyst and formal police and other evidence, the case of the Crown rested on the sole testimony of a single eye-witness, a woman by the name of Irene Rodrigo, the mistress of a man called Edwin alias Ediman, who had herself received certain gun-shot injuries on the fingers of her left hand in the course of the firing which she alleged caused the deaths of two men and injuries on four others on the night in question. Shortly stated, her evidence was to the effect that she had accompanied Ediman about 6 p.m. on the night of the 7th July 1963 to an evening party at Ratmalana to celebrate the wedding of a police constable. Ediman took along to this party a friend of his, a man named Gilbert, and Gilbert's mistress Sumanawathie and four men, Tyrell, Christie, Anthony and Ariyadasa, who were all musicians and who, along with about six others, provided the music at the party. They travelled to the party from Panadura in two cars, picking up the musicians on the way at Moratumulla. Liquor appears to have been served liberally at the party which broke up about 11 p.m. On the way back Ediman and Irene, Gilbert and Sumanawathie got into Ediman's car. Three of the musicians, Tyrell, Christie and Anthony, also got into it and sat on the front seat beside Gilbert who took the wheel. The other three sat on the rear seat, Irene between Ediman and Sumanawathie. Irene in her evidence described Sumanawathie and herself as being the only persons who were sober. The others had all partaken of liquor at the party.

At a place described as the junction between De Mel road and Fonseka road a car which Irene recognised as the car of the 1st accused came up and halted about 8 feet away from the car in which she was travelling, blocking its progress. She raised a cry "There is Shelton Bass's car". (Shelton Bass is a name by which the 1st accused is commonly known). As the car halted she recognised the 4th accused getting down from its driving seat with a gun in his hand. (The 4th accused is the car driver of the 1st accused). Almost immediately thereafter the 3rd accused, who is a cousin of the 1st and 2nd accused got down from the rear seat of the car, also carrying a gun. Irene cried out to her husband almost instinctively "They are trying to shoot". At the same moment the 5th accused got down from the front seat with a pistol in his hand. (The 5th accused is a car driver employed under the 2nd accused who is a brother of the 1st accused). Thereafter the 2nd accused, and finally the 1st accused, also got down from the rear seat of the same car, each of them carrying a gun. All of them then moved as if in a row towards the left of Irene's car. None of the occupants of her car made any attempt to get down. As the 4th accused aimed his gun at them, Irene, shouting to Ediman to duck, held him by his head and pressed him down. That shot rang out and Ediman collapsed on to the floor of the car. Then, as the 3rd accused stepped forward to fire, Irene put her arm round the shoulder of Sumanawathie and shouted "Bend

down". Both women ducked the shot fired by the 3rd accused which Irene thought struck some portion of the rear seat of the car. As the two women raised their heads thereafter, Irene saw the 2nd accused aim his gun in the direction of the front seat of the car and fire. Tyrell cried out, and Irene assumed Tyrell had been injured by that shot. The 1st accused then aimed his gun in the direction of the car and fired. A silence of about two minutes followed. Irene raised her head and looked round. None of the accused was then to be seen, but immediately thereafter she again saw the 4th accused go up to the other car, take over a gun from one of the persons in that car, step forward towards Irene's car and fire in the direction of the front seat As a result of that firing Christie's head slumped towards the left and Irene thought that shot struck Christie. The 4th accused next got into that car which then drove off in the direction of the main road. In answer to a specific question as to whether she saw the 5th accused do anything, Irene replied that while the other firing was going on the 5th accused was seen firing three or four times shaking the pistol.

After the car in which the accused had come there had driven off, Irene raised cries and a crowd collected. The other car which carried the rest of the musicians also came up about this time, and Gilbert and Sumanawathie were taken to hospital in that car. Ediman was lying unconscious on the floor of his car. Irene raised him on to her lap. Anthony got off the front seat. He was the only person of the seven who travelled in Ediman's car who had escaped injury. Tyrell and Christie lay slumped on the front seat. Some man who had come up there for the cries that were raised drove Ediman's car to the hospital carrying in it the injured Ediman, Irene, Tyrell and Christie. In all probability Tyrell and Christie were then already dead. The medical evidence was to the effect that Tyrell and Christie had received gun shot injuries killing them almost instantaneously. Ediman had several gun shot wounds on his face and head and Gilbert similar wounds on his chest and abdomen. The two women had also received gun shot injuries but they were relatively minor ones.

The investigating police found at the scene of the firing certain spent cartridges, wadding etc. which were examined by the ballistics expert who expressed the opinion that at least six, possibly seven, shots had been fired that night. If one or more of those who fired with guns did not reload their guns at the scene they would in all probability have the spent cartridge still in the gun at the time of driving away from the scene, and in that event there were probably more shots fired than even the seven which was the estimate of the expert. There was damage on Ediman's car that could have been caused, in the opinoin of the expert, by at least two bullets from pistols. This expert evidence went some way towards corroborating the evidence of Irene that she heard seven or eight shots being fired before the 4th accused fired the last shot just before the other car drove off.

It was plain at the trial that Irene must undoubtedly have been in the company of the persons who were killed or injured on the night in question. She claimed that apart from the lights of the cars there was a bright street lamp at the junction. The jury by its verdict showed that it accepted and acted on her evidence except so much of it as related to her identification of the 5th accused.

The main ground of appeal relied on by counsel for all four appellants was that the verdict on the first to the eighth charges (the unlawful assembly charges) was unreasonable in the light of the acquittal of the 5th accused. As Irene stated that only the 1st to the 5th accused were present at the firing, and because the jury was not satisfied that the 5th accused was one of those so present, they contended that only four persons were proved to have been present, thus making it obligatory on the jury to return a verdict of not guilty in respect of all the charges dependent upon the existence of an unlawful assembly. An assessment of this argument requires an examination of Irene's evidence in regard to two matters, (1) the number of persons who participated in the firing and (2) the identity of those persons.

In regard to the number of persons, Irene was never in doubt that there were five persons who got down from the 1st accused's car. She had known the brothers, the 1st and the 2nd accused, from her childhood. Their cousin, the 3rd accused, she had known for 15 years. She had known the 4th accused for some 10 years, and had also known that he was for the last 6 years the car driver of the 1st accused. The 5th accused she had known for a relatively shorter period of 2 years, but she knew that he used to drive the car of the 2nd accused. Her cross-examination elicited an answer from her that when she made a statement to the police she had not mentioned the name of the 5th accused because she could not remember it at

the time. That part of her statement was, however, proved by the defence at the trial — (vide 4D3) — and showed that what she had stated to the police was that she "did not know the name of the person who fired two or three shots with a pistol." She had described that man as a driver who lives at Katubedde junction, not even as a driver employed under the 2nd accused whom she had earlier in that statement named as a participant in the firing. This aspect of her testimony was referred to by the learned trial judge in his charge to the jury in the following words:—

> "Then gentlemen, in regard to these people, she says that she knew them; she knew them by name; but she says in regard to the 5th accused, she knew the man, but she had forgotten his name. Now there, gentlemen comment has been very legitimately made by the defence, 'Well, in that case why did she not say to the police I know the man, but I have forgotten his name'.....
>
> If, in view of that discrepancy, you think that it was not the 5th accused that she referred to at that time, but some other man, and that later she has brought in the 5th accused saying that it was Podda's (2nd accused's) driver, then, the benefit of that doubt must be given to the 5th accused that she has not correctly identified, and gentlemen, if she has made you to come to the conclusion with certainty that she has not correctly identified; I mean it is not just a question of giving the benefit of the doubt to the 5th accused, but you are certain in your mind then you must see the impression on your mind in regard to the other accused; whether you believe her evidence or not."

This is a direction which indicates that the trial Judge was telling the jury that if they entertained a reasonable doubt about correct identification of the fifth man, the 5th accused had to receive the benefit of that doubt; but that if they went further and concluded that Irene was either testifying falsely in respect of the 5th accused or was quite mistaken in regard to his identity, then they had to consider whether the evidence in respect of the identification of the other four (the appellants) is also not tainted thereby. The jury's verdict can fairly be taken as indicating that they merely entertained a reasonable doubt about the identity but not about the presence of a fifth man.

We should, moreover, not overlook another direction which the trial judge gave the jury. Referring to a suggestion made by counsel for the defence he said — "If you think that she did not know the assailants, or if you think that she never saw the assailants because they never got out of the car, then you will remember, if that is your opinion, that you are disbelieving Irene; or in your consideration of the evidence you come to the conclusion that that is possible, then there is no use in going further, for then Irene has told a false story in the box."

Dealing finally with the unlawful assembly charges, the trial judge stated:—

> "If Irene's evidence has satisfied you that the 1st, 2nd, 3rd, 4th and another man were there, because if you have doubts in view of Irene earlier having said that it was a man she knows but she did not give the name of the man, or that it was Podda's driver — though she said it was a driver — if that creates a doubt in your mind with regard to the 5th accused, then the 5th accused is out. If you accept Irene's evidence that these five people were there, or the 1st, 2nd, 3rd, 4th accused and another man were there, then gentlemen, we have to consider the Crown charge that there was an unlawful assembly."

As we construe it, the charge in the indictment alleged that these four appellants and the 5th accused were that night members of an unlawful assembly. In other words, the allegation was that there was an unlawful assembly of five persons there that night at the junction, and that the persons charged at the trial were identified as those five persons. There were two matters the Crown undertook to prove, (1) the existence of an unlawful assembly and (2) the identification of the persons who formed the membership of that particular assembly. We do not consider that the way in which the learned judge addressed the jury on the question was unfair in the circumstances, nor can we agree with the contention that in his charge to the jury the judge was setting up a new case altogether from that which the prosecution alleged and the defence had to meet. As he put it, "if you accept Irene's evidence that she saw the 1st, 2nd, 3rd and 4th — you might prossibly have some doubt whether the 5th was there in view of what I told you earlier — If you have that doubt whether the 5th accused was there in view of Irene's evidence saying "I know the man", then the question is *whether there were five persons. Now Irene said right along that there were five; she never swerved from that position.* The fifth man she had said was the 5th accused. Even if you doubt that it was the 5th accused, there was a fifth man according to her. *So then the fifth man and these four people would form the unlawful assembly.*"

In returning verdicts of guilty on the first eight charges, it is undeniable in the circumstances that the jury was satisfied that there were that night five persons, four of whom, they were confident, were the four appellants. We were referred to the remarks contained in the judgment of the Privy Council in the case of *Mohamed Fiaz*

Baksh v. *The Queen*,(1958) A.C. 167, hat the credibility (of witness) could not be treated as divisible and accepted against one and rejected against another. These remarks, it must not be overlooked, came to be made on an appeal from the Court of Criminal Appeal in British Guiana where that court had made an unusual order. The appellant and his co-accused (who had each relied on an alibi) had been convicted of murder. At an appeal taken to the Court of Criminal Appeal, that Court permitted to be produced and proved before it statements, which had not been available at the trial, made to the police by the three main witnesses for the prosecution. The Court found that a comparison of the statements with the oral evidence given by those witnesses at the trial disclosed material discrepancies. In respect of the appellant's co-accused the Court said that in the interests of justice the value and weight of the new evidence should be determined by a jury and not by that court, and his conviction was quashed and a retrial ordered. In the case of the appellant the Court said that different considerations applied, that nothing favourable to him could have been obtained from the statements which were not available at the trial and held that the jury's verdict could not be disturbed. In regard to the distinction the Court of Criminal Appeal made, the Privy Council observed that "if the statements afforded material for serious challenge to the credibility or reliability of the witnesses on matters vital to the case for the prosecution, the defence by cross-examination might have destroyed the whole case against both accused or, at any rate, shown that the evidence of those witnesses could not be relied on as sufficient to displace the evidence in support of the alibis." The remark that credibility of witnesses could not be treated as divisible came to be made in the circumstances related above. We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly in this country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that persons or enemies of such witnesses. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true. In the instant case, in the light of the directions given by the trial judge, it is, in our opinion, not permissible to infer that the jury considered Irene's evidence in respect of her identification of the 5th accused to be false. The high probability is that they concluded she was merely mistaken in regard to the identity of the fifth man, the man with the pistol. Certainly, they found on her evidence that five persons did come along with firearms and participated in an attack substantially in the manner she described.

We do not consider, as we have already indicated above, that there is much substance in the argument that the defence was taken by surprise by a case of an allegation of unlawful assembly composed of the appellants and an unidentified man "being sprung upon it for the first time" during the summing-up of the trial judge. The charge was that the five persons named in the indictment were members of an unlawful assembly. So long as the Crown was able to establish the presence of the requisite number of persons with a common unlawful object, the unlawful assembly was complete. All that was thereafter necessary was identification of those proved to be present. As Bose J. stated in delivering the judgment of the Supreme Court of India in *Dalip Singh* v. *State of Punjab*, 1953 A.I.R. (S.C.) at 366, "this is not to say that five persons must always be convicted before section 149 can be applied. There are cases and cases. It is possible in some cases for judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 would be good". In the local case of *The King* v. *Fernando et al.* (1947) 48 N.L.R. 200, one of the two reasons given by this Court for the dismissal of an appeal of four appellants who had stood their trial (along with a fifth man who was acquitted) on charges of unlawful assembly and murder was that "while there was overwhelming evidence that the four appellants and another took part in the transaction which resulted in the death of the deceased there were circumstances which involved in some doubt the identity of the fifth person". This case was sought to be distinguished in a decision given by a single judge, Pulle J., in *Jayaram* v. *Saraph*, (1954) 56 N.L.R. 22, but the distinction was based on the manner in which the charge had been there framed. The charge in *Jayaram* v. *Saraph* was that the accused "did form members of an unlawful assembly", i.e. they constituted the unlawful assembly, and not, as here, that they "were members of an unlawful assembly".

Reference was made also to the case of *Harry Margulas*, (1922) 17 Cr. A.R. 3, and cases which

have purported to follow it. In all those cases, however, the jury on evidence of the same weight had in the case of one or more of the accused persons returned a verdict of guilty while acquitting another or others. Such a result would, of course, be unreasonable; but that is not the position in the instant case where the distinction drawn by the jury can be shown to be based on sufficient reason.

Another argument addressed to us was that the verdict shows that the jury was satisfied beyond reasonable doubt only in respect of the presence of the four appellants. If there was a reasonable doubt in regard to the presence of the 5th accused, so counsel argued, such a doubt could not in any circumstances amount to proof beyond reasonable doubt of the presence of a fifth unidentified man. While we must, of course, agree that a doubt in respect of the presence of a named man cannot amount to proof beyond reasonable doubt of the presence of an unnamed man, the verdict in the light of the directions given to the jury by the trial judge meant that the jury was quite satisfied that five persons were present doing the acts attributed to them by the witness Irene. In our opinion the main ground relied on by the appellants fails.

We can now turn to the examination of the other two grounds of appeal that were urged. The first of these related to an alleged inadequacy of the directions in regard to proof of common intention. In framing the ninth of the fifteenth charges, the Crown had placed reliance on the principle of law embodied in Section 32 of the Penal Code. In respect of these charges, it was urged that the directions actually given to the jury were inadequate. We need only say, however, that in directing the jury on these particular charges the learned judge placed the burden on the prosecution at the highest possible level when he stated:—

> "In other words, did each of them have a murderous intention, and did they agree among themselves to commit the act in which case it becomes a common murderous intention."

This was repeated at a later stage of his charge when he stated "but if they had all agreed then the murder by A is murder by all". The verdict shows that the jury was satisfied that the appellants had agreed to kill. Indeed, an acceptance of Irene's evidence in respect of the appellants did not leave room for any other inference. The blocking by an armed gang of the car in which the victims were travelling and repeated firing by all at the cornered victims could not have been explained on any other theory but that of a prearrangement to kill. The plan of the appellants in all probability was to kill Ediman, but the manner of the execution of that plan left little room for doubt that they were determined also to kill anyone else who might be in the way of the achievment of that object. The directions to the jury in so far as they affected the ninth to the fifteenth charges were neither inadequate nor unfair. That ground of appeal also therefore fails.

The remaining ground of appeal revolved round the omission of the Crown to call certain witnesses (occupants of Ediman's car at the time of the firing) whose names were on the indictment in the list of witnesses for the prosecution. After the Crown and the Defence had closed their respective cases, counsel for the 4th and 5th accused began his address to the jury and concluded it on the next day. Thereupon Crown counsel addressed the jury, followed by counsel for the 1st, 2nd and 3rd accused. He had not concluded his address at the time the Court adjourned for the day and on the following day, before counsel could resume his address, the foreman of the jury asked the judge whether it was possible (a) to call Gilbert as a witness and (b) to make a visit to the scene. For reasons which appear to us to be adequate, the trial judge declined to order either of the steps indicated by the jury to be taken. It was conceded by counsel for the appellants that in so far as a discretion lay with the judge that discretion could not be said to have been exercised wrongly or unfairly. It was contended, however, that the directions to the jury on the question of omission to call the witness Gilbert and/or other similar witnesses was wrong and was contrary to the presumption that could have been drawn as shown in illustration (f) to section 114 of the Evidence Ordinance. What the learned judge did say was as follows:—

> "The Crown has called one person. The Crown has called that person to tell you what happened. The Crown has not called the others. Well, you may infer that the Crown did not call the others because they are not in a position to speak to the assailants. You may infer that they are witnesses who do not help the prosecution case. The defence says, well, you cannot expect us to call prosecution witnessess because we will lose the right of cross-examining them for they are likely to be adverse and so on. I think the simple point for you to decide is this: do you accept the testimony of Irene? If you feel that you want to hear other witnesses, it is because you don't rely on the evidence of Irene. If you are doubting the evidence of Irene, then you must acquit the accused."

At the stage the jury made the inquiries specified above, it is highly probable they did so because

counsel who addressed them on behalf of the accused had made comments unfavourable to the Crown's case on account of the failure to call the other witnesses. The direction given to the jury to acquit the accused if they doubted the evidence of Irene put the matter as favourably as possible to the defence, and we saw no substance in this last ground of appeal.

This Court has dealt with a similar point in *The King* v. *Chalo Singho*, (1941) 42 N.L.R. 269, where Soertsz J. stated on behalf of the Court that "there is no non-direction by the judge when he omits to refer to the presumption under section 114(f) of the Evidence Ordinance in cases in which the Crown does not call or tender for cross-examination on the request of the prisoner's pleader a witness whom the prisoner's pleader had himself an opportunity of calling. Indeed, it would be a misdirection for a judge, in those circumstances, to tell the jury that they may apply the presumption." The law on this point has been understood in the manner above stated and has been so applied in this country for nearly a quarter of a century, but we were invited by learned counsel for the 1st accused to consider whether it should not be reviewed in the light of the recent decision of the English Court of Criminal Appeal in *R.* v. *Olivia*, (1965) 3 A.E.R. 116 at 122. Lord Parker, C.J., there observed:—

> "Accordingly, as it seems to this court, the principles are plain. The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them, or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interests of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness."

We would like to observe, with respect, that we find nothing in the above enunciation of the relevant principles to induce us to attempt to modify the salutary dictum in *Chalo Singho's case* (*supra*) we have quoted above. Indeed, it is our experience that in this country where unfortunately for several years there has been too great a time lag between committal and trial — a time lag which still disfigures the calendars of the courts — there is particular reason not to criticise or interfere unduly with the discretion of prosecuting counsel as to the witnesses he should call. As Erle C.J. stated in *R.* v. *Edwards, Underwood and Edwards*, (1848) 3 Cox C.C. at 83, "generally speaking, we ought to be careful not to overrule the discretion of counsel who are, of course, more fully aware of the case than we can be."

For the reasons we have now set down we dismissed at the conclusion of the argument the appeals and the applications for leave to appeal of the four appellants.

Appeals dismissed.

Present: **T. S. Fernando, J., G. P. A. Silva, J. and Alles, J.**

PASANGNA *vs.* THE REGISTRAR-GENERAL & ANOTHER

D. C. Criminal 47/1963 — *D. C. Matale* — X 868.

Argued on: 30th September, 1964, and 29th January, 1965.
Decided on: 12th February, 1965.

Registration of Births and Deaths Act (*Cap.* 110) *section* 10 —*Application for alteration of particulars regarding father's and mother's race from "Indian Tamil" to "Ceylon Tamil" in Birth Register under section* 28(i)(b) — *Applicant, a registered citizen of Ceylon under Indian and Pakistani Residents* (*Citizenship*) *Act* (*Cap.* 350) — *Effect of sections* 6(2)(iv) (*a*) *and* 18 — *Distinction between "race" and "citizenship."*

Interpretation of Statutes—Schedule to Enactment—Preamble—Their importance in interpretation.

The petitioner-appellant applied in terms of section 28 (1)(b) of the Births and Deaths Registration Act (Cap. 110) for the alteration of two entries as to the petitioner's race and that of his wife from 'Indian Tamil" to "Citizen of Ceylon

Tamil". These entries had been made in cages (4) and (5) respectively in the register of Births in respect of the registration of the birth of the petitioner's son born on 30. 9. 1960 as required by section 10(1) of the said Act and Form A referred to therein. To the particulars in Form A regarding "race" in each of the cages 4 and 5 is attached a footnote containing the following words:—

"Tamils or Moors must be described as Ceylon Tamils or Moors or Indian Tamils or Moors as the case may be."

The evidence led before the District Court showed:—

(*a*) that the petitioner, his wife and four children were on 18. 3. 1954 registered as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act.

(*b*) That the petitioner and his wife were born in India and they were Indian Tamils by race and born of parents who lived in India, before he obtained citizenship rights in Ceylon.

The learned District Judge upheld the contention of the respondents (The Registrar General and the Provincial Registrar of Births and Deaths) that the acquisition of citizenship rights by any person did not involve a change in his 'race' and refused the application.

An appeal was taken from this order on the ground inter alia that by virtue of the provisions of section 18 of the Indian and Pakistani Residents (Citizenship) Act, a person who is registered as a citizen under the Act becomes entitled to the same rights and subject to the same liabilities as any other citizen of Ceylon and therefore the appellant and his wife were Ceylon Tamils on the day of the birth of the son whose registration was in question.

On account of a difference of opinion between the two Judges before whom the appeal was originally argued, the matter was referred to a Bench of three judges under section 38 of the Courts Ordinance.

Held: (1) That it is a rule of interpretation that what is provided in a schedule referred to in a section of an Act is as important as a provision in the Act itself, and would cease to prevail only in the event of a repugnance to a provision in the main Act itself.

(2) That applying this principle, it is imperative that the schedule referred to in Section 10 of the Births and Deaths Registration Act and containing the Form A, which lays down in clear terms the particulars to be entered, should be complied with, there being no conflicting provision in the Act itself.

(3) That, therefore the Registrar was correct in making the entry "Indian Tamil" in both cages 4 and 5 aforesaid.

(4) That there is a distinction between 'race' and 'citizenship' and consequently the renunciation of all the rights to the civil and political status referred to in section 6(2)(iv)(a) of the Indian and Pakistani Residents (Citizenship) Act would not preclude an applicant who is registered as a citizen from calling himself thereafter an Indian Tamil by race. This would not prejudicially affect such a person or any member of the family.

M. Tiruchelvam, Q.C., with *T. Somasunderam* and *Mark Fernando* for the petitioner-appellant.

R. Hector Deheragoda, Senior Crown Counsel, with *N. B. de S. Wijesekera, Crown Counsel*, for the respondents-respondents.

G. P. A. Silva, J.

The petitioner-appellant made an application to the District Court of Matale to have certain particulars of entries made by the Registrar of Births, Matale, in respect of the registration of the birth of his son born on 30. 9. 1960, altered in terms of section 28(1)(b) of the Births and Deaths Registration Act, (Chapter 110 of the Legislative Enactments of Ceylon). The said particulars, so far as they are relevant to the present appeal, consisted of the alteration of the particulars as to the father's race and the mother's race from "Indian Tamil" to "Citizen of Ceylon Tamil" in cages (4) and (5) of the Register of Births.

The evidence of the petitioner before the District Court was that he, his wife and their four children were, on 18. 3. 1954, registered as Citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act, (Chapter 350 of the Legislative Enactments of Ceylon). He produced the certificate relating to their registration as Citizens of Ceylon and there was no dispute in regard to this matter. In cross-examination, however, the petitioner stated that both he and his wife were born in India and that they were Indian Tamils by race

and that he was a subject of India, being born of parents who lived in India, before he obtained citizenship rights in Ceylon. It would appear from the evidence that the relevant particulars in the Register of Births in regard to a son born on 4. 10. 1954 after he became a Citizen of Ceylon had been entered in the way the petitioner desired, namely, as "Ceylon Tamil". It was contended on behalf of the respondents, the Registrar-General and the Assistant Provincial Registrar of Births and Deaths, Matale, that the alterations desired by the petitioner should not be made. The learned District Judge upheld the respondents' contention and refused the application holding that the acquisition of citizenship rights by any person did not involve a change in his race, the petitioner having admitted that he and his wife were Indian Tamils by race.

The appellant has appealed to this court from the decision of the learned District Judge inter alia on the ground that, by virtue of the provisions of section 18 of the Indian and Pakistani Residents (Citizenship) Act, (Chapter 350 of the Legislative Enactments of Ceylon), a person who is registered as a citizen under the Act becomes entitled to the same rights and subject to the same liabilities as any other citizen of Ceylon and also that, by reason of such registration, the appellant and his wife were Ceylon Tamils on the day of the birth of the son whose registration was in question. For these reasons, the appellant prayed for an order setting aside the order made by the learned District Judge and requiring an alteration of the words "Indian Tamil" to "Ceylon Tamil" in cages (4) and (5) of the Register of Births referred to. On account of a difference of opinion between the two Judges of this court before whom the appeal first came up for argument it was listed before us in terms of section 38 of the Courts Ordinance.

Primarily, in this appeal, the law which this court is called upon to interpret is a provision contained in Births and Deaths Registration Act. It is necessary that the provisions of any Act should be read together with any Schedule referred to therein as well as any Forms given thereunder. A Schedule has often even greater importance than a provision in the Act itself, for a Schedule or a Form contained therein may clarify a provision that is otherwise doubtful. It is stated in Craies on Statute Law (Sixth Edition) at page 224, that the Schedule in a Statute is as much a part of the Statute and is as much an enactment as any other part, and that if an enactment in a Schedule contradicts an earlier clause it prevails against it. Maxwell on 'Interpretation of Statutes' (Eleventh Edition) at page 156, says that where a passage in a Schedule to a Statute is repugnant to one in the body of the Statute the latter would prevail. Earlier at page 143 it is stated, "Clear provisions in the Schedule to an Act cannot be limited either by the title to that Schedule, or by a section in the Act itself reciting the purpose for which the Schedule is enacted." The conclusion to be drawn from these principles of interpretation is that what is provided in a Schedule referred to in a section in the Act is as important as a provision in the Act itself and would cease to prevail only in the event of repugnance to a provision in the main Act itself.

The Births and Deaths Registration Act, a non-compliance of the provisions of which is complained against in this appeal, lays down in section 10(1) that it shall be the duty of every Registrar of Births and Deaths to register accurately and with all convenient despatch in the registers provided by the Registrar-General the particulars of the matters set out in forms A and B of the Schedule. Form A relates to registration of births while Form B relates to registration of deaths. Cage (4) of Form A requires the Registrar to give the following particualrs with regard to the father of the child which is being registered:—

Full name:
Date of Birth:
Place of Birth:
Race:
Rank or profession:

Cage (5) requires him to enter the same particulars as regards the mother of the child. To the particulars regarding "Race" in each of the cages (4) and (5) is attached a foot note numbered 2 to the following effect:

"Tamils or Moors must be described as 'Ceylon' Tamils or Moors, or 'Indian' Tamils or Moors, as the case may be."

An application of the rule of interpretation referred to in the last paragraph to the facts of this case would lead to the conclusion that it is imperative that the provisions of the Schedule containing a Form which lays down in clear terms the particulars to be entered should be complied with, there being no specific provision in the Act itself which conflicts with such compliance. In regard to the particulars as to race the Registrar made the entry "Indian Tamil" in both cages (4) and (5) as he considered it to be the only compliance with section 10 and Form

A in the Schedule and the learned District Judge to whom an application was made in terms of section 28 of the Act for an alteration of these particulars refused the application on the ground that the particulars entered by the Registrar were correct.

The main questions arising in this appeal, therefore would appear to be:

(1) What is the general meaning attributable to the word 'race'?
(2) Can the race of a person be indirectly altered by an Act of any legislature subsequent to such person's birth?
(3) What is the meaning of the word 'race' in the contemplation of the Births and Deaths Registration Act?
(4) Does the registration of an Indian or Pakistani resident as a Citizen of Ceylon under the Indian and Pakistani Residented (Citizenship) Act entitle an Indian Tamil or an Indian Moor to be called a Ceylon Tamil or a Ceylon Moor or, as stated by the appellant in his application to the District Court, a "Citizen of Ceylon Tamil" or a "Citizen of Ceylon Moor" after such registration has been effected? and
(5) If the answer to (4) is in the negative or even in doubt. would a Registrar be in order in describing the race of an Indian Tamil, who has obtained Ceylon Citizenship by registration under the Indian and Pakistani Residents (Citizenship) Act, as a Ceylon Tamil, in the face of the specific provision in Form A in the Schedule to the Registration of Births and Deaths Act?

The word 'race' does not appear to have been legally defined in our law nor has a clear definition of the word in the Municipal Law of any other country or in International Law been brought to our notice. While the word 'nationality' has been defined as being the state or quality of belonging to a nation with political independence the word 'race' has a narrower connotation. While the fact of belonging to a certain nationality will necessarily confer a certain political status carrying with it certain civil rights which every national of a country will be entitled to, the fact of belonging to a certain race will not give either such political status or such civil rights. The political status and civil rights will be determined by the nationality to which a person of a particular race belongs. Depending on the nationality laws of a particular country the nationality of a person can be altered by the acquisition of another nationality. There are no such laws which would enable a person to change his race. 'Race' has generally been described in the courts as an ethnic group. This has probably followed the dictionary meaning of the word 'race'. Webster's Dictionary gives the meaning of the word 'race', inter alia, as the "state of being one of a special people or ethnical stock; hence, more narrowly, state of belonging to a particular group or family....." It also gives the following meanings: "The descendants of a common ancestor; a family, tribe, people, or nation, believed or presumed to belong to the same stock; a lineage; a breed; also, more broadly a class or kind of individuals with common, characteristics, interest, appearance, habits, or the like, as if derived from a common ancestor; as, the race of doctors; the race of birds." Although the word 'nation' too has been loosely used among the other words in Webeter's Dictionary, in view of the consideration that political status and civil rights appear to be the dividing line between 'nationality' and 'race' in modern times and in view of the fact that nationality or citizenship laws which have been enacted in most countries deal with national groups and not racial groups and as the question or decision in the instant case revolves to some extent round the implications of the Citizenship Act in which the term 'citizen of Ceylon' is used in the sense of nationality, the use of the word 'race' as being equivalent to or co-extensive with the word 'nation' can reasonably be eliminated.

Looking at it from another angle, nationality or citizenship of an individual is unaffected by the race to which he belongs and, conversely, whatever the race a person may belong to, he is not precluded from becoming a national or a citizen of another country, as the case may be, if he conforms to the requirements of the nationality or citizenship laws of that particular country. The words 'nationality' and 'citizenship' can generally be said to have the same meaning while 'race' does not. It is only in a few countries that citizenship has a wider connotation than nationality and this is from the point of view of Municipal Law. Citizenship, in these instances, would mean the state of being endowed with full political and personal rights, while nationality would not grant all those rights.

Oppenheim (Eighth Edition — Volume I) at page 645 says " 'Nationality' in the sense of citizenship of a certain State, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race. Thus, according to International Law, Englishmen and Scotsmen are, despite their different nationality as regards race, all of British nationality as regards their citizenship. Thus further, although all Polish individuals are of Polish nationality qua race, for many generations there were no Poles qua citizenship." Here too even though 'nationality'

and 'race' are used more or less as synonyms, citizenship is used in the different sense of being endowed with political and civil rights. The argument of counsel for the appellant too was in support of the principle that race was immutable while citizenship or nationality was not. This principle, of course, stands to reason. In the book entitled 'Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland' by Clive Parry, a number of instances are given, at page 264 and subsequent pages, of the circumstances in which a person belonging to a foreign race or nationality (in the sense of race) can apply for citizenship of the United Kingdom, thus showing the distinction between race and citizenship. In the instances such as those above cited from Oppenheim, I should be very surprised if a Pole or a Canadian or a Frenchman or a German by race called himself British by race after acquiring citizenship of the United Kingdom, although he would, no doubt, enjoy the very same political and civil rights as a British having such rights.

Bearing those principles in mind, I shall now proceed to consider the position in the instant case having regard to the specific provisions of law in the Births and Deaths Registration Act. According to Schedule A, read with section 10 of the Births and Deaths Registration Act, it is clear that the Act requires the Registrar to state in the cage dealing with the race of the father or the mother of the child, where the father or the mother is a Tamil, the words 'Indian Tamil' or 'Ceylon Tamil'. In my view it is not necessary in this application to engage in any profound research as to where the line is to be drawn between Tamils of recent Indian origin and Tamils of remote Indian origin for the purpose of section 10 of the Act. The appellant admitted in evidence in the lower court that he was an Indian Tamil. The fact that he applied for registration as a Ceylon citizen under the Indian and Pakistani Residents (Citizenship) Act confirms his evidence. For, Ceylon Tamils are citizens of Ceylon and are not required to take any action in order to entitle them to all the civil and political rights attaching to a Ceylon citizen. If that was so and, if a change in one's nationality or citizenship does not change one's race, would the Registrar of Births and Deaths have any alternative except to obey the peremptory requirement of the Act which, far from leaving the matter in doubt, gives the very words that the Registrar must use in regard to the particulars in question?

No doubt a difficulty is created by the fact that, ordinarily, the race of a Tamil person who makes an application under the Indian and Pakistani Residents (Citizenship) Act would be Tamil, and 'Indian' or 'Ceylon' would only be an adjective describing his domicile. It may logically be argued, therefore, that when a person obtains Ceylon citizenship under this Act, he would in effect be changing his domicile and would be entitled to describe himself thereafter as a 'Ceylon' Tamil. But, of course, it has to be borne in mind that neither the Indian and Pakistani Residents (Citizenship) Act, nor the Citizenship Act deals with questions of domicile, but only with the question of citizenship. In view of the silence of the Indian and Pakistani Residents (Citizenship) Act on this question, there is no warrant by inference to describe an Indian Tamil who has obtained Ceylon Citizenship as a Ceylon Tamil on the ground of his domicile and to make use of that description which will have the effect of violating an express provision of the Births and Deaths Registration Act, which, as I have said before, has made a clear distinction between Indian Tamils and Ceylon Tamils and considered Indian Tamils as a *race* for the purposes of the Act. In the context in which it is used, therefore, one has to conclude that at least for the purposes of the Act a race called the 'Indian Tamil' race and another called the 'Indian Moor' race have been recognised. If such a race was not recognised at least for the purpose of this Act, it would be wrong to give a direction in the foot note that the race should be shown as 'Indian' Tamil, 'Ceylon' Tamil, 'Indian' Moor or 'Ceylon' Moor. Further, quite apart from the special meaning given to "Indian Tamils" as being a race in the Act, in view of the varied meanings given to the word 'race' in Webster's Dictionary quoted earlier, it would not be inappropriate nor without justification to call the Indian Tamils a race. It is, therefore, necessary to apply the same rules which I have referred to earlier in considering whether the conferment of Ceylon citizenship on an Indian Tamil has the effect of changing his race or not.

The argument of counsel for the appellant on this matter, at the time it was advanced, had considerable attraction and appeared convincing. He submitted two aspects for our consideration based on section 6(2)(iv)(a) of the Indian and Pakistani Residents (Citizenship) Act which was to the effect that it shall be a condition for allowing any application for registration under this Act that the applicant shall have produced sufficient evidence to satisfy the Commissioner that the

applicant clearly understands that in the event of being registered as a Citizen of Ceylon, the applicant will be deemed in law to have renounced all rights to the civil and political status the applicant has had, or would, but for such registration in Ceylon, have had, under any law in force in the territory of origin of the applicant or the applicant's parent, ancestor or husband, as the case may be. Mr. Tiruchelvam submitted that the renunciation of all the rights to the civil and political status referred to in this provision would preclude an applicant who is registered as a citizen from calling himself thereafter an Indian Tamil by race. In other words, his contention was that once an Indian Tamil was registered as a citizen of Ceylon under this Act, it would be wrong for him to call himself an Indian Tamil and he thereafter became a Ceylon Tamil and that, therefore, if he continued to call himself an Indian Tamil, it would contradict the position that he has been registered as a Ceylon Citizen and has renounced all rights to the civil and political status he has had prior to that, or would, but for such registration in Ceylon, have had. The other aspect he advanced for our consideration was that it would be discourteous for an Indian Tamil, who was conferred Ceylon citizenship by this country, to enjoy the privileges of citizenship and to continue to call himself an Indian Tamil. On a closer examination of this submission, however, and upon a consideration of the distinction between 'race' and 'citizenship' which I have referred to earlier, it seems to me that there is no difficulty in reconciling the provision relied on by counsel for the appellant with the fact of an Indian Tamil who is granted citizenship continuing to call himself an Indian Tamil by race. For, the accent in section 6(2)(iv)(a) appears to me to be on the words "civil and political status" which is a necessary attribute of citizenship and not an attribute of race.

I shall now proceed to deal in greater detail with the interpretation of the words contained in the relevant provision. Maxwell on 'Interpretation of Statutes' says:—

"The preamble to a statute, even after repeal, is a good means of finding out its meaning and, as it were,a key to the understanding of it. It may legitimately be consulted to solve any ambiguity or to fix the meaning of the words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt." It is useful to look at the preamble to the Indian and Pakistani Residents (Citizenship) Act in terms of this definition. This preamble sets out the purpose as being an Act to make provision for granting the *status of a Citizen of Ceylon by Registration* to Indians and Pakistanis who have the qualification of past residence in Ceylon for a certain minimum period. In interpreting any section of the Act whose meaning for some reason is not clear, it behoves one not to travel outside its scope and always to bear in mind the purpose of the Act. The preamble to the Act refers to the status of a Citizen of Ceylon which is sought to be conferred on certain Indians and Pakistanis with certain residence qualifications. Section 6(2) (iv) (a) of the Act on which reliance is placed to support the argument that an Indian Tamil ceases to be such and becomes a Ceylon Tamil after registration as a Ceylon Citizen, also refers to the rights to the civil and political status which such a Ceylon Citizen is deemed to have renounced on the conferment of Ceylon Citizenship. The contention of counsel being, or being tantamount to saying, that one of the rights so renounced is the right to be called an Indian Tamil — which necessarily involves the corollary that one of the rights conferred by Ceylon Citizenship in this case is the right to be called a Ceylon Tamil— the true meaning of the word 'status' or the words 'civil and political status' in the context referred to above assumes the greatest importance. As I have pointed out earlier in this judgment, political status and civil rights have no relation to race and if a person's race continues to be what it was, despite this change of civil and political status, the only correct course of action for the Registrar will be to act in the manner he has done. We are not called upon, in this case, to decide the abstract question as to what the race of the child which is sought to be registered would or should be and it is, therefore, unnecessary to delve into that aspect in the present appeal.

Yet another way of testing this matter is to leave aside for a moment the Indian and Pakistani Residents (Citizenship) Act and to consider whether a person, who belongs to a race different from Indians or Pakistanis and who obtains Ceylon citizenship under the Citizenship Act, will be entitled to call himself by any other race than his original race if he had to register the birth of a child. Would it be in order for an Englishman or Frenchman or Italian or a Chinese by race, for instance, who is granted citizenship under section 13 of the Citizenship Act to call himself by any other race in furnishing particulars to the Registrar of Births in respect of the particulars to be entered in cages (4) and (5) of Form A in the

Schedule. The question he is called upon to answer for this purpose is what his race is and not whether he is a citizen of Ceylon or not. The obvious answer seems to me to be to mention his original race as a member of which he applied for and obtained citizenship. If that is the answer to the question vis-a-vis a person registered as a Citizen of Ceylon under the Citizenship Act, the principle cannot be different in the case of one registered as such under the Indian and Pakistani Residents (Citizenship) Act.

Considering the case from yet another aspect, would the entry of the particulars of the race of the father or the mother as "Indian Tamil" in a Birth Register defeat the purpose of even the Indian and Pakistani Residents (Citizenship) Act, which again, it may be noted, we are not called upon to interpret in the present appeal, although, admittedly, the provisions of section 6(2)(iv)(a) indirectly arise for consideration. The answer to this question to my mind is unambiguously in the negative. For, whatever may be the race of the person, who is granted citizenship of Ceylon by registration under this Act, he will be fully entitled to all the rights to the civil and political status which are granted by the certificate of registration and they will continue to remain undiminished, be he called "Indian Tamil" or "Indian Moor" or "Pakistani Tamil" or "Pakistani Moor", unless and until he either renounces his Ceylon Citizenship or does some other Act, such as acquiring some other nationality or citizenship, which will *ipso facto* have the effect of depriving him of his Ceylon Citizenship. Even on the ground of possible mischief or prejudice to the person who has been registered as a Ceylon Citizen or to any member of the family, therefore, I cannot see how the contention of counsel for the appellant can prevail because mischief or prejudice there is none.

For these reasons, I am of opinion that the Registrar of Births and Deaths was right in noting down the particulars of the race of the father and the mother of the child as he did. The appeal must, therefore, fail and it is accordingly dismissed.

T. S. Fernando, J.
I agree.

Alles, J.
I agree.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: **Basnayake, C.J., T. S. Fernando J., and Herat J.**

THE QUEEN *vs.* ARIYADASA AND ANOTHER

Appeals Nos. 160-161 *of* 1961 *with Applications Nos.* 168-169 *of* 1961
S.C. No. 67 *M.C. Dambulla No.* 9878

Argued on: February 27 and March 12, 1962.
Decided on: April 5, 1963.

Court of Criminal Appeal — Misdirection — Burden of proof on prosecution — Evidence of prosecution witnesses uncontradicted by accused — Does this lessen burden on prosecution —Whether duty cast on accused to give evidence on their own behalf in every case — Evidence Ordinance, sections 101, 155.

Five accused were charged in this case with being members of an unlawful assembly and attempting inter alia to commit murder in prosecution of its common object. They were also indicted on a charge of attempted murder on the basis that they committed a criminal act in furtherance of the common intention of all.

In the course of his charge, the learned Trial Judge directed the jury as follows:—

"....I want you to bear in mind that in view of the assessment of innoncence there is no duty cast on an accused person to give evidence. He can remain silent and the prosecution must prove the guilt of each accused beyond reasonable doubt. But where you have a case where evidence is given which implicates an accused, then when you come to assess that evidence you could take into consideration the fact that there is no evidence given by the accused person contradicting such evidence. On that question then of credibility of the prosecution witnesses you have their evidence. You have no evidence which contradicts it given by the persons whom they accuse. You can take that into consideration in assessing the credibility of the prosecution witnesses Ran Banda and Mudiyanse who say 'we

saw these people there. They attacked us.' When you come to decide whether you are going to believe them or not you can ask yourselves of the fact—the fact that none of the accused gave evidence—and of your assessment of the evidence given by these 2 persons."

Held: (1) That the learned trial Judge's direction was wrong in law. The fact that an accused person elects not to give evidence does not render the prosecution evidence more credible on that account and is not a factor to be taken into consideration in evaluating such evidence.

(2) That therefore the conviction must be quashed as it could not be said that the jury were not influenced by this wrong direction in arriving at a verdict.

Per BASNAYAKE, C.J. — "The burden of proving the case against the accused is on the prosecution (s. 101 Evidence Ordinance) and that burden is not lessened by the fact that the accused does not contradict on oath the evidence for the prosecution. The view expressed by the learned Judge would make it incumbent on accused persons to give evidence on their own behalf in every case. It finds no support in the Evidence Ordinance or the Criminal Procedure Code or any other enactment. When an accused person pleads not guilty the plea must be taken as denial of every assertion of fact against him by the prosecution. Section 155 of the Evidence Ordinance specifies the ways in which the credit of a witness may be impeached. Contradicting a witness with the evidence of another is not one of the ways prescribed in that section. A prosecution witness's credibility has to be assessed on his own merits and the fact that he is uncontradicted by the sworn testimony of the accused does not enhance his worth."

M. L. de Silva with *K. Jayasekara and M. Shanmugalingam* (*assigned*), for the accused-appellants.

T. A. de S. Wijesundere, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

Five accused by name Wasala Mudiyanselage Ariyadasa, Wasala Mudiyanselage Wijedasa, Mahara Mudiyanselage Jayaratne, Don Cyril and Wasala Mudiyanselage Premadasa were indicted on charges of being members of an unlawful assembly, the common object of which was to cause hurt to Panabokke Upasakagedera Ran Banda and his father Mudiyanse, and attempting to commit the murder of Ran Banda in prosecution of the common object of the unlawful assembly. They were also indicted on a charge of attempted murder on the basis that they committed a criminal act in furtherance of the common intention of all. They were all acquitted of the charge of being members of an unlawful assembly and committing the offence of attempted murder in prosecution of its common object, and the 3rd, 4th and 5th accused were also acquitted of the charge of attempted murder based on the existence of a common intention. The 1st and 2nd accused were found guilty of attempted murder and each of them was sentenced to undergo eight years' rigorous imprisonment. They have appealed against that conviction. The appellants are brothers.

The case for the prosecution rests on the evidence of Ran Banda and his father Mudiyanse, both of whom were injured. This attack was at night in the dark. The motive for the attack is not clear. The prosecution story is that the accused were lying in wait to attack Mudiyanse's neighbour Weragama. But Weragama was not attacked. What is more, both Weragama and Ukku Amma, his wife, whose names were on the list of witnesses for the Crown gave evidence for the defence.

The two grounds of appeal urged before us were —

(*a*) that the verdict is unreasonable, and

(*b*) that the learned Trial Judge misdirected the jury as to the effect of the accused not being called to give evidence on their behalf.

There was no charge in respect of the injuries caused to Mudiyanse, although the evidence disclosed that the avowed intention of the 1st accused was to attack him. The attack on his son Ran Banda was incidental, and was made only because he raised cries when his father was, attacked. In examination-in-chief Ran Banda did not say that the 1st accused-appellant atacked him. He said: "When my father was assaulted I raised cries saying, my father is assaulted, then the 2nd accused Wijedasa came running and struck me on my head with a weapon. I fell down unconscious at that blow." Questioned further as to the nature of the weapon with which he was attacked he said it was an iron rod. It was in cross-examination that the evidence against the 1st accused was elicited. Ran Banda was reminded of his deposition in the Magistrate's Court and questioned thereon as follows:—

"176. *Q:* Why didn't you run for your life?

A: I started to run. It was at that stage that Wijedasa came running in the dark and came and struck me.

177. *Q:* Wijedasa is the 2nd accused?
A: Yes.

178. *Q:* You are quite certain that it was Wijedasa?
A: Yes.

179. *Q:* You remember giving evidence in the Magistrate's Court?
A: Yes.

180. *Q:* Did you tell the Magistrate, 'the 1st accused dealt the first blow on my head'?
A: I did not say that.

181. *Q:* If it was recorded?
A: I would accept that I have said so.

182. *Q:* Which is correct, 1st or 2nd accused who assaulted you ?
A: First of all 2nd accused Wijedasa came near me and the others came running close to me.

183. *Q:* Which is correct, 1st accused assaulted or 2nd accused assaulted you?
A: The first blow was dealt by the 2nd accused, thereafter the 1st accused also came and struck me."

In answer to further questions Ran Banda said that the 1st accused dealt a blow on his left shoulder on the top of his forearm with an iron rod. In order to discredit Ran Banda the defence proved the statement D1 made by him in the Magistrate's Court that it was the 1st accused who dealt the first blow. Mudiyanse's evidence throws no light on the attack on Ran Banda as Mudiyanse was the first to be attacked and he lost consciousness after the attack on him.

Despite the infirmities in Ran Banda's account of the attack on him there is evidence of a concerted attack by the 1st and 2nd accused-appellants. The evidence against the 1st accused though elicited in cross-examination was evidence on which the jury were entitled to act. It is the duty of the jury to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned. The verdict against the appellants cannot therefore be said to be unreasonable or unsupported by the evidence.

In regard to the other ground it was submitted that the following direction of the learned Judge was wrong in law:—

"Perhaps there is one matter which I must touch on. You have the evidence of all these witnesses who spoke to those matters which they say they heard. There is no evidence given by any of these accused. They called witnesses. It is for you to assess the value of these witnesses. I want you to bear in mind that in view of the assessment of innocence there is no duty cast on an accused person to give evidence. He can remain silent and the prosecution must prove the guilt of each accused beyond reasonable doubt. But where you have a case where evidence is given which implicates an accused, then when you come to assess that evidence you could take into consideration the fact that there is no evidence given by the accused person contradicting such evidence. On that question then of credibility of the prosecution witnesses you have their evidence. You have no evidence which contradicts it given by the persons whom they accuse. You can take that into consideration in assessing the credibility of the prosecution witnesses Ran Banda and Mudiyanse who say 'we saw these people there. They attacked us.' When you come to decide whether you are going to believe them or not you can ask yourselves of the fact — the fact that none of the accused gave evidence — and of your assessment of the evidence given by these 2 persons.

Will you please now retire and consider your verdict."

The learned Judge's direction is unusual and is capable of creating the impression that if the prosecution evidence is not contradicted by the testimony of the accused the prosecution witnesses should be believed. The burden of proving the case against the accused is on the prosecution (s. 101 Evidence Ordinance) and that burden is not lessened by the fact that the accused does not contradict on oath the evidence for the prosecution. The view expressed by the learned Judge would make it incumbent on accused persons to give evidence on their own behalf in every case. It finds no support in the Evidence Ordinance or the Criminal Procedure Code or any other enactment. When an accused person pleads not guilty the plea must be taken as a denial of every assertion of fact against him by the prosecution. Section 155 of the Evidence Ordinance specifies the ways the credit of a witness may be impeached. Contradicting a witness with the evidence of another is not one of the ways prescribed in that section.

A prosecution witness's credibility has to be assessed on his own merit and the fact that he is uncontradicted by the sworn testimony of the accused does not enhance his worth. In the instant case Ran Banda as a witness was not entirely satisfactory. He was not observant and he was not consistent. In the Magistrate's Court he had said it was the 1st accused-appellant who dealt the first blow on his head; in the trial Court he asserted that it was the 2nd accused-appellant who dealt the first blow which rendered him in-conscious. Nor did his story find support in the evidence of Ukku Amma who was according to him an eye-witness of the attack. There is also the fact that the jury rejected the evidence of both Ran Banda and his father Mudiyanse on the charge that the 1st to 5th accused were members of an unlawful assembly whose common object was to murder them.

The learned Judge's direction is wrong in law. There is no obligation on an accused person to give evidence on his own behalf except where he relies on his own evidence to establish a general or special exception, the onus of proving, which is on him. The fact that an accused person elects not to give evidence does not render the prosecution evidence more credible on that account and is not a factor to be taken into consideration in evaluating such evidence.

We are unable to hold that the jury were not influenced by this wrong direction in arriving at their verdict. We therefore direct that the conviction of the appellants be quashed.

On the question whether a judgment of acquittal should be entered or a new trial ordered, the order of the Court is that a judgment of acquittal be entered.

Accused acquitted.

Present: **H. N. G. Fernando, S.P.J., and T. S. Fernando, J.**

THE RAJAPAKSE ESTATES COMPANY LIMITED *vs.* NISSANGA DULSIN AND OTHERS.

S. C. No. 119/63 (*Inty.*)—*D. C. Negambo No.* 325/P.

Argued on : 1st June 1965.
Decided on: 2nd September 1965.

Fideicommissum — Deed of Gift — Prohibition against alienation — Clause vesting the property in heirs executors administrators and assigns of the donees — Validity of fideicommissum.

By deed P 3, E gifted to the three children of his son M certain interests in a land subject to a life-interest reserved for M and his wife.

After prohibiting the donees from alienating,the deed proceeded to state that "the four portions of land hereby gifted shall vest in the abovenamed three children of my said son and in the children that may be born to him in the future and their heirs, executors administrators and assigns....."

Held: That the deed P 3 did not create a fideicommissum as the persons who were to take in the event of a breach of the prohibition were not clearly designated.

Case referred to: *Seneviratne* v. *Mendis,* (1962) 65 N.L.R. 169

J. W. Subasinghe, for the 6th defendant-appellant.

T. B. Dissanayake, for the plaintiff-respondents.

H. N. G. FERNANDO, S.P.J.

By a deed of gift No. 25795 of 1880 (P 3), one Endoris Silva conveyed a one-third share of the land which is the subject of this action to the children, then born and unborn, of his son Marthelis, subject to a life-interest reserved for Marthelis and his wife. There was a clause in the deed prohibiting the alienation of the property by the donees, followed by the following provision:-

"'Therefore all the right title claim and interest of me the said donor and of my heirs executors administrators and assigns in and to the

said four portions of land hereby gifted shall vest in the above-named three children of my said son and in the children that may be born to him in the future and their heirs executors administrators and assigns and they may after the death of the said Marthelis Silva and Sethan Silva Hamine possess the same, for which I have hereby granted and set over the same as a gift."

I cannot but express dismay at the fact that the District Judge, without any reference to authority, formed the opinion that (P 3) created a fideicomissum. The prohibition against alienation, which was the only feature of the deed which could lead to that opinion, was nude, and inoperative to create a fideicommissum, unless the persons who were to take in the event of a breach of the prohibition were clearly designated. It has repeatedly been held in decisions of this Court, the most recent of which is that of WEERASOORIYA J. in *Seneviratne* v. *Mendis* (65 N.L.R. 171) that a clause which vests property in the donees "and their heirs executors administrators and assigns" is merely a mode of vesting the full dominium in the donees themselves. Even in cases where such a clause has wrongly been thought to be a sufficient designation of the persons to benefit in the event of a breach of a prohibition against alienation, there have usually been other circumstances which led to such mistaken findings. There is no such excuse for the finding in this instance.

The decree appealed from is set aside with costs in both Courts. The District Judge will enter a fresh decree on the basis that the deed (P 3) did not create a fideicommissum.

T. S. FERNANDO, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : **T. S. Fernando, J., (President), Sri Skanda Rajah, J., and Sirimane, J.**

S. H. SIRINIYAL *alias* SIRIGURUNNANSE *vs.* THE QUEEN

C.C.A. Appeal, No. 125 *of* 1964 (*with Application* 139 *of* 1964)
S.C. No. 46/64—*M.C. Balapitiya,* 40401.

Argued on : 18th and 19th January, 1965.
Decided on : 19th January, 1965.
Reasons delivered on : 1st February, 1965.

Criminal Procedure Code, section 121—*Statements in first information to police not testified to orally in Court—Improper admission of hearsay evidence—Duty of Appeal Court.*

At a trial for murder, it transpired that a witness, *M.*, (who was the wife of the deceased) was the person who carried the first information to the police of the injuries caused to her husband. Her complaint as recorded by the police was produced in document form, in terms of section 121 of the Criminal Procedure Code, as part of the case for the Crown This complaint was read out to the jury and it contained, *inter alia*, the following statement :—

" He (the appellant) has on several occasions threatened to shoot us."

M. did not in her evidence refer to any previous threat either to shoot or injure in any other way.

Held : (1) That the evidence of previous threats by the appellant to shoot was hearsay and, therefore, inadmissible.

(2) That where such evidence is wrongly admitted the Appeal Court would quash the conviction unless the Crown was able to satisfy it that a reasonable jury, had they been properly directed, would without doubt have convicted the appellant.

Cases referred to: *R.* v. *Ivor Stephen Parker,* (1961) 45 Cr. A.R. 1.
Teper v. *R.,* (1952) A.C. 480; (1952) 2 A.E.R. 447; (1952) 2 T.L.R. 162

G. E. Chitty, Q.C., with *R. Rajasingham* and *M. Kanakaratnam,* for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, with *R. Abeysuriya, Crown Counsel,* for the Crown.

T. S. FERNANDO, J.

By a 6 to 1 majority verdict of the jury the appellant was convicted of the offence of murder of a man called Leedin. On the appellant's behalf it was argued : (1) that there was non-direction amounting to misdirection of the jury as to the manner in which an inference of guilt may be made in a case depending solely on circumstantial evidence ; and (2) that there was illegal reception at the trial of hearsay evidence which could well have turned the scale against the appellant.

In regard to the first of these two grounds of appeal, it may be mentioned that the case was one of shooting of the deceased at night by an assailant at a distance of 50 to 60 feet from his victim. The Crown's case in regard to identification of the assailant rested on the testimony of a single witness, Meelin, the widow of the deceased. This woman stated that at about 7.30 p.m. when the deceased was stooping over the edge of the verandah of her house in order to spit on to the compound a shot was heard and the deceased was seen falling as a result of injury caused by that shot. She had an electric torch in her hand and she flashed that torch in the direction from which the shot appeared to come, and she then saw the appellant running with a gun in his hand in the direction of his own house.

The learned trial judge stated more than once to the jury that if they were satisfied that Meelin identified the appellant the latter should be found guilty of the offence of murder. Learned counsel for the appellant argued that identification of the appellant as he was running away was no more than a circumstance which could have tended to incriminate him, and that, as Meelin did not claim to have seen the appellant fire at the deceased, more inferences than one could have been drawn in the case from the fact that the appellant was seen running away. He contended, therefore, that it was incumbent on the learned judge to have directed the jury as to the manner in which circumstantial evidence should be considered before a verdict of guilty can be returned. While it may be correct strictly to label this a case of circumstantial evidence in the technical sense that the fact in issue was dependent on an inference from another fact, we are in agreement with the argument of learned Crown Counsel that in this case the fact in issue could have been decided with as much practical certainty as if it had been observed by Meelin. Therefore, notwithstanding certain infirmities and some improbability in Meelin's evidence to which our attention was drawn, we were unable to take the view that there was a misdirection of the jury. The first ground of appeal failed.

The reception of hearsay evidence took place in the following circumstances. Meelin was the person who carried the first information to the police of the injuries caused to her husband. Her complaint as recorded by the police was produced in document form as part of the case for the Crown, and section 121 of the Criminal Procedure Code, of course, permitted such production. This complaint was read out to the jury and it contained, *inter alia*, the following statement :— " He (the appellant) has on several occasions threatened to shoot us." Meelin had not in her evidence (which had been completed before the production of the document which was made only when the Inspector of Police gave evidence) referred to any previous threat either to shoot or injure in any other way. No attempt was made to recall Meelin in an effort to prove the truth of this statement. The evidence of previous threats by the appellant to shoot was, therefore, hearsay and inadmissible. It was, therefore, patent that there was error of law in the conduct of the trial.

It was not possible for us to accede to the argument of Crown Counsel that the jurors were hardly likely to have remembered this bit of evidence. A striking example of the powers of jurors to recollect statements made in evidence is to be found in the reported case of *Ivor Stephen Parker*, (1960) 45 Cr. A.R. 1, That was also a case where certain inadmissible evidence had been given at the trial. The trial judge had not even heard the evidence in question and, when it was brought to his notice by a juror at the conclusion of his summing-up, he directed the jury not to attach any weight at all to it. In regard to this, Lord Parker, L.C.J., stated in the Court of Criminal Appeal :—

> " Whether a direction of this sort will in any particular case cure the wrongful admission of evidence must, in the opinion of the Court, be one of degree. There may be many cases where the inadmissible evidence is of such little weight or is liable to create so little prejudice that it would be right and proper that the matter should be dealt with by a direction to the jury. On the other hand, there are other cases where the inadmissible evidence is so pre-

judicial and so likely to influence the jury in arriving at their verdict that the Court is reluctantly forced to the conclusion that the matter cannot be left to a direction, but must be dealt with by discharging the jury."

The Court of Criminal Appeal there adopted the test formulated by Lord Normand in the Privy Council in the case of *Teper* v. *R.*, (1952) A.C. 492, in these words :—" The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant. "

In the case before us there was not even a direction to the jury to disregard the evidence wrongly admitted. Error of law having been established, the burden shifted to the Crown to satisfy us that a reasonable jury, had they been properly directed, would without doubt have convicted the appellant. We were unable to say that the Crown had so satisfied us. Indeed, we were unable also to overlook the probability of the evidence of previous threats by the appellant to shoot having turned the scale against him to the point of the jury getting some confirmation thereby of the evidence of identification given by Meelin. Upholding the second ground of appeal, we allowed the appeal and quashed the conviction of the appellant.

Appeal allowed.

Present: **Sri Skanda Rajah, J.**

B. FLOCKS *vs.* INSPECTOR OF POLICE, MIRIHANA

S.C. 1237/64. *M.C. Colombo South*, 51933/B.

Argued and decided on: 20th November, 1964.

Criminal Procedure Code, sections 15 *and* 17—*Sentence of whipping—When can a Magistrate inflict it—Maximum sentence a Magistrate is empowered to impose when convicting a person on several counts.*

Held: (1) That a Magistrate has jurisdiction to inflict a sentence of whipping only in the case of a person who is under 16 years of age.

(2) That under section 17 of the Criminal Procedure Code a Magistrate could sentence an accused convicted on several counts to a maximum of only 12 months.

S. S. Sahabandu, for the accused-appellant.

U. C. B. Ratnayake, Crown Counsel, for the Attorney-General.

SRI SKANDA RAJAH, J.

I see no reason to interfere with the conviction; but in passing sentence the Magistrate has violated the provisions of sections 15 and 17 of the Criminal Procedure Code.

It would appear that the accused was 24 years of age. Though whipping is a sentence in section 345 of the Penal Code for the use of criminal force with intent to outrage the modesty of a woman, the Magistrate had no jurisdiction to inflict a sentence of whipping. He has jurisdiction to inflict a sentence of whipping only in the case of a person who is under 16 years of age. Therefore, the sentence of whipping in respect of the second count has to be deleted. The Magistrate sentenced the accused to terms of three months' imprisonment in respect of the first, third and fourth counts, and to 6 months' imprisonment and whipping on count two, and he ordered all these sentences to run consecutively, which would total to fifteen months' rigorous imprisonment. Even that he had no jurisdiction to do. At most under section 17 of the Criminal Procedure Code he could sentence the accused to a maximum of only 12 months.

Therefore, I delete the sentence of whipping and also order that all sentences do run concurrently. The accused will in the result undergo a term of rigorous imprisonment for six months.

Sentences varied.

Present : **Abeyesundere, J., and G. P. A. Silva, J.**

FERNANDO *vs.* FERNANDO

*S.C.*264 *(F)*, 1963—*D.C. Colombo, No.* 8851/*L.*

Argued and decided on : 19th May, 1965.

Possessory action—Meaning of the words " ut dominus ".

Held: That the learned Judge had misinterpreted the expression "*ut dominus*" to mean "as sole owner". A possessory decree is not based on sole ownership. The words " *ut dominus* " in the context of a possessory action means " in his own right ".

Case referred to: *Cooray* v. *Samaranayake*, (1946) 47 N.L.R. 322: XXXII C.L.W. 43

E. B. Wikremanayake, Q.C., with *M. L. de Silva*, for the plaintiff-appellant.

Roland de Zoysa, for the defendants-respondents.

ABEYESUNDERE, J.

In this case the plaintiff sued the defendants on two alternative causes of action. On the first cause of action he averred that he had acquired a prescriptive title to the allotment of land described in the schedule to the plaint which is a divided portion of a large land, and prayed for a declaration of title to that allotment of land and for the ejectment of the defendants therefrom. On the second cause of action the plaintiff pleaded that he had been in possession of the said allotment of land for a period of more than a year and a day before he was dispossessed by the defendant, that he had raised a coconut and rubber plantation thereon, and that the defendants had dispossessed him, and he prayed for the ejectment of the defendants from the said allotment of land. The plaintiff also claimed damages. The learned District Judge who tried the action dismissed it. The plaintiff has appealed from the judgment and decree of the learned District Judge.

Mr. E. B. Wikremanayake, Q.C., who appeared for the appellant, did not support the appeal in respect of the first cause of action. He restricted the appeal to the second cause of action. He also did not support the claim to damages. According to the findings of the learned District Judge, the plaintiff and the defendants are co-owners. In regard to the second cause of action the learned District Judge has on the facts held that the plaintiff had raised a coconut and rubber plantation on the aforesaid allotment of land and had possessed it for the requisite period of a year and a day but he held that the plaintiffs' possession was not *ut dominus* and, therefore, he was not entitled to a possessory decree. The learned District Judge has interpreted the expression "*ut dominus*", to be "as sole owner". A possessory decree is not based on ownership. The expression "*ut dominus*". with reference to possession pleaded by a plaintiff in a possessory action, means "in his own right". In the present case the plaintiff has been in possession of the aforesaid allotment of land in his own right. I, therefore, hold that the learned District Judge has misdirected himself on the interpretation of the law applicable to a possessory action. This Court has held in the case of *Cooray* v. *Samaranayake*, reported in 47 N.L.R., page 322, that a co-owner who has been in possession of the entire common property for a year and a day *ut dominus* can maintain a possessory action against another co-owner who thereafter ousts him. In view of the findings of the learned District Judge on the facts relating to possession I hold that the plaintiff had been in possession of the aforesaid allotment of land for a period adequate in law to entitle him to a possessory decree against the defendants.

I set aside the judgment and decree of the learned District Judge and I order that the defendants be ejected from the aforesaid allotment of land and the plaintiff be restored to possession thereof. The appellant is entitled to the costs of this appeal.

G. P. A. SILVA, J.
I agree.

Appeal allowed.

Privy Council Appeal No. 15 *of* 1965

Present: **Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Upjohn, Lord Pearson**

THE BOARD OF TRUSTEES OF THE MARADANA MOSQUE
vs.
THE HONOURABLE BADI-UD-DIN MAHMUD AND ANOTHER

From
THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 19TH JANUARY 1966

Certiorari —Failure to observe the principles of natural justice —Failure to consider the right question before making an order —Consequent lack of jurisdiction to make order — Assisted Schools and Training Colleges (Special Provisions) Act No. 5 *of* 1960 — *Assisted Schools and Training Colleges Supplementary Provisions) Act No.* 8 *of* 1961.

The Appellants are a body incorporated by the Maradana Mosque Ordinance (Cap. 347) and charged with the administration, inter alia, of Zahira College. Zahira College became on the 30th November 1960 an Unaided School, and as such became subject to Sections 6 and 11 of the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960, and afterwards to the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961. On the 11th August 1961 respresentations were made by groups of teachers to the 2nd Respondent that their salaries were not being paid in accordance with the duty imposed on the Appellants by section 6(*i*) of Act No. 5 of 1960, and that fact showed that the Appellants were not in a position to satisfy the duty imposed on them by Section 6(*k*) of the same Act. The 2nd Respondent thereupon informed the Appellants on the 11th August 1961 that it had been brought to his notice that they had contravened section 6(*i*), and asked them to show cause why the School should not be taken over for management by the 2nd Respondent. There was no reference to Section 6(*k*), nor were the Appellants informed that a complaint existed that they were not in a position to satisfy the duty imposed by Section 6(*k*).

The Appellants by a letter dated 15th August 1961 showed cause as requested. On the 21st August 1961 the 2nd Respondent informed the Appellants that the school had been taken over under section 11 of Act No. 5 of 1960 as section 6(*i*) of theAct had been violated. About two months later, the 1st Respondent made a broadcast speech, which was later published as an official paper by the Government, giving the reasons for the take over of the School. The Minister here stated that the letter of the Appellants of the 15th August 1961 clearly indicated that the appellants had been disregarding section 6(*k*), as well as 6(*i*), and that under these circumstances he had no alternative but to order the take over of the School. The Appellants challenged the validity of the order for the take over of the school made on the21st August 1961 by way of certiorari on a number of grounds. The two grounds adjudicated on by their Lordships were,

(*a*) that in making the order, the Minister was acting in a judicial or quasi-judicial capacity and was under a duty to observe the rules of natural justice; this he failed to do in that he did not afford the appellants an opportunity of answering the charge against them.

(*b*) that the Minister failed to consider whether the school "is being administered incontravention of any of the provisions of this Act," (which were the words of Section 11) which imply an element of continuance in the contravention of the Act as at the date of the order.

Held: That both arguments were entitled to succeed. With regard to the first argument, the Appellants had no notice of any complaint in regard to the contravention of section 6(*k*), and no opportunity of stating their case in regard to this. In making the order, it was established that the Minister was largely influenced by this alleged contravention of which the Appellants had no notice. With regard to the second argument, in making the order the Minister had not considered the right question which was whether the School was presently being administered in contravention of the Act. The Minister should have concerned himself with the present conduct of the School, and not the past. Since he had not considered the right question, he had no jurisdiction to make the order.

Per Curiam—When an applicant applies to quash an Order on the ground of a failure of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence.

Cases referred to: *Ridge* v. *Baldwin*, 1964 A.C. 40; 1963 (2) A.E.R. 67; 1963(2) W.L.R. 935.

Franklin And Others v. *Minister of Town And Country Planning*, 1948 A.C. 87; 1947(2) A.E.R. 289; 63 T.L.R. 446,

E. F. N. Gratiaen, Q.C., with *T. O. Kellock, Q.C., A. C. M. Ameer, Q.C.*, and *Walter Jayawardena*, for the appellant.

Victor Tennekoon, Q.C., with *R.K. Handoo* and *V.S.A. Pulleneyagum*, for the respondent.

Lord Pearce

The Maradana Mosque is a leading place of Muslim worship in Ceylon.

The appellants are a body incorporated over forty years ago by the Maradana Mosque Ordinance (No. 22 of 1924). They are charged with the administration of the Mosque, and its lands and property, part of which is a large school known as Zahira College (referred to as "the school"). The appellants sought from the Supreme Court of Ceylon a mandate in the nature of a writ of certiorari quashing an order made on the 21st August 1961 in respect of the school by the first respondent who was at the relevant dates Minister of Education (referred to as "the Minister") after consultation with the second respondent who was at the relevant dates Director of Education (referred to as "the Director"). The late Herat J. in the Supreme Court refused a mandate and the appellants appeal against that refusal. There has been delay in the proceedings since, owing to the illness of the late learned judge, there was an interval of eighteen months between the hearing and judgment.

Until 30th November 1960 the school was an Assisted School, that is to say, it provided free education and received a government grant towards its running expenses. In 1960 however the government was empowered to take over the management of all Assisted Schools by the terms of the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960 (referred to as the 1960 Act). The 1960 Act, however, gave to the proprietors of Assisted Schools an election to carry on the schools without government aid (Section 5). The appellants did so elect within the statutory period and therefore on the 30th November 1960 the school became an Unaided School. As such it was subject to Sections 6 and 11 of the 1960 Act and afterwards to the Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961 (referred to as the 1961 Act) which was passed on the 2nd March 1961, amending the 1960 Act and introducing a new provision for vesting of school property in the Government without compensation.

Section 6 as amended provides:—

> "The proprietor of any school which, by virtue of election made under Section 5, is an unaided school—
>
> . . . . . .
>
> (*i*) shall pay to every teacher and employee who is on the staff of such school the salary and allowances due to such teacher or employee in respect of any month not later than the 10th day of the subsequent month;
>
> . . . . . .
>
> (*k*) shall satisfy the Director that necessary funds to conduct and maintain the school will be available and shall conduct such school to the satisfaction of the Director;"

Section 11 provides:—

> "Where the Minister is satisfied—
>
> . . . . . .
>
> (*b* after consultation with the Director, that any school which, by virtue of the provisions of this Act, is being administered as an unaided school, is being so administered in contravention of any of the provisions of this Act or any regulations or Orders made thereunder or of any other written law applicable in the case of such school,
>
> the Minister may, by Order published in the Gazette declare that, with effect from such date as shall be specified in the Order—
>
> (i) such school shall cease to be an unaided school.
>
> (ii) such school shall be deemed for all purposes to be an Assisted school, and
>
> (iii) the Director shall be the Manager of such school.

Section 4(1) of the 1961 Act provides:—

> "Where the Minister, considers it desirable so to do, the Minister may, by Order published in the Gazette (in this Act referred to as a 'Vesting Order'), declare that, with effect from such date as shall be specified in the Order (not being a date earlier than fourteen days after the date of such publication), all property of the description specified in the Order, being property liable to vesting, shall vest in the Crown."

In the summer of 1961 the school had run into financial difficulties. The salaries of the teachers up to the end of June were duly paid, but most of the salaries for July had not been paid by the 10th August, so that there was a contravention of Section 6(*i*). On the 11th August 1961 there were

two letters from groups of the teachers to the Director. Both letters complained of the non-payment of the salaries. One of them added—"From the time Zahira became unaided on the 1st December 1960 we have been receiving our salaries regularly on or about the last day of each month. This failure on the part of the Management reveals that the Management does not have the necessary funds to manage the institution properly." On the same day, the 11th August, the Director of Education sent to the appellants a formal complaint that it had been brought to his notice that they had failed so far to pay the salaries of the teachers for the month of July 1961 and that they had thereby contravened Section 6(*i*) (whose terms were set out in full). The letter ended with these words "I shall be thankful if you will show cause on or before the 18th August 1961 why I should not recommend that Zahira College be taken over for Director-management in terms of the Special Provisions Act No. 5 of 1961." There was no reference to paragraph (*k*) of Section 6: the Director did not invite the appellants to satisfy him that "necessary funds to conduct and maintain the school will be available". Nor did he inform them of the observation on this point made by the group of teachers in their letter to him.

In answer to the Director's letter of 11th August, referring only to paragraph (*i*) of Section 6, the appellants, in a letter of 15th August, showed cause as requested. They said:—

> "With reference to your letter No. NSB. 112 of the 11th instant, I write to inform you that owing to a certain misunderstanding the salaries of all the teachers of the College were not paid by the 10th instant. I am making arrangements to pay the salaries of the remainder of the teachers by the 18th instant.
>
> The salaries of the teachers for August 1961 and the subsequent months will be paid by the 18th of the subsequent month in terms of the Provisions of the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960 as amended by the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961."

The appellants were able to provide the necessary funds by means of a further loan from the Mosque, and on the 18th August the unpaid teachers were offered their salaries but refused to accept them from the appellants.

On the 21st August the President of the Executive Committee of the Mosque, who was also the manager of the school, received a letter from the Director stating that the Minister had ordered that the school should be taken over for Director-management with effect from the 21st August "as Section 6(*i*) of the aforesaid Act was violated". On the same day, the 21st August, 1961 an Order of the Minister (referred to as the first Order) bearing date the 19th August, was published in the Government Gazette declaring that the school should cease to be unaided, that it should be deemed for all purposes to be an Assisted School, and that the Director of Education should be its Manager. From the 21st August 1961 the Director took over the management and administration of the school.

About two months later, as representations had been made to him complaining of the "take over" of the school, the Minister made a broadcast statement, which was published as an official paper by the Government and was put in evidence. It was headed

> "Zahira College
> Education Minister's Statement
> Published by the Department of Information
> (Printed at the Goverment Press Ceylon)
>
> The following is the text of a broadcast made over Radio Ceylon by the Honourable Minister of Education and Broadcasting, Mr. Badiuddin Mahmud, giving the reasons for the take over of Zahira College, Colombo."

In the course of his statement the Minister referred to the "twelve conditions" namely 6(*a*) to (*l*) "to be satisfied by the proprietor" of a school under Section 6 of the 1960 Act as amended and said—

> "The law further provided that a school should be taken over for Director-management if any of these twelve conditions was violated. The procedure was also laid down. According to it, the Minister, in consultation with the Director of Education has to publish an Order declaring the school to be director-managed. The law does not give the Minister any discretion to excuse the violation of any of the above-mentioned conditions or to adopt any course of action other than director-management."

In a later passage the Minister, referring to what the appellants had said in their letter of the 15th August, said:—

> "These statements were a clear indication that the Executive Committee of the Maradana Mosque had not only violated Section 6(*i*) but had been disregarding Section 6(*k*) which required the Committee to have available with it the necessary funds to conduct and maintain the school. All these very poignantly pointed to the fact that the Executive Committee of the Maradana Mosque did not have the necessary funds to pay even a month's salary to its teachers. Under these

circumstances there was no alternative for me, but to issue the inevitable Order, under Section 11 to take over Zahira College for Director-management. This step was rendered compulsory by the failure of the Executive Committee of the Maradana Mosque to comply with the unambiguous provisions of the law."

On the 2nd December 1961 the Minister made an Order under Section 4 of the 1961 Act vesting in the Crown the premises, movable property and money of the school.

The Minister's second Order vesting the property in the Crown is not attacked in these proceedings, nor is the Crown a party to them. Their Lordships are not concerned with any future proceedings that may be taken with regard to the second Order.

The first Order however which declared that the school should cease to be unaided, that it should be deemed an Assisted School and that the Director should be its Manager is attacked on various grounds.

It is contended first that the Minister in making the first Order was acting in a judicial or quasi-judicial capacity and was under a duty to observe the rules of natural justice; this he failed to do in that he did not afford the appellants an opportunity of answering the charge against them.

Further it is contended that the Minister acted in excess of his jurisdiction, in that he failed to consider the right questions and failed to make the decisions which were the requisite foundations for an Order under Section 11. The passages from his broadcast statement, which have been set out above, are relied upon as showing that, in the view of the Minister, as soon as any breach of any of the provisions of Section 6 had been proved, he had no further question to consider and no discretion to excercise and was bound to make the Order. It is contended that the Minister thus erroneously failed to consider (*a*) whether the school "is being administered in contravention of any of the provisions of this Act", which implies an element of continuance in the contravention as at the date of the Order and (*b*) whether, if such contravention had been established, it would in all the circumstances be right to make the Order. Then it is said that, as the Minister failed to consider these questions, he did not make the decisions which were the necessary foundations for the Order and therefore the Order was made in excess of his jurisdiction.

There is also a contention that there was an error of law on the face of the record. This is put on the ground that the Director's letters of the 11th and 21st August 1961 form part of the record and show that the mere single breach of Section 6(*i*) by failure to pay the July salaries within the statutory time limit was considered a sufficient foundation for the Order. Alternatively it is put on the ground that in the circumstances of this case the record should be taken to include the Minister's own broadcast statement of his reasons for making the Order, and that statement reveals his errors in law in holding and acting upon the belief that if a single breach of the statutory requirements had been proved it would follow automatically that he must make an Order.

Herat J. in the Supreme Court refused the appellants' application on two grounds; first that certiorari only lies to question and quash a judicial act and the act in question, even if unjustified, was purely ministerial; secondly that the minister was acting *intra vires* since one flagrant act of contravention satisfied the condition of "being administered in contravention."

With all respect to the learned judge, it is not correct to regard the Minister's act as purely ministerial. It was not contested below nor before their Lordships that the Minister was acting in a judicial or quasi-judicial capacity in satisfying himself whether there had been a contravention. And until he was so satisfied he had no jurisdiction to make the Order. He must therefore in satisfying himself on that point observe the rules of natural justice. He must give the appellants notice of what was charged against them and allow them to make representations in answer.

So far as a contravention of Section 6(*i*) was alleged the appellants had fair warning. The Director on the 11th August 1961 sent the formal complaint (referred to above) that they had failed so far to pay the salaries of the teachers for the month of July 1961 and that they had thereby contravened Section 6(*i*) and it concluded with the invitation to show cause why he should not recommend that the school be taken over.

The appellants accordingly showed cause in their letter of 15th August 1961 quoted above. So far as concerned the promise of payment on the 18th instant and of good behaviour in the future, that answer was satisfactory, but so far as explaining the past lapse was concerned it was not very illuminating. Whether the appellants took

their danger too lightly or whether, having little to excuse their lapse, they felt that the least said would be the soonest mended, one cannot say. But they had an opportunity to state their case and they chose to state the excuse for their lapse in very cursory form.

In respect of the complaint under Section 6(*i*) therefore, it cannot be said that the appellants were denied an opportunity of stating their case.

They had, however, no notification that any complaint was being made under Section 6(*k*) which is a different and, in this case, more far reaching matter. If, therefore, an imputed failure under Section 6(*k*) can be shown to have played a material part in the Minister's decision, the appellants were not fairly treated.

The learned Solicitor-General argues forcefully that a political speech is no adequate evidence for establishing that Section 6(*k*) formed an important part of the Minister's decision. He relies on *Franklin's* case (1948) A.C. 97 at 105. But the *dicta* in that case are not near enough to the facts of the present case to provide an analogy. Here the Minister presented a serious and detailed statement (in a broadcast which was printed as a government paper) "giving the reasons for the take over of Zahira College". There seems therefore no reason to doubt the truth of the Minister's own assertion that the appellants' contravention of Section 6(*k*) played an important part (and, it may well be, the most important part) in his decision to make the Order.

When an applicant is applying to quash an Order on the ground that there was an infringement of the rules of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence. In their Lordships' view it is sufficiently established by the government paper that the Minister in making the Order was largely influenced by an alleged contravention of which the appellants had no notice.

Whether it could be a valid answer to say that the appellants had in truth no defence even if they had been given an opportunity of presenting it, need not be considered. That point was left open in *Ridge v. Baldwin* (1964) A.C. 40. In the present case their Lordships cannot assume that the appellants had no means to satisfy the provisions of 6(*k*). It would appear that the Mosque has funds out of which it lent money to the school in order to provide the greater part of the payment which was tendered to the teachers on 18th August. It may be that, if challenged under 6 (*k*), the appellants would have made funds available to the school for its maintenance. If indeed no funds were available, it seems hardly likely that this appeal would have been launched, since its success would in that case be followed immediately by a fresh Order based on a contravention of 6(*k*).

On the appellants' first argument, the appeal succeeds.

The second argument is also valid in their Lordships' opinion. Before the Minister had jurisdiction to make the Order he must be satisfied that "any school..... *is* being so administered in contravention of any of the provisions of this Act." The present tense is clear. It would have been easy to say "has been administered" or "in the administration of the school any breach of any of the provisions of this Act has been committed", if such was the intention of the legislature. But for reasons which common sense may easily supply, it was enacted that the Minister should concern himself with the present conduct of the school, not the past, when making the Order. This does not mean, of course, that a school may habitually misconduct itself and yet repeatedly save itself from any Order of the Minister by correcting its faults as soon as they are called to its attention. Such behaviour might well bring it within the words "*is* being administered". But in the present case no such situation arose. The evidence shows that before July 1961 payment of salaries had always been punctual, a fact which was used to emphasize the lapse that occurred with regard to the July salaries. Although on this occasion the salaries were not paid, as they should have been, by 10th August, the appellants promised to pay them by 18th August. This promise they fulfilled, since for this purpose tender was equivalent to payment. Moreover a promise was made that all payments would in future be made by the due date. There was therefore no ground on which the Minister could be "satisfied" at the time of making the Order. As appears from the passages of his broadcast statement which are cited above, he failed to consider the right question. He considered only whether a breach had been committed, and not whether the school was at the time of his order being carried on in contravention of any of the provisions of the Act. Thus he had no jurisdiction to make the Order at the date on which he made it.

The remaining contentions of the appellants raise difficult questions as to the scope of the remedy by mandate in the nature of a writ of certiorari. In thinking that he had at the final stage no discretion in deciding whether or not to make the Order, was the Minister exceeding his jurisdiction or merely making a mistake in the exercise of it? What is the record in relation to the Order of a Minister, and in this case should it be taken to include the Director's letters of the 11th and 21st August 1961 and the Minister's broadcast statement of his reasons for the Order? Their Lordships, however, find it unnecessary to embark upon a discussion of these problems.

The appellants have shown by their first and second arguments that the Minister made the Order both without giving the appellant a fair hearing under 6(*k*) and without jurisdiction. Therefore this appeal succeeds.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the decree of the Supreme Court dated the 3rd September 1963 set aside with costs and the case remitted to the Supreme Court in order that it may issue a mandate in the nature of a writ of certiorari quashing the Order of the first respondent dated the 19th August 1961. The respondents must pay the costs of this appeal.

Appeal allowed.

Present: **T. S. Fernando, J.**

CHARLOTTE BEATRICE PERERA

vs.

THE COMMISSIONER OF INLAND REVENUE

S.C. Application No. 426 *of* 1964
Application in Revision in M.C. Panadura No. 86367

Argued on: 24th June 1965
Decided on: 8th July 1965

Income Tax Ordinance, section 85(1) — *Tax in default deemed to be a fine — Not obligatory on Magistrate to impose term of imprisonment in default of payment of fine — Criminal Procedure Code, section* 312(1).

Held: (1) That it is not obligatory on a Magistrate, in every case where tax in default is deemed by section 85(1) of the Income Tax Ordinance to be a fine, to order a term of imprisonment in default of payment of fine.

(2) That although no appeal lies against an order made in pursuance of section 85(1) of the Ordinance, it is open to the Supreme Court to alter such order in the exercise of its power of revision.

Per **T.S. Fernando, J.**—(*A*) "No question of convicting a person arises where proceedings under section 85 of the Ordinance have been taken. Where sufficient cause has not been shown, the tax in default *shall* be deemed to be a fine imposed by a sentence of the Magistrate on the defaulter for an offence punishable with fine only or not punishable with imprisonment."

(*B*) "This Court does not ordinarily interfere with the exercise of a judicial discretion. But the learned Magistrate, in making the order sought to be revised here, acted on the assumption that he was obliged, at the time of imposition of the fine, also to make an order in respect of imprisonment in default of payment. *De Jong's case* had been cited before him, and Weerasooriya J. had there made the observation that the object of the proceedings under section 85(1) would be defeated if the Magistrate merely makes an order that the defaulter should pay the tax as a fine. The learned Magistrate, therefore acted in the instant case as if he had no discretion in regard to the question whether imprisonment in default of payment should be ordered or not."

Not followed : *De Jong* v. *Commissioner of Income Tax,* (1955) 57 N.L.R. 281

Distinguished : *Puswella* v. *Commissioner of Income Tax,* (1958) 60 N L R. 497

Cecil de S. Wijeratne, for the petitioner.

P. Naguleswaran, Crown Counsel, for the respondent.

T. S. Fernando, J.

The proceedings in the Magistrate's Court in this case commenced with the issue by the Commissioner of Inland Revenue of a certificate in terms of section 85(1) of the Income Tax Ordinance (Cap. 242) to the effect that the petitioner had made default in the payment of Rs. 7,350/- made up of income-tax due, surcharge thereon and a sum added by reason of non-payment.

The petitioner, when summoned by the Magistrate to show cause why further proceedings for the recovery of the amount certified should not be taken against her, gave evidence which disclosed that her liability to pay this sum arose as a result of tax being attracted to a sum of Rs. 37,662/50 which she received on 4th July 1959 as the 2nd prize in a Hospital Sweep. She is a widow with children, and she gave an account of the manner in which she spent this money. The learned Magistrate has accepted that the money has been utilised for legitimate and necessary expenses. About six weeks before she received the prize money legislation had been passed making prize money from sweeps liable to income tax. Whether the petitioner knew or did not know of such a tax liability is irrelevant because the liability to pay the tax is not dependent on that knowledge. The petitioner had at no time prior to the receipt of the prize money been liable to pay income tax, and a notice of assessment of liability to tax issued for the first time only on 22nd January 1963, some three and a half years after she became liable to pay it and after she had spent the prize money. When she received the assessment she had no money or other assets to pay any sum at all.

The learned Magistrate, holding that she had not shown sufficient cause within the meaning of section 85(1), imposed on her a fine of Rs. 7,350/-, and in default of payment "convicted her and sentenced her to 2 months' simple imprisonment." No question of convicting a person arises where proceedings under section 85 of the Ordinance have been taken. Where sufficient cause has not been shown, the tax in default *shall* be deemed to be a fine imposed by a sentence of the Magistrate on the defaulter for an offence punishable with fine only or not punishable with imprisonment.

Learned counsel for the petitioner attempted to rely on the decision in *Puswella* v. *Commissioner of Income Tax* (1958) 60 N.L.R. 497, in his argument that the Magistrate should have held that sufficient cause was shown against recovery by the procedure of section 85. The facts of the instant case, however, are different, and *Puswella's case* is, in any event, distinguishable. I see no reason to interfere with that part of the order which relates to the tax being deemed a fine imposed by the Magistrate.

The question that has given me some difficulty is whether the Magistrate is obliged, in every case where the tax in default is deemed by section 85(1) to be a fine, to order a term of imprisonment in default of payment of the fine. Counsel for the Commissioner argued that there is such an obligation on the Magistrate and relied for support for that argument on the observations of Weerasooriya J. in *de Jong* v. *Commissioner of Income Tax*, (1955) 57 N.L.R. at page 281. There that learned judge observed that the tax due is deemed to be a fine only for the purpose of invoking the provisions of section 312(1) of the Criminal Procedure Code relating to the imposition of a term of imprisonement in default of payment of tax. He also went on to observe that the object of proceedings under section 85(1) of the Ordinance is to ensure recovery of the tax due from a defaulter by subjecting him to a term of imprisonment should he fail to pay the tax. Where, however, it is not disputed that the defaulter is not possessed of any money, I find it difficult, with respect, to appreciate how the subjecting of the defaulter to a term of imprisonment will result in a payment of the tax or even a part of it. Counsel for the Commissioner suggested that, if the petitioner is sentenced to imprisonment, her children might come forward to pay the tax in order to save their mother from gaol. I do not think that such a hope is one which the Commissioner should be encouraged to entertain at law.

This Court does not ordinarily interfere with the exercise of a judicial discretion. But the learned Magistrate, in making the order sought to be revised here, acted on the assumption that he was obliged, at the time of imposition of the fine, also to make an order in respect of imprisonment in default of payment. *De Jong's case* had been cited before him, and Weerasooriya, J. had there made the observation that the object of the proceedings under section 85(1) would be defeated if the Magistrate merely makes an order that the defaulter should pay the tax as a fine. The learned Magistrate, therefore, acted in the instant case as if he had no discretion in regard to the question whether imprisonment in default of payment should be ordered or not.

Section 85(1) itself, while it makes it obligatory that a tax in default *shall* be deemed to be a fine, leaves it, in my opinion, open to the Magistrate to decide whether or not any of the provisions of section 312(1) of the Criminal Procedure Code shall be made applicable to the fine. In the words of that section, "the Magistrate *may* make any direction which, by the provisions of that sub-section 312 (1), he could have made at the time of the imposition of the sentence." Again, provision (b) of sub-section 1 of section 312 vests in the Magistrate a discretion whether or not to direct by the sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term. Although in many cases a Magistrate may decide to impose a term of imprisonment in default, there may be some cases where he does not think such action called for.

There is, of course, no appeal available against an order made in pursuance of section 85(1) of the Ordinance; it is, however, open to this Court to consider whether in the circumstances the order complained of here should be altered in the exercise of its powers of revision. The Magistrate having imposed the term of imprisonment on the assumption that he had no discretion in the matter but that he was obliged to do so, it is open to this Court to consider whether in the circumstances of the case it was one in which a term of imprisonment in default of payment was called for. In the ordinary case of the imposition of a fine and a sentence of imprisonment in default of payment of the fine upon a conviction for an offence, the serving of the sentence of imprisonment puts an end to the liability to pay the fine. It was conceded, however, that serving a term of imprisonment for default does not put an end to the liability to pay the tax-vide section 88 of the Ordinance. It is implicit in the findings in this case that the petitioner has no present means of paying the tax (now a fine). Sending her to gaol in the face of that finding can hardly be said to be necessary to ensure recovery of the tax. The interests of the Revenue did not require the imposition of the term of imprisonment. I would, therefore, acting in revision, quash that part of the order made on 27th October 1964 by the Magistrate which relates to conviction and sentence of 2 months' simple imprisonment. The imposition of the fine of Rs. 7,350/- will stand.

Varied.

ELECTION PETITION, No. 11 *OF* 1965

Present: **Sirimane, J.**

ELECTORAL DISTRICT NO. 32—AGALAWATTA

G. DON YASAPALA & ANOTHER

vs.

ANIL KUMAR MUNASINGHE *alias* ANIL KUMAR MOONESINGHE

Decided: May 9, 1966

Election Petition Inquiry — Right to obtain certified copies of statements made to police by witnesses for purposes of cross-examination — Law applicable to summoning of witnesses and admissibility of evidence in Election cases — Civil Courts (Special Provisions) Act No. 43 of 1961 section 3 — Ceylon (Parliamentary Elections) Order-in-Council, section 78(A)(3).

Held: (1) That there is no legal objection to the issue of certified copies of statements made to the police by some of the witnesses listed to testify against a party to an election petition when such party needs them for the purpose of cross-examining these witnesses.

(2) That the provisions of section 3 of the Civil Courts (Special Provisions) Act No. 43 of 1961 and those of section 78(A)(3) of the Ceylon (Parliamentary Elections) Order-in-Council justify the view that in matters relating to the summoning of witnesses and the admissibility of evidence, the law applicable to civil trials before a District Court should be followed in a Election Court, rather than the provisions of the Criminal Procedure Code.

P. Navaratnarajah, Q.C. with *J. W. Subasinghe, S. C. Crossette-Tambiah, J. E. P. Deraniyagala, R. N. Hapugala* and *Miss Barr-Kumarakulasinghe*, for the petitioners.

K. Shinya with *Nimal Senanayake, Stanley Tillekeratne, Tudor Siriwardena* and *Vernon Gunaratne*, for the respondent.

L. B. T. Premaratne, Senior Crown Counsel, as amicus curiae.

Sirimane, J.

The respondent has made an application for certified copies of statements made to the police by some of the witnesses listed to testify against him in regard to alleged acts of intimidation etc. These statements are needed for the purpose of cross-examination and would undoubtedly be of assistance to Court in assessing the evidence of the witnesses.

The police are apparently very reluctant to grant these copies.

Personally I look upon with disfavour any attempt to hide or keep secret statements made to the police in the course of their investigation. Unless the law very clearly prohibits it, there is no good reason for withholding such statements.

Is there any legal objection to the issue of these statements? I think not.

Under Section 2 of the Civil Courts (Special Provisions) Act No. 43 of 1961 a party to any proceedings in a Civil Court is undoubtedly entitled to obtain such certified copies on payment of the charges specified in the schedule to the Act. Civil Court in this Act has the same meaning as in the Civil Procedure Code, where, a Civil Court means a Court in which a Civil action may be filed. (Section 5).

The District Court is therefore a Civil Court.

Section 78(*A*)(3) of the Ceylon (Parliamentary Election) Order-in-Council — Chapter 381, provides that for the purpose of summoning or compelling the attendance of a witness, an Election Judge shall have the same powers, jurisdiction, and authority as are possessed and exercised by a judge of a District Court in the trial of a Civil action.

There is, of course, no specific reference to the provisions of Act No. 43 of 1961. But, on a consideration of the two Sections referred to above, I am of the view that in matters relating to the summoning of witnesses and the admissibility of evidence the law applicable to Civil Trials before a District Court should be followed in a Election Court, rather than the provisions of the Criminal Procedure Code.

The application for certified copies made by the respondent is allowed.

Application for certified copies allowed.

Present: **T. S. Fernando, J. and Tambiah, J.**

L. A. CHANDRASIRI *vs.* D. WICKRAMASINGHE

S.C. 15(F)/1962—*D.C. Kandy No.* L 4862

Argued on: 19th & 24th November, 1965
Decided on: 15*th December*, 1965

Servitude — Right of way of necessity — What must a plaintiff proves to succeed in such an action — Burden of proof.

Held: (1) That the onus lies on a person who claims a right of way of necessity to show that it is neccessary for him to claim this right.

(2) That an owner of a land is not entitled to claim, a way of necessity if there is another though less convenient road.

A. C. Gooneratne, Q.C. with *N. Gooneratne*, for the Defendant Appellant.

C. Ranganathan, Q.C. with *K. Nadarajah*, for the Plaintiff-Respondent.

Tambiah, J.

The plaintiff, who is the owner of the northern three pelas of a land called Diddeniya Kumbure depicted in plan No. 1903 of 12. 1. 1961 and marked X in the course of the proceedings, claimed a right of way over the defendant's land along the path ABCD on two causes of action, namely, by right of prescriptive user and by way of necessity. After trial the learned District Judge held that the plaintiff respondent had not prescribed to this path but granted a servitude by way of necessity. The defendant has appealed from this order.

It transpired in the course of the evidence that there is another path EF along which the plaintiff could have access to the public road. Mr. De La Motte, the surveyer who prepared the plan testified that the road marked EF in plan appeared to be a well used path and that it is possible to go along this path to the abandoned brick kiln marked 2 and the well No. 3 which are situated in the plaintiff's land. The plaintiff who gave evidence stated that he had only used AB and not the path EF but he admitted under cross-examination that about 50 or 60 people use the road EF to get on to his land for the purpose of going to another well in his land which is marked No. 4 in the plan referred to earlier. He stated that seven to eight house holders come along the Village Committee path to this well using the path marked EFGH. He also admitted that this path had been in existence for at least 20 years.

The second defendant stated that about 60 to 70 people use the path EF to go to the plaintiff's land from the public road and that this was an old path. He also added that there are other paths apart from this path claimed, to go to the plaintiff's land from the public road to the West. The plaintiff was forced to admit that there are other paths to have access to his land from the public road but he said that they were not convenient. The road EF runs through Kiri Ukku's land. The plaintiff-respondent has led no satisfactory evidence to show that he cannot use this path. When he was asked why he could not use this road he stated that the road EFGH is only limited to seven or eight houses and that he has not used it. He has led no evidence to show that he would be prevented if he attempts to use the path EF along which sixty to seventy people pass daily to go to the well of the plaintiff.

Mr. A. C. Goonaratne, Q.C., who appeared for the appellant, submitted that a right of way of necessity cannot be granted when there is another equally convenient path. It is my view that the path EF can be used by the plaintiff if he chooses to do so, to have access to the public road.

Mr. C. Ranganathan, Q.C., submitted that every person who owns a land-locked land has got the right to obtain a right of way of necessity if he proves that he has no other path which he has acquired either by grant or prescription. In support of this contention he relied on the last few lines of a passage from Maasdorp, which is as follows: (vide The Institutes of South African Law, Vol. II 6th Edition p. 218).

> "In addition to the above rights of passage, which have their origin, like all other servitudes, in express or implied grant, we have to consider another kind of right of way which falls under the class of servitudes of necessity, to which allusion has already been made above, namely, necessary way or way of necessity. It is based on the right which every owner of land has to communication with the world at large outside his ground, and, with this object in view (whenever no definite path or road has been allotted to him, by way of grant or acquired for his land by prescription), to claim some means of access to the public roads of the country, without which his land would be useless to him."

The authorities cited in support of this proposition by Maasdorp are *Kimberly Mining Board* v. *Stamford*, 1 Buch App. C. 129 and a passage from Grotius (G. 2.35.7). I have examined these authorities and they do not support the contention of Mr. Ranganathan. Hall and Kellaway, in their well-known work on servitudes, state as follows: (vide Servitudes by Hall and Kellaway p. 68):

> "Nor may a person claim a road ex necessitate over his neighbour's land on the ground that this property alone intervenes between his land and a public road, whereas he has the use of a road giving access to another public road, but one which passes over a number of intervening properties whose owners may in the future object to his using it. (*Lentz* v. *Mullin* 1921 E.D.L. 268)."

It is clear law that such an owner is not entitled to claim a right of way on the grounds of necessity, if there is another though less convenient road.

The onus lies on a person who claims a right of way of necessity to show that it is necessary for him to claim this right and when there is an alternative convenient route he cannot make this claim. In *Lentz* v. *Mullin* (1921) E.D.L. 268 at 270 Graham J.P. said:

"The onus of proving a claim of this character is upon the person alleging it, and the claimant alleging it to succeed, must show that he has no reasonable or sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry out his farming operations. If he had an alternative route to the one claimed, although such a route may be less convenient and involve a longer and more arduous journey, so long as the existing route gives reasonable access to the public road, he must be content and cannot insist upon a more direct approach over his neighbours property."

The plaintiff has not discharged this onus.

In this case although a feeble attempt was made by the plaintiff to show that this path EF in plan X was not allowed to be used, he has not led satisfactory evidence to show that the owner of the land over which the path passes had any serious objection if the plaintiff wanted to use it. Kiri Ukku, the owner of the land through which EF passes has not objected to 60 to 70 people using this path. No reason had been given as to why he should object if the plaintiff also uses this path.

The plaintiff stated that he made a complaint to the police when he was refused this path. But he has not called any police officer to prove that he made such a complaint. Further he stated that he only used the path AB. For these reasons I set aside the order of the learned District Judge granting a right of way of necessity over the path ABCD in plan X and dismiss the plaintiff's action with costs in both courts.

T. S. Fernando, J.

I agree.

Appeal allowed and action dismissed.

Present: **Sansoni, C.J., Tambiah, J., Silva, J., Manicavasagar, J. and Alles, J.**

LEELAWATHIE *vs.* WEERAMAN & OTHERS

S.C. No. 78/64 (*Inty*)—*D.C. Matara Case No.* 3729 P

Argued on: 17th March, 1966
Decided on: 30th March, 1966.

Partition action — Addition of parties — Whether summons or notice should issue on such added parties—Discretionary power of trial Judge to add parties at any stage—Partition Act (*Cap.* 69), *sections* 12, 13, 22 *and* 70(1).

Held: (1) That once a person has been added as a party to a partition action he is entitled to be served with summons and the correct procedure would be to issue summons on him.

(2) That under the Partition Act (Cap. 69), a notice should be issued only on a person who is not a party to the action.

(3) That section 70(1) of the Partition Act empowered a trial Judge to add a party at any time and even before the trial stage of the action.

(4) That, in the present case, as the learned trial Judge had ordered a notice and not summons to issue after an order to add the 7th to 13th defendants as parties, all steps taken since that stage (including the interlocutory decree already entered) should be set aside.

Per **Sansoni, C.J.** — "A party to an action can, of course, waive the service of summons and enter an appearance even before summons has been issued. That is because the rule that service of summons is necessary has been laid down in the interest of the party, and to prevent orders being made behind his back. If he appears before the Court and is permitted to take part in the proceedings, he may be said to have dispensed with the need for complying with the rule."

C. Ranganathan, Q.C., with *W. D. Gunasekera*, and *M. T. M. Sivardeen*, for the 11th defendant-appellant.

A. C. Gunaratne, Q.C., with *R. C. Gunaratne*, for the plaintiff-respondent.

Sansoni, C.J.

This partition action was instituted against six defendants. In execution of the commission issued to him, the Surveyor sent a report, verified by affidavit, in the course of which he disclosed the names and addresses of seven claimants who claimed the land surveyed.

On 19th June 1963 when the case was called in Court, the Additional District Judge who had the Surveyor's report before him made the order "Add and issue notice on fresh claimants for 24.7.63." They were added as 7 to 13 defendants.

Clearly, the Judge was wrong when he ordered notice to be issued instead of summons. It is elementary that once a person becomes a party to an action as a defendant, he is entitled to be served with summons. Under the Partition Act Cap. 69 a notice is issued only on a claimant who is *not* a party to the action. Section 22 of the Act provides for notice to be issued on a person who is not a party, while sections 12 and 13 require summonses to be issued on defendants — and this rule would apply to added defendants also.

The very form of notice in the Second Schedule to the Act, and that is the notice which was served on the added defendants, shows that it is merely to give them notice of an action without requiring them to appear in Court. A summons, on the other hand, as the form of summons in the second Schedule demonstrates, summons the party to appear in Court either in person or by Proctor and to state whether he disputes the accuracy of the share allotted to him or to any other party. Indeed, it was not seriously argued that once a person is made a party the correct procedure is to issue summons on him.

Mr. Guneratna, however, submitted that the Judge had no power to add as defendants the claimants who were disclosed by the Surveyor. He argued that section 70(1) of the Act does not apply before the trial stage of the action, even though the section reads:—

> "70(i). The court may *at any time* before interlocutory decree is entered in a partition action add as a party to the action, ...
>
> (*a*) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or
>
> (*b*) any person who, claiming an interest in the land, applies to be added as a party to the action."

It is obvious that this section confers a discretionary power on the Judge to add a party *at any time:* and once the order to add has been made, the next step should be to order summons to issue. To issue a notice on such an added party is wrong and is not justified by any provision of the Act.

It was open to the added defendants, once they were served with the notices issued by the Court, to apply to be added as parties to the action under section 70(1)(b) which has just been quoted, but that again was left to their discretion. It surely cannot be argued that the stage at which section 70(1) b) can be applied is only the trial stage. Why then should the application of section 70(1)(a) be confined to the trial stage?

A party to an action can, of course, waive the service of summons and enter an appearance even before summons has been issued. That is because the rule that service of summons is, necessary has been laid down in the interest of the party, and to prevent orders being made behind his back. If he appears before the Court and is permitted to take part in the proceedings, he may be said to have dispensed with the need for complying with the rule.

There seems to have been some misconception in the mind of the Additional District Judge as to the effect of the notice which was served on the defendants. In his order refusing the application of the 11th defendant to set aside the interlocutory decree, he has said that the 11th defendant should have appeared in Court when notice was served on her. He seems to have thought that a notice was a substitute for a summons. If he had not made that mistake, and if he had realised that it was his duty to issue summons on the 11th defendant, he would undoubtedly have set aside the interlocutory decree. Even Counsel who appeared for the 11th defendant seems to have made the same mistake with regard to the effect of the notice, for he pleaded that the 11th defendant could not appear in Court in obedience to the notice because she was ill.

For these reasons I would hold that the interlocutory decree already entered should be set aside. All steps taken since the addition of the 7th to 13th defendants are also set aside. Summonses must be issued on the added defendants before any other steps are taken in the action.

The 11th defendant-appellant is entitled to the costs of the enquiry held on 27th May 1964 and of this appeal from the plaintiff-respondent.

Tambiah, J.
I agree.

Silva, J.
I agree.

Alles, J.
I agree.

Manicavasagar, J.

I agree with the opinion of My Lord, the Chief Justice, and the Order proposed by him, but I desire to state my views as well.

The submission of Counsel for the respondent that where a claim is made before a surveyor, the procedure which the Court should follow is confined only to Section 22(1) of the Partition Act, and that Section 70(1) has no application at all, except when in the opinion of the Court *formed at the trial stage*, a party should be added, appears to me to ignore completely the words "at any time before interlocutory Decree" in Section 70(1). The submission that the Court can form no opinion as to whether any person should be added as a party or not, except at the trial stage, does not commend itself to me. In a partition suit the Court must bear in mind the effect of a decree which it enters, and therefore should be careful to bring in parties who appear to have an interest. The fact that a person has made a claim before a surveyor commissioned to survey a land, and the data appearing on his plan and report, are sufficient to enable the Court to form an opinion ; if the Court be of opinion that the claim made to the surveyor should also be inquired into, two courses are open; the Court may either act under Section 22(1)(a) or it may add him under Section 70(1) as a party defendant and issue summons on him.

Appeal allowed.

Present: **T. S. Fernando, J. and Sri Skanda Rajah, J.**

L. K. LEBBAYTHAMBY AND NINE OTHERS
vs.
THE ATTORNEY-GENERAL AND ANOTHER

S.C. Application No. 20 *of* 1964 — *D.C. Colombo No.* 935/Z
Application under section 753 *of the Civil Procedure Code to revise an order made by the District Court of Colombo in Case No.* 935/Z

Argued & decided on: 30th January 1964
Reasons delivered on: 5th February 1964

Stay of proceedings — Interlocutory appeal — Refusal by trial judge to stay execution of order allowing evidence on commission — Power of Supreme Court to act in revision — Likely delay in disposal of appeal irrelevant consideration. — Courts Ordinance, section 73.

Held: (1) That where a District Judge makes order refusing an application for stay of proceedings pending an interlocutory appeal, section 73 of the Courts Ordinance does not limit in any way the powers of the Supreme Court to revise such an order.

(2) That in an application for stay of proceedings pending an interlocutory appeal, the likely delay in the disposal of the appeal is not a factor that can override the possibility that the appeal itself, if successful, would be rendered nugatory.

H. V. Perera, Q.C., with *M. Tiruchelvam, Q.C.*, and *G. D. Welcome*, for the plaintiffs-petitioners.

J. G. T. Weeraratne, Crown Counsel with *Siva Pasupati*, for the defendants-respondents.

T. S. Fernando, J.

This action No. 935/Z was instituted by the plaintiffs-petitioners to obtain (i) a declaration that certain bars of gold seized as forfeit under the Customs Ordinance are the property of the plaintiffs and were not liable to be seized and (ii) an order directing the return of the bars of gold to them. After the case for the plaintiffs had been closed at the trial, the defendants successfully made an application to the trial judge for the issue of a Commission to record in the United Kingdom the evidence of three persons named in that application. The plaintiffs appealed on December 16, 1963 to this Court against the order directing the issue of the Commission. On December 20, 1963 the plaintiffs applied to the District Court for a stay of the issue of the Commission until this appeal is decided. After hearing Counsel for the parties, the District Court on January 13, 1963 refused the application for stay of proceedings in respect of the Commission. The plaintiffs thereupon made the present application to this Court for a revision of the order of the 13th January. In support of the revision application it has been argued that the plaintiffs will be called upon to incur heavy expenditure in connection with the recording of evidence in the United Kingdom and that, if they are eventually successful in the appeal now pending in this Court, not only will the appeal be rendered nugatory but the costs that may be awarded will not include the total expenses incurred in connection with the Commission.

Learned counsel for the defendants has pointed to section 73 of the Courts Ordinance which enacts that no appeal to the Supreme Court against a judgment, decree or order of a District Court shall have the effect of staying the execution of such judgment, decree or order unless the District Judge shall see fit to make an order to that effect. The District Judge is, therefore, vested with a discretion in the matter of directing a stay of execution of the order in respect of the Commission referred to above, and it is contended that that discretion has here been exercised. We do not, however, understand that section of the Courts Ordinance as limiting in any way the powers of this Court to revise in appropriate circumstances an order staying or refusing to stay execution.

The appeal of December 16, 1963 has not yet been received by this Court. We are not here called upon to say anything in regard to its merits. It is correct to say, however, that if the Commission issues and is either executed or is in the process of being executed before the appeal is decided, the appeal to this Court, if successful, will be rendered nugatory and the expenditure unnecessary. Moreover, in the present case the bars of gold are still in the possession of the proper officers of the Crown, and it was not shown to the learned District Judge how the interests of the crown in the litigation will suffer by a stay of the execution of the Commission until the appeal has been decided by the Supreme Court. A point was made in the District Court as well as before us of the delay that will ensure. Delay by itself cannot, in my opinion, override the considerations that must in the present case be weighed against it, viz. the admittedly heavy expenditure that will be involved and the appeal itself, if successful, being rendered nugatory. There is no reason why an attempt should not be made to move this Court, by appropriate application, to expedite the hearing of the appeal. If such an application is made we have little doubt that it will receive the Court's serious consideration.

The order made by the District Court on January 13, 1964 is set aside. Proceedings in respect of the issue of the Commission are to be stayed pending the determination of the appeal filed on December 16, 1963. They are entitled to the costs of the present application to this Court.

Sri Skanda Rajah, J.

I agree.

Application allowed.

Present: **T. S. Fernando, J. and Sirimane, J.**

DULLEWE *vs.* DULLEWE & ANOTHER

S.C. No. 391 (*Final*) *Of* 1963—*D.C. Kandy L.* 5765

Argued on 4th November, 1965
Decided on: 3rd December, 1965

Kandyan law — Deed of gift — Use of words "as a gift irrevocable" — Revocability of such deed of gift — Kandyan Law Declaration and Amendment Ordinance (Cap. 59), section 5(1).

A donor gifted lands to his son "as a gift irrevocable," subject to a fideicommissum. It was submitted on behalf of the appellant that the expression "as a gift irrevocable" used in the deed was merely declaratory of the kind of gift the donor was making, but did not amount to an express renunciation of the statutory right to revoke vested on him by section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance. It was further submitted that the case of *Punchi Banda* v. *Nagasena* (64 N.L.R. 548) was wrongly decided and should not be followed on this point.

Held: That the use of the words "*as a gift irrevocable*" was sufficient to indicate the gift was meant to be irrevocable and to bring it within section 5(1)(d).

Followed: *Punchi Banda* v. *Nagasena*, (1963) LXIII C.L.W. 10 ; 64 N.L.R. 548.
Kuruppu v. *Dingiri Menika*, S.C. 161/62 (F) D.C. Kandy 6442, *S.C. Mts. of* 5. 12. 63.

H. V. Perera, Q.C., with *C. R. Gunaratne* and *N. S. A. Goonetilleke*, for the defendant-appellant.

S. Nadesan, Q.C., with *S. Sharvananda*, for the plaintiffs-respondents.

T. S. Fernando, J.

Mr. Perera has invited us on this appeal to consider the correctness of the decision of this Court in *Punchi Banda* v. *Nagasena* (1963) — 64. N.L.R. 548 which held that by the use of the single word 'irrevocable' in a Kandyan deed of gift the donor may, under section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59), expressly renounce his right to revoke the gift.

By the deed we are concerned with on this appeal the donor gifted a number of lands to his son "as a gift irrevocable", subject however to a *fidei commissum*. Mr. Perera has argued the expression 'as a gift irrevocable' that in the deed is merely declaratory of the kind of gift he was making, but does not amount to an express renunciation of the statutory right to revoke vested in him by section 5(1)(d) of the Ordinance. We are unable to accede to that argument. We agree respectfully with the reasons contained in *Punchi Banda* v. *Nagasena* (*supra*), and we may add that the same interpretation of the relevant provision of the Ordinance is to be found in the later decision in the case of *Kuruppu* v. *Dingiri Menika* — (S.C. 161/62(F) — D.C. Kandy 6442 — S.C. Minutes of 5.12.1963). Herat J. (with Sri Skanda Rajah J. agreeing) there held that the expression in a deed "by way of gift absolute and irrevocable" is a sufficient compliance with the provisions in section 5(1)(d) to indicate clearly that the gift was an irrevocable Kandyan deed of gift.

Mr. Perera has stated that in D.C. Kurunegala Case No. 10580 and in D.C. Ratnapaura Case No. 1317, the respective District Courts have held that this expression "as a gift absolute and irrevocable" does not constitute a sufficient compliance with the requirements of the said section, and that appeals taken from these two decisions to this Court have been dismissed. We have sent for and examined the records of these two cases but find that both appeals have been dismissed without reasons stated. The appeal in the Kurunegala case has been dismissed on 11th October 1956 and that in the Ratnapura case on 16th September 1960. We therefore do not know whether the point now raised received consideration by the Court on either occasion. *Punchi Banda* v. *Nagasena* (*supra*) and *Kuruppu* v. *Dingiri Menika* (*supra*) are decisions of 1963 and, as stated above, we see no good reason for taking a different view.

We would dismiss this appeal with costs.

Sirimanne J.

I agree.

Appeal dismissed.

Present : **Sri Skanda Rajah, J.**

PITCHAI *vs.* FEENA UMMA

S.C. No. 1451/'64—*M.C. Kandy, No.* 35039.

Argued and decided on : 2nd July, 1965.

Maintenance, in respect of illegitimate child of Muslim parents—Has Magistrate's Court exclusive jurisdiction ?

Held : That the Magistrate's Court has exclusive jurisdiction to try an application for maintenance in respect of an illegitimate child of Muslim parents.

Cases referred to : *Jiffry* v. *Nona Binthan*, 62 N.L.R. 255 ; LVIII C.L.W. 49.
Ismail v. *Latiff*, 64 N.L.R. 172.
Moosa Lebbe v. *Asiya Umma*, LXII C.L.W. 106.

M. T. M. Sivardeen, for the defendant-appellant.

George Candappa, for the applicant-respondent.

SRI SKANDA RAJAH, J.

This is an application for maintenance in respect of an illegitimate child. The child's mother is Muslim and so is the putative father. On the facts there is ample corroboration of the mother's evidence.

A point of law was raised, namely, that the Magistrate's Court has no jurisdiction to entertain an application of this nature because the parties are Muslims. A similar objection was disposed of in three cases, *Jiffry* v. *Nona Binthan*, 62 N.L.R., page 255 ; *Ismail* v. *Latiff*, 64 N.L.R., page 172, both of which were decisions of single Judges, and *Adam Bawa Mossa Lebbe* v. *Ahamadu Lebbe Asiya Umma*, S.C. 2, Quazi Courts 3829, S.C. Minutes of 28.6.62* a decision of two Judges. I would follow these cases and hold that the Magistrate's Court had exclusive jurisdiction to try this case.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

* 62 C.L.W., Page 106

Present: **Sri Skanda Rajah, J.**

NAGAMUTTU *vs.* INSPCTOR OF POLICE, GAMPOLA

S.C. No. 525/65—*M.C. Gampola, No.* 20199.

Decided on: 9th July, 1965.

Theft—Charges of theft and of retaining stolen property—Can the accused be convicted of both charges.

Held: That a person cannot be convicted of theft and also with retention of the same stolen property.

Accused-appellant in person.

Aloy N. Ratnayake, Crown Counsel, for the Attorney-General

SRI SKANDA RAJAH, J.

As in S.C. No. 518/65, the accused was convicted on his own plea of both theft and retention of stolen property. A person cannot be convicted of theft and also with retention of the same stolen property. Therefore, I set aside the conviction and sentence in respect of the 2nd count but affirm the conviction and sentence on the 1st count.

Subject to this variation, the appeal is rejected.

Appeal rejected.

PRIVY COUNCIL APPEAL No. 10 *OF* 1965

Present: **Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Upjohn, Lord Pearson**

AUSTRALIA AND NEW ZEALAND BANK LIMITED
vs.
ATELIERS DE CONSTRUCTIONS ELECTRIQUES DE CHARLEROI

FROM
THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED THE 22ND FEBRUARY 1966

Agency — Actual authority of agent to indorse cheques made in favour of principal — Conversion of cheques by agent by payment into his bank account — Action by principal against Bank for conversion.

The Respondents were suppliers of heavy electrical machinery, who appointed the firm of Helios Heavy Electrical Engineering Contracting Co., Private Ltd., as their general agents in Australia for the negotiation and execution of contracts for the supply and installation of electrical machinery. In pursuance of such a contract entered into between the Respondents and Snowy Mountains Hydro-Electric Authority, the Authority handed over to Helios Ltd., a number of cheques made out in favour of the Respondents. Helios Ltd. indorsed the cheques and paid them into its account with the Appellants but did not remit the proceeds of fifteen of the cheques abroad to the Respondents. The Respondent sued the Appellants in conversion in respect of these cheques, and the trial judge held in their favour. In appeal—

Held: That as Helios Ltd. was, *inter alia*, operating the Australian office of the Respondents, acting as importer and holder of the import licences for the equipment supplied by the Respondents, arranging and paying for expenses connected with the peformance of the Respondents' contracts, was the holder of a "full credential" from the Respondents to act for them in negotiating contracts, and had of necessity to devise some method of paying the Respondents in Belgium in respect of payments made to the Respondents in Australia in Australian currency, Helios Ltd. had implied actual authority to endorse the cheques. The Appellants were therefore not liable in conversion.

H. Jenkins, Q.C., with *A. H. Conlon*, for the appellants.

R. Watson, Q.C., with *R. B. Murphy*, for the respondents.

LORD PEARSON

This is an appeal from a judgment in a commercial cause by Manning J. in the Supreme Court of New South Wales. He gave judgment for the plaintiff company, now the respondents in this appeal, against the defendant bank, now the appellants in this appeal, for £55,540 18s. 7d. as damages for the conversion of fifteen cheques. The basis of the judgment was that the cheques, drawn in favour of the plaintiff company and duly delivered or sent to their agent, were without authority and wrongfully indorsed by the agent and paid into his account with the defendant bank, and that the defendant bank wrongfully converted the cheques by receiving them and collecting the proceeds for the agent's account. The total amount of the cheques was £280,309 16s. 11d., and in respect of them sums amounting to £224,768 18s. 4d. were remitted by the agent to the plaintiff company, so that there was a shortage of £55,540 18s. 7d. The judgment was for damages equal to the amount of the shortage.

At the trial the defendant bank had put forward five points as defences to the plaintiff company's claim, namely:—

(1) that the agent had actual authority, express or implied, from the plaintiff company, to indorse the cheques and pay them into his account;

(2) that the plaintiff company represented to the defendant bank that the agent had such authority, and the defendant bank in reliance on the representation acted to their detriment in receiving the cheques and collecting the proceeds for the agent's account, and therefore the plaintiff come

pany are, as against the defendant bank, estopped from denying that the agent had such authority;

(3) that the plaintiff company ratified the agent's acts in respect of the cheques as done on their behalf;

(4) that the defendant bank had a statutory defence under section 88 of the Australian Bills of Exchange Act 1909-58 (corresponding to section 82 of the English Bills of Exchange Act 1882), because they had in good faith and without negligence received payment of these cheques for the agent as their customer;

(5) that the agent was part owner of the cheques or some of them and by virtue of his part ownership was entitled to indorse them and have the proceeds collected and paid into his account.

But at the hearing of this appeal counsel for the defendant bank abandoned points (4) and (5), explaining that the abandonment of point (4) did not involve any admission that the defendant bank had been negligent. He elected to rely only on points (1), (2) and (3) — actual authority, ostensible authority and ratification. As the arguments in the appeal were developed, it became evident that the principal question was whether the agent had actual authority, express or implied from the plaintiff company to deal with the cheques as he did. If he had such actual authority no question of ostensible authority or ratification would arise. Examination of the facts is required.

The plaintiff company at all material times carried on business at Charleroi in Belgium as (*inter alia*) manufacturers of heavy electrical equipment. Mr. Haesaerts, who was in the employment of the plaintiff company and soon afterwards became head of their Export Division, came out to Australia in December 1952, in order to investigate and prospect the potential market in Australia for goods of their manufacture, and, according to his findings, to propose to the plaintiff company that they should appoint a representative or form a company. Mr. Haesaerts did not state in his evidence what proposal he made, but in fact the plaintiff company appointed a representative and did not form a company in Australia.

On the 24th February 1953 an agreement was made between the plaintiff company, represented by its Director-General, and "the firm Helios (Heavy Electrical and Engineering Company) at Sydney, represented by Mr. T. Ismet Guler, its owner-manager." Mr. Guler afterwards formed a company called "Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd." which took over the business of the firm. As the learned judge said in his judgment "It seems to have been regarded by all parties as unnecessary to distinguish between Mr. Guler personally, the firm and the company, and all three have been treated as one and the same." "Helios" is a useful word for covering all three — Mr. Guler, the firm and the company — and may be treated as a masculine singular noun. The agreement was in French and, as two different translations are available, there is some choice of phrasing, but there is no problem of interpretation.

Article 1 of the agreement gave to Helios exclusive representation for the Australian territory for the sale of all material manufactured by the plaintiff company. Article 3 provided that, unless otherwise indicated by one or the other of the parties, the plaintiff company would forward to Helios their lowest prices, quoted generally in the currency of their choice, for goods delivered F.O.B. Antwerp or C.I.F. Australian port, including suitable packing, but with customs duties and taxes excluded. Article 3 also provided commissions for Helios atspecified rates. Article 4 provided that in respect of all business transacted through Helios, and whatever might be the conditions of payment decided by mutual agreement,

(a) without permission from the plaintiff company Helios could not deal except in the currency stipulated in the plaintiff company's offers;

(b) Helios would be guarantor to the plaintiff company of the solvency of his customers;

(c) the commissions provided for in Article 3 would be payable only on final completion of the transactions.

Article 4 also provided that for important transactions with certain authorities the contracts would be drawn up directly between the customers and the plaintiff company. By Article 5 Helios undertook to do any necessary advertising for developing sales in his territory, to visit his clients regularly, to keep himself informed of new possibilities of business, and, in a word, to fulfil in relation to the plaintiff company all the obligations

of a good representative. In particular Helios undertook to open in the centre of Sydney an agency office (French "bureau de représentation") for the plaintiff company. Article 5 also provided that the expenses of advertising, correspondence, cables, purchase of specifications, travelling and otherwise, should be the responsibility of Helios. By Article 6 the plaintiff company promised to give technical assistance to Helios, and to facilitate the work of Helios by furnishing without charge their publications of all types, agendas and other advertising material which they normally furnish to their offices abroad (French "bureaux étrangers"). By Article 8 as afterwards amended the agreement would remain in force until the 28th February 1957 and thereafter from year to year until terminated by notice.

Helios arranged a number of contracts under which the plaintiff company would supply heavy electrical equipment to Australian customers. This case is directly concerned with only a contract made with the Snowy Mountains Hydro-Electric Authority (which for want of a better abbreviation has been and will be referred to as "Snowy") for the supply, delivery and supervision of erection of seven transformers of 56 M.V.A. and auxiliary equipment. This contract was in substance concluded by an acceptance letter dated the 27th July 1955, although the formal contract was not signed until later. It was under this contract that the fifteen cheques were drawn and issued. However, on the question as to the extent of the authority of Helios in respect of such cheques the relevant arrangements in the other contracts have some bearing. The relevant arrangements are those as to parties and as to modes of payment. Full details of the other contracts are not available; it was reasonable not to increase the already great bulk of the documents by including them. But there is enough information to show that some at least of these other contracts were earlier in date than the contract with Snowy and had been partly performed before performance of the contract with Snowy began. The outlines of the relevant arrangements are sufficiently clear, and two types of contract can be distinguished.

Type A — There were about seven contracts with the Electricity Commission of New South Wales, including a contract known as E. 60 dated the 8th October 1953 and involving the supply of eight transformers of 30 M.V.A. The parties to that contract were the plaintiff company and the Commission. The price of the equipment C.I.F. Australian port was payable by the Commission to the plaintiff company, but the local expenses (e.g. for customs duty and transport and insurance in Australia) were to be invoiced by Helios to the Commission and paid by the Commission to Helios. The original arrangements and the amended arrangements for payment of the C.I.F. price (less 5% retention) appear from a letter dated 28th January 1954, in which the plaintiff company said to the Commission "we beg to recall that it was initially being agreed that payment would be made in London, up to 95% of the C.I.F. price of plant from time to time shipped, in pounds sterling upon presentation of on board bills of lading, insurance certificates and a certificate by the Commission's authorised Inspecting Engineer that the plant in question has passed the necessary and appropriate tests at the manufacturer's works. We have been informed by our representatives in Sydney, Messrs. Helios, that you are prepared to transfer the invoiced amounts in Belgian francs or transferable pounds sterling to be converted into Belgian francs, after having checked the above-mentioned shipping documents. We agree to receive direct payment by bank transfer from your company to ours after Messrs. Helios will have been possessed of said documents sent from our end." Under a contract of this type there would be many things to be done or arranged by Helios as the agent for the plaintiff company, e.g. obtaining the necessary import licences, receiving the transformers, payment of customs duty, transport and insurance of the transformers to the site, supervision of erection, and financial arrangements for the payment of the C.I.F. price by the Commission in Australia through the banks to the plaintiff company in Belgium. But the financial arrangements would be simple in principle: the amount of the C.I.F. price in Australian currency (less the 5% retention) would be paid directly by the Commission to the defendant bank and would be used by the bank in purchasing a sum of Belgian francs in Belgium for the credit of the plaintiff company: the local expenses incurred by Helios would be paid by the Commission to Helios.

Type B — There were made with the State Electricity Commission of Western Australia five contracts for the supply of transformers, with the Northern Rivers County Council one contract for the supply of transformers, and with the State Electricity Commission of Victoria one contract for the supply of transformers and one for the supply of lightning arrestors. In these contracts Helios appeared as the party contracting to supply the transformers or other equipment,

though Helios was in fact contracting as agent for the plaintiff company. Under these contracts the price was payable to Helios, and consequently the cheques were drawn in his favour, received and indorsed by him and paid into his account with the defendant bank. It was his duty to remit to the plaintiff company the C.I.F. content of the price or cost of the equipment (making all the necessary arrangements in respect of import licences, exchange control and otherwise) but the residue of the price would be in the bank account of Helios covering the local expenses incurred by him.

In February 1955 an arrangement was made by the plaintiff company at the request of Helios to assist Helios to make payments of customs duties and other local expenses before receiving payments from the customers. The plaintiff company guaranteed an overdraft on the Helios account with the defendant bank up to to a limit of £5000 0s. 0d., which was afterwards raised to £10,000 0s. 0d. This arrangement was no doubt helpful to Helios, but did not affect the reimbursement of the local expenses. That reimbursement would be made to Helios under the Type A contracts by direct payment of the local expenses as such by the customers to Helios, and under the Type B contracts by payment of the whole price, including the element of local expenses, by the customers to Helios.

The contract with Snowy was negotiated by Helios. After consultation with the plaintiff company Helios submitted a tender dated 13th December 1954 and discussions and correspondence ensued. On the 21st March 1955 for the purpose of these negotiations the plaintiff company cabled to Snowy a "full credential" in terms requested by Helios, and followed it with a confirming letter of the 23rd March 1955, which was almost in the same terms, The letter referred to the cable and said "We wish to confirm that Messrs. Helios Heavy Electrical Engineering Contracting Co., City House, 164 Pitt Street, Sydney, owned by Mr. T. I. Guler, are our general agents for Australia and that they have the power of attorney to act on our behalf for the submission, the execution and the realisation of contracts made or subcontracted by ourselves with our full technical and financial backing." The word "realisation" does not have an exact meaning in relation to a contract, but would naturally include both the performance of the plaintiff company's contractual obligations in Australia and also taking steps to obtain for the plaintiff company the benefit Snowy's performance of the contract.

In letterheads used by Helios there was a description of Helios as "Sole Australian agent for A.C.E.C. Charleroi, Belgium" or a description of the Helios office as "Australian office for A.C.E.C." No objection was made by the plaintiff company.

The contract with Snowy was in effect concluded by Snowy's letter of acceptance dated the 27th July 1955 and addressed to Helios. The formal contract came much later on the 13th June 1957, and was signed on behalf of the plaintiff by Mr. Guler under a special power of attorney. But performance proceeded before the execution of the formal contract.

The contract with Snowy differed in respect of the relevant arrangements both from the Type A contracts and from the Type B contracts mentioned above. The party contracting to supply the transformers was the plaintiff company. The whole price, including not only the C.I.F. content or cost of the equipment but also the amount of the local expenses, was payable to the plaintiff company, and was payable in Australian currency in Australia. In the course of the negotiations Helios had tried to obtain a provision for payment of the amount of the local expenses to Helios, but Snowy would not agree to such a provision and Helios had to agree that the whole price should be paid to the plaintiff company. The contract also provided that for the purpose of conversion into Belgian currency for transmission to the Plaintiff company a fixed rate of 112 Belgian francs to the Australian pound should be assumed.

Other provisions of the contract which need to be mentioned were as follows:—

(i) Under clause 14 of the General Conditions and clause 6(2) of the Specification progress payments, if required by the plaintiff company, were to be made by Snowy on an engineer's certificate of the progress of the manufacture at the plaintiff company's works and a bank guarantee of repayment in the event of non-delivery of the equipment concerned;

(ii) Under clause 18 of the General Conditions every application by the plaintiff company for payment by Snowy was to be accompanied by a detailed claim in duplicate setting forth particulars of the claim;

(iii) Under clause 29 of the General Conditions the plaintiff company was to maintain a competent representative in Australia having authority to act for them and satisfactory to Snowy;

(iv) Oil for filling the transformers was to be supplied by the plaintiff company, and the figure for the oil shown in Schedule VIII was £20,692.

Afterwards the plaintiff company instructed Helios to order and pay for the oil and to invoice it to Snowy.

By June 1956 enough progress had been made with the manufacture of the transformers to justify a progress payment of £62,180 11s. 2d., representing 40% of the F.O.B. value of one transformer and 20% of the F.O.B. value of the other six transformers. The necessary bank guarantee was arranged through the plaintiff company's Belgian bank and the defendant bank. Then the first of the fifteen cheques was drawn by Snowy and delivered or sent to Helios as agent for the plaintiff company. It was dated the 27th June, and was for £62,180 11s. 2d. It was drawn in favour of "Ateliers de Constructions Electriques de Charleroi C/- Helios Heavy Elect. Engr. and Contracting Co. 164 Pitt Street, Sydney." It was then indorsed by Helios and paid into the account of Helios with the defendant bank at their Chatswood Branch. The indorsement was by means of a rubber stamp with the words "Helios Heavy Electrical Engineering and Contracting Co., 197 Victoria Avenue, Chatswood J.A. 2592" and then a signature "T. Holt". On the 29th June 1956 Helios wrote to the defendant bank, asking them to transmit by telegraphic transfer to the plaintiff company the sum of 6,964,222 Belgian francs, and attaching a cheque for £62,967 12s. 0d. made out at an exchange rate of 110.6 Belgian francs to the Australian pound. The telegraphic transfer was duly carried out through the defendant bank and the plaintiff company's Belgian bank, and notified to the plaintiff company. In a letter of the 3rd July 1956 the Belgian bank referred to the transfer as "On instructions Helios Co"., but in a credit advice of 11th July 1956 they said that the remitter was Snowy.

As appears from the evidence of Mr. Guillery, who was from late in 1954 to May 1960 manager for the plaintiff company for the export zone which included Autralia, no instruction was given by the plaintiff company at this time, or at any time before about May 1958, as to the mechanism of the financial operation involved. They received the correct sum of Belgian francs in Belgium, and they were evidently content with that. They left to Helios, as their general agent in Australia already charged with many tasks on their behalf, the further task of devising or using appropriate mechanism for receiving payment of the sum of Australian currency in Australia and converting it into a sum of Belgian francs credited to the plaintiff company in Belgium. Payment by Snowy of the sum of Australian currency was naturally made by means of a cheque made out in favour of the plaintiff company and delivered to Helios. The plaintiff company had no bank account in Australia. Helios had a bank account which had been used for the reception of very large sums paid to Helios as agent for the plaintiff company under the Type B contracts. In the circumstances it is not suprising that Helios indorsed the cheque for the plaintiff company and paid it into the Helios bank account, and then drew a cheque on the account to enable the defendant bank to purchase the necessary sum of Belgian francs to be credited to the plaintiff company in Belgium. That was a convenient mechanism by which the intended result was achieved.

On this point questions were put to Mr. Guillery in cross-examination. He said he knew that under the Snowy contract payments were to be made in Australian currency, but did not know until later that they were made by cheque. Then followed these questions and answers:—

'*Q*. At all event you would expect that someone would have to convert it into Belgian currency or purchase the requisite Belgian currency. You anticipated that? *A*. Yes.

Q. And won't you agree that Helios was your agent for that purpose? *A*. Yes.

Q. And he had the authority of the company—did he not — to do whatever was necessary to enable it to be sent to you in Belgian francs?

A. Yes. Just like with other customers; the Electricity Commission of N.S.W. for instance."

It is however surprising that the defendant bank should have taken the risk of accepting the cheque for collection in spite of the irregular indorsement, and collecting the proceeds of the cheque for the account of their customer Helios,

and not asking for any confirmation of the indorsement or of the authority of Helios to indorse such cheques on behalf of the plaintiff company. There was some evidence on this point and it was considered in the judgment of the learned judge, as it was relevant to the question of ostensible authority and to the statutory defence, but it is separate from the question of the actual authority of Helios, which is now being considered.

In respect of the first cheque there was an exchange difference. The plaintiff company was entitled under the contract to receive 6,964,222 Belgian francs as the equivalent of £62,180 11s. 2d. at the rate of 112 Belgian francs to the Australian pound. But the rate of exchange had moved in favour of Belgium. Helios sent to the defendant bank a cheque for £62,967 12s. 0d., assuming an exchange rate of 110.6, but this was not enough because the actual rate on the material date was 110.12, and Helios had to pay to the defendant bank a further sum of £274 10s. 4d. Thus Helios had paid out £62,967 12s. 0d. plus £274 10s. 4d. and had only received £62,180 11s. 2d. and so were out of pocket to the extent of £1,061 11s. 2d. Snowy then gave the second cheque, which was dated the 27th August 1956, for that sum payable to the plaintiff company. That was indorsed by Mr. Guler and paid into the account of Helios, and as that sum was making good the loss sustained by Helios there was no remittance to the plaintiff company. Any objection to Helios's dealing with this cheque would have been technical rather than practical. Mr. Guillery, was asked in cross-examination "And you do not complain about him paying that into his account, do you," and he said "I do not understand. I have no complaint. We did not complain about that, no."

On the 10th January 1957 Snowy wrote a letter to Helios containing instructions with regard to (*inter alia*) the manner in which claims for payment were to be made, and enclosing a specimen of the form to be used. The form required entries to be made under headings relating to F.O.B. value, marine freight, insurance to site and transport in Australia, and there was a heading "(g) portion of total claim to be remitted to Belgium." Helios sent a copy of that letter to the plaintiff company on the 1st February 1957. The plaintiff company replied on the 15th June 1957, dealing with details of the claim to be made, and they said: "We understand that the claim forms will be drawn up by you as for progress payments. We leave you the care to complete the paragraphs (f) and (g) of the customer's sample." At this stage it must have been apparent to both parties that only a portion of the sums paid under the contract could be remitted to Belgium. Exchange control was associated with import licensing, and there would be no reason for allowing foreign exchange to be used in payment of local expenses incurred in Australia, for instance those referred to in headings (e) and (f) of the claim form — insurance to site and transport in Australia. The amount of the local expenses included in any payment by the customer would have to be retained in Australia. Where, how and by whom would it be held? The plaintiff company gave no instructions and mde no enquiry on these points, leaving them to be settled by Helios as their general agent in Australia.

The third cheque given by Snowy was dated the 27th May 1957 and was drawn in favour of the plaintiff company care of Helios, as before, and was indorsed in the name of the plaintiff company with a signature by Mr. Guler, and was paid into the account of Helios. The amount was £38,862 17s. 1d., and there was a remittance to Belgium through the banks as before, and the plaintiff company received the proper sum of Belgian francs corresponding to the sum of £38,862 17s. 1d.

Similarly there was a fourth cheque given on the 30th August 1957 for £9,822 8s. 7d. and there was a corresponding remittance to Belgium on the 16th September 1957.

The fifth cheque was dated 9th September 1957 and was for £3,513 1s. 6d. covering local expenses, and no remittance was made.

The sixth cheque was dated 23rd September 1957, and was for £15,545 2s. 10d., and there was a corresponding remittance to Belgium on the 4th November 1957. That was a substantial delay. Things were beginning to go wrong.

The seventh cheque, dated the 21st October 1957, was for £6,189 14s. 10d., of which only £529 8s. 5d. was for local expenses, so that, £5,660 6s. 5d. should have been remitted, but the remittance was delayed until January 1958.

The eighth cheque, dated the 28th October 1957 was for £5,919 15s. 2d. of which £4,992 7s. 0d. was for local expenses, so that £927 8s. 2.d should have been remiited, but the remittance was not made.

Further cheques were given up to the 14th April 1958, which was the date of the fifteenth and last cheque. The remittances were irregular and seriously deficient.

Over a long period the plaintiff company in their correspondence with Helios had been complaining that they were not receiving sufficient information from Helios as to the state of the accounts under the several contracts. They wished to know under each contract what sums had been claimed, what sums had been paid by the customer, and which of the sums remitted were attributable to that contract. Helios persistently failed to give that information, and the learned judge has found that Helios was acting in bad faith, withholding monies that should have been paid to the plaintiff company and keeping them in dark as to the true state of the accounts. There is evidence to support these findings, and they cannot be impugned. Helios had other business besides the agency for the plaintiff company, and the other business may have absorbed money which should have been remitted to the plaintiff company.

Mr. Guillery had visited Australia and had many meetings with Mr. Guler in 1955 and 1957, and he came again to Australia in February 1958 to investigate the position. On the 26th April 1958 he wrote what may be called a "white-washing" letter to Snowy, saying, though he knew this was not entirely true, that he had found everything perfectly in order and all remittances from Snowy for the plaintiff company had been transferred by Helios. Mr. Guillery had reasons of policy for writing that letter, and it is not in itself significant, but his answers in cross-examination on it are interesting:— "*Q.* But you knew the moneys had gone to Helios? You knew they had gone into his account? *A.* I knew that the money was paid to Helios, but how, I did not know. *Q.* Provided he accounted for it to your company you would not at that time have taken any objection, would you? *A.* No."

On the 23rd May 1958 Mr. Guillery went to the offices of Snowy and was shown the cheques and so became aware that they had been indorsed by Helios and paid into the Helios account. He desired that future payments should be kept away from Helios. Snowy desired to be assured that their past payments were valid and effective. Mr. Guler was willing to co-operate. Accordingly a document was drawn up by Snowy and signed by Mr. Guillery and Mr. Guler. It was dated the 28th May 1958. It referred to Contract No. 40,006 (the relevant Snowy contract for seven transformers of 56 M.V.A.) and to Contract No. 40,019 for twenty-two lightning arrestors (in which evidently Helios appeared as the contracting party), and it said "We the undersigned, representative of Ateliers de Constructions Electriques de Charleroi and Helios Heavy Electrial Engineering Contracting Company Pty. Ltd., the Contractors for the above-mentioned Contracts, respectively hereby request that all future payments due by the Authority to the Contractors under those Contracts be made by the Authority's cheques payable and paid to the Sydney Branch of Comptoir National d'Escompte de Paris to be credited to the account of Ateliers de Constructions Electriques de Charleroi with the said Bank and *We state* that the receipt of the said Bank for the said payments shall be a sufficient discharge to the Authority of its liability to the said Contractors for the said payments under the said Contracts and *We acknowledge* that all payments made by the Authority on account of the said Contracts up to the date hereof have been properly made and have been received by the said Contractors on the said account and *We undertake* to furnish to the Authority within one month of the date hereof written confirmation by the said Contractors respectively of the above request, statement and acknowledgment." Written confirmation was given on behalf of the plaintiff company on the 19th June 1958. The acknowledgment contained in this document is relied by upon the defendant bank as constituting a ratification of the reception of the money by Helios into the Helios bank account as a due reception of it on behalf of the plaintiff company. It can be contended on the other side that this acknowledgment was given only to reassure Snowy that as between Snowy and the Contractors the past payments had been duly made and received, and that the acknowledgment does not necessarily mean any more than that the cheques had been duly given and received as conditional payment and there was no failure to honour the cheques on presentation. It is not necessary to express any opinion on the question of ratification. In relation to the question of actual authority, it is of some significance that there was no concurrent reservation of rights against Mr. Guler and at any rate no written complaint at this time about the indorsement of the cheques by Helios and payment of them into the Helios account. Equally there was not at this time any written complaint against the defendant bank in respect of their having collected the proceeds of the cheques for Helios. It is doubtful whether there was any oral complaint against the

defendant bank. Mr. Guillery in evidence said he "probably" made one. On the other hand there is a contemporaneous note made in the defendant bank's diary of an interview with Mr. Guillery on the 23rd June, 1958, and it records that "he made no reflection on our bank."

Mr. Guillery consulted a firm of solicitors in Sydney, and they, presumably on the basis of his instructions as well as their own consideration of the position, wrote a letter to Mr. Guler dated the 10th June 1958, in which they said:—

> "Referring in particular to contract with the Snowy Mountains Authority, it appears that, in addition to the goods sold per medium of you, your Company "Helios" contracted to carry out certain work in connection with the transport of the materials to the sites for erection and in connection with the erection of the material on the sites chosen by the Snowy Mountains Authority. For this latter work you are entitled to receive your special remuneration or rather your company "Helios" was entitled to receive its own special remuneration. We understand that included in the cheques received from the Snowy Mountains Authority and made payable to A.C.E.C. were some moneys which belonged to Helios. Having received the cheques and paid them into the account of Helios your plain duty was to account immediately to our clients for that portion of the proceeds which really belonged to them. This was not done."

That letter reflects the attitude of the plaintiff company which is shown by the history of the case. They were strenuously complaining of the failure to account and the failure to remit. They were not interested in the mechanism of the reception of the money and the making of the remittances. They made no protest against the procedure adopted by Helios in indorsing the cheques and paying them into the Helios account.

The business of Helios did not prosper, and in July 1958 the defendant bank, acting under an equitable mortgage, appointed a receiver of the Helios company's undertaking. Afterwards there was a liquidation and the Helios company was found to be insolvent.

The plaintiff company's claim against the defendant bank was made for the first time in a letter of 12th January 1960, and the writ was issued on the 20th February 1961.

The learned judge decided in favour of the plaintiff company in a careful judgment dealing with the numerous points raised on behalf of the defendant bank. His decision on the question of actual authority seems to have been partly based upon or influenced by an erroneous impression of similarity between the Type A contracts (those made with the Electricity Commission of New South Wales) and the Snowy contract. In fact these contracts differed in material respects, as has been pointed out above. Under the Type A contracts the customer contracted to pay the cost of the equipment to the plaintiff company in Belgian currency in Belgium, so that no bank account in Australia was required for this purpose, and the amount of the local expenses was paid directly by the customer to Helios and so was from the beginning a separate amount. Under the Snowy contract Helios received cheques drawn in favour of the plaintiff company for sums of Australian currency in Australia, and it was necessary for Helios by some means (a) in many cases to divide the amount of a single cheque into the part allowed to be remitted to Belgium and the part to be retained in Australia, (b) in so far as remission was permitted, to transmute sums of Australian currency in Australia into sums of Belgian currency credited to the Belgian company in Belgium, and (c) out of the amount retained in Australia to reimburse Helios for his outlay on the local expenses.

Did Helios have actual authority to indorse the cheques and pay them into the Helios account? Normally of course it would be quite wrong for an agent without specific authority to indorse his principal's cheques and pay them into his own account. That is the strength of the plaintiff company's case and of the learned judge's decision in their favour. On the other hand the special facts and history of this case have to be brought into account, and in a commercial case of this kind it is right to take a practical, commercial view rather than a technical or legalistic view. How would the case appear, and how did it appear, to the business men concerned? It is necessary to consider the position and functions of Helios as the general agent for the plaintiff company in Australia. Helios was operating the "Australian office" for the plaintiff company, and was acting as importer and holder of the import licences for the equipment supplied by the plaintiff company, and was arranging and paying for the performance of the plaintiff company's contractual obligations in Australia in respect of transport, insurance, supervision o

erection and provision of oil, and was collecting the very large sums falling due from very important customers. There was the "full credential" of the 22nd March 1955, declaring that Helios was authorised to act on behalf of the plaintiff company for the submission, the execution and the realisation of contracts, made or subcontracted by the plaintiff company, with their full technical and financial backing. There was the course of business established under the Type B contracts for incoming payments to be received into the Helios account and remittances to be made from it. There was the need to have some means of (i) receiving the money (ii) paying for the remittances to Belgium (iii) holding the sums not allowed to be remitted to Belgium (iv) reimbursing to Helios the outlays on local expenses. There was the persistent attitude of the plaintiff company in giving no instructions, and apparently making no enquiry, as to the mechanism or procedure for the reception of the money and the making of the remittances, and in not complaining of the mechanism or procedure when they ascertained what it was. Helios was an exceptionally general and exceptionally trusted agent.

In the end the compelling point is this. The sums due were payable in Australian currency. If Snowy had chosen to make payment in cash, admitedly Helios had authority to receive it. But payment by order cheques in favour of the plaintiff company must have been expected. It could not have been supposed that they would be sent to Belgium to be indorsed, and the plaintiff company had no bank account of their own in Australia. Apart from exchange control difficulties. the only practical plan from a business point of view was for Helios to indorse the cheques and pay them in to the Helios account. This became the only possible plan when the total amount of the cheques exceeded the sum which exchange control permitted to be exported, or when it became proper for Helios to retain part of the sum in any cheque to pay local expenses. Implied authority was necessary to give business efficacy to the transactions. In view of the large sums which the plaintiff company knew that Helios had earlier paid into that account under other contracts, it is easy and natural to infer the necessary authority to meet any difficulty caused by the fact that the precise method of payment by Snowy differed from the methods of payment under earlier contracts.

For these reasons their Lordships consider that there was implied actual authority.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be allowed, and that judgment should be entered for the defendant bank. The plaintiff company must pay the bank's costs of the action and of this appeal.

Appeal allowed.

Present: **Manicavasagar, J.**

LUCHOW *vs.* DE SILVA

S.C. 127/1965 (R.E.)—*C.R. Kandy* 17924

Argued and decided on: 1st April, 1966

Decree, amendment of — Ejectment of tenant from premises — Wrong assessment number given through bona fide error — Error partly due to tenant—Writ returned by Fiscal — Application to amend decree allowed — Appeal — Civil Procedure Code, section 189 *— Inherent powers of court.*

Of consent decree was entered to eject a tenant from premises No. 25 Old Matale Road, Kandy. When writ issued, the Fiscal's Officer reported that the premises occupied by the tenant was No. 28 and not No. 25. The Landlord, then realising that she had erred in giving the assessment Number which was partly due to her being misled by the description given in an application by the tenant to the Rent Control Board and the failure to dispute in the answer this obvious misdescription in the plaint, moved for an amendment of the decree, which the learned Commissioner allowed. On an appeal by the tenant—

Held: (1) That the error aforesaid did not fall within the ambit of section 189 of the Civil Procedure Code.

(2) That the said erroneous description does not affect the right of the Landlord to execute the decree after it was duly amended by correcting the error. This was an appropriate case for the Court to use its inherent powers to prevent a miscarriage of justice.

T. B. Dissanayake, for the defendant-appellant.

C. R. Gunaratna, for the plaintiff-respondent.

Manicavasagar, J.

The problem, in this appeal by the tenant, is whether the Court has the power to amend its decree even though the amendment that is sought does not fall within the ambit of section 189 of the Civil Procedure Code.

In this action, decree to eject the tenant from premises No. 25, Old Matale Road, Kandy was entered on 23. 3. 64 by consent of the parties; writ was not to issue till 31. 3. 65. When writ issued to the Fiscal, the officer reported that the premises occupied by the tenant was 28, Old Matale Road, Kandy and returned the writ unexecuted. The landlord then realised that she had erred in giving an incorrect assessment number and applied to the original court to have the decree amended, by altering the figure 25, to 28. The appellant, who when the time to quit the premises under the decree was drawing nigh, had unsuccessfully sought on frivolous grounds to set aside the decree to which she was a consenting party, now took advantage of the error in the assessment number and objected to the application to amend. The learned Commissioner granted the landlord's application and directed that the decree be amended.

Counsel for the tenant submitted that the power of the Court to amend the decree is contained only in section 189 of the Civil Procedure Code, and this provision had no application to this case. Mr. Gunaratne for the respondent submitted that the amendment could be brought under section 189 of the Civil Procedure Code as this was an error arising from an accidental slip; he also submitted further reasons as to why the order of the learned Commissioner should not be disturbed.

I am of the view that section 189 has no application to the facts of this case: I do not, however, agree that the powers of the court are limited only to the instances provided by the section.

Section 189 enables the court to correct (i) clerical or arithmetical errors contained in a judgment, or (ii) an error arising in the judgment from any accidental slip or ommission, or (*iii*) errors in the decree so as to bring it into conformity with the judgment; the error in the instant case does not fall into any one of these categories; the mis-description of the number was not an arithmetical or clerical error in the judgment or an error due to an accidental slip or omission in the judgment, or an error in the decree. The decree merely adopted the description in the pleadings.

The court, however, is not without the power to amend its decree, if justice demands that the amendment should be granted, and I think this is one such case where the court should intervene in the interests of justice. The error was undoubtedly an honest mistake, into which the landlord was in a way led by the tenant's description of the assessment number in his application to the Rent Control Board. The tenant in her answer to the plaint did not dispute this obvious mis-description of the number in the plaint; she continued the same mistake right throughout the proceedings: that the premises, despite the mis-description, was one occupied by the appellant as tenant of the plaintiff, and no other, was never in dispute: the identity of the premises was not an issue. These circumstances point clearly to both the landlord and the tenant having erred in describing the premises by an incorrect assessment number; both parties were agreed that the decree related to certain premises in Old Matale Road, Kandy belonging to the landlord, and occupied by the appellant. In this situation, the court ought not to lend its assistance to a party who attempts to wreck the decree by taking advantage of an erroneous description to which she herself was a party and in regard to which she remained silent when she had the opportunity prior to the entering of the decree to point out the error. This is a case where an erroneous description does not affect the right of the landlord to execute the decree, duly amended, by correcting the error; it is just that the court should use its inherent powers to prevent a miscarriage of justice.

The appeal is dismissed with costs.

Appeal dismissed.

Present: **T. S. Fernando, J., Tambiah, J. and Alles, J.**

LADAMUTHUPILLAI ARUMUGASAMY

vs.

LADAMUTHUPILLAI KATHIRKAMANPILLAI*

S.C. Application No. 118 *of* 1965

In the matter of a Rule for Contempt of Court under section 47 *of the Courts Ordinance.*

Heard on: 16th November, 1965

Order made on: 26th November, 1965.

Contempt of Court—Order by Supreme Court on administrator on 3rd August 1962 *to bring all income of the properties forming the estate of the deceased to Court—Subsequent order on 1st April* 1963 *with consent of administrator directing him to file final accounts on or before 31st October* 1963 *and bring into Court the income from the properties in his charge — Failure to comply with both orders — Charge of contempt of Court—Courts Ordinance, section* 47.

The respondent, the eldest son of the deceased, who died intestate leaving a widow and six children was granted letters of administration on 9.3.53. The widow and three of her children successfully moved the Court for orders revoking the grant of the said letters and appointing the widow in his place as administratrix. The respondent appealed from these orders as well as from a later order refusing stay of execution.

Pending these appeals, on an application by the respondent to the Supreme Court to stay all testamentary proceedings in the District Court and for the advancement of the date of hearing of the said appeals, on 3.8.62 the Supreme Court made order directing

(i) a stay of further action in the District Court

(ii) that all the income of the properties forming the estate of the deceased be brought into Court to the credit of the testamentary case.

The two appeals came up for hearing on 29.3.63 and on 1.4.63 and after argumant the orders appealed against were set aside after recording an agreement of Counsel in the following terms:—

"That the appellant who is the present administrator is directed to file a final account together with vouchers and receipts on or before 31. 10. 63, and that the account be judicially settled thereafter. Until the final settlement of the accounts the administrator is directed to bring into Court the income from the properties in his charge."

On a motion and affidavit by the petitioner—one of the sons of the deceased—a rule was issued on the respondent to show cause why the latter should not be punished for the offence of contempt of Court for failing comply with and for disobeying the directions contained in the said two orders.

It was not denied that no payment as directed by the Court was made by the respondent since the first order on 3.8.62. The final accounts were filed only on 28.5.64 after obtaining several dates from the District Judge. The respondent in his affidavit admitted that he had Rs. 40,000/- in his hands as administrator and further stated (a) that a sum of Rs. 248,690/- was spent on litigation and other expenses (b) that Rs. 157,022/71 was lost through thefts by the petitioner and two other brothers, who were acquitted in criminal proceedings in that connection.

Held: (1) That the complaint that the respondent is guilty of contempt of Court in respect of the order made on 3.8.62 should not be pursued in view of the fact that the said order was made pending the appeals which were disposed of on 1.4.63 on an order being made of consent; besides the complaint was a stale one, being made two years after the event.

(2) That the aforesaid order of 1.4.63 contains a clear direction by the Supreme Court (not an undertaking between parties which the respondent hoped he would be able to fulfil) to an administrator who is an officer of Court, disobedience to which amounts to a contempt of Court.

(3) That the words "income from the properties" mentioned in the said consent order of 1.4.63 should be understood to mean the net income from the properties after deducting the expenses of production

* For Sinhala translation, see Sinhala section, vol. 12 part 5, p. 15

thereof. They could not mean that the expenses of litigation with third parties regarding disputes to properties or expenses of duly administering the estate were to be deducted from the gross income without an order of Court.

(4) That as the respondent had failed to bring into Court the net income of the properties, and as he had failed to deposit in Court at least the sum of Rs. 40,000/- admittedly in his hand, his conduct amounted to a wilful disobedience of the direction given by this Court and therefore he was guilty of the offence of contempt of Court.

Cases referred to: *Badri Dass* vs. *Labhu Mal* (1959) 60 Cr.L.J. of India 899
Botticelli vs. *Ribeira* (1872) Ramanathan's Reports 12.

A. C. Nadarajah, for the petitioner.

G. E. Chitty, *Q.C.*, with *A. S. Vanigasooriar* and *D. S. Wijewardene*, for the respondent.

J. G. T. Weeraratne, Crown Counsel, with *N. B. de S. Wijesekere*, Crown Counsel as *amicus curiae*.

T. S. Fernando, J.

The respondent comes before us on a Rule which this Court issued on him on a motion and affidavit presented by the petitioner calling upon him to show cause why he should not be punished in terms of section 47 of the Courts Ordinance for the offence of contempt committed against or in disrespect of the authority of this Court, in that

(a) having been directed by the order of this Court in Application No. 128 of 1962 made on the 3rd August 1962 to bring into court to the credit of testamentary case bearing No. 14879 of the District Court of Colombo all the income of the properties forming the estate of Muthu Vairan Ladamuthu Pillai, deceased, of Chilaw, pending the determination of the appeals bearing Nos. 29 (Interlocutory) and 110 (Final) of 1962; and

(b) having through his Counsel agreed in settlement of the above mentioned appeals to abide by the direction of this Court made on 1st April 1963 to file, in his capacity of Administrator of the Estate of the said Muthu Vairan Ladamuthu Pillai, a final account of his administration together with vouchers and receipts on or before the 31st day of October 1963, in order that the accounts may be judicially settled thereafter, and having also agreed to bring into court the income of the properties in his charge until the final settlement of the said accounts,

he has, in total disregard of those orders

(1) failed to bring into court the income of the properties forming the Estate of the abovenamed deceased or any portion of such income up to the date of the determination of the said appeals Nos. 29 and 110, namely, the 1st day of April 1963; and

(2) failed to file a final account of his administration, together with vouchers and receipts, on or before the 31st day of October 1963, and to bring into court the income of the properties in his charge up to that date.

The respondent is the eldest son of the deceased who died intestate so long ago as 8th April 1951 leaving a widow and six children, two of whom were minors. The respondent was, on his own application granted letters of administration on 9th March 1953 to enable him to administer the estate of the deceased which is a considerable one and the value of which in 1951 was assessed at Rs. 711,198/-. The widow and three of the children, of whom the petitioner was one, moved the District Court in September 1960 for an order revoking the grant of letters on grounds of

(a) failure to file inventory, valuation and accounts;

(b) neglect to bring into court monies received by the administrator to which the heirs were entitled;

(c) purchase by the administrator of properties in his own name with profits of lands forming the estate;

(d) deliberate delay in duly administering the estate with a view to depriving the other heirs of their lawful rights.

The District Court, after inquiry, made order on 18th January 1962 revoking the letters of administration granted to the respondent and making a grant in favour of the widow. The respondent appealed to this Court against this order of revocation — Appeal No. 110 (Final), as well as against a later order of the District Court refusing a stay of execution — Appeal No. 29 (Interlocutory). In addition to the filing of the appeals, the respondent made an application to this Court (Application No. 128 of 1962) for a stay of all proceedings in the Testamentary Case No. 14879 during the pendency of the appeals and for an advancement of the hearing of the main appeals. This application came up for hearing before this Court on 3rd August 1962 when the Court made

order directing (1) a stay of further action in the District Court and (2) "that all the income of the properties forming the estate of the deceased be brought into court to the credit of the testamentary case." It made further order that "should in the meantime any taxes or rates fall due in respect of the properties forming the estate of the deceased, the petitioner (i.e. the present respondent) will obtain the sanction of the District Court to pay them out of the monies brought into court."

The two appeals came up for hearing before this Court on 29th March 1963 and after argument on that day and on 1st April 1963, an agreement of Counsel was recorded and the orders appealed from were set aside. The agreement of Counsel is recorded in the following way in the judgment of this Court which reads:—

> "Counsel on both sides now agree that this matter can be settled on the following terms; namely, that the appellant who is the present administrator is directed to file a final account together with vouchers and receipts on or before 31st October 1963, and that the accounts be judicially settled thereafter. Until the final settlement of the accounts the administrator is directed to bring into court the income from the properties in his charge."

The respondent in his affidavit of 17th July 1965 states that the terms on which the appeals were decided were agreed to by his counsel without reference to him. I pointed out to Mr. Chitty that the appellant was present throughout the argument on both days (29th March and 1st April 1963). That the appellant was present in court when the appeals were argued was not denied or disputed before us. We are quite unable to accept as true the respondent's statement to which I have referred above.

The rule charges the respondent with disobedience to the directions contained in both orders made by this Court, viz. that of 3rd August 1962 and that of 1st April 1963. It is not denied that no payment of any kind into court has been effected since the first of these two orders was made. In fact, it is not disputed that the last payment into court by the administrator was made on 9th February 1961 when the District Judge made the following order:—

> "I find from the accounts filed that there is a sum of Rs. 157,022/71 in the petitioner's hands. First of all this amount must be brought into court. Issue deposit order for Rs. 157,022/71 which must be deposited immediately."

Mr. Chitty has contended that as the appeals were disposed of on 1st April 1963 on an order being made of consent, a complaint by the present petitioner made two years later (26.3.1965) that the respondent is guilty of a contempt of court in that he has disobeyed this Court's order of 3rd August 1962 was quite stale, and that in any event that order made, as it was, pending the determination of the appeals must not now be pursued for purposes of contempt proceedings. There is substance in this contention and we are disposed to accede thereto. We propose therefore to consider only the matter of the alleged disobedience to the order of this Court made on 1st April 1963.

It is beyond question that the latter order contains a clear direction given by this Court. It does not embody merely an intention of the parties to do certain specified things. We have been referred to a case decided in India, *Badri Dass* vs. *Labhu Mal* (1959) 60 Cr. L.J. of India, page 899 where the Punjab High Court has decided that where, in a suit for money, the defendant accepts the claim of the plaintiff and makes a statement promising to pay the amount in instalments and promises not to alienate any part of his immovable property till the payment of the claim, and it appears that the statement was based upon a private compromise between the parties, the undertaking contained in the statement is not one given to the Court. It is no more than a solemn promise by the defendant to the plaintiff and the nature of that promise or undertaking can never be changed by reason of the compromise being accepted by the Court and a decree passed in its terms. The breach of such an undertaking or promise does not amount to contempt of Court. This decision, in my opinion, has no application to the facts of the case before us. Here is no mere private undertaking between parties, nor is this an ordinary private suit between parties. This is a testamentary action where the administrator is an officer of the court. Moreover, as I have already stated, the breach is of a direction given by a court, not of an undertaking which the respondent hoped he would be able to fulfil. In principle, the situation is not different to that in *Botticelli* vs. *Ribeira* (1872) Ramanathan's Reports, p. 12 where this Court committed for contempt a defendant (a trustee who had fraudulently appropriated money) who had been ordered by Court to pay the money into court, and who instead of obeying the order, got himself made an insolvent on his own petition, and then

set up his own insolvency as a reason why the order of the court should not be enforced by attachment for contempt.

It was next contended that the expression "income from the properties in his charge" means not the gross income, but the net income. The petitioner pointed to the earlier order of the Court, namely, that of 3rd August 1962 which too directed that "all the income of the properties" be brought into court and which contained an express direction as to the nature of the disbursements in respect of which money could be drawn out from the sums deposited in court. Apart from the fact that it is not open to us, particularly in proceedings of a criminal nature, to interpret one order in the light of another and an earlier order, we find that when the District Judge by his order of 18th January 1962 revoked the grant of letters to the respondent in favour of a grant to the widow of the deceased, the latter was directed to deposit quarterly only the net income from the properties. A deposit in court of the gross income is impractical and as the accounts have ultimately to be judicially settled, the court will be burdening itself in having to make payment orders frequently without any significant advantage to any party. I shall therefore deal with the question before us on the basis that the direction this Court made on 1st April 1963 was to bring into court the net income from the properties.

There is no denial that the gross monthly income was about Rs. 50,000/-. That would appear to be the position even from the accounts that have now been filed in the District Court by the respondent himself. He however contends in his affidavit that the average net monthly income is Rs. 9623/64. Therefore, even if the order of the Court made on 1st April 1963 is looked at only prospectively, the respondent should today have in his hands a sum in excess of Rs. 9623 x 30 or Rs. 288,690/-. He has stated in his affidavit of 17th July 1965 that he has only a balance of Rs. 24,695/45 which balance, as his affidavit of 15th November 1965 shows, has since increased to about Rs. 40,000/-. In spite of his admission of having in his hands at least these much reduced sums, he has not brought a single cent of that money into court.

He has attempted to make out that the difference representing a sum in excess of Rs. (288,690/- less Rs. 40,000/-) Rs. 248,690/- has been spent by him in litigation and other expenses. The correctness of this claim of his will no doubt be examined in the appropritae court. I am unable to conclude that the net income from the properties means anything other than the gross income from the properties less the expenses of producing that income in the sense this last expression is ordinarily understood. I entertain no reasonable doubt that the Court intended and the respondent understood that income from the properties was the gross income less the expenses of producing that income; I cannot infer that the respondent could reasonably have understood or interpreted the Court's order made of consent to mean that the expenses of litigation with third parties who are alleged to have claimed the properties or, to use the words of his Counsel, the expenses of duly administering the estate were to be deducted from gross income *without an order of court*. Every administrator knows that he is entitled to apply to court to draw out monies from the estate of the deceased as and when required for due administration. The respondent himself was not slow to apply to the District Court to obtain further time when he was unable to file final accounts on or before 31st October 1963 as decreed by this Court. The record shows that the District Judge granted him time on several occasions even after 31st October 1963. Final accounts were filed only on 28th May 1964. As he himself puts it in his affidavit of 21st August 1965, "whenever I found that I was unable to do certain acts on the dates fixed by Your Lordship's Court, I made application to the District Court in the Testamentary proceedings for extension of dates and the Court granted me such time." On the other hand, no application was even attempted to be made to court in respect of any relief against the order to deposit the income from the properties, even if the court were to decide ultimately that it had no power to vary the order of the Supreme Court. It is significant that after the disposal of the appeals by this Court, the District Judge made two specific orders, the first on 6th November 1963 and the second on 19th August 1964, for the cash in the hands of the respondent to be deposited to the credit of the case. These orders have also been completely disregarded by the respondent.

In his affidavit of 17th July 1965, the respondent, while stating that the balance cash in his hands is only Rs. 24,695/45, asserts that "this money cannot be brought into court as money is required daily for current expenditure including expenses in pending litigation." This assertion he repeats in another affidavit dated 15th November 1965, the day before the hearing by us, where,

after stating that the amount now in his hands is about Rs 40,000/-. he adds "I have been compelled to retain this comparatively small amount in my hands for the due discharge of the duties as administrator". I feel constrained to observe that the due discharge of his duties as administrator plaintly required him to deposit the net income in court and then to apply to draw out such sums as the court thought reasonable to enable him duly to perform his function of administrator.

I must add that in computing that the balance in his hands in July 1965 — vide paragraph 15 of his affidavit of 17th July 1965 — was Rs. 24,695/45, he has accounted for a sum of about Rs. 157,000/- as being lost through thefts by the present petitioner and two other brothers. The respondent's position in regard to these thefts is set out in paragraph 5 of that same affidavit. The losses are alleged to have taken place on 26th March 1961, i.e. within two months of his deposit by the respondent of another sum of Rs. 157,022/71 in court, as already mentioned. As to this allegation of theft by his brothers, the petitioner states — see paragraph 5 of his affidavit of 3rd August 1965 — that he and his brothers were acquitted in criminal proceedings, the trial judge holding that the allegation of theft was "a fabrication by the respondent, his sister and his brother-in-law". That the District Judge acquitted the petitioner and his brothers and made the observation quoted above is not denied. If this sum of Rs. 157,022/71 was indeed not stolen — and I wish to say nothing myself here in respect of the truth or otherwise of the allegation — then the respondent should obviously have brought this sum too to the credit of the testamentary case long ago.

In view of all that I have stated above, leaving out of account the failure of the respondent to file a final account by 31st October 1963 (an account which has now been filed after extensions of time obtained from the District Court), I am satisfied that the respondent has failed to bring into court the income from the properties in his charge, by which I understand the net income from the properties after deducting the expenses of production thereof. I hold that the respondent could not reasonably have understood, and did not in fact understand, that the direction was to bring into court the income after deduction of expenses and all other expenses of due administration. Such an interpretation of this Court's order of 1st April 1963 would virtually have constituted the respondent the judge of what amount, if any, he should deposit in court. Even on an assumption that the only money now in his hands as administrator of this estate is about Rs. 40,000/-, he has on his own showing been guilty of the offence of contempt of this Court by failure to deposit at least this sum admittedly in his hands. The respondent's failure, in my opinion, has been wilful and contumacious; the wilful disobedience of the direction of this Court, a direction to which he in fact consented, makes the contempt the more heinous.

I find the respondent guilty of the offence of contempt of court on the findings set out above. I order that he be committed to jail for a period of twelve months, there to undergo rigorous imprisonment.

Tambiah, J.

I agree.

Alles, J.

I agree.

Rule made absolute.

Present **Sansoni, C.J.**

WEERASINGHE

vs.

PERMANENT SECRETARY, MINISTRY OF DEFENCE & EXTERNAL AFFAIRS AND ANOTHER

(*S.C. Application No.* 177/1966)

In the matter of an Application for a Mandate in the nature of a Writ of Habeas Corpus to produce the body of Captain Duleepsingh Upawansa Weerasinghe and/or a Writ of Mandamus against the Second Respondent

Argued on: April 30th, & May 2nd, 1966.
Judgment delivered on: May 13th, 1966.

Public Security Ordinance (Cap. 40), section 5 — Validity of Ordinance and Regulations made thereunder — Whether delegation of law making powers to Executive valid — Ceylon (Constitution) Order-in-Council (Cap. 378), sections 15(5), 45, 51(2) — Emergency (Miscellaneous Provisions and Powers) Regulations — Powers of detention and right to regulate conditions under which persons detained given by Regulation 26 — Whether duties other than those referred to in section 51(2) of Constitution can be imposed on a Permanent Secretary to a Ministry.

Writs of Habeas Corpus and Mandamus — Application by brother of person detained under Emergency Regulations — Whether petitioner has status to make an application for a Mandamus — Powers of Court to issue Writ of Habeas Corpus during state of Public Emergency — Regulation 26(10) of Emergency (Miscellaneous Provisions and Powers) Regulations.

The petitioner filed this application for writs of Habeas Corpus and Mandamus, praying for the custody of his brother the 3rd respondent, a captain in the Regular Army, who had been arrested on orders issued by the 1st respondent under regulation 26(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, made by the Governor General under section 5 of the Public Security Ordinance. It was contended for the petitioner (*a*) that the Public Security Ordinance under which the Governor General had purported to make the regulations relevant to the 3rd respondent's arrest and detention was ultra vires the Constitution. (*b*) that the regulations in question imposed duties upon the Permanent Secretary to the Ministry of Defence and External Affairs which were not contemplated in and in conflict with the duties imposed by section 51(2) of the Constitution; (*c*) that a mandamus lay against the 2nd respondent Chairman of the Advisory Committee appointed under regulation 26(4) to inquire into the objections filed by the 3rd respondent; and (*d*) that the 3rd respondent had been denied the rights and privileges to which he was entitled under the Prisons Ordinance (Cap. 54).

Held: (i) That the Public Security Ordinance was *intra vires* the Constitution and so also the Regulations made thereunder, for the reason that Parliament by virtue of sections 2(3) and 5(3) of that Ordinance and 15(3) of the Constitution retained its power and control over the Executive even during a State of Emergency when regulations such as those under the Public Security Ordinance can be made by the Executive.

(ii) That the power of the Court to issue a writ of habeas corpus was, during a state of emergency taken away by Regulation 26 (10).

(iii) That section 51(2) of the Constitution empowering each Permanent Secretary to exercise supervision over the department or departments in the charge of his Minister is not exhaustive of the powers and duties which may be conferred on a Permanent Secretary, and additional powers not in conflict with section 51(2) may be conferred.

(iv) That no mandamus would lie because there is nothing to suggest that the 2nd respondent has failed or will fail to do his duty at the appropriate time, apart from the fact that as no duty was owed the petitioner by the 2nd respondent, the petitioner had no status to make the application.

(v) That regulation 26(3) empowers the Inspector General of Police with the sole authority to issue instructions in regard to the conditions under which prisoners are held in detention and it is not for the Courts to adjudicate upon such measures as are taken under regulation 26(3).

Per **Sansoni, C.J.** — "One thing is essential for the validity of a delegation of its* law making power, and that is that it should not abandon its legal authority or its control over the Executive Authority to which it has delegated that power. It must not try to transform the Executive into a parallel legislature and abdicate its function. There is nothing in the Public Security Ordinance to indicate that Parliament has abdicated its legislative authority."

G. D. C. Weerasinghe, with (*Miss*) *Maureen Seneviratne* and *P. Karunaratne*, for the petitioner.

V. Tennakoon, Q.C., Solicitor-General, with *H. L. de Silva*, Crown Counsel for the 1st and 2nd respondents.

Sansoni, C.J.

The petitioner in this application moves for writs of Habeas Corpus and Mandamus. He is a brother of the 3rd respondent, a Captain in the Regular Army. The 1st respondent is the Permanent Secretary to the Ministry of Defence & External Affairs, and the 2nd respondent is the Chairman of the Advisory Committee appointed by the Governor-General under Regulation 26(4) of the Emergency (Miscellaneous Provisions and Powers) Regulations made by the Governor-General under section 5 of the Public Security Ordinance, Cap. 40.

* Parliament's

By reason of the existence of a state of public emergency, the Governor-General under section 2 of that Ordinance declared by a Proclamation that the provisions of Part 2 of the Ordinance should come into operation throughout Ceylon on 8th January, 1966. In each succeeding month a similar Proclamation was made, and the state of emergency still continues. The 3rd respondent was taken into custody on 17th March, upon an order made by the 1st respondent in exercise of the powers vested in him by Regulation 26(1), as he was of the opinion that it was necessary to make such an order on the grounds set out in that Regulation.

The main argument of Mr. Weerasinghe is that the Governor-General has no right to make any Regulations, as section 5 of the Public Security Act which purports to give him the power to make Emergency Regulations is beyond the power of Parliament as laid down in the Constitution. If this objection fails, I think there is little or nothing that can be said in support of the other objections he has taken.

On the main objection, that the Emergency Regulations are invalid, the argument is the familiar one that the Constitution entrusts the power to make laws to Parliament and to nobody else: therefore no other authority has a law-making power. As against this, the Solicitor-General's position is that Parliament can delegate its power to make laws to the Executive as it did in this case, even though there is nothing said about it in the Constitution.

Section 5 of the Public Security Ordinance certainly purports to vest legislative authority in the Governor-General to "make such regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community." Two conditions are laid down by the Ordinance for the exercise of this authority by the Governor-General. One is "the existence or imminence of a state of public emergency" of which the Governor-General is the sole judge; and the other is that the Regulations he makes must be such as appear to him to be necessary or expedient. In passing I may mention that the petitioner relied on statements by the Minister of State made on 11th March 1966 to the effect that he thought the emergency can be lifted, and that the Regulations were used because the emergency was on. Neither of these statements shows that the Governor-General's powers were not being properly exercised or that the Regulations were being improperly exercised or that the Regulations were being improperly used. The Ordinance gives prominence to the part which Parliament has to play at this time. Under section 5(3) any Emergency Regulation may be added to, altered or revoked by resolution of the House of Representatives. Under section 2(3) a Proclamation of a state of emergency must be forthwith communicated to Parliament, and if Parliament is at the time separated by adjournment or prorogation for more than ten days it must be summoned to meet within ten days. It is relevant to refer here to section 15(5) of the Ceylon (Constitution) Order-in-Council, Cap. 379, which states that even after a dissolution of Parliament the Governor-General may summon it by Proclamation if he is satisfied that an emergency has arisen of such a nature that an earlier meeting of Parliament is necessary. All these provisions ensure that Parliament retains its powers and its control over the Executive even during a state of emergency. One thing is essential for the validity of a delegation of its law-making power, and that is that it should not abandon its legal authority or its control over the executive authority to which it has delegated that power. It must not try to transform the executive into a parallel legislature, and abdicate its function. There is nothing in the Public Security Ordinance to indicate that Parliament has abdicated its legislative authority. In my view the power to make laws for the peace, order and good government of the country include the power to make such a law as the Public Security Ordinance which, and I emphasise this, makes provision for delegation of legislative power only at a time of public emergency.

The important question that has been argued, whether the delegation of legislative power is ultra vires the Constitution, has been discussed and decided in many cases, but I intend to refer only to a very few of them. The Solicitor-General cited the Supreme Court of Canada decision of the Reference as to the validity of the Regulations in relation to chemicals (1943) S.C.R. 1, where the validity of regulations and orders made under powers conferred by the War Measures Act, 1914 was considered and upheld. Rinfret, J. there said: "Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands. How far it shall

seek the aid of subordinate agencies and how long it shall continue them in existence, are matters for Parliament and not for courts of law to decide. Parliament has not abdicated its general legislative powers.....The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence." Duff, C.J., pointed out that every regulation, rule and order made under the Act derives its legal force solely from that Act, for as the Privy Council decided in The Zamora (1916) 2 A.C. 77, all such instruments "derive their validity from the statute which creates the power, and not from the executive body by which they are made." The argument that there was the risk that extensive and drastic powers of control may thus be given to persons who were not responsive to the will of the electorate was met by Davis, J. who said, "the safety valve of our constitutional system of government remains intact. Parliament has not effaced itself..... as representative of the people (it) has, in a practical sense, full power to amend or repeal the War Measures Act or to make ineffective any of the Orders-in-Council in pursuance of its provisions." It should not be forgotten however, that this case and *In Re George Edwin Gray* (1918) 57 S.C.R. 150 which it approved, dealt with regulations framed during national emergencies when the safety of the country was in peril.

In *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* vs. *Dignan* (1931) 46 C.L.R. 73 the High Court of Australia had to consider a similar question of delegation of legislative power where the Commonwealth Parliament conferred upon the Governor-General the power to make regulations. It was held to be intra vires, even though it was not an instance of emergency legislation. Dixon, J. used words to describe the delegated power which equally well describe the power conferred by section 5 of the Public Security Ordinance. He said: "Section 3 of the Transport Workers Act, 1928-1929, cannot be regarded as doing less than authorizing the Executive to perform a function which, if not subordinate, would be essentially legislative. It gives the Governor-General in Council a complete, although, of course, a subordinate power, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be pursued as well as the means to be adopted. Within the limits of the subject matter, his will is unregulated and his discretion unguided. Moreover, the power may be exercised in disregard of other existing Statutes, the provisions of which concerning the same subject matter may be overridden."

His conclusion was that "a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law." He sounded a note of warning, however, when he added that the subject matter dealt with by the law may be so extensive or vague, so wide and uncertain, that the attempt to hand over legislative authority would be invalid. I wish to add that, it having been decided that the Legislature is competent to delegate its power, whether there is a limit beyond which that power must not travel, or whether the power is unconfined, is a difficult question to answer. But even if there is a limit, it could only be found when the circumstances of a particular case have been examined. Certainly a threat to the safety of the nation would entitle the legislature to delegate its powers to make laws to an authority in whom it can have the utmost confidence. Parliamentary debates on the details of necessary legislation at a time when speedy action is essential would seem to be out of place.

The Privy Council, in *Attorney General for Australia* vs. *The Queen* (1957) A.C. 288, referred to Dignan's case and said this: "The other matter to which their Lordships must refer has already been mentioned. It is the departure from the principle of separation of powers in matters legislative and executive. They refer to this matter again lest it should be thought that in anything they have said in relation to the judicial power they intended to cast any doubt upon the line of authorities where the union of legislative and executive power has been considered. Reference has already been made to Dignan's case, and a salient passage from it cited. From the same case in exhaustive judgments of Dixon J, and Evatt J. many other passages will be found which illustrate how different are the measures which have been and ought to be meted out to the union of legislative and executive powers on the one hand and the union of such powers and judicial power on the other." Evatt, J. has pointed out in that case that judicial power occupies a special place

because of its special nature, and that there is a great cleavage between legislative and executive power on the one hand, and judicial power on the other. He also pointed to the British tradition that judicial functionaries are or should be free from any interference on the part of the Legislature or the Executive, and this has resulted in a special tendency to resist any serious encroachment upon the field of judicial action by agencies of the Executive Government. This is the answer to the argument of Mr. Weerasinghe that because of the recent pronouncements of the Privy Council about the judicial power in our Constitution it must also be held that there was a strict separation of all the three powers of Government.

Before I conclude this part of my judgment I should also refer to In re Art. 143, Constitution of India and Delhi Laws Act, A.I.R. (1951) S.C. 332 decided by seven judges of the Supreme Court of India. The judgments in that case dealt exhaustively with the subject of delegated legislation, and numerous cases, including those to which I have referred, were discussed. There was a sharp conflict of views as to the constitutional validity of such legislation, and my impression is that the judges were divided four to three, the majority holding the view that the Indian Parliament had no power to delegate its legislative authority to the extent, say, that our Parliament has done in the Public Security Ordinance, though it can validly delegate the power to make subsidiary or ancillary legislation, and conditional legislation.

After considering the matter as carefully as I can, I hold that the Public Security Ordinance is *intra vires*, and the Regulations, as well as the orders and rules made under the authority of such Regulations, are also valid. Consequently the order made by the 1st respondent that the 3rd respondent should be taken into custody and detained is valid. Regulation 26 (10) takes away the power of this Court to issue a writ of habeas corpus during the emergency, and that is the final answer to the application for that writ.

Another argument put forward for the petitioner was that, under section 51(2) of the Constitution, each Permanent Secretary could only "exercise supervision over the department or departments of Government in the charge of his Minister," and that no other duties could be imposed, even by a law, on a Permanent Secretary. I do not think that section 51(2) was intended to be exhaustive of everything that a Permanent Secretary can do while he holds that office. The wording of the section does not suggest that. I see no objection to the passing of a law which gives the Permanent Secretary additional powers, provided that they do not in any way come into conflict with section 51(2). If this argument were to be upheld it could be argued that the exercise of legislative power by the Governor-General when he makes Regulations under the Public Security Ordinance would also be contrary to the Constitution, because, section 45 of the Constitution speaks only of the Governor-General exercising executive power, and says nothing about his exercising legislative power. It seems to me that it is perfectly constitutional for the Governor-General to make Emergency Regulations when he is empowered to do so by an Act of Parliament, for such a power does not conflict with his exercise of executive power.

There only remains the question as to whether any relief should be granted on the application for Mandamus against the 2nd respondent. Under Regulation 26(6) the 2nd respondent presides over meetings of the Advisory Committee appointed by the Governor-General to hear any objections which the 3rd respondent might make against his order of detention. The Solicitor General stated that objections had been filed by the 3rd respondent. In due course the Advisory Committee will consider those objections if it has not already done so, and the 2nd respondent will inform the 3rd respondent of the grounds on which he is detained and furnish him with such particulars as the 2nd respondent considers sufficient to enable him to present his case. There is no need for a Mandamus, because there is nothing to suggest that the 2nd respondent has failed or will fail to do his duty at the appropriate time. In point of law the petitioner has no status to make the application for a Mandamus, because no duty is owed to him by the 2nd respondent, and the petition should fail on this ground also though I have not dismissed it for this reason.

Other matters mentioned in the petition are the denial of visits by relations and friends of the 3rd respondent, the deprivation of privileges to which he was entitled under the Prisons Ordinance (Cap. 54), and the imposition of solitary confinement. The 1st respondent has made orders which he was entitled to make under Regulation 26(3) suspending the operation of certain provisions of that Ordinance. Regulation 26(3) empowers the Inspector General of Police

to issue instructions with regard to the conditions under which persons are held in detention. The 3rd respondent is detained under conditions covered by such orders and instruction. It is not for the Court to judge the necessity for such measures, since that is within the sole province of the authorities who are empowered to impose them.

For these reasons the application is dismissed with costs.

Application dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: **T. S. Fernando, J. (President), Tambiah, J. and Manicavasagar, J.**

THE QUEEN *vs.* U. DON PREMADASA & TWO OTHERS

C.C.A. Application Nos. 10, 11 & 12, *of* 1966
S.C. No. 83 — *M.C. Horana No.* 38540.

Argued & decided on: March 14, 1966.

Court of Criminal Appeal — Plea of guilt — Culpable homicide and attempt to commit culpable homicide not amounting to murder — Sudden fight — Principles and basis of punishment — Sentence manifestly excessive — Criminal Procedure Code, section 325 (2).

In an Assize trial for murder and attempted murder, before the close of the prosecution case, the trial Judge accepted on behalf of the three appellants a plea of guilty of culpable homicide not amounting to murder and of attempting to commit culpable homicide not amounting to murder on the basis that the injuries were inflicted in the course of a sudden fight. The defence had suggested that the appellants went to the assistance of their mother, who had a number of injuries.

The trial Judge sentenced the first and second appellants to 10 years' and 2 years' rigorous imprisonment on the two counts, the sentences to run consecutively and the third appellant to 10 years rigorous imprisonment on the first count. In imposing the sentence, the trial Judge stated that he was satisfied that the appellants were lying in wait to attack the deceased when he was returning from his brother's house, and characterised the causing of the injuries as a cowardly attack.

Held: (1) That it is contrary to principle to accept a plea on one basis and to impose punishment on another, and that the basis on which the plea was accepted must be regarded as the basis also of the appropriate sentence in respect of the offence.

(2) That the sentences imposed in this case were not only contrary to principle, but also manifestly excessive.

(3) That the following sentences should be imposed:—

(*a*) First and second appellants—4 years' rigorous imprisonment on the first count and 2 years' rigorous imprisonment on the second count, the sentences to run concurrently;

(*b*) Third appellant (who only had a club which evidently he had not used) — to enter into a bond in a sum of Rs. 500/- with one surety, to be of good behaviour for 2 years, in terms of section 325(2) of the Criminal Procedure Code.

E. R. S. R. Coomaraswamy, with *Miss Barr-Kumarakulasinghe*, *Nihal Jayawickrema* and *Kumar Amerasekera*, for the accused-appellants.

N. Tittawela, Crown Counsel, for the Crown.

T. S. Fernando, J.

The three appellants who are brothers and one Siriwardene who is their uncle stood their trial at the Kalutara Assizes on two charges, (1) of the murder of a man called Lihinis and (2) of the attempted murder of a man called Don Nomis. Towards the end of the prosecution case the learned Judge addressed the Jury on the question as to whether they wished to go on with the case, against Siriwardena. The evidence against him was unsatisfactory and pointed strongly to a false implication of him as one of those who participated in the attack on Lihinis and Don Nomis. The jury were unanimously of the opinion that they did not wish to go on with the case

against Siriwardena, and he was accordingly acquitted. Thereupon, the prosecution acquiescing, the learned Judge accepted a plea on behalf of the three appellants of guilty of culpable homicide not amounting to murder on the first charge and of attempting to commit culpable homicide not amounting to murder on the second charge on the basis that the injuries were inflicted in the course of a sudden fight.

The pleas came to be offered and accepted in the following circumstances. The mother of the appellants, a woman by the name of Sopinona, had a number of injuries, but the prosecution failed to establish how she came by those injuries. The suggestion for the defence — be it noted that the case ended before the defence was called — was that the appellants went to the assistance of their mother Sopinona when she was being attacked, and that Siriwardena was nowhere about at the time. The learned Judge, after the Jury had agreed to accept the pleas, sentenced the 1st and 2nd appellants to ten years' rigorous imprisonment and two years' rigorous imprisonment on the 1st and 2nd counts respectively the sentences to run consecutively. They were therefore to serve twelve years in all; the 3rd appellant was sentenced to a term of ten years' imprisonment on the 1st charge.

Although the pleas were accepted on the basis that the injuries on the two men, Lihinis and Don Nomis, took place in the course of a sudden fight, the learned trial Judge in imposing sentence stated that he was satisfied that the three appellants were lying in wait to attack Lihinis when he was returning from his brother's house. If that was the case, then there was no ground for an acceptance of the pleas. Moreover, he characterised the causing of the injuries on the two men as a cowardly attack. The making of these observations shows that the trial Judge himself did not think that the occurrence of a sudden fight was probable. He does not appear to have placed any weight on the circumstance that the injuries on Sopinona remained unexplained by the prosecution. To accept a plea on one basis and to impose punishment on another is contrary to principle. The basis on which the plea was accepted must be regarded as the basis also of the appropriate sentence in respect of the offence.

We are of opinion that the sentences imposed in this case are not only contrary to principle, but also manifestly excessive. We therefore substitute for the sentence imposed by the trial Judge the following sentences:— the 1st and 2nd appellants will undergo a term of four years' rigorous imprisonment on the first charge and two years' rigorous imprisonment on the second charge the sentences to run concurrently. In regard to the 3rd appellant, the evidence for the prosecution was that he was armed with a club. There is a strong inference from the medical evidence that no club injuries had been dealt either on Lihinis or on Don Nomis; this goes to indicate that, although armed with a club, the 3rd appellant refrained from using that club. In the circumstances, especially having regard to the fact that his mother was involved in some incident at this time in the course of which she received a number of injuries, we do not think that the 3rd appellant should be sentenced to a term of imprisonment. Acting in terms of section 325(2) of the Criminal Procedure Code, we direct that he do enter into a bond in a sum of five hundred rupees, with one surety, to be of good behaviour for a period of two years.

Sentences varied.

Present: **Tambiah, J.**

PIYASENA, SUB INSPECTOR OF POLICE, PITIGALA *vs.* FERNANDO

S.C. 718/'65—*M.C. Balapitiya Case No.* 3049 /E

Argued on: 11-11-65
Decided on: 16-11-65

Excise Ordinance—Charge of possessing fermented toddy against husband and wife — Acquittal of wife and conviction of husband — Absence of husband from home at time of raid.

Held: That the mere fact that a husband is the chief occupant of the house, without any other evidence against him, cannot support the conviction of the husband for the possession of an excisable article.

S. W. Jayasooriya, with *K. Charavanamuttu* for the accused-appellant.

E. D. Wikremanayake, C.C., for the Attorney-General.

Tambiah, J.

The accused-appellant and his wife were charged with the offence of possessing 176 drams of Excisable article, namely fermented toddy which is 160 drams in excess of the quantity declared by the Minister as a limit of sale by retail without a permit from the Government Agent, an offence punishable under section 17 of Chapter 52 read with Excise Notification No. 484 published in the Government Gazette No. 11826 of 7.8.59. After trial the learned Magistrate acquitted the wife and convicted the accused and sentenced him to pay a fine of Rs. 150/-. The appellant has appealed from this order.

The evidence led on behalf of the prosecution which has been accepted by the learned Magistrate establishes that the appellant was the chief occupant of a house in which were found some pots of fermented toddy. Inspector Piyasena, in the course of his evidence stated that when he raided this place he saw the first accused who was standing in the verandah of her house, running inside. He followed her into the kitchen and saw the first accused with a pot in her hand, the contents of which was later found to be fermented toddy. The appellant was nowhere near the house at the time of the raid and there is no evidence to show as to when he left the house. The learned Magistrate, having accepted the evidence of the prosecution witnesses should have convicted the wife for the offence for which she was charged. However, he had chosen to acquit her and convict the accused appellant on the ground that he was the chief occupant of the house and had a license to sell sweet toddy. There is no evidence to show that the accused was in possession of sweet toddy which he allowed to ferment.

The counsel for the appellant contended that it had not been proved that the accused-appellant has been in possession of the toddy. In support of this contention he cited the case of *Alice* vs. *Excise Inspector, Kandy* (1955) 59 N.L.R. 550 in which it was held that where excisable articles are found inside a house, the chief occupant is not liable to be prosecuted for unlawful possession of it unless there is evidence that he was in conscious possession of it. This view has been adopted in a number of cases (vide *Cornelis* vs. *Excise Inspector* (1946) 47 N.L.R. 407; *Sudu Banda and another* vs. *Inspector of Excise, Passara* 35 C.L.W. 6).

The learned Crown Counsel submitted that the appellant was in conscious possession since he was the chief occupant of the house. In support of his contention he cited the case of *Samaraweera* vs. *Babee* 4 C.L.W. 48. This case is however distinguishable from the instant case. The evidence in that case disclosed that the husband had just left the house when the raid took place and the excisable articles in excess of the prescribed amount were found in the house. In such circumstances a court is justified in holding that the husband was in possession of the excisable articles. Soertsz J. took the view that there is a presumption that a house occupied by a married couple is in the possession of the husband rather than that of the wife and that to succeed in a charge of illicit possession of toddy against a married woman living with her husband the prosecution must rebut this presumption. I am unable to agree with this view. The presumption that a house occupied by a married couple is in the possession of the husband cannot help the prosecution in this case because there is no presumption that the toddy found in the house of the appellant, who was not there at the time of the raid, was in the possession of the accused. It is a cardinal principal of law that the accused is presumed to be innocent till the ingredients of the offence are proved by the prosecution beyond reasonable doubt.

I am of the view that where an excisable article is found in the house occupied by a husband and wife, the mere fact that the husband is the chief occupant of the house without any other evidence against him cannot support the conviction of the husband for the possession of such article.

For these reasons I set aside the order of the learned Magistrate and acquit the accused.

Conviction set aside.

Present: **T. S. Fernando, J. and Alles J.**

THE QUEEN *vs.* SELLIAH AND ANOTHER

S.C. 53-54/'65—*D.C. Kandy (Criminal) Case No.* 769/16903

Argued & decided on: March 18, 1966.

Evidence — Charges of obstruction of public servants and escape from lawful custody — Proof of lawful discharge of duties — Investigation consequent to first complaint — Oral evidence inadmissible — First complaint must be produced — omission fatal to convictions — Criminal Procedure Code, section 121 *— Penal Code, sections* 183 *and* 220*A — Evidence Ordinance, section* 91.

The first appellant was charged with offences, inter alia, under Sections 183 and 220 A of the Penal Code, and the second appellant with two offences under the said sections. All these charges depended on proof that the police officers who received injuries were acting in the lawful discharge of their public functions. The prosecution alleged that the injuries were received when they went to investigate into a complaint made by a man named H to one of the police officers.

Held: That no evidence of the nature of the complaint made by H could have been led in Court other than through the document itself, that is, the complaint made in terms of section 121(1) of the Criminal Procedure Code, and that oral evidence of the contents of the document was wrongly admitted in the absence of the document and was fatal to the convictions on those charges.

Followed: *The King* vs. *Haramanisa* (1944) 45 N.L.R. 532; XXVIII C.L.W. 68.
The King vs. *Don Samuel* (1946) 47 N.L.R. 449.

E. R. S. R. Coomaraswamy, with *S. S. Sahabandu* and *K. Amarasekera*, for the accused-appellants.

Cecil Goonewardena, Crown Counsel, for the Attorney-General.

T. S. Fernando, J.

Counsel on behalf of the two appellants has raised a legal objection to the maintainability of the convictions on the 1st, 2nd, 4th and 5th charges which all depended upon proof that the police officers who received injuries on the day in question were acting in the lawful discharge of their public functions. It was the case for the prosecution that the public officers received these injuries on an occasion when they went to investigate into a complaint made by a man named Haramanis to one of the police officers and to arrest the persons accused by Haramanis in that complaint. This was obviously a complaint made in terms of section 121(1) of the Criminal Procedure Code and therefore had to be reduced to writing and copied into the Information Book. It has been held in the case of *The King* vs. *Haramanisa* (45 N.L.R. 532) that oral evidence of such a complaint is inadmissible. This decision was followed in the case of *The King* vs. *Don Samel* (47 N.L.R. 449). It follows therefore, that no evidence of the nature of Haramanis's complaint could have been led in court other than through the document itself. The prosecution omitted to produce the document, but led oral evidence of some of its contents. It was a serious omission and, as it turns out, it is fatal to the conviction on the four charges we have referred to above. If Crown Counsel who prepared the indictment in this case had addressed his mind to the matters that required proof on the part of the prosecution before a conviction could have been expected, we are confident that the omission could have been supplied before the indictment was signed. We therefore with reluctance allow the appeal in so far as it relates to the convictions on those four charges, that is, 1, 2, 4 and 5, and the sentences imposed in respect of them.

Counsel for the appellants frankly concedes that he is unable to attack the conviction on the 3rd count which was one of causing grievous hurt *simpliciter* to the driver of the police jeep, Adikari. Adikari had driven the jeep that brought the two police constables to the scene of their investigation. It was Adikari's evidence that when he heard the cries of his comrades who were being attacked he rushed to their assistance only to find himself stabbed by the first appellant. In respect of the 3rd charge which was only against the 1st appellant the sentence imposed was one of one year's rigorous imprisonment. We have little doubt that this sentence came to be fixed by the learned Judge because he had already

imposed in respect of the other charges a term of two years' rigorous imprisonment. Attacks on police officers who go about on public duty — and let it not be forgotten that they are not armed in this Country — are becoming increasingly frequent; and it is the duty of the courts to afford protection not only to the civilian population but also to members of the Police ervice. We, therefore, while affirming the conviction on the third charge, increase the sentence imposed in respect of it to one of two years' rigorous imprisonment. In the result the 1st appellant will undergo two years' rigorous imprisonment while the 2nd appellant is, to our regret, entitled to be acquitted.

Alles, J.

I agree.

Second appellant acquitted.
Sentence on first appellant enhanced.

Present: **Sansoni, C.J.**

In Re NANCY DE SILVA

S.C. 148/66 — *M.C. Colombo No.* 27862/C

Argued and decided on: 15th February, 1966.

Right of appeal — Appeal by person not party to proceedings from order directing motor car to be returned to alleged owner—Motor car produced by police on complaint of robbery—Criminal Procedure Code, section 338 (1).

Where N, who was not a party to any proceedings in the lower court, appealed from an order of the Magistrate directing a motor car which was produced by the police in connection with a complaint of robbery, to be returned to the alleged owner P.—

Held: (1) That N had no right of appeal.

(2) That proceedings can be instituted and continued even where an appeal is pending and the record has been sent up to the Supreme Court, all that the Magistrate has to do in such an event is start another record.

No appearance for the appellant.

Cecil Gunawardene, Crown Counsel, as amicus curiae.

Sansoni, C.J.

This is an appeal by one Nancy de Silva against the order of the Magistrate directing a motor car, which was produced by the Police in connection with a complaint of robbery, to be returned to the alleged owner Mrs. L. S. Peiris.

The first question that arises for determination is whether the appellant has a right of appeal. She was no party to any proceedings in the lower court, and she therefore does not come within the terms of section 338(1) of the Criminal Procedure Code.

Learned Crown Counsel has referred me to various authorities and has asked me to give a decision on the question whether an appeal would have lain if Nancy de Silva had been a party to the proceedings in the lower court. Any opinion I express on this point, on which there seems to be some conflict of opinion, will be obiter and I do not think I should deal with such a hypothetical situation.

This appeal was listed for hearing early because the record had been sent up to this court along with the petition of appeal, and it was undesirable that any proceedings that the Police wished to institute shall be delayed on that account. I wish to add that even if the record remained in this court such proceedings could be filed, because all the Magistrate has to do in such an event is to start another record. Proceedings can be instituted and continued even where an appeal of this nature is pending and the record has been sent up to this court.

So far as this appeal is concerned, as no appeal lies it is dismissed.

Dismissed.

Present: **H.N.G. Fernando, S.P.J. and G.P.A. Silva, J.**

KANDIAH THIAGARAJAH *vs.* POORANESWARY KARTHIGESU

S.C. No. 568 *(F)* 1963—*D.C. Batticaloa* 1949/*Mis.*

Argued on: 6th, 18th, 19th and 20th June, and 6th July 1966
Reasons and decision on: 22nd July 1966

Declaratory decrees—Declaration that plaintiff not married to defendant—Action for jactitation of marriage—Jurisdiction of our Courts in respect of such actions—Civil Procedure Code, sections 217, 40 *and* 5*—Limits to the jurisdiction of Court to grant a declaratory order—Plaintiff's cause of action in such a case—Application of maxim " ut magis valeat quam pereat "—Courts Ordinance, section* 62.

The plaintiff sued the defendant for a declaration that he was not married to the defendant, and for an order restraining the defendant from boasting that she was married to the plaintiff. The trial Judge held on the evidence that the plaintiff and the defendant were in fact married on the 21st January 1959 according to the custom applicable to the Mukkuwa community to which both parties belonged and dismissed the plaintiff's action.

In appeal the defendant raised the question that the Court had no jurisdiction to entertain the action.

Held: (1) That with regard to the action to prevent the defendant boasting that she was married to the plaintiff (action for jactitation of marriage), such an action was one within matrimonial jurisdiction, and no authority had been cited which might indicate that the Courts in Holland or Ceylon had entertained such an action.

(2) That the Court had jurisdiction to grant the declaration that the plaintiff was an unmarried man. The cause of action in such a case in terms of section 5 of the Civil Procedure Code was the defendant's denial of the plaintiff's status, which would include the denial of the rights of the plaintiff arising from the status denied. In granting such a declaration, however, the Court would not order either party to perform conjugal duties.

(3) That the power of a Court to grant a declaration would be subject to the following conditions:—

(*a*) The Court would have a discretion in deciding whether to grant the declaration or not.

(*b*) The declaratory jurisdiction could be invoked for the determination of legal disputes, but not for disputes of a moral, social or political character.

(*c*) Theoretical issues could not be determined in such an action.

(*d*) The declaratory jurisdiction could not be invoked to determine the lawfulness of a proposed action, or the rights which might be claimed or denied if and when a person takes such proposed action.

(*e*) Nor could it be invoked if the declaration could have no practical consequences.

(4) That none of these limitations, however, could be invoked in the present case to defeat the plaintiff's action. The Court therefore had jurisdiction to grant the declaration asked for.

(5) That on the evidence the trial judge had erred in finding that the parties had on the 21st January 1959 gone through a ceremony of marriage according to the custom applicable to the parties, or that the plaintiff had intended to contract a marriage with the defendant on that day.

Cases referred to: *Aziz* vs. *Thondaman*, (1959) 61 N.L.R. 217; LVII C.L.W. 73.
Grand Junction Waterworks Co. vs. *Hampton U.D.C.*, (1898) 2 Ch. 331; 78 L.T. 673; 14 T.L.R. 467.
Hanson vs. *Radcliffe U.D.C.*, 1922 Ch. 490; 127 L.T. 509; 38 T.L.R. 667.
Barnard vs. *National Dock Labour Board*, (1953) 2 Q.B. 18; (1953) 1 A.E.R. 1113.
Russian Commercial and Industrial Bank vs. *British Bank for Foreign Trade Ltd.*, 1921(2) A.C. 438; 126 L.T. 35; 37 T.L.R. 919.
Lever Brothers vs. *Manchester Ship Canal Co.*, (1945) 78 Lloyds L.R. 507.
Har-Shefi vs. *Har Shefi*, (1953) 1 A.E.R. 783; 1953 P. 161.
Aronegary vs. *Vaigalie et al.*, (1881) 2 N.L.R. 322.
Andres vs. *Bastiana*, 1860-62 Ramanathan Reports 133.

Texts cited: *The Declaratory Judgment* — Zamir
Law and Orders — Allen (2nd Ed.) 266.

S. Nadesan, Q.C. with *C. Ranganathan, Q.C., Crosette Thambiah* and *K. Thevarajah*, for the plaintiff-appellant.

H. W. Jayawardene, Q.C., with *K. Kanthasamy* and *Mark Fernando*, for the defendant-respondent.

H. N. G. FERNANDO, S.P.J.

This is an unusual action, probably one of first instance in our Courts, in which the plaintiff prays for a declaration that he is not married to the defendant. Reference to the facts is not necessary at this stage, for the first question is whether our Courts have jurisdiction to grant such a declaration.

Section 217 of the Civil Procedure Code provides that "a decree or order of court ..... may, without affording any substantive relief or remedy, declare a right or status", and Section 40 of the Code refers to an action "to establish, recover or enforce a status". Chapter XXV of the Code, which deals with the continuation of actions after alteration of a person's "status", shows that the expression as used in the Code regards the marriage of a woman as being a change of her status. If, as the Code contemplates, the change from being a *feme sole* to being a married woman is a change of status, the change from bachelorhood to the condition of being a married man is equally a change of status. In the former case, the change can affect the capacity in two ways, i.e. a woman's right to property or her contractual capacity may be altered by reason of marriage, and also her capacity to contract a valid marriage is ordinarily limited by the fact of her subsisting marriage. In the latter case, the capacity of a married man to contract a valid marriage is equally limited. In fact, the counsel for the defendant in appeal did not seriously contend that the declaration sought in this case is not a declaration of the plaintiff's status.

Counsel's principal argument was that this action is one for jactitation of marriage, i.e. to restrain a defendant from boasting that he or she is married to the plaintiff. (The plaintiff in this action has asked for that very relief in addition to the declaration which he claims). That action was a matrimonial action, which in England used to be entertained by the Ecclesiastical Courts. But it is argued that such an action cannot be entertained by our Courts, because the matrimonial jurisdiction referred to in Chapter LII of the Code does not include such a reference was, it is argued, deliberate, and established an intention that our Courts should have no jurisdiction to entertain actions for jactitation of marriage.

I do not disagree with the argument that the action for juctitation of marriage is one within matrimonial jurisdiction, and no authority was cited to us which might indicate that the Courts in Holland or Ceylon entertained such an action. But the plaintiff in this case seeks also another remedy, which is a declaration of his status as an unmarried man; and the objections which I have thus far considered are not relevant to the question whether the jurisdiction to make a declaration of status (the existence of which jurisdiction is clearly contemplated in Head G of Section 217 of the Code) does or does not include the jurisdiction to declare the status which the defendant in this case has denied.

Counsel for the defendant sought to draw an analogy between the present case, and that decided in 1860-1862 *Ramanathan's Reports* (page 133). This Court there held that it had no jurisdiction to order the restitution of conjugal rights, on the ground that the Courts in Holland were not shown to have had such a jurisdiction. The decision was so expressed, but what is its principle? If the Courts of Holland did not make orders for the restitution of conjugal rights, the reason was that the substantive law governing the marriage contract did not compel a spouse to participate in marital relations, although the denial of marital rights might constitute a breach of the contract. The principle is the same as that which prevents a party to certain other contracts from enforcing specific performance of the contract by the other party. If the law does not compel the specific performance, then equally the courts will not decree the remedy of specific performance. In appropriate cases, the courts have the duty, to determine that the contract was not performed but only for the purpose of exercising its jurisdiction to decree the relief which the law allows for non-performance, which in most cases would be pecuniary damages for breach of contract. Indeed

there can be no doubt that the Courts in Ceylon, for the purpose of deciding whether a decree of divorce or separation should be granted, do have the duty to determine whether a party to a marriage has failed to perform his or her contractual duties of cohabitation.

The suggested analogy between such cases and the present one is in my opinion fallacious. For no question here arises of a Court making any order inconsistent with the substantive law governing contracts of marriage. Even if a court were to grant a positive declaration that A *is* married to B, the court would not thereby order either party to perform conjugal duties. The question whether A is or is not married to B can arise for determination in several contexts, e. g. in a matrimonial action, in an action for declaration of title to land, in an action for defamation,in an action for injury caused to A or to B, and so on. In the instant case, the plaintiff's action for a declaration of his status calls for a determination of that question, and it is the duty of the court to decide it, if there is jurisdiction to decree the declaration.

Counsel has argued that under our Code a person cannot institute an action unless he is able to plead that he has a cause of action as defined in section 5 of the Code. A similar argument was considered in *Aziz v Thondaman* (61 N.L.R. 217) where the court apparently took the view that, because Section 217 (G) of the Code declares that a decree may "declare a right or status", a person may therefore bring an action to have a right or status declared. The precise objection, based on the definition of "cause of action" was (I think with respect) not clearly formulated in that judgement. The objection is that the definition *does* expressly include the denial of a *right*, but makes no reference to the denial of a *status*, and that therefore the denial of a status does not give rise to an actionable cause. The answer to this objection is that the definition and the provisions of Section 217 (G) must be read together, and construed as far as reasonable so as to render both provisions effective. Inconsistency is avoided by the construction that, in the definition, "denial of a right" includes the denial of a status. To deny a status can involve a denial of the legal rights flowing from such a status. To deny the plaintiff's status of bachelor was to deny his right and his capacity to contract a valid marriage. A cause of action can therefore arise upon that denial. Any other construction would render the provision for a decree or order declaring a status a dead latter, and would offend the principle of construction *ut magis valeat quam pereat*.

The arguments of counsel were to some extent based upon the absence of any precedent in the Courts of Holland for the grant of the particular declaration sought in this case, that A is not married to B. The lack of such precedent can compel me to assume, even though the assumption may in fact be incorrect, that the courts of Holland had no jurisdiction to make such a declaration. But it is not to be further assumed that therefore the Courts in Ceylon do not have that jurisdiction. Section 62 of the Courts Ordinance, which is only a re-enactment of the corresponding provision in Section 24 of the Charter of 1833, confers on District Courts "original jurisdiction in all civil.....matrimonial..... matters,.....and in any other matter in which jurisdiction .....*is now or may hereafter be given to District Courts by law*." Section 62 had in contemplation the jurisdiction referred to in Section 217 of the Civil Procedure Code for a civil Court to make a court decree or order declaring a status. It is significant, and decisive of this matter, that the date of operation of the Courts Ordinance, No. 1 of 1889, was 2nd August 1890, while the date of operation of the Code, No. 2 of 1889, was 1st August 1890. The jurisdiction referred to in Section 217 (G) of the Code was thus in existence immediately before Section 62 of the Courts Ordinance came into operation. That jurisdiction now exists quite independently of the consideration whether or not it was recognised in the Roman-Dutch law. And it is very nearly beyond argument that in conferring that jurisdiction, the Legislature of Ceylon intended to adopt the English Law contained in Order XXV, rule 5, of the English Rules of the Supreme Court 1883, to the following effect:

> "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

That the modern declaratory judgement is in many jurisdictions the consequence of adoption from the English Law has been stated in a comprehensive and very helpful study of numerous English cases by Dr. Zamir of the University of Jerusalem. (*The Declaratory Judgement* 1962). Section 217 (G) of our code amply confirms that statement so far as Ceylon is concerned

In *Aziz* v. *Thondaman* (supra), this court disapproved the opinion of the trial Judge that the granting of a declaration of status is not a matter within the discretion of the Court. That opinion I think with respect was correct, not merely because it was in line with English decisions, but because those decisions demonstrate the danger and inconvenience which can result if a declaratory judgement can be claimed as of right.

> "It seems to me that when the court is simply asked to make a declaration of right, without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it except in very special circumstances."
>
> (*Grand Junction Waterworks Co.* vs. *Hampton U.D.C.* 1898. 2 Ch. 331).

> "The power of a Court to make a declaration, where it is a question of defining the rights of two parties is almost unlimited..... The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide". (*Hanson* vs. *Radcliffe U.D.C.* 1922, Ch. 490).

These two citations, from judgements delivered in 1898 and 1922 respectively show how sharply the attitude of the Courts in England towards declaratory judgements changed within a short space of time. In 1953 (*Barnard* v. *National Dock Labour Board* 1953, 2 Q.B. 18), Denning L.J. said " I know no limit to the power of the Court to grant a declaration, except such as it may in its discretion impose upon itself. "

The limits of the jurisdiction as laid down in English cases are classified in Dr. Zamir's book and I shall freely borrow from it, in order to refer to the limitation appropriate to cases like the one before us.

The declaratory jurisdiction can be invoked for the determination of legal disputes, but not for disputes of a moral, social or political character. The dispute in the present case, whether a valid ceremony of marriage took place between the plaintiff and the defendant, is certainly a legal dispute, because it concerns the status and rights of the parties.

Theoretical issues cannot be determined. "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it". (1921 A.C. 438). If the right asserted by the plaintiff is not denied by the defendant, or where there exists only the possibility of a claim against the plaintiff or the possibility of the denial of his rights, the issue is only theoretical; so also where the facts in relation to which a declaration is sought are hypothetical.

There are two other limitations on the exercise of the declaratory jurisdiction which have to be specially considered, in this case. A person who contemplates some course of action cannot seek a declaratory order pronouncing upon the lawfulness of the proposed action, or upon the rights which might be claimed or denied if and when he takes the proposed action (*Lever Brothers* v. *Manchester Ship Canal Co*, at page 56 of Zamir). Again a declaration will not be granted if it can be of no practical consequence. Thus, where the plaintiffs claimed a declaration that they were entitled to an ancient ferry from point to point, the declaration was refused on the ground that no disturbance had been proved of the plaintiffs' alleged rights.

Both such limitations might appear to be applicable in the present case. The mere assertion that the plaintiff is married to the defendant, by itself, has no practical consequences, and it seems to follow that a declaration to the contrary also will have no practical consequences. The plaintiff may have fears that the defendant may claim from him such personal or proprietory rights as may be accorded to a wife by the relevant law applicable in their case; but there has yet been no such claim, and if there is one, the dispute as to their marriage can then be determined. The plaintiff may fear that, if he now contracts a marriage, he may become liable to a conviction for bigamy; but that liability can arise, not because of the defendant's assertion, but because of the facts involved in the assertion which if they are subsequently proved will establish the offence of bigamy. If in effect it is the plaintiff's purpose to obtain from a civil court a declaration that will or may protect him from future criminal proceedings for bigamy, that in itself might be sufficient reason for denying to him a declaratory decree.

The principle underlying the limitations just mentioned is a general one, applicable to every exercise of a Court's jurisdiction, and not only to the declaratory jurisdiction. It is stated thus by Allen (*Law and Orders*, 2nd Edition page 266):-

> "It is a principle of our jurisprudence — and, it is to be supposed, of most systems of law — that courts will not entertain purely hypothetical questions. They will not pronounce upon legal situations which may rise, but generally only upon those which have arisen."

Since this principle is generally applicable, it must be presumed that its requirements are satisfied when a Court enters a decree of nullity

of marriage or of divorce. Taking in particular an action for a decree of nullity ab initio, it must be presumed that there is a pending legal dispute for determination by the Court and that the decree when entered will have practical consequences. But the point of the dispute is no different from that arising in the present case, namely, "was there a valid marriage between the plaintiff and the defendant?"—Denning, L.J. (in *Har-Shefi* v. *Har Shefi* (1953) 1 A.E.R. 783) stated that the sole object of a suit for nullity was "to obtain a declaration that what purported to be a valid marriage was in law a nullity." The present action differs from a suit for nullity only because the plaintiff does not concede that there was even the semblance of a marriage in his case. But the dispute is precisely whether the ceremony relied on by the defendant as purporting to be a valid marriage, was valid according to customary law. Again, the consequences of a decree of nullity ab initio are no different from those which will flow from a declaration in the present case that the plaintiff and the defendant are not, and never were, husband and wife. Hence the principle, that the issue involved in litigation must be real and not hypothetical, must be held to be equally satisfied in both types of action.

Consideration of this matter leads me to the opinion that, properly classified, a decree of nullity ab initio of a purported marriage falls within the categories of decrees declaring status. And since a person's status, whether of bachelor spinster or married person, so obviously affects his rights and capacities, there is a reasonable presumption that a declaration of such status will have practical consequences. The same presumption may I think be invoked when the plaintiff in this action seeks a declaration of his status as a bachelor.

I would hold for these reasons that the District Judge rightly held that he had jurisdiction to grant the declaration.

The learned District Judge dismissed the plaintiff's action because he reached a finding upon the evidence that the plaintiff and the defendant were in fact married on 21st January 1959 according to the custom applicable to the community to which both parties belonged, namely the *Mukkuwa* community of the Tamils of the Batticaloa district.

The plaintiff is a graduate teacher, and the only child of a teacher. The defendant is the daughter of a teacher. Both parties enjoy a high social status in their community on this account, and both parties are comparatively speaking regarded as being affluent units in their community.

On 16th January 1959, there was a meeting between the plaintiff, his father, the defendant's parents, and one or two others, at which a marriage between the plaintiff and the defendant was arranged. The defendant's father agreed to give as dowry a sum of Rs. 10,000/- in cash, and a land on which he agreed to erect a house of the value of Rs. 25,000/- or more, and two paddy fields. Actually, the erection of a house on the land had already commenced at the time, but the major part of the building operations had yet to be taken in hand. According to the plaintiff, the dowry included a motor-car of the value of Rs. 13,000/-; but according to the defendant's father the arrangement was that he would assist the plaintiff to purchase a car.

There is conflict as to the further arrangements made on 16th January. According to the plaintiff, it was arranged that on 21st January he and the defendant should become formally engaged to each other, in token of which there would be an exchange of rings; the notice of (prospective) marriage was also to be signed on that day and given to the Registrar of Marriages; the dowry deed was also to be signed on the 21st. But the cash dowry of Rs. 10,000/- was to be paid on the day of the marriage, and the erection of the house would also be completed before that day. The actual date of the marriage was not fixed.

The defence version of the events arranged for 21st January was similar to that of the plaintiff, but differed vitally in that (according to this version) a marriage according to custom was to take place on that day. It was arranged that the dowry deed for the land and paddy fields were to be signed on the 21st, but there was no arrangement as to the payment of the cash dowry and no undertaking that the house would be erected within any specified time.

The trial Judge has assumed, presumably upon the evidence of the actual events of 21st January, that the parties, and principally the plaintiff, had intended to contract a customary marriage on the 21st. But he did not attempt to test the truth of the two conflicting versions of the arrangement reached on January 16th by an examination of those versions themselves.

The plaintiff's evidence is that, very soon after the arrangements made on the 16th, he received some disturbing information concerning the defendant. For this reason he wrote a letter on the 19th to the defendant's brother in which he requested that the engagement ceremony, fixed for the 21st, should be postponed. But the brother came and saw him and persuaded him not to press for the postponement. He then withdrew his request for the postponement, because at that stage the information which he had was only a matter of rumour and because in any event he was only to become engaged, and not to be married on the 21st.

The defendant's father admitted the receipt of a letter requesting a postponement of the ceremony arranged for the 21st. But according to him the request was for a postponement of *the marriage ceremony* fixed for that date. The letter, he said, had been handed to the defendant's proctor, but he could "not definitely say whether I can produce this letter this afternoon." These statements were made by the witness on the morning of 16th July 1962. When the trial was resumed that afternoon, the witness again said that the letter had been given to the proctor. But, in answer to a further question, he admitted that he had not asked the proctor whether the letter was still available. It was not produced at the trial.

This letter would in all probability have either confirmed or rebutted the plaintiff's evidence that what had been arranged for the 21st January was only an engagement ceremony. If it did refer to an engagement, and not to a marriage ceremony, it would have shown at the least that shortly before the 21st January, the plaintiff had denied an arrangement for a marriage on that day; and if so, the failure to refute in writing such a denial made in a letter was significant. It is unfortunate that the trial Judge did not choose to infer that the defence withheld the letter because it must have contained evidence unfavourable to the defendant' s case. That inference can nevertheless be relied upon at the stage of appeal.

The trial Judge has noted in the record a statement of defence counsel that "certain documents had been misplaced." But even if this statement might show that the letter had been misplaced, it was open to the defence to call the proctor as a witness to give secondary evidence of the contents of the letter. As matters actually stood, the plaintiff's evidence as to the contents of the letter was not contradicted by the best available evidence.

Before referring to the grounds upon which the learned trial Judge held that the plaintiff and the defendant were married according to the custom prevailing in their community, I must note one feature which distinguishes this case from many contained in our Law Reports in which there arose the question whether a marriage had been celebrated according to custom. The distinction is that the question there arose in relation to persons claimed to have been husband and wife by habit and repute, and not (as in this case) to persons who have never lived together even as man and concubine. In the usual cases "where a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage," (*Aronegary* v *Vaigalie et al.* 2 N.L.R. 322, Privy Council). In view of the evidence of cohabitation and repute, it was held in that case that it was wrong to place, on the party asserting the marriage, the burden of proving the appropriate marriage customs and the fact that the requisite ceremony was performed. But in the present case, the parties have neither cohabited for a single day nor even lived together under the same roof. There is therefore no presumption in favour of their marriage, proof of which depends solely on evidence to the effect that a valid ceremony of marriage was actually performed.

In deciding what was the custom prevailing in this particular community, the learned trial Judge has adopted the opinion of the witness Pandit Periatambipillai which was:-

> "whether it be milk and fruit or rice and curry they are all mixed up and placed in the same vessel and both the he and the she who had lived and grown up in two different homes partake of the meal that is mixed up, the one and only meal and this is intended to achieve the oneness of the he and the she. In other words it is the identity of one getting merged into the identity of the other. This is also what is described as the identification of both in the sorrows and happiness of one with the other."

This, witness appears to have created a very favourable impression both as to his learning and his credibility. It is fortunately not necessary for me to examine the credentials of the witness, which counsel for the plaintiff in appeal has quite properly attempted to attack. I am satisfied, on different

grounds, that the evidence of this witness fell far short of establishing that a valid marriage according to custom did take place between the plaintiff and the defendant.

The witness admitted more than once that the essential element of a customary marriage in this particular community is the *kalan* ceremony in which rice and seven curries are offered to the bridegroom; it is interesting to note that this "rice ceremony" was accepted eighty years ago in the judgement of the Privy Council (2 N,L.R. 322) as being the essential element of a valid marriage, and that in a case from the District Court of Batticaloa. The ceremony, according to the witness is that the bridegroom mixes some rice with the curries, and first eats three mouthfuls himself; he then with his hands feeds three mouthfuls to the bride. The defendant's father did state that this rice ceremony was performed between his daughter and the plaintiff; but the trial Judge quite rightly did not act upon that statement, for the unusually good reason that there was not at the time any witness who could claim to have been present at the rice ceremony and to have seen it performed. Since the performance of this ceremony is the essential element of the marriage custom it is incredible that it was performed in secret, without opportunity for invited friends and relatives to witness its performance if so minded. The defendant's "expert" witness had often witnessed this ceremony, and indeed his qualification as an expert depended very much on the fact that he had attended several marriages at which the rice ceremony was performed. Moreover, the trial Judge has not rejected the evidence of at least one reputable witness called by the plaintiff that the rice ceremony ordinarily takes place in the view of invited guests.

The trial Judge should not in my opinion have been content with merely declining to act upon the evidence of the defendant's father that rice ceremony was performed. There were good grounds for him to find, in all the circumstances that no rice-feeding ceremony took place.

The plaintiff's evidence at the trial was given on 25th October 1960, and on 17th January 1961. In regard to the *kalan* ceremony alleged to have taken place on 21st January 1959 the plaintiff was cross-examined solely on the basis that he and the defendant had jointly partaken of milk and fruit. No question was put to him suggesting that the rice ceremony had been performed. His evidence was concluded on 17th January 1961.

On 18th January 1961, during the cross-examination of a witness called by the plaintiff to speak to marriage customs, it was suggested more than once to this witness that rice is not essential for the *kalan* ceremony and that "something like milk or something pure" could be used instead. The same suggestions were repeated to the witness during the afternoon session. But a while later, defence counsel for the first time suggested in his questions that the rice ceremony had actually been performed between the plaintiff and the defendant in an inner room in the house.

It seems to me that the plaintiff was entitled to the benefit of the fact that, until the afternoon of 18th January 1961, it had not been the defence position that the rice ceremony had been performed. The inference which strongly arises is that the rice ceremony did not in fact take place.

The plaintiff was subsequently recalled by the Judge and in answer to him denied that the rice ceremony had taken place. Thereafter, the defendant's father asserted that it had. The trial Judge did not think it necessary to consider who spoke the truth, and who the lie, on this point. If the circumstances to which I have just referred had been taken into account, together with the unusual feature that there was not available to the defence a single witness, not even the defendant herself or her father, who could testify at first hand to the performance of the rice ceremony it would have been a perfectly justifiable conclusion that the evidence of the defendant's father on this point was deliberately false, and conversely that the plaintiff's evidence was true.

By way of parenthesis I must here refer to defence counsel's explanation to the Judge "that by some over-sight perhaps he did not put it to the plaintiff.....that there was a *kalan* ceremony..... meaning participation in rice and curry..... inside a room". One point has been established beyond doubt by the evidence in this case, namely that the rice ceremony alone would constitute a valid marriage between these parties. That being so, the plaintiff can rightly ask this court to presume that the fact of its performance should have been the vital and decisive question, for determination at the trial of this action. The failure of the defence to raise this question,

except belatedly, must enure to the plaintiff's advantage despite the explanation from the Bar which quite properly was expressed in uncertain terms.

It is convenient at this stage to consider a matter to which I have already referred, namely the omission of the trial Judge to consider the question of the intention which the plaintiff entertained when he came to defendant's house on 21st January 1959, that is to say "did he come there as prospective fiancee or else as bridegroom"? According to his evidence, he did not imagine that he could contract a valid marriage except by participation in the rice ceremony, and for the reasons I have stated he certainly did not participate in such a ceremony. As to the alleged symbolic and alternative participation in milk and fruit, he was not even asked in cross-examination whether he was aware before he came to the defendant's house on 21st January 1959, that the arrangements fixed for that day contemplated any ceremony in which he would drink from some vessel and thereafter hand the vessel to the defendant. Nor was he questioned with a view to showing that he had been informed that his marriage would be solemnized, not by the known rice ceremony, but instead by some alternative ceremony, the validity of which could if necessary be established by "expert" evidence in a court. There is no evidence that he was instructed in any way as to his part in such an alternative ceremony, which would have been novel to him. The fact that the rice ceremony was not performed on 21st January 1959, and the lack of evidence indicative of a prior arrangement to perform an alternative ceremony of marriage, render reasonable and credible the plaintiff's evidence that he did not intend to be married that day.

It is common ground that the "financial" transactions fixed for the 21st was only the execution of a deed for the promised land and paddy fields; these were valued in the deed at Rs. 9,000/-. Hence the parties did not contemplate that the cash dowry of Rs. 10,000/- would be given on that day, nor that any agreement would then be executed binding the defendant's parents to fulfil their promise to erect a valuable house on the land and to assist the plaintiff in the purchase of a car. Indeed the defendant's father admitted that "there was no talk as to when the money (the cash dowry) should be paid."

The defence version meant that, although the marriage was fixed for January 21st, the plaintiff was content to rely on the bare word of the defendant's parents in regard to a very substantial part of the promised dowry, and did not seek even an oral assurance as to the time when the promise would be performed. There is literally nothing in the evidence to indicate that the plaintiff was thus ready to marry in haste without troubling to eliminate possible causes for subsequent repentance. Indeed, I shall immediately refer to evidence which eliminates the possibility that the ordinary motive for a hasty marriage was present in the mind of either of these two parties.

This alleged marriage was in fact not consummated. At one stage, the defendant's father appeared to give the court the impression that by some prior arrangement "the marriage was to be consummated only after the tying of the *tali* is gone through" at some later time. But he later admitted that there had been no discussion of the question of the consummation of the marriage. Since there had been no discussion of this delicate but important detail, one cannot understand why both parties appeared to have readily assumed (this is obvious from the evidence that they were not to live as husband and wife after the ceremony which took place on January 21st.

I need refer only to one other matter which is relevant to the question whether the plaintiff intended to be married on 21st January. The defendant's expert witness stated that "depending on the means of the parties concerned", the *koorai* and *tali* ceremonies take place on the day of the marriage. There was in this case no *tali* ceremony. This omission was explained by the defendant's father's evidence that both sides had earlier agreed to have this ceremony performed "after the wedding", but without fixing even an appropriate date. At one stage of his cross-examination, the witness resiled from this position by stating there had been no discussion as to the *tali* ceremony. A while later he reverted to the explanation of a postponement of that ceremony, stating that on 9th January, the question was discussed and "the plaintiff's party were finding it difficult to have the *tali* made, and I suggested that I could get that *tali* made." This explanation was later expanded by the witness, when he stated that the plaintiff's family were at the time unable to afford the expense of buying a *tali*. He then proceeded to give evidence, as to the means of the plaintiff and his parents, in an effort to support the allegation of their ina-

bility to pay for a *tali*. But he did admit that the plaintiff's parents were possessed of several properties, and he had earlier made the admission that "both his parents and we are fairly well to do."

The trial Judge refers in the judgement to the explanation that the *tali* cermony was not performed because the plaintiff's family did not have at the time the Rs. 600/- or 700 necessary to procure a *tali*. But he did not consider the credibility of that explanation, and expressed no view as to its truth. Nor did he examine the truth of the assertion that the question of the *tali* ceremony had been discussed and settled on 9th January. Had he examined that assertion in the light of the relevant evidence to which I have now referred, he would not have found any reasonable grounds upon which to accept it as true. I am myself convinced in the circumstances of this case that, if the intention of the parties had been that the ceremony of a customary marriage should take place on 21st January, that *tali* ceremony would also have been fixed for that day.

I have referred in detail to the matters relevant to the point whether the plaintiff came to the defendant's house on 21st January with the intention of marrying her. There must be added to these the item that the truth of the defendant's father on this point is cast in doubt by the falsity of his version that the rice ceremony was in fact performed. There is also the consideration that the defendant herself did not enter the witness box to speak to her own state of mind. The only reasonable conclusion which the trial Judge could have reached on this point, if he had considered these matters, is that the plaintiff did not leave his home with any intention of contracting a marriage.

I shall now consider the crucial question decided by the trial judge, namely that a ceremony did take place on 21st January which constituted a valid customary marriage. He referred to the evidence that the "bridegroom" was brought to the "bride's" house by the latter's elder brother; the house of the defendant was decorated for the occasion and a canopy of white cloth had been erected; on the arrival of the plaintiff the defendant's father broke a coconut and the "evil eye ceremony" was performed; the plaintiff and the defendant garlanded each other and sat together on a settee; they exchanged rings ; a porcelain vessel containing milk and fruit was delivered to the defendant who offered it to the plaintiff; the plaintiff took three sips from the vessel and returned it to the defendant who in turn took three sips; thereafter a dowry deed was read over by a Notary and signed by the parties including the plaintiff.

It is the partaking in the manner stated above of fruit and milk which the Judge has held to have had "an inner meaning" and to have constituted the marriage ceremony.

The evidence of the defendant's chief witness Pandit Periyathambipillai makes it quite clear that the *Kalan* ceremony which had customarily been observed in this community is the rice ceremony performed in the manner I have explained. But he stated his opinion that according to the sastras it is sufficient if fruit and milk is used instead of rice. The answers of the witness in subsequent cross examination appear to indicate that his opinion is not supported by the writing he had in mind. But even if valid this was opinion evidence based on the witness's interpretation of ancient writings. He was questioned further as to the instances in which to his knowledge milk and fruit had actually been used in the *kalan* ceremony instead of rice. His answers revealed that during the course of twenty five or thirty years he had noticed the use of milk and fruit only on two occasions although he had been present at over a hundred marriages.

One of the two occasions was a case where on the day of the marriage the bridegroom's party threatened to take away the bridegroom (and thus not to proceed with the arranged marriage). At this stage, according to the witness, he himself suggested a immediate second marriage between the two families. i.e. "an exchange marriage" between the bridegroom's sister and bride's brother. This emergency proposal made after midnight was proceeded with and the bridegroom's sister was hurriedly brought from her house, knowing then for the first time that she was to be married. In this emergency the witness himself apparently suggested that milk and fruit instead of rice should be served for both the marriages.

The second instance according to the witness where fruit and milk took the place of rice was in 1940 but he attempted no explanation as to why a traditional rice ceremony was not performed.

The effect of the evidence of this witness surely is that custom is followed among this community in Batticaloa requires the performance of the rice ceremony, and that in nearly every case to which he can speak that ceremony was in fact performed, but that on two occasions, one of which had been of his own devising, milk and fruit took the place of rice. Thus the use of milk and fruit even according to the witness was an exception to the traditional custom and in one at least of the two instances was resorted to in quite extraordinary circumstances at the witness's own suggestion. Two deviations from traditional custom are in my opinion quite insufficient to support the witness's position that in modern times young people are accustomed to follow the deviation rather than the tradition. In the first of the two instances, the deviation was not made in consequence of the modern views held by young people, nor in the present case is there any clue that either the plaintiff or the defendant abhorred the use of rice or that milk and fruit are modern in comparision with rice. In fact, the defendant's father could not even attempt to explain why in this instance, fruit and milk were used as a substitute for rice. The witness's frequent admissions concerning the observance of the rice ceremony contradict his own assertion that the community has recognised any new custom.

The dowry deed P6 contains a recital that it is a conveyance to the plaintiff "as bride-groom" and the defendant "as bride", The acknowledgement which they signed in acceptance of the gift also refers to them as bridegroom and bride. This undoubtedly constitutes an admission by the plaintiff that the marriage took place on 21st January.

The plaintiff explained at the trial that when the dowry deed was read, he understood it to refer to a future marriage. He had given the same explanation in the letter P5 written by his proctor to the defendant on 26th May 1959. No reply to this letter was sent to the plaintiff and no satisfactory reason was given for the failure to reply. There was not even evidence that the plaintiff was ever requested to complete the alleged outstanding arrangements for the civil marriage before the Registrar and for the *tali* ceremony. The plaintiff's denial in May 1959 was not contradicted in writing or by conduct until after the institution of this action in March 1960.

The considerations just mentioned, and the matters with which I have dealt in discussing whether the plaintiff intended to contract a valid marriage, are more than sufficient to rebut the effect or the apparent admisssion in the deed P6.

During the argument of the appeal my brother suggested that the proceedings (if I may so term them) of 21st January 1959 had the appearance of a marriage ceremony, and that many of the events of that day would not have taken place on the occasion of an engagement. It was in view of this feature, unfavourable to his case, that the plaintiff's counsel proposed to produce certain love-letters alleged to have been written by the defendant to a Sinhalese by the name of Mendis; counsel proposed a line of cross-examination designed to show that "there was an alleged plan on the part of the defendant's father to stage a milk-feeding ceremony and to incorporate in the dowry deed a term to the effect that the marriage had already taken place". This course the Judge did not permit, because in his view "what is really before the court is the nature of the ceremonies and other things that took place on that day". This statement confirms my clear impression that the Judge did not consider important or even relevant in the question whether the plaintiff intended to contract a marriage. In the result, he presumed that intention because the ceremonies in his opinion constituted a valid marriage, but he took little or no account of the several matters which (as I have tried to show) negatived that intention. The inconsistency, that the plaintiff, who had no intention to contract a marriage, is explained in the submission of plaintiff's counsel that the defendant's father planned to stage a marriage ceremony. It is fortunate that this already long judgement need not include any pronouncement on the validity of that explanation.

I am compelled for the reasons stated to reverse the finding of fact of the trial judge and to hold that the plaintiff is not married to the defendant:-

(a) on the ground that the plaintiff did not intend to contract a marriage to the defendant on 21st January 1959; and/or

(b) on the ground that a valid marriage between the plaintiff and the defendant did not take place on that day, or at any other time.

The legal issues in this appeal are interesting and important, and the factual issues have been at the least interesting. On both aspects, counsel for both parties have been of great assistance to the Court.

The decree appealed from is set aside and decree will be entered declaring that the plaintiff is not married to the defendant. The decree will order payment to the plaintiff of taxed costs in both courts.

G. P. A. SILVA, J,
I agree.

Appeal allowed.

Present: **H. N. G. Fernando, A.C.J.**

OSCAR JOACHIM FERNANDO *vs.* THERESE DYLANTHIE FERNANDO (Minor) AND OTHERS*

H.C. Application No. 450/63

Argued on: 30th August, 1965.
Decided on: 3rd September, 1965.

Custody of minor — Application for, by parents (petitioners) — Parents acceding to request of wife's childless sister (3rd respondent) to bring up child — Petitioners and respondents sharing cares and joys of child's upbringing—Substantial contribution by petitioners to child's welfare—Absence of any indication to renounce parental rights — To what extent is a child's consent relevant in such an application.

Child *D* was the daughter of the petitioner and his wife. At the request of the wife's childless sister the child was given to the latter to be brought up in her home, but without any agreement express or implied to renounce parental rights. For many years, the petitioners and the respondents "together shared the cares and joys of child's upbringing." The child was sent or taken on visits to her parents and brothers and sisters and the parents contribute to the welfare of the child in a substantial manner.

In an application by the parents for a writ of habeas corpus in respect of the child against the respondents—

Held: (1) That in the circumstances, it could not be said that the parents ever intended to renounce their parental rights to the child. The father was therefore entitled to its custody.

(2) That the child, not having attained the age of discretion was not entitled in law to consent to her continuance in the custody of others. Her wishes were only relevant to the consideration whether the placing in parental custody would be detrimental to health and morals.

J. W. Subasinghe, for the petitioner.

H. W. Jayawardene, Q.C., with *L. W. Athulathmudali*, for the respondents.

H. N. G. Fernando, A.C.J.

Counsel for the petitioner has justifiably maintained that the petitioner and his wife did not effectively renounce their rights of parent-lord in respect of their child Dylanthie, in favour of the 2nd and 3rd respondents. It is perfectly clear on the evidence that the petitioner's wife, out of affection and sympathy for her childless sister, acceded to a request that the sister be permitted to bring up the child in her home, but without any agreement or implication, for a renunciation of parental rights. This undefined arrangement worked admirably for many years, during which the child's parents and the respondent husband and wife together shared the cares and joys of the child's upbringing. The 3rd respondent has admitted that, as frequently as possible every year, the child was sent or taken on visits to her parents and her sister and brothers and that the parents had throughout contributed towards the welfare of the child in a substantial manner. It would be quite unrealistic to think that the parents ever ceased to regard themselves as such, from the point of view whether of duty or of affection.

* For Sinhala translation, see Sinhala section, Vol. 12 part 3, p. 23

In these circumstances, I am unable to say that the petitioner's application lacks good faith. While the petitioner's wife had previously been willing, on compassionate grounds, to share with her sister the affection of her child, it is not surprising that under an impression (whether valid or imaginary) that her sister no longer deserves her compassion, she should now desire to deny to the sister the favour and sympathy extended in the past. The petitioner and his wife also apparently believe that the child's mind is being poisoned against them, and for this reason as well are anxious to resume their full rights and responsibilities of custody in their own interests and in those of the child.

Prima facie, the petitioner in this case has the right to the custody of his child. The child is under 8 and has not attained the age accepted by this Court as the age of discretion. She is therefore not entitled in law to consent to her continuance in the custody of others. (*Gooneratne* vs. *Clayton* 31 N.L.R. 132; *The Queen* vs. *Jayakodi* 9 S.C.C. 148). Her wishes are therefore relevant only to a consideration of the question whether it will be detrimental to her life, health and morals to place her now in parental custody. For this purpose I have talked to the child, and I find her to be quite normal, intelligent and of a cheerful disposition. She very definitely wishes to remain where she is, and I believe her statement that she has told her parents that she would not consent to stay with them even if they threatened to kill her. While these undoubtedly are her wishes I do not think that severe mental suffering or injury to health will ensue if she has now to live with her parents. (At the same time I would not like to form a final opinion at this stage.)

The child has stated that her parents and her sisters were unkind to her, and even ignored her, while she was with them last year. But it may well be that this unpleasantness was the consequence of her refusing her consent to live with her family, and I trust the family will strive to avoid such causes of discontent.

I accordingly order that the child be returned forthwith to the custody of her parents. I trust that this will be done next week without the need for any further intervention by the Court. But the petitioner will produce the child before me in chambers on Monday, 8th November 1965. In the meantime I trust that no change will be made in regard to the schooling of the child at St. Bridget's Convent, Colombo. I make no order as to the costs of the proceedings.

Application allowed.

ELECTION PETITION, No. 41 OF 1965

Present : **Tambiah, J.**

TISSAMAHARAMAYA—ELECTORAL DISTRICT NO. 75

LAKSHMAN RAJAPAKSE *vs.* S. KATHIRAGAMANATHAN

Argued on : August 31 1965
Decided on : October, 4 1965

Election Petition—Prayer for scrutiny and recount of votes and for declaration that candidate who lost be declared duly elected—Successful candidate not made a respondent—Is the petition badly constituted—Ceylon (Parliamantary Elections) Order-in-Council, 1946, *Third Schedule, rules* 8, 9 *and* 29 (1).

The petitioner in an election petition, to which only the Returning officer had been made respondent prayed:

(*a*) for scrutiny in terms of Section 80(b) of the Ceylon (Parliamentary Elections) Order-in-Council 1946.

(*b*) for a recount.

(*c*) for a declaration that if either of these showed that the petitioner had polled a majority of the lawful votes, that he be duly elected.

The successful candidate at the election was not made a party to the petition.

Held: (1) That as the successful candidate who is the party vitally interested had not been made a respondent, the petition was badly constituted and should be dismissed.

(2) That an amendment to an election petition is permitted only within the time allowed by law and the Court has no power to add a respondent after this time has lapsed.

(3) That the form of the petition and the rules set out in the Third Schedule to the Ceylon (Parliamentary Elections) Order-in-Council, 1946, also clearly contemplate that a successful candidate should he made a respondent when a declaration is sought that the candidate who lost should be declared duly elected.

Per **Tambiah, J.** — "A clear distinction should be drawn between a recount and a scrutiny. A recount is only ordered when there has been no count according to law and a scrutiny is granted when as a result of bribery, impersonation, etc., a winning candidate has not obtained the votes he is entitled to in law."

P. Nagendran with *S. S. Kandiah*, for the petitioner.

M. Kanagasundaram, Crown Counsel, for the respondent.

TAMBIAH, J

In this case the petitioner has made only the Returning Officer a respondent. He has failed to make Mr. C. F. W. Edirisuriya, the candidate returned at the election, a party to this action. When this matter was mentioned in chambers, I brought to the notice of counsel for the petitioner and the Crown Counsel who represented the Returning Officer that I would like to consider whether the election petition is properly constituted.

On the 31st of August this matter was argued and the learned Crown Counsel submitted that the successful candidate is a necessary party in this case and since the petitioner has not made him a party the petition should be dismissed.

After a careful consideration of the arguments presented by counsel I am of the view that the successful candidate is a necessary party to this action. Particularly in view of the grounds on which this election petition is based and the remedies sought for in the prayer of this petition the successful candidate should have been made a party to the action.

The petitioner alleges that he was not given permission for a recount despite his request to do so, and that the purported recount granted to him was in fact, in law no recount at all as the manner of the recount could not and did not exclude errors in counting nor did it aid the discovery of errors in sorting. He prays that a scrutiny be granted in terms of section 80 (b) of the Ceylon (Parliamentary Elections) Order in Council, 1946 and also for a recount. He seeks a declaration that in the event of the scrutiny or recount showing that the petitioner had polled a majority of the aw ful votes that the petitioner be duly elected.

A clear distinction should be drawn between a recount and a scrutiny. A recount is only ordered when there has been no count according to law and a scrutiny is granted when as a result of bribery, impersonation, etc., a winning candidate has not obtained the votes he is entitled to in law. In a scrutiny the inquiry into each vote is dealt with separately (vide The Law of Election and Election Petitions by Hugh Fraser (3rd Edition) page 225). On a scrutiny the Court is empowered to strike out the votes which were procured by bribery, cheating, undue influence, impersonation and on other grounds set out in section 85 of the Parliamentary Elections Order in Council. When a scrutiny is asked for by a petitioner the successful candidate is also entitled to show that votes cast in favour of the petitioner should be struck off for similar reasons.

In an election petition where scrutiny is asked for, if the petitioner leads evidence to establish a case for scrutiny, the Returning Officer would naturally be not interested in defending the case. The only person who could disprove the allegations and who is interested in the matter would be the successful candidate. It is clear therefore that the person who is vitally interested in the scrutiny demanded is the successful candidate. It is a fundamental and elementary proposition of law that no order can be made against a person before he is heard. The *audi alteram partem* rule is ingrained in every legal system of the civilized world.

Counsel for the petitioner however contended that although scrutiny and recount were remedies asked for in the petition, he would confine his case only to a recount. Since the time allowed for amending the petition has elapsed, counsel for the petitioner cannot now amend the

petition by striking out the prayer for scrutiny. Even if the remedy sought for is only a recount still the successful candidate should have been made a party to this action. The successful candidate may be able to show that there had been a proper count and therefore no case has been made for a recount. He could do this by cross-examination of the witnesses who would be called by the petitioner as well as by calling evidence on his own behalf. This opportunity has been denied to the successful candidate.

The third schedule to the Ceylon (Parliamentary Elections) Order in Council, 1946 contains a form of the petition. It has no caption but from the several provisions found in the schedule it is clear that the successful candidate is a necessary party in an action of this nature. The prayer in the model petition that is set out in schedule 3 of the Order in Council states as follows: "Wherefore your petitioners pray that it might be determined that the said A. B. was not duly elected or returned, and that the election was void (or that the said E. F. was duly elected and ought to have been returned, or as the case may be)." The terms of the prayer in the model petition have been followed in this action.

In the prayer the petitioner seeks for a declaration that he should be duly elected. In these circumstances it would be a denial of justice if the successful candidate is not given a chance to defend the action.

Rule 8 of the third schedule referred to above enacts:

> "The respondent in a petition complaining of an undue return and claiming the seat for some person may lead evidence to prove that the election of such person was undue. In such case the respondent shall, six days before the day appointed for trial, deliver to the Registrar, and also at the address, if any, given by the petitioner, a list of the objections to the election upon which he intends to rely, and the Registrar shall allow inspection of office copies of such lists to all parties concerned and no evidence shall be given by a respondent of any objection to the election not specified in the list, except by leave of the judge, upon such terms as to amendments of the list, postponement of the inquiry, and payment of costs, as may be ordered."

From this it is clear that the successful candidate is a respondent within the meaning of Rule 8.

Rule 10 of the third schedule referred to, refers to the appointment of an agent by a winning candidate, although no election petition has been filed against him. The caption to this rule is as follows: "Appointment of agent by respondent". This rule again clearly contemplates the making of a successful candidate a respondent.

Rule 29 (1) enacts that if before the trial of an election petition a respondent dies or resigns, or gives notice in writing to the court that he does not intend to oppose the petition, the petition shall not be abated but shall continue whether or not any person applies to be admitted as respondent as hereinafter provided. All these rules clearly contemplate that the successful candidate should be made a respondent to an election petition if a declaration is sought that the candidate who has lost should be declared duly elected.

In India it has been held that all candidates nominated at an election must be made respondents if the petitioner in addition to calling in question the election of the returned candidate, also claims to be duly elected (vide *Sharanpore case* 1 Hammond's Indian Election Petitions at 199, cited in Elections and Election Petitions by Nanak Chand, Nanchand and Kali Sharan, p. 501) If this is not done the petitioner cannot be declared to be elected even though the election of the respondent has been over-ruled.

The petitioner could have amended his petition during the time allowed to him by law. This time has elapsed now. The court has no power to add the candidate as a party to the petition. Therefore I hold that the election petition is badly constituted since the successful candidate has not been made a respondent. The action is therefore dismissed with costs.

Dismissed.

Present: **Sri Skanda Rajah, J.**

PEIRIS *vs.* THOMAS

S.C. 1119/65—*M.C. Gampaha Case No.* 96661/*B.*

Argued and decided on: 14th February, 1966.

Penal Code, section 409—*Co-owner demolishing fence erected by another co-owner on co-owned property—Is he guilty of the offence of mischief ?*

Held : That a co-owner who demolishes a fence erected by another co-owner on co-owned property cannot be convicted of the offence of mischief.

Cases referred to : *Porolis* v. *Romanis*, 2 C.A.C. 162
Ibrahim Lebbe v. *Saibo*, 2 C.W.R. 99

N. E. Weerasooria (Jnr.) with *C. V. R. Isaac*, for the accused-appellant.

F. W. Obeysekera, for the respondent.

SRI SKANDA RAJAH, J.

In the course of his judgement the Magistrate came to the finding: " The Certificate of Encumbrance, D 2, shows that the claim made by the accused that he was a co-owner of undivided shares of Ambagahawatte is not altogether unfounded by reason of the examination and execution of these deeds. The question would therefore arise whether if he was a co-owner he had the right to demolish a fence erected by another as and how he chose."

The Certificate of Encumbrance shows the two deeds on which C.H. Obeysekera took a mortgage of an undivided 1/16 share of Ambagahawatte and another mortgage of an undivided 1/32 share of Ambagahawatte. There is another deed showing that J. S. Obeysekera with O. H. Obeysekera as the trustees and J. P. Obeysekera, D. W. Peiris, H. D. Peiris (nee Obeysekera) and P. E. Peiris dealt with certain undivided shares of Ambagahawatte. So that the finding of the Magistrate is not without substance.

The complainant, watcher of this property, had seen the deeds on which his master or masters claim shares. Those deeds have not been produced. There is no indication that this land was amicably divided among co-owners at any stage. Under those circumstances this conviction should not be allowed to stand.

If authority is necessary the following case is relevant: *Porolis* vs. *Romanis* 2 C.A.C 162, where it was held that, " A person can be said to be guilty of mischief only if he acts spitefully, maliciously or wantonly. He should either intend to cause wrongful loss or know that wrongful loss is likely to be caused to some person.

A co-owner who removes a fence in the assertion of a real or fancied right to an enclosed portion of what is claimed as common property does not thereby commit mischief. "

This case was followed in *Ibrahim Lebbe* vs. *Saibo* 2 C. W. R. 99 where the accused who claimed to be co-owners of a certain land with the complainant with a view to protesting against the assertion by the complainant of a right to a defined portion, removed a fence put up by the complainant. It was held that where the act was done in the assertion of a right to prescription, the offence of mischief was not committed.

For these reasons I would set aside the conviction and sentence and acquit the accused.

Accused acquitted.

* For Sinhala translation, see Sinhala section, Vol. 12, part 5, p. 22

Present: **Sri Skanda Rajah, J. and Alles, J.**

EKANAYAKE MUDIYANSELAGE DAYAWATHIE

vs.

WIJESINGHE ARATCHILAGE GUNARATNE

S.C. 561/1964 (F)—*D.C. Kurunegala* 1656/*D*

Argued on: 1st September, 1965
Decided on: 9th February, 1966

Marriage Registration Ordinance (*cap* 112), *sections* 42 *and* 46—*Marriage of minor registered without consent of parent or guardian—Is the marriage void?*

Held: That when the marriage of a minor is registered under the Marriage Registration Ordinance, want of consent of parent or guardian does not make the marriage null and void.

Case referred to: *Selvaratnam* v. *Anandavelu*, (1941) 42 N.L.R. 487.

W. D. Gunasekera with *W. S. Weerasooriya*, for the plaintiff-appellant.

T. B. Dissanayake, for the defendant-respondent.

SRI SKANDA RAJAH, J.

The marriage between the Plaintiff-Appellant, who was 18 years and 2 months old, and the defendant-respondent was registered on 23.8.1963.

This action was filed praying for a declaration that the marriage was null and void on the ground that it was contracted without the consent of her father, the next-friend.

The relevant provision in the Marriage Registration Ordinance, Cap. 112, section 42, which enacts:-

"After any marriage shall have been registered under this Ordinance it shall not be necessary in support of such marriage to give proof . . . . . of the consent to any marriage having been given by any person whose consent thereto was required by any law . . . . . *nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage.*"

The portion underlined above speaks for itself. If evidence regarding want of consent is shut out by Statute, then it necessarily follows that the marriage cannot be declared invalid on that score.

Want of the requisite consent is not one of the circumstances mentioned in section 46 which sets out the circumstances in which a marriage will be null and void.

In *Selvaratnam et al. v. Anandavelu* (1941), 42 N.L.R. 487, at 493, de Kretser, J. pointed out, "where the provisions of the Ordinance have been flagrantly flouted, section 42 (new section 46) declared such marriage null and void. Want of consent was not so drastically treated." I would respectfully adopt this dictum.

For these reasons, I would dismiss the appeal without costs.

ALLES, J.

I agree.

Appeal dismissed.

Present: **Sansoni, C.J. and G. P. A. Silva, J.**

M. S. KARIAPPER *vs.* THE CLERK AND THE ASSISTANT CLERK OF THE HOUSE OF REPRESENTATIVES

In the matter of an application for a Mandate in the nature of a WRIT OF MANDAMUS under the provisions of Section 42 of the Courts Ordinance, Chapter VI, Volume I of the Legislative Enactments of Ceylon (1956 Revised Edition)

(S. C. Application No. 8/1966)

Argued on: 16th, 18th, 21st and 30th March, 1966.
Decided on: 30th April, 1966.

Mandamus — Does not lie against servant or agent of the Crown.

Appropriation Act — Does not create rights or impose legal duties — Payment of allowances to Members of Parliament — No legal duty imposed on Clerk to the House.

Ceylon Constitution — Doctrine of "ultra vires" — Effect of Speaker's Certificate — "Peace Order and Good Government" — Usurpation of Judicial Power — Doctrine of amendment by subsequent inconsistent enactment.

Civic Disabilities (Special Provisions) Act No. 14 of 1965, Sections 5, 7, 10 — Ceylon (Constitution) Order-in-Council 1946, Sections 3, 13, 24, 28(I), 29, 55 (I)—Appropriation Act No. 7 of 1965, Section 2—Criminal Law (Special Provisions) Act No. 1 of 1962 — Criminal Law Act No. 31 of 1962—Bribery Act No. 11 of 1954 — Bribery (Amendments) Act No. 40 of 1958.

Interpretation of Statutes—Expressio unius exclusio alterius

The Petitioner was elected to the House of Representatives from the Kalmunai Electoral District at the General Election held in March 1965. Four years previously, in 1960, a Commission of Inquiry appointed by the Governor-General under the Commissions of Inquiry Act to investigate and report upon the prevalence of bribery among members of the Legislature had found that an allegation of bribery made against the Petitioner was proved. On 16th November 1965, the Imposition of Civic Disabilities (Special Provision) Act—hereinafter referred to as the impugned Act—received the Royal Assent. The object of this Act was to impose civic disabilities on the persons against whom allegations of bribery had been held to have been proved by the Commission of Inquiry. In terms of its provisions, the Petitioner was deemed to have vacated his seat from the date on which the impugned Act came into operation, and he was further disqualified from being elected or appointed to the Legislature for a period of seven years. The Act contained a provision that wherever necessary, it was to be deemed as having amended the Ceylon (Constitution) Order-in-Council 1946. There was also endorsed on the Bill when it was presented for the Royal Assent, the Certificate of the Speaker that two-thirds of the members of the House of Representatives had voted in favour of it.

The Petitioner contended that inasmuch as the Act was *ultra vires* the Ceylon (Constitution) Order-in-Council, he continued to be a Member of Parliament. He therefore applied for a Writ of Mandamus against the Clerk to the House directing him to recognise him as the Member for Kalmunai, and pay him his remuneration and allowances as such member which had not been paid since the end of October 1965.

It was argued on behalf of the Petitioner that:—

1. Though the Act purported to deprive the electors of the Kalmunai Electoral District of the services of the Member of Parliament whom they had chosen and impose on him penalties, such as vacation of the seat and the disqualification from sitting and voting, no Act of Parliament, even by a constitutional amendment, could do this;

2. The Act was not a law contemplated by section 29(4) of the Ceylon Constitution because it was in effect a judgment or an enactment interfering with judicial power and could not be saved even by the Speaker's Certificate;

3. Before this Bill was placed before the House, the Constitution should have been amended by a separate Act which empowered the Legislature to exercise judicial power and to pass Bills of Attainder;

4. The Bill should have been expressly stated to be a Bill for the amendment or repeal of the Constitution and not one for the imposition of civic disabilities.

Held: (*a*) That a provision of any Act bearing the Speaker's Certificate which is inconsistent with a term of the Constitution operates as a repeal by implication.

(*b*) That an amendment of the Constitution made in accordance with section 29(4) becomes a part of the Constitution and is entitled to all the obedience due to any other part of the Constitution.

(*c*) That it is not open to the Supreme Court to say that a law passed by two-thirds of the members of the House of Representatives does not conduce to peace, order and good government. The Court is not at liberty to declare an Act void because it is said to offend against the spirit of the Constitution though that spirit is not expressed in words.

(*d*) That the *ex post facto* nature of the legislation did not affect its validity.

(*e*) That accordingly, the Imposition of Civic Disabilities (Special Provisions) Act No. 14 of 1965 is *intra vires* the Ceylon (Constitution) Order-in-Council 1946.

Held further: (*f*) That the effect of the Appropriation Act was not to give a third party a right to the money authorised by it to be expended for a particular purpose. Accordingly, there is no legal duty on the Clerk to the House to pay the Petitioner his remuneration and allowances.

(*g*) That the Clerk to the House, when he pays Members of Parliament their remuneration and allowances, acts as a servant or agent of the Crown, and Mandamus does not lie against a servant or agent of the Crown to compel him to perform a duty which he owes to the Crown.

Per G. P .A. Silva, J.—(*A*) "I am therefore of the view that the *ex post facto* nature of the legislation does not affect its validity. The fact that this legislation touches a matter which belongs to the field of conduct of members over which the House has full control would tend to reduce the offensive nature. if any, of such legislation."

(*B*) "I do not think that when the proviso to Section 29 (4) proceeded to set out the manner of presentation of a constitutional amendment it also intended to prescribe a particular form to be present on the face of it This provision is in fact tantamount to the requirements for a Bill whtch amends or repeals the Constitution, namely, a vote of two-thirds of the whole number of members of the House and a certificate of the Speaker to that effect. If these requirements are satisfied, as they have been in this case, I think, that the Parliament, in terms of Section 29(4), can amend or repeal any provision of the Constituton subject to any objection which may be raised in view of Section 29 (2).

Cases referred to: *The Queen* v. *Lords Commissioners of the Treasury* (1872) 7 *Q.B.D.* 387.
United States v. *Lovett* (1945) 328 U.S. 303.
Calder v. *Bull* (1798) 3 U.S. 386.
The Queen v. *Liyanage & Others*, (1962) 64 N.L.R. 313 ; LXII C.L.W. 49
Liyanage v. *The Queen* (1966) LXX C.L.W. 1.
The Bribery Commissioner v. *Ranasinghe* (1964) 66 N.L.R. 73; LXVI C.L.W. 1; 1965 A.C. 172
Gopalan v. *The State of Madras* (1950) 63 L.W. 638.
McCawley v. *The King* (1918) 26 C.L.R. 9.
The Queen v. *Richards* (1954) 92 C.L.R. 157.
Cooper v. *Commissioner of Taxes for Queensland* (1904) 4 C.L.R. 1304.
McCawley v. *The King* (1920) A.C. 691.
Krause v. *Commissioner for Inland Revenue* (1920) A.D. 286.
Thambiayah v. *Kulasingham*, (1949) 50 N.L.R. 25; XXXVIII C.L.W. 53.
Shyamakant Lal v. *Rambhajam Singh et al.*, A.I.R. 1939 Federal Court 74.
Ashwarden v. *Tennessee Valley Authority*, (1935) 297 U.S. 288.

H. W. Jayawardene, Q.C., with *M. T. M. Sivardeen*, *D. Sena Wijewardena* and *Mark Fernando*, for the Petitioner.

V. Tennakoon, Q.C., Solicitor-General, with *V. T. Thamotheran*, Deputy Solicitor-General and *H. L. de Silva*, Crown Counsel, for the Respondent.

Sansoni, C.J.

The petitioner, Mr. Mohamed Samsudeen Kariapper, was duly elected a member of the House of Representatives for the Kalmunai Electoral District at the General Election held in March 1965. He has applied for a writ of Mandamus against the Clerk and the Assistant Clerk to the House, ordering them to recognise him as the Member of Parliament for Kalmunai, and to pay him his remuneration and allowances as such Member which have not been paid since the end of October 1965.

The discontinuance of such payment dates from the passing of the Imposition of Civic Disabilities

(Special Provisions) Act, No. 14 of 1965, which received the Royal assent on 16th November, 1965. The legality of this Act (which I shall refer to as the impugned Act) has been challenged by the petitioner on the ground that it offends against the Ceylon (Constitution) Order-in-Council, 1946.

It is necessary, in view of this attack on the Act, to consider how it came to be enacted. On 11th September 1959, a Commission of Inquiry consisting of Messrs. W. Thalgodapitiya, T. W. Roberts and S. J. C. Schokman was appointed under the Commissions of Inquiry Act, Cap. 393, by the Governor-General to investigate and report on —

(*a*) whether during the period commencing on January 1, 1943, and ending 11th September 1959, any gratification had been offered, promised, given or paid directly or indirectly to any person who then was or had been a member of the Senate, or the House of Representatives, or of the State Council, in order to influence his judgment or conduct in respect of any matter with which he in that capacity was concerned whether as of right or otherwise;

(*b*) whether during that period any such gratification had been solicited or received, directly or indirectly, by any such person as a reward for any service rendered by him in that capacity whether as of right or otherwise.

It issued an interim report by which it found Messrs. Henry Abeywickrema, D. B. Monnekulame and R. E. Jayatilleke guilty of having received gratifications as contemplated by the terms of reference. By its final report it found Messrs. C. A. S. Marikkar, M. P. de Zoysa and the petitioner also guilty. These reports were tabled in the House of Representatives on December 16, 1960, and were ordered to be printed. They have been published as Parliamentary Series No. 1 of the Fifth Parliament.

The Commissioners pointed out in their interim report that the standard of proof required by them was proof beyond reasonable doubt. They also pointed out in that report that each term of reference was much wider in scope than Section 14 of the Bribery Act No. 11 of 1954, in that it "categorically and universally covers any act done by any Member of Parliament in his capacity as a Member of Parliament whether he has a right or not." They said in their final report: "The appointment of the Commission was due to serious allegations made in Parliament and the local press of wide-spread corruption by members of the Government in power, specially since the grant of independence to Ceylon. A Commission with similar terms of reference was issued to Mr. L. M. D. de Silva (now Right Honourable L. M. D. de Silva, P.C.) in 1941 which covered the period up to the end of 1942 The period under the purview of this Commission starts from 1943....."

With regard to their procedure, they stated: "All investigations were carried out under the direction of the Commission. We received clues either written or oral. Then the Investigation Officers attached to the Commission were directed to investigate such clues. Those officers brought the results of their investigations to the Crown Counsel attached to the Commission and any further evidence, if necessary, was obtained on his instructions. The Crown Counsel reported to the Chairman whether there was a prima facie case, and if the Commission agreed, the person against whom the allegation had been made was summoned before the Commission, informed of the allegations against him and given an opportunity to make any statement he wished to make in explanation or in exculpation. Thereafter if the explanation seemed unsatisfactory, the matter was fixed for inquiry. By adopting this method the Commission sought to avoid the risk of being suspected of prejudice or pre-judgment." They also said this: "We decided at the outset that all hearings at inquiries should be in public. We did so because we wished not merely that justice should be done but should plainly and manifestly be seen to be done. The proceedings of the inquiries were open to the public and, we believed, were fully published in the newspapers in all three languages."

The preamble to the impugned Act recites the appointment of this Commission, the findings that the allegations of bribery had been proved against certain persons, and that it has become necessary to impose civic disabilities on the said persons consequent on the findings of the said Commission. The long title of the Act recited that it is an Act to impose civic disabilities on certain persons against whom allegations of bribery were held by a Commission of Inquiry to have been proved, and to make provision for matters connected therewith or incidental thereto.

The six persons who were found guilty by the Commission are mentioned in the Schedule to the Act and it is to them and them alone that the Act applies. The disabilities imposed on them are:—

(1) Disqualification for registration in registers of electors — section 2.

(2) Disqualification from voting at a parliamentary or local election — section 3.

(3) Disqualification from being a candidate at a parliamentary or local election — section 4

(4) Disqualification from being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or in the House of Representatives — section 5.

(5) Disqualification from being a Member of any local authority — section 6.

(6) If any of them was a Senator or a Member of the House of Representatives or any local authority on the day immediately prior to November 16, 1965 his seat in that capacity is deemed to have been vacant on that date — section 7.

(7) Disqualification from employment as a public servant, or from being a member of any scheduled institution as defined in the Bribery Act — section. 8.

(8) If any of them was a public servant or a member of a scheduled institution on the day immediately prior to November 16, 1965, he is deemed to have vacated his office in that capacity — section 9.

Section 10 reads:—

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

(2) Where any provisions of this Act are supplementary to, or inconsistent or in conflict with, any provisions of any appropriate law, other than the Order-in-Council referred to in sub-section (1), the said provisions of this Act shall be deemed, for all purposes and in all respects, to be as valid and effectual as though the said provisions of this Act were in an Act for the amendment of such appropriate law enacted by Parliament.

(3) The provisions of any appropriate law shall have force and effect subject to the provisions of this Act, and accordingly shall be read and construed subject to such modifications or additions as may be necessary to give the provisions of such appropriate law the force and effect aforesaid.

(4) In the event of any conflict or inconsistency between the provisions of this Act and the provisions of any appropriate law, the provisions of this Act shall be read and construed subject to all such modifications or additions as may be necessary to resolve such conflict or inconsistency or, in the event of it not being possible so to do, shall prevail over the provisions of such appropriate law.

There can be no question that the Act was treated by the Legislature as coming within section 29(4) of the Constitution which deals with Bills for the amendment or repeal of the provisions of the Constitution. There was endorsed on the Bill, when it was presented for the Royal assent, the necessary certificate of the Speaker that the number of votes cast in favour of it in the House of Representatives amounted to no less than two-thirds of the whole number of the Members of the House (including those not present). A copy of Hansard dated 21st October 1965 is produced along with the petition for Mandamus. It shows that the Second Reading was passed by 142 votes to 1, and the Third Reading by 130 votes to none.

The first objection taken by the Solicitor-General to the grant of the writ was based on two grounds — (1) that there is no legal duty on the Clerk of the House to pay the petitioner his remuneration and allowances, and (2) that the Clerk, when he pays Members of Parliament their remuneration and allowances, acts as a servant or agent of the Crown and Mandamus does not lie against a servant or agent of the Crown to compel him to perform a duty which he owes to the Crown. As this objection can be decided apart from any constitutional question that arises, I shall deal with it first, assuming for this purpose that the petitioner is still a Member of Parliament.

The question is whether such a Member can ask for a writ of Mandamus from this Court to compel the Clerk of the House to pay him his remuneration and allowances. Now these amounts would be paid out of money provided by the Appropriation Act No. 7 of 1965. Section 2 of the Act authorises the sums appearing in the first schedule to be expended as specified in that schedule. Under Head VI Vote No. 2 a sum of money has been specified as payable on account of "administration charges — recurrent expenditure" of the House of Representatives. But the Act does not either expressly or impliedly

impose a legal duty which the Clerk of the House owes to the petitioner. The matter is made clear in *The Queen* vs. *Lords Commissioners of the Treasury* (1872) 7 Q.B.D. 387. The argument of Jessel, S.G., that the effect of the Appropriation Act is not to give any third person a right to the money, was accepted by Blackburn, J. in his judgment.

The further ground of objection, that the money voted in the Act would be received by the Clerk and paid by him to a Member of Parliament as a servant or agent of the Crown, is also valid. He is answerable to the Crown, and to the Crown alone. Cockburn, C.J. said in his judgment in the same case, referring to the jurisdiction to issue a Writ of Mandamus, "I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction." It is not necessary to refer to any further authorities on this point because the case cited is still regarded as a leading authority.

Mr. Jayawardene argued that the Clerk is neither a servant of the Crown nor a public officer, but a servant of the House. He would, I think, be a servant of the House in so far as he has duties to perform in the House; and he is bound to obey the commands of the House: but he is undoubtedly, for the purpose of the law relating to Mandamus, a public officer who has been appointed under section 28(1) of the Constitution by the Governor-General. He is not a public officer as that term is used in the Constitution, only because Section 3 of the Constitution excludes him from the category of public officers. But if any payments of public money provided by the Appropriation Act have to be made, he is the proper person to make them, and he makes them as a public officer who is answerable to the Crown.

The legal position that a person cannot ask for Mandamus against a public officer to pay him money which the latter holds as a servant of the Crown was conceded by Mr. Jayawardene. He admitted that his application must fail if the Clerk is a servant of the Crown, and if the money which the petitioner claims is money of the Crown. The petitioner, therefore, must fail on this ground alone.

But in deference to the arguments which we heard in respect of the constitutionality of the impugned Act, I think we should express our opinion on the question where the petitioner is still a Member of Parliament, as he claims to be. For the decision of this question it is not necessary to pronounce specifically on all the sections of the Act, since sections 5, 7 and 10 alone are concerned in this application. If section 5 is valid the petitioner is disqualified for 7 years from November 16, 1965, for sitting or voting in the House of Representatives. If section 7 is valid he is deemed to have vacated his seat in the House of Representatives. And throughout it must be remembered that section 10 and the certificate of the Speaker save such provisions of the Act as involve a conflict with the Constitution. Now sections 5 and 7 are related to sections 13 and 24 respectively of the Constitution. Section 13(3) provides:—

> "A person shall be disqualified for being elected or appointed as a .....member of the House of Representatives or for sitting or voting..... ..... in the House of Representatives .....
>
> (*k*) if during the preceding seven years he has been adjudged by a competent Court or by a Commission appointed with the approval of the Senate or the House of Representatives or by a Committee thereof to have accepted a bribe or gratification offered with a view to influencing his judgment as a Senator or as a Member of Parliament."

Section 24(1) provides —

> "The seat of a Member of Parliament shall, become vacant .....
>
> (*d*) if he becomes subject to any of the disqualifications mentioned in section 13 of this Order.

It will thus be seen that so far as sections 5 and 7 of the impugned Act are concerned they seek to add another disqualification to those provided in section 13 of the Constitution, and to render the seat of a Member of Parliament vacant on a ground not already contained in section 24(1) of the Constitution. This is undoubtedly an attempt to amend the Constitution, and was recognised as such by those who sought to make it. That is why the procedure prescribed in section 29(4) was adopted; and to make the matter clear

there was enacted section 10 which says that the Act was to be deemed to be as valid and effectual as though its provisions were an Act for the amendment of the Constitution.

Mr. Jayawardene's argument was that as the Act deprived the electors of the Kalmunai Electoral District of the services of the Member of Parliament whom they had chosen, and imposed on him penalties, such as vacation of the seat and the disqualification from sitting or voting, no Act of Parliament can do this even by a constitutional amendment. He relied on certain American decisions, none of which dealt with a similar situation. In *United States* vs. *Lovett* (1945) 328 U.S. 303, it was held that an Act of Congress which prohibited payment of compensation to certain named Government employees charged with subversive activity was void, as it violated the Constitution. There is a certain risk in relying on American decisions which interpret provisions of that Constitution which have no parallel in our Constitution. That decision held that the Act of Congress was a Bill of Attainder which offended against Article 1, Section 9, Clause 3 of the Constitution, which states "No Bill of Attainder or *ex post facto* Law shall be passed." There is no provision of that nature in our Constitution, though the same result could be reached in Ceylon by attacking the Act as a usurpation of judicial power, as the Privy Council has recently shown. But always a distinction must be drawn between Acts passed in the ordinary way and those passed under section 29(4) of the Constitution.

Another American decision cited was *Calder* vs. *Bull* (1798) 3 U.S. 386. It considered what was an *ex post facto* law within the meaning of the Constitution, and held that the phrase applied only to penal and criminal statutes. I think that decision is still good law in America, and its effect would be to prevent the passing of an Act which inflicted a punishment for any conduct which was innocent at the time it was committed, or increased the punishment previously provided for any specific offence. The judgment of Chase, J. was cited by the Privy Council in its recent judgment in *Liyanage* vs. *The Queen* (1966) 70 C.L.W. 1. The particular sentence quoted by Lord Pearce reads: "These acts were legislative judgments; and an exericse of judicial power," and it occurs in a passage which reads: "All the restrictions contained in the Constitution of the United States on the power of the State Legislatures, were provided in favour of the authority of the Federal Government. The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other laws, lesser punishment. These acts were legislative judgments; and an exercise of judicial power..... ..... To prevent such and similar acts of violence and injustice, I believe, the Federal and State Legislatures were prohibited from passing any bill of attainder; or any *ex post facto* law." The citation was undoubtedly appropriate in the Privy Council judgment because it was there held that the Criminal Law (Special Provisions) Act No. 1 of 1962 and the Criminal Law Act No. 31 of 1962 were enacted with the aim of ensuring that the defendants who were then in custody should be convicted and should suffer enhanced punishment. They thus constituted, in the opinion of the Privy Council an interference with the functions of the judiciary. They were aimed at particular known individuals who were about to be tried, and taking these and other facts into consideration they were held to infringe the judicial power. But at the same time Lord Pearce made it clear that legislation is not necessarily a usurpation or infringement of the judicial power because it is *ad hominem* and *ex post facto*. He said: "Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed,..... and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings." I cannot, however, see any resemblance between the substance of the impugned Act and the two Acts which the Privy Council considered in their judgment. The former Statute was enacted in order to give effect to the findings of the Commission of Inquiry which had finished its task. The latter Statutes were "a legislative plan *ex post facto* to secure the conviction and enhance the punishment of particular individuals."

But what is more important, and I think decisive, is the fact that the impugned Act was passed as a Constitutional amendment, with the Speaker's certificate to protect it, while the two Acts considered by the Privy Council were not. The Privy Council has, in this judgment and earlier, held that section 29(1) of our Constitution "was intended to and did have the result

of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State." The only limitation on that power is that contained in section 29(2), as the Privy Council held in *Ranasinghe's case* (1946) 66 N.L.R. 73. It is beyond doubt that the words used in section 29(1) of the Constitution are the words "habitually employed to denote the plenitude of sovereign legislative power."

Mr. Jayawardene submitted that the impugned Act was not a law contemplated by section 29(1) because it was in effect a judgment or an enactment interfering with judicial power, and could not be saved even by the section 29(4) certificate. But the answer to that argument is that an amendment of the Constitution made in accordance with section 29(4) becomes a part of the Constitution, entitled to all the obedience due to any other part of the Constitution. It is not for the Court to say that a law passed by two-thirds of the whole number of members of the House does not conduce to peace, order and good government. The Court is not at liberty to declare an Act void because it is said to offend against the spirit of the Constitution though that spirit is not expressed in words. "It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority" — per Kania C.J. in *Gopālan* vs. *The State of Madras* (1950) 63 L.W. 638. There is also the opinion of Isaacs and Rich JJ. in *McCawley* vs. *The King* (1918) 26 C.L.R. 9 that "there is nothing sacrosanct or magical in the word 'Constitution', the expression itself not indicating how far, or when, or by whom, or in what manner the rules comprising it may be altered. All these things must depend upon the rules themselves." Sir Owen Dixon on his appointment as Chief Justice of the High Court of Australia in 1952 said this: "The Court's sole function is to interpret a Constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and it has nothing whatever to do with the merits and demerits of the measure. ..... There is no safer guide to judicial decisions in great conflicts than a strict and complete legalism."

The judgment of the Privy Council in *Liyanage's case* contains some very significant passages which are relevant to this part of the argument. It said, "there exists a separate power in the judicature which under the Constitution *as it stands* cannot be usurped or infringed by the executive or the legislature" and again, "Their Lordships cannot read the words of section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature — e.g. by passing an act of attainder against some person or instructing a judge to bring in a verdict of guilty against some one who is being tried — if in law such usurpation would otherwise be contrary to the Constitution. There was speculation during the argument as to what the position would be if Parliament sought to procure such a result *by first amending the Constitution by a two-thirds majority*. But such a situation does not arise here. In so far as any Act passed *without resort to section* 29(4) *of the Constitution* purports to usurp or infringe the judicial power it is *ultra vires*." (the italics are mine in each case). It is that situation we are faced with now, and I have given my view after anxious consideration.

Dealing with the matter on a lower plane, the Solicitor-General also submitted that the Constitution itself, provided in section 13(3) (k) for a Commission appointed with the approval of the House of Representatives or a Committee of the House to adjudge one of its Members guilty of a charge of accepting a bribe or gratification, and thereby passing judgment on him. In this case the petitioner was a Member of Parliament whom the House of Representatives, by passing the impugned Act, judged unfit to occupy his seat any longer because of the findings of the Commission of Inquiry. In my view, sections 13 and 24 of the Constitution lend support to the view I have formed that, apart from other considerations which may affect the other provisions of this Act, the Legislature was well within its powers when it enacted sections 5 and 7 with the necessary two-thirds majority. The case of *The Queen* vs. *Richards* (1954) 92 C.L.R. 157, which the Solicitor-General cited is not exactly in point, but it throws light on the nature of the particular power which has been exercised in sections 5 and 7 of this Act, had they and section 10 alone been enacted. Dixon C.J. pointed out in that case, which was one where the Speaker of the House of Representatives of the Commonwealth Parliament issued a warrant of arrest, that there has been throughout the course of English history a tendency to regard the powers of the House of Commons in such matters as not strictly judicial but as belonging to the legislature, as something essential or at any rate proper for its protection. I see no objection to the Ceylon House of Representatives, by a constitutional

amendment, extending the power it had under section 13(3)(k) to this particular case by enacting sections 5 and 7 of the impugned Act. They do not thereby exercise judicial but legislative power, and restrospectively impose a disqualification on one who was already a Member of Parliament.

Mr. Jayawardene also attacked the procedure by which Parliament passed the impugned Act. He submitted that the Constitution should first have been amended by a separate Act which empowered the Legislature to exercise judicial power and to pass Bills of Attainder. A Bill should then have been placed before Parliament containing provisions similar to sections 2 to 9. He read the words "Bill for the amendment or repeal of any of the provisions of this Order" appearing in section 29(4) of the Constitution as contemplating only a Bill which directly amended or repealed specific provisions of the Constitution, and not a Bill such as the one before us. For this argument he relied mainly on the case of *Cooper* vs. *Commissioner of Taxes for Queensland* (1904) 4 C.L.R. 1304. The High Court of Australia held in that case that it was not competent for the Legislature of Queensland to pass any enactment inconsistent with the provisions of the Queensland Constitution Act without first specifically amending the Constitution. In effect the High Court held that the doctrine of amendment be subsequent inconsistent enactment was not available, and that there should have been an antecedent amendment of the Constitution before any Act which came into conflict with the Constitution was passed.

In my opinion Cooper's case ceased to be of any authority after the decision of the Privy Council in *McCawley* vs. *The King* (1920) A.C. 691, which overruled Cooper's case and held that a provision of any Act which was inconsistent with a term of the Constitution of Queensland operated as a repeal by inconsistency. In the Privy Council judgment Lord Birkenhead approved the dissenting judgment of Isaacs and Rich JJ. in *McCawley* vs. *The King* (1918) 26 C.L.R. 9. It is useful to quote two passages from that dissenting judgment "implied repeal by antagonistic legislation of an affirmative character is said to be legally impossible. No doubt is raised as to the competency of the Queensland Parliament to pass the self-same Act in the same terms, in the same way, by the same royal assent. But it is said to be dependent upon the condition that it previously passed an Act expressly labelled as an amendment of the Constitution Act, and expressly repealing or altering the sections referred to. All this, it is said, arises because the Constitution Act of 1867 is labelled "Constitution." If such efficacy is given to that Act because of its label, then it is self-evident that any other Act passed in the ordinary way, provided no specific manner or form is prescribed for such an Act, will be of equal validity if only it be similarly labelled. And so, ultimately it comes to a question of prefatory label." Also, "Does English law make any distinction between an express repeal and an implied repeal? We think not. Given the competent authority, given the absence of any stated requirements as to special method of repeal, we know of no doctrine that upholds a repeal if express, and condemns it if necessarily implied. The effect is the same. The effect of the repealing Act must therefore depend on what it does, and not on the label it affixes to itself." They quoted with approval an opinion of the Attorney-General and the Solicitor-General for England, which said: "It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the object, the purpose and the intention of the enactment, is the same; it need not be expressed in any recital or preamble; and it is not (as we conceive) competent for any Court judicially to ascribe any part of the legal operation of a Statute to inadvertence."

These passages which I have cited are, I think, a sufficient answer to Mr. Jayawardene's argument that both the short and the long titles of the Bill under consideration are wrong, and that the Bill should have been expressly stated to be a Bill for the amendment or repeal of the Constitution and not one for the imposition of civic disabilities. There is, however, also the case of *Krause* vs. *Commissioner for Inland Revenue* (1920) A.D. 286 cited by the Solicitor-General where Wessels J.A. said: "If a later Act of Parliament is inconsistent with the South Africa Act, the Court may hold that the later Act impliedly varies such part of the South Africa Act as is inconsistent with the later Act. ..... In considering whether the Legislature intended the later Act to supersede a provision of the South Africa Act, the Court must take into consideration the whole of the later Act as well as the South Africa Act, and gather from these Acts, as well as from the effect of the legislation, what the Legislature intended when it passed the later Act."

Lord Birkenhead referred in *McCawley's case* to the difference between a controlled and un-

controlled Constitution. In the case of the latter, he said, the terms "may be modified or repealed with no other formality than is necessary in the case of other legislation", while the former "can only be altered with some special formality, and in some cases by a specially convened assembly." In this sense, the Ceylon Constitution is controlled because it prescribes in section 29(4) a requirement which has to be complied with in the case of Bills to amend or repeal any of its provisions. But apart from the certificate of the Speaker under that sub-section no other condition is to be found anywhere in it. That is the only procedure stipulated by the Constitution, and it would be wrong to require other formalities which are not prescribed by the Constitution itself. The restraint or limitation which Mr, Jayawardene has sought to introduce in the form of a preliminary Act is a negation of the principle of repeal or amendment by subsequent inconsistent enactment.

The Privy Council in *Bribery Commissioner* vs. *Ranasinghe* (1964) 66 N.L.R. 73, considered section 29(4) and pointed out that the Bribery Act No. 11 of 1954 Cap. 26 had the necessary certificates of the Speaker, because it was treated as coming within section 29(4). Section 2 of that Act reads:—

> 2. (1) Every provision of this Act which may be in conflict or inconsistent with anything, in the Ceylon (Constitution) Order-in-Council 1946, shall for all purposes and in all respects be as valid and effectual as though that provision were in an Act for the amendment of that Order-in-Council enacted by Parliament after compliance with the requirement imposed by the proviso of sub-section (4) of section 29 of that Order-in-Council.
>
> (2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail.

Although the terms of this section are different from the terms of section 10 of the impugned Act, it is obvious that both sections were inserted in order to comply with section 29(4) of the Constitution. Nowhere in that Privy Council judgment was it suggested that the Bribery Act No. 11 of 1954 was invalid because it was not preceded by a separate Act to amend or repeal any of the provisions of the Constitution. The judgment considered the validity of the Bribery (Amendments) Act No. 40 of 1958 which came into conflict with section 55(1) of the Constitution and held it to be invalid because it did not comply with the procedural requirements imposed by the proviso to section 29(4) of the Constitution. It is not difficult to gather from the judgment that the amending Act would have been valid if it had the Speaker's certificate, for Lord Pearce said, "where an Act involves a conflict with the Constitution the certificate is a necessary part of the Act making process." After explaining the difference between *McCawley's* case and *Ranasinghe's* case, Lord Pearce said that alterations of the Constitutional provisions, whether implied or express, can only be made by laws which comply with the special legislative procedure laid down in section 29(4).

For these reasons I would dismiss this application with costs.

G. P. A. Silva, J.

In agreeing with the judgment of My Lord the Chief Justice I wish to express my own views on some of the aspects that arise for consideration in this application. Even though the decision of this matter can be confined to one or two points, I feel that the Court owes a duty to the Counsel on both sides, who have presented an exhaustive argument, to deal with all the points raised. The submissions made and the cases cited have been dealt with in some detail by My Lord the Chief Justice.

While counsel for the petitioner assailed the validity of the entirety of the Imposition of Civic Disabilities (Special Provisions) Act, the Solicitor General at the very commencement of his argument, urged that we should not in any event declare the whole of the Act in question invalid as there were certain provisions in which could remain valid even if certain other provisions may be declared invalid. He based his submission on the doctrine of severability. This question arose for decision in Ceylon in the case of *Thambiayah* vs. *Kulasingham* 50 N.L.R. page 25 where the point at issue was whether a certain amendment to the Ceylon (Parliamentary Elections) Order-in-Council 1946 was *ultra vires*. It was held in that case that the fact of repugnancy to the Constitution of a part of a statute did not render the remaining provisions *ultra vires*. The Divisional Bench in that case followed the principle enunciated in the case of *Shyamakant Lal* vs. *Rambhajan Singh et. al.* reported in All India Reporter (1939) Federal Court 74.

These judgments show that a Court would, in dealing with an Act of Parliament, be only justified

in pronouncing whether any particular provision therein is *ultra vires* or not and it would be travelling outside the scope of its powers if it pronounces the entirety of an Act of Parliament invalid unless every single provision is repugnant to an existing provision of the Constitution. An Act of Parliament will remain on the statute book until it is repealed by another Act of Parliament or until it lapses by reason of any time limit imposed on its operation by the Act itself and the Courts will be competent only to pronounce on the validity of a particular provision of an Act which is sought to be impugned by any party affected by such provisions. The Solicitor General has also drawn attention to the case of *Ashwarden* vs. *Tennessey Valley Authority* (1935), 297 United States Reports at page 288 in which a number of useful rules were laid down in regard to the manner in which Courts should approach constitutional questions. The principles laid down in this case serve as a guide to decide this as well as the other aspects arising in the instant case. The Privy Council has confirmed this principle of severability in the last paragraph of the judgment in *Liyanage* vs. *The Queen*, 70 C.L.W. 1. Having earlier, in dealing with the offending provisions of this legislation, characterised the Acts as a legislative plan *ex post facto* to secure the conviction and enhance the punishment of particular individuals and for that reason bad, the Privy Council drew pointed attention to certain other provisions of the Act which in their view could survive on this principle of severability. When therefore they pronounced the Acts to be invalid they must necessarily be taken to have pronounced to be invalid such of the provisions as were repugnant to the Constitution on the ground that the alterations to the existing criminal law effected by the Acts constituted an incursion into the judicial sphere. On the authority of this case and the earlier cases cited, the Solicitor General's contention must be upheld. There are to be found in this Act provisions disqualifying the persons mentioned in the schedule from future appointments in the Public Service or from election to any local body for seven years. These provisions are innocuous and will remain valid even if certain other provisions which are impugned in this case are declared to be invalid. The main questions that require consideration would fall into the following categories:—

(1) Whether the Parliament has the power to pass legislation which would disqualify a member from sitting and voting and from continuing as a member by reason of a certain state of facts, which existed before such member even contested the election at which he was duly elected a Member of Parliament and which was not a disqualification according to the law as it then existed.

(2) Is such an Act of the Legislature, or does such Act tantamount to, a usurpation of the functions of the Judicature and, if so, does it violate the principle of separation of powers which has been recognised by our Constitution and confirmed by the judgment of the Supreme Court in the first Trial-at-Bar, *Queen* vs. *Liyanage and Others* reported in 64 N.L.R. 313 as well as in the Privy Council judgment in *Liyanage* vs. *The Queen*, 70 C.L.W. 1.

(3) Does this Act contain a law or laws within the meaning of section 29(1), of the Constitution.

(4) Does the Act in question constitute an amendment of the Constitution.

(5) In any event is the Clerk to the House of Representatives the holder of a public office against whom a writ of mandamus from the Supreme Court, compelling him to perform a certain duty, lies.

In regard to the first point, it is manifest that the provisions of the Act proper have as their aim the imposition of certain disabilities on the six named individuals. Sub section (3)(k) of Section 13 of the Ceylon Constitution which contains the disqualification of members of either House shows that one of the disqualifications for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in either House is that, *inter alia*, he has been, during the preceding seven years, adjudged by a Commission appointed with the approval of that House or by a committee thereof to have accepted a bribe or gratification. This is an indication that even at the time of the drafting of the Constitution a special jurisdiction as it were was conferred on each House in the sphere of bribery, to disqualify a member of such House without the normal condition precedent, namely, a conviction by a Court. This provision has in effect given the decision of a Committee of the House the same sanctity as a decision of a Court in regard to the acceptance of a bribe by a member. It seems to me that if such a disqualification can

result from a decision of even a Committee of the House, *a fortiori* an Act of Parliament which is passed by both Houses would result in such disqualification. When an Act of Parliament enacts that certain persons who have been found by a particular Commission of Inquiry to have been guilty of bribery shall be disqualified for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or House of Representatives it must be presumed that the two Houses of Parliament perused the proceedings of that Commission of Inquiry and were satisfied of the correctness of the findings when both Houses proceeded to pass the enactment; and thereafter the decision of the Commission, even though the latter was not appointed with the approval of the Senate or the House of Representatives, must be considered to be translated into a decision of both Houses of Parliament. Mr. Jayawardena in this connection made several complaints in regard to the findings of the Commission of Inquiry one of which was even bias on the part of one of the Commissioners. Had the petitioner in the first instance made a successful attack on these findings — I do not know in which appropriate proceeding he could have done so — the situation would have merited different considerations. As it is, however, the findings of the Commission remain intact and the Parliament has based the present enactment on those findings as they stand.

The question as to the validity of *ex post facto* legislation in this case arises for consideration in this regard. For, the act or acts of bribery referred to were clearly committed and the findings thereon arrived at by the Commission even before the member concerned sent in his nomination papers for the election. Mr. Jayawardena advanced a number of cogent and powerful arguments in this connection which would have persuaded me to decide this question in his favour had it not been for the now settled view in regard to retrospective legislation. The gravamen of Mr. Jayawardena's attack was that while the words of Section 13(3)(k) contemplated a situation where the decision as regards the disqualification had been taken prior to the election or appointment as a Senator or Member of the House, the present enactment effected a disqualification which was not a disqualification at the time the petitioner was duly elected as a Member of Parliament to represent his constituency and that the Parliament cannot enact law which would deprive the electors of the candidate of their choice who was duly elected. The principle that the Parliament has the power to pass retrospective or *ex post facto* legislation has now been well established vide the Order of Court in *The Queen* vs. *Liyanage and Others*, 65 N.L.R. page 73. The question was also considered in the Order of Court dated 21.6.1965 in the subsequent Trial-at-Bar No. 1 of 1965 in the following passage:— "These principles which have been the subject of judicial interpretation in England would equally apply to the Parliament of Ceylon. The only restriction placed upon the legislative power of Parliament in Ceylon is to be found in Section 29 and, in a sense, to a limited extent in Section 39 of the Ceylon (Constitution) Order-in-Council itself and so long as any Act of Parliament is duly passed and does not offend against restrictions placed in the sections referred to above, either expressly or by necessary implication, courts of law are obliged to treat such Acts of Parliament as having enacted good law, be it prospective or retrospective. We may say that this matter was fully argued and received careful consideration by a Bench of three Judges of this Court before whom the Trial-at-Bar, No. 2 of 1962, was held and their rejection of the argument in regard to the invalidity of retrospective legislation fortifies the conclusion which we ourselves have reached. On an examination of a number of decisions of the English Courts we observe that this is one of those subjects in regard to which all the decisions have been in one direction, despite the almost universal natural revulsion of Judges towards the concept of retroactive laws." I am therefore of the view that the *ex post facto* nature of the legislation does not affect its validity. The fact that this legislation touches a matter which belongs to the field of conduct of members over which the House has full control would tend to reduce the offensive nature, if any, of such legislation.

This leads me to the second point as to whether this legislation is, or is tantamount to, a usurpation of the functions of the judicature. This is an aspect that has given me considerable anxiety in this case, namely, the question whether the acceptance of a bribe being punishable under the Penal Code, the present legislation which has as its object the disqualification of a member for acceptance of a bribe, indirectly has the effect of a person being convicted by legislation whereas there should be a conviction by court, and, if so, whether such legislation being an inroad into the judicial sphere, is *ultra vires* to the extent of the inroad so made. Mr. Jayawardena sought to argue that there was a clear separation of powers

recognised by our Constitution and that, as far as the powers of the Judicature which are entrenched in the Constitution are concerned, they are unalterable and that any inroads on the Judicature by the Legislature will be invalid to the extent that they conflict with the entrenched powers of the Judicature. In his submission this was the view expressed by the Privy Council in *Liyanage* vs. *The Queen*, referred to above. The relevant observations of the Privy Council in this connection are contained in the following passage:— "Section 29(1) of the Constitution says:—'Subject to the provision of this Order. Parliament shall have power to make laws for the peace, order and good government of the Island.' These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of Section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature—e.g. by passing an act of attainder against some person or instructing a Judge to bring in a verdict of guilty against someone who is being tried — if in law such usurpation would otherwise be contrary to the Constitution. There was speculation during the argument as to what the position would be if parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to Section 29(4) of the Constitution purports to usurp or infringe the Judicial power it is *ultra vires*." I understand this observation to mean that, although Section 29(1) gives the fullest scope for the Parliament to pass laws for peace, order and good government of the Island, it cannot be construed as entitling Parliament by a simple majority to pass legislation which usurps the judicial power of the Judicature for the reason that such usurpation would indirectly come in conflict with the Constitution and the legislation would therefore be tantamount to an amendment of the Constitution which has been careful to preserve the independence of the Judiciary in part VI thereof. The two examples given by the Privy Council in this connection, namely, the passing of an act of attainder against some person or instructing a Judge to bring in a verdict of guilty against someone who is being tried, make the view taken by the Privy Council quite clear as, in both these instances, if there was legislation intended to achieve the two purposes mentioned, they would patently be usurpations of judicial power.

Let me now examine the bearing of the instances cited by the Privy Council and the legislative judgment which they had in mind on the facts of the present case. Their Lordships went on to say "The pith and substance of both Acts was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction, and finally it altered *ex post facto* the punishment to be imposed on them. In their Lordships view that cogent summary fairly describes the effect of the Acts. As has been indicated already, legislation *ad hominem* which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordship have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere." With these observations in the forefront it is not difficult to compare and contrast the facts of the case before us in order to arrive at a conclusion whether there is any resemblance of one case to the other in any respect. In the instant case what may be termed a Royal Commission was appointed with certain terms of reference to probe reported cases of bribery among certain Members of Parliament, in terms of existing laws in regard to commissions of inquiry. The Commission was appointed at the instance of one Parliament. Those against whom allegations of bribery were made were given notice of the allegations and were represented by counsel at the sittings of the Commission. The Commission arrived at certain findings which held the persons named in the schedule to the Imposition of Civic Disabilities (Special Provisions) Act to be guilty of bribery. The Parliament which was responsible for the appointment of the Commission took no action on the Commission's report. A subsequent Parliament which defeated and replaced the Parliament which appointed the Commission have thought it fit to pass the Act referred to, imposing disqualifications and disabilities against those found guilty by the

Commission without making any modification or qualification in the report of the Commission. Can it be said in these circumstances that the Parliament which passed the present Act had any plan at all to secure the punishment of any particular individuals who had in some manner offended the government in power. Far from there being even the semblance of a plan, the whole ground was prepared by one Parliament and the implementation was by another which, as I said before, displaced the earlier one. There was no changing of any law, no placing of any barrier against these individuals in the way of their defences, no violation of any principle of natural justice in securing the findings against these individuals; in short not one factor which shows that the procedure adopted in this case at the instance of one Parliament was anything out of the ordinary either in regard to the appointment of the Commission or the mode of inquiry adopted by the Commission in reaching their decision touching the six persons concerned, nor did the legislation by the other Parliament which enacted the impugned Act have any plan to disqualify the six persons of its choice as the choice had already been made by a Commission appointed during the period of its predecessor. A vital distinction between the legislation for the trial of the Coup suspects and this enactment regarding the restriction of the Act to named individuals is that, while in the Coup case the named persons were awaiting trial, with the presumption of innocence operating in their favour, the six persons named in this schedule had already been found guilty of allegations of bribery long before the Act was passed. Briefly stated, in the one case the enactment intended to regulate the trial preceded the finding against the named individuals; in the other the finding preceded the enactment. In these circumstances I fail to see how there has been any incursion into the judicial sphere by the legislature in this case when it merely disqualified a Member of Parliament for findings of bribery which had already been finalised several years before the legislation was passed. It seems to me that the real question which arises for consideration is the objection to the *ex post facto* character of the legislation. I have dealt with this aspect already and in the state of the existing law there can be only one view in this regard.

As regards counsel's contention that these disabilities were in the nature of penalties imposed on these six persons and that the legislature in imposing such penalties had impinged on the province of the judiciary, there is a further important distinction between legislation intended to punish any particular individuals who would render themselves liable to punishment under the ordinary law of the land and legislation intended to impose certain disqualifications or disabilities on present or prospective members of the House *qua* members. While in regard to the first category a Court would in certain circumstances hold the legislation to be invalid as being an encroachment on the province of the judiciary a Court will be slow to invalidate any law passed by the Parliament imposing certain disabilities or disqualifications on Members of Parliament in view of the power the Parliament has to control its own proceedings and impose its own discipline. Further, the offence of bribery mentioned in Section 13(3)(k) of the Order-in-Council is not the same as that contemplated in the Penal Code. There are two chapters of the Penal Code dealing with offences of bribery, namely, Chapter IX which relates to the acceptance of gratifications by public servants as a motive or reward for doing or for forbearing to do official acts and Chapter XI which relates to the acceptance of a gratification to screen an offender from legal punishment. The offence contemplated in the Order-in-Council, however, is the acceptance of a bribe by a member of either House with a view to influencing his judgment in that capacity. It seems to me therefore that bribery among Senators and Members of Parliament is an area where each House by virtue of the Constitution itself exercises a sort of special jurisdiction and a finding by a Commission appointed with the approval of the Senate or the House of Representatives or by a Committee thereof will have the same force as an adjudication by a competent Court. What the present Act seeks to achieve is to extend this disqualification to certain persons found guilty of this same offence by a Commission of Inquiry appointed under the Commissions of Inquiry Act. Any legislation therefore in this area will carry with it a further argument in support of validity.

Implicit in the words of the Privy Council is the condition precedent that the provisions of the Constitution with regard to the Judicature are present in their existing form. This is far from saying that the powers of the Judicature which are set down in Part VI are unalterable. The last sentence of the passage quoted above, namely, "In so far as any Act passed without recourse to Section 29(4) of the Constitution purports to usurp or infringe the judicial power it is *ultra*

vires.", to my mind, can also be expressed differently, namely, that where an Act is passed after due recourse to Section 29(4) of the Constitution, even though that Act usurps or infringes the judicial power, it is *intra vires*. If one were to use almost the identical phraseology of the Privy Council, it would mean that, even though any Act passed *with* recourse to Section 29(4) of the Constitution purports to usurp or infringe the judicial power, it is *not ultra vires*. In my judgment there is no justification to draw from this passage the inference which is contended for by the learned Counsel for the petitioner namely, the unalterability of the separation of judicial power in the Constitution. Such an alteration can, I think, be validly achieved if Parliament passes the necessary legislation with a two-third majority and the certificate of the Speaker, in terms of Section 29(4) although, *as the Constitution stands at present*, there is such a separation of power which cannot be infringed by an ordinary Act of Parliament for the good reason that such an infringement will be *ultra vires*, the Constitution which alone conferred on Parliament that very power to legislate.

There is a further argument that militates against Mr. Jayawardena's contention. In giving expression to the plenitude of powers of our Legislature, Section 29 proceeded in sub sections 2 and 3 to enumerate certain limitations in respect of such powers. The acceptance of Mr. Jayawardena's contention would necessarily lead to the implication that apart from the limitation imposed by sub-sections 2 and 3 of Section 29 there is a further limitation which the Constitution has chosen silently to express, namely, that no law shall remove or reduce any of the powers of the Judicature which have been provided for in the Constitution and that any law made in contravention of this limitation shall to the extent of such contravention be void. It is a cardinal rule of interpretation that when certain exceptions or limitations are laid down touching any particular provision, no further exceptions or limitations should be read into the provisions — *expressio unius exclusio alterius*. This principle too would therefore dissuade a Court from accepting the argument that apart from the express limitation contained in Section 29(2) there is a further restriction on Parliament to pass laws which conflict with the entrenched principle of separation of judicial power.

On the next point for consideration Mr. Jayawardena argued that this Act did not contain any law within the meaning of Section 29(1). His submission was that, according to sub section 29(4), Parliament could pass any legislation to amend or repeal the Constitution only in the exercise of its powers under Section 29(1); that Section 29(1) conferred on the Parliament the power to make laws for the peace, order and good government and as this Act does not contain any law or laws which are contemplated in Section 29 (1), Parliament exceeded its powers in passing this Act. His argument on this aspect too again revolved round the contention that a legislative judgment is not law as decided by the Privy Council in the judgment referred to. This Act which, according to his contention, purported *ex post facto* to secure a finding of guilty of six named individuals for bribery, being therefore a legislative judgment of the type that was referred to in the Privy Council decision, is not legislation which the Parliament could properly pass. The answer of the Solicitor General to this contention was that the limitation on legislation, apart from those mentioned in Section 29(2), resulted not from the word law in Section 29 (1) but from Part VI of the Constitution which secured the independence of the Judiciary. As the Constitution stood, great care has been taken to secure the independence of the Supreme Court and of all the members of the Judicial Service by vesting the power of appointment of the latter in the Judicial Service Commission. There was therefore entrenched in the Constitution a separation of legislative and executive power on the one hand from the judicial power of the State on the other so that, if there was any ordinary legislation which, although it conformed to the normal processes for the passage of legislation, constituted in pith and substance an incursion into the judicial sphere, in that the legislation brought about a certain situation in which the Judiciary, instead of independently exercising its judgment, was constrained or compelled to exercise it in a particular way, such legislation would, by reason of its repugnance to the aforesaid entrenched powers of the Constitution, be *ultra vires*. These objectionable elements, in the Solicitor General's submission, are not present in this Act. On a careful analysis of the Privy Council decision I am inclined to favour this view. I am also inclined to accept the submission of the learned Solicitor General that Section 29(1) has always been interpreted to give Parliament the widest possible legislative powers known to the British Constitution subject to the limitations set out in Section 29(2), this submission too being supported by the Privy Council judgment when it stated "These words

have habitually been construed in their fullest scope." As I have already expressed the view that this enactment is not a legislative judgment and does not make any inroad into the judicial sphere I do not find it possible to accept Mr. Jayawardena's argument that this Act does not constitute a law which the Parliament is empowered under Section 29(4) to make. It must be remembered that the Privy Council also held in the very judgment relied on by Mr. Jayawardena that every enactment which can be described as *ad hominem* and *ex post facto* does not inevitably usurp or infringe the judicial power. When one considers all the qualifications contained in the conclusions arrived at by the Privy Council in this case it seems to me that their Lordships did not base this decision on one particular fact or circumstance. Like the necessity for the presence of all the links in a chain of circumstances the totality of which goes to prove a case of circumstantial evidence it is the presence of a number of circumstances at the same time in the Coup case, namely, the facts disclosed in the White Paper, the alteration of existing laws, the limitation of the law to specific named individuals and the wresting from the Judges their proper judicial discretion regarding the punishment, that made the Privy Council characterise the Acts as legislative judgments. Just as a case of circumstantial evidence would fail owing to the absence of a necessary link in the chain of circumstances, the absence of any one of these essential circumstances may have led the Privy Council to take a different view and to hold the impunged provisions to be *intra vires* the Constitution. It will therefore be unsafe on the authority of the Privy Council decision to rush to a conclusion that Parliament has enacted a legislative judgment by reason of the mere presence of one or more of the features that are present in the Criminal Law (Special Provisions) Act in such an enactment.

I shall now consider the next point of attack made by the counsel for the petitioner, namely, that this enactment does not constitute an amendment of the Constitution. In his submission the original Bill was on the face of it not an amendment of the Constitution but a Bill to impose civic disabilities etc., and this description did not comply with the provisions of Section 29(4) which requires such a Bill to bear on the face of it that it is an amendment of the Constitution. He also brought to our notice in his support one or two previous amending Acts which were described as such. He also submitted that the danger of a Bill, not bearing on its face such a description was that neither the members of the House nor the public will have notice of such an amendment which must be considered to be of greater importance than an ordinary enactment. Finally he submitted that Section 10 of this Act clearly stated that it was not an amendment but that any provisions therein which were inconsistent with the Constitution shall be deemed to be an amendment. In my view there can be either a direct amendment of a particular provision in the Constitution or one which, though not a direct amendment, may have the effect of an amendment of one or more provisions. In the latter case, it may not always be practicable to describe a Bill as an Amendment of a particular provision. Section 10 on which counsel relies is itself in my opinion, the warning for members of the House and the public that there are, or at least may be, some provisions which constitute amendments of the constitution. I do not think that when the proviso to Section 29(4) proceeded to set out the manner of presentation of a constitutional amendment it also intended to prescribe a particular form to be present on the face of it. If so, I should have expected such a form to be attached to the proviso or to an appendix or the proviso to use some phraseology indicating such an imperative requirement, particularly when another imperative requirement is categorically stated, namely, the certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House. This provision is in fact tantamount to the requirements for a Bill which amends or repeals the Constitution, namely, a vote of two-thirds of the whole number of members of the House and a certificate of the Speaker to that effect. If these requirements are satisfied, as they have been in this case, I think that the Parliament, in terms of Section 29(4), can amend or repeal any provision of the Constitution subject to any objection which may be raised in view of Section 29(2). As any such objection does not arise for decision in this case, there is no justification to declare any of the provisions of the impugned Act to be invalid.

In regard to the last point on which the counsel on either side joined issue, namely, whether the Clerk of the House of Representatives is a holder of a public office against whom a writ of mandamus from the Supreme Court lies, while I am not prepared, on the material placed before us,

to say that a writ will not lie against him in any circumstances, in view of the fact that he is constrained both by this Act of Parliament and by the orders of the Speaker to follow the course he has adopted in this case, I do not think that this Court should issue a writ, which is a discretionary one. In any event, this question does not arise unless and until the petitioner successfully establishes the impugned provisions of the Act to be invalid.

Application refused.

Present: **Sansoni, C.J. and Sirimane, J.**

M. R. LEELAWATHIE *vs.* THE MINISTER OF DEFENCE AND EXTERNAL AFFAIRS*

In the matter of an application for a Mandate in the nature of Writ of Certiorari and Mandamus under Section 42 of the Courts Ordinance Vol. 1 (Cap. 6).

(*S.C. Application No.* 148/'64)

Argued on: December 6, 1965
Judgment delivered on: December 10, 1965.

Citizenship Act, No. 18 *of* 1948, *section* 12, 12(4) *and* 12(6)—*Indian citizen marrying Ceylon citizen by descent—Application for registration as citizen of Ceylon—Refusal—Unsuccessful appeal to Minister—Application for Writs of Certiorari and Mandamus — Right to question Minister's decision — Applicability of Universal Declaration of Human Rights.*

The petitioner, an Indian citizen came to Ceylon in November, 1958 and in January, 1959 married a citizen of Ceylon by descent. In 1960 she applied for registration as a citizen of Ceylon in terms of Section 12 of the Citizenship Act (Cap. 349).

This application having been disallowed by the Ministry of Defence and External Affairs, her husband appealed to the Minister concerned and on 16/4/64 he was informed that the decision was taken after careful consideration for giving effect to Government policy and that it could not be altered. Thereupon this application for Certiorari and Mandamus was filed.

It was contended in support of the application,

(*a*) that the failure to state the reasons for the Minister's said refusal was contrary to natural justice.

(*b*) that the reason stated viz. that it was giving effect to Government policy was bad as that concept was not the same as public interest.

(*c*) that the provisions of Section 12(6) of the Citizenship Act were unconstitutional.

(*d*) that the said refusal was in breach of the Universal Declaration of Human Rights.

Held: (1) That in view of sub-sections 4 and 6 of Section 12 of the Citizenship Act it was not necessary for the Minister to give reasons for refusing the said application.

(2) That there does not appear to be any conflict between the concepts of Government policy and public interest. The policy of the Government would presumably always be in accordance with the public interest.

(3) That the Parliament has the power to enact a Statute which contains a provision such as Section 12(6).

(4) That while the Universal Declaration of Human Rights is an instrument of the highest moral authority, it has no binding force as it is not a legal instrument forming part of the Law of Ceylon.

C. Thiagalingam, Q.C., with *E. A. G. de Silva* and *N. R. M. Daluwatte*, for the petitioner.

J. G. T. Weeraratne, Senior Crown Counsel, with *F. C. Perera*, Crown Counsel for the respondent.

* For Sinhala translation, see Sinhala section, Vol. 12, part 6, p. 26

Sansoni, C.J.

The petitioner who was an Indian citizen came to Ceylon in November 1958, and in January 1959 she married a citizen of Ceylon by descent. In 1960 she applied for registration as a citizen of Ceylon in terms of section 12 of the Citizenship Act, Chap. 349.

There was an exchange of correspondence between her and the Ministry of Defence and External Affairs until 4th March 1964, when she was informed by a letter written on behalf of the Permanent Secretary to the Ministry that her application for citizenship had been disallowed. Her husband appealed against the order to the Minister of Defence & External Affairs through a Member of Parliament. On 16th April 1964 the Member of Parliament was informed, and so was the husband, that the decision to reject the petitioner's application was taken after very careful investigation as a decision taken for giving effect to Government policy, and that it cannot be altered.

The present application for Certiorari and Mandamus was filed in May 1964. Section 12(4) of the Act provides that "the Minister may refuse an application if he is satisfied that it is not in the public interest to grant the application." Section 12(6) reads:—

> "The Minister's refusal under subsection (4) of this section to allow the application of any person for registration as a citizen of Ceylon shall be final and shall not be contested in any court."

For the petitioner it was submitted that the reasons for the Minister's refusal should have been stated, and that the failure to do so was contrary to natural justice. The case of *Merricks* v. *Nott-Bower* (1964) 1 A.E.R. 717 was cited. The Court of Appeal there dealt with a plea of privilege put forward by a Government Department which was asked to produce certain documents. Lord Denning, M.R. disapproved of the practice, which seemed to have grown up, of exhibiting a certificate in common form to the effect that a document ought not to be produced because it was necessary in the public interest for the proper functioning of the public service to withhold it from production. I do not think this judgment is relevant to the case we are considering, which concerns a statute that states under what circumstances the Minister may refuse an application for registration as a citizen of Ceylon.

It is interesting to find that Lord Denning, in an earlier part of the same judgment, said:—

> "It is a well-known principle of our law that any powers conferred by statute or regulation on an executive or administrative authority must be exercised in good faith for the purpose for which they are granted. They must not be misused or abused by being applied to an ulterior purpose."

Although the petitioner does allege, as one of the grounds of her application, that the Minister acted wrongfully, *mala fide* and without jurisdiction no grounds whatsoever are set out in justification of these allegations. No attempt has been made to substantiate them. In short, there is nothing before us to show that there was not a real and proper exercise of discretion in good faith by the Minister.

We do not think that it was necessary for the Minister to give her reasons for refusing the application. Subsections (4) and (6) of section 12 indicate clearly that the policy of the Act is to make the Minister the sole and final judge of the merits of an application, and to shut out any enquiry by a Court into the correctness of his decision. This is not surprising when one considers that it is the Prime Minister who is given the responsibility and the power to make an order on the application. Parliament may well have thought that an important matter of this nature could well be entrusted to him to decide, and that it was undesirable that the correctness of his decision should be examined in a court of law. In this connection, we were referred by Senior Crown Counsel to a passage in Judicial Review of Administrative Action by Mr. S. A. de Smith p. 241 which reads:—

> "The principle, many times affirmed in older cases, that even wide discretionary powers must be exercised 'judicially', is seldom applied where the recipient of the power is a Minister of the Crown. The courts often invoke the principle of ministerial responsibility to Parliament in support of their refusal to review the manner in which a discretion has been exercised."

Another argument put forward was that in the letter written to the Member of Parliament on behalf of the Permanent Secretary it was stated that the decision was to give effect to Government policy, and that as this is not the same concept as public interest the refusal was bad in that it was made on wrong grounds. I do not see any conflict between the two concepts. The policy of the Government would presumably always be in accordance with the public interest;

the welfare of the State would be presumed to be the main object of Government policy. That policy would normally be decided by, or with the approval of, the Minister of Defence and External Affairs, and when she came to a make a decision as to what was in the public interest she would not be uninfluenced by the policy of the Government. Such policy would be a proper and relevant factor to be taken into account.

Mr. Thiagalingam also argued that the provisions of section 12(6) were unconstitutional and that it took away the right of a citizen to go to Court. We do not agree with this argument, since it appears to us that Parliament has the power to enact a statute which contains such a provision as section 12(6). Phrases of this sort are quite common now, and they have to be interpreted according to the context in which they are found. A suggestion was made on behalf of the petitioner that the application was refused because she was an Indian. Such a suggestion proves nothing and it has not been explained on what basis it was made. One can well understand the anxiety of the petitioner to know the reasons for the refusal of her application, if only to enable her to attack them as unjustified and unreasonable. But I do not think that the petitioner has any right to know the reasons.

Lastly, it was submitted that the refusal was in breach of the Universal Declaration of Human Rights. Even if the principles contained in the instrument have any relevance, it is sufficient to say that while it is of the highest moral authority, it has no binding force as it is not a legal instrument and forms no part of the law of this country. The predicament in which the petitioner and her husband find themselves is indeed a sad one, but they married at their risk and it is no argument to say that if the application fails they may have to live apart. In the result, the application of the petitioner must be refused with costs.

I would dismiss the application with costs.

Sirimane, J.

I agree.

Application refused.

Present: **Sirimane, J.**

JAYASUNDERA (P.S 2790) *vs.* S. K. SINNIAH

S.C. 304/1964—*M.C. Hatton No.* 9866

Argued and decided on: 17th June, 1964.

Motor Traffic Act (*Cap.* 203), *section* 149 — *When it applies.*

Held: That section 149 of the Motor Traffic Act applies where an accident is imminent and when a person fails to take such action as may be necessary to avoid such an accident ,and not where a collision takes place in trying to avoid pedestrians.

M. M. Kumarakulasingham with *F. Kodagoda*, for the accused-appellant.

W. K. Premaratne, Crown Counsel, for the Attorney General.

SIRIMANE, J.

The accused-appellant had been found guilty of failing to take such action as may be necessary to avoid an accident — in contravention of Section 149(1) of the Motor Traffic Act, (Chapter 203). The evidence of the accused-appellant, which the learned Magistrate accepted in preference to the evidence led by the prosecution in regard to the impact, was that he (appellant) was avoiding two pedestrians who were on the tarred portion of the road at the time when he saw the virtual complainant's car about 120 feet away from him. The accused-appellant stated that the virtual complainant's car then came up and collided against his car. Section 149 of the Motor Traffic Act applies where an accident is imminent and when a person fails to take such action as may be necessary to avoid such an accident. I do not think that on the facts in this case as accepted by the learned Magistrate any blame can be attached to the accused. The learned Magistrate appears to have attached undue weight to a sketch produced in the case which is misleading when one considers the evidence led at the trial.

I set aside the conviction and acquit the accused

Set aside.

END OF VOLUME LXX

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පාර්ෂවකාරයින්ගේ නාම

උසාවියට අපහාස කිරීම

උසාවියට අපහාස කිරීම — මිය ගිය තැනැත්තා ගේ බුදලය සත්තෑ දේපොළවල සියලුම ආදයම උසාවියට ගෙන ආ යුතු යයි ශ්‍රේෂ්ඨාධිකරණය විසින් 3.8.62 වැනි දින අද්මිනිස්ත්‍රාසිකාරයෙකුට දෙන ලද නියෝගයක් — ඉන්පසු අද්මිනිස්ත්‍රාසි කාරයාගේ කැමැත්තත් ඇතුව 1.4.63 වැනි දින ඔහුට 31.10.63 වන දින හෝ ඊට පෙර අවසාන ගණන් හිලව් උසාවියට ඉදිරිපත් කිරීමට යයි නිර්දේශ කිරීමක් — මෙම නියෝග දෙක ම ක්‍රියාවේ යෙදීම පැහැර හැරීම — උසාවියට අපහාස කිරීමේ චෝදනාවක් — අධිකරණ ආඥා පණතේ 47 වන ඡේදය.

වැන්දඹු භාර්‍යාවත් දරු හය දෙනෙකුත් අත්හැර මිය ගිය අයගේ වැඩි මහල් පුත්‍රයා වූ මෙම නඩුවේ වගඋත්තරකරුට 9.5.53 වන දින අද්මිනිස්ත්‍රාසි බලපත්‍ර දෙන ලදී. වැන්දඹු භාර්‍යාවත් දරු තිදෙනෙකුත් මෙම අද්මිනිස්ත්‍රාසි බලපත්‍ර අවලංගු කොට වැන්දඹු බිරිඳ අද්මිනිස්ත්‍රාසිකරු හැටියට පත් කරන ලෙස උසාවියට කරන ලද ඉල්ලීම, සාර්ථක විය. මෙම පත්කිරීමට සහ ඊට පසුව තමාගේ දේපොළ අල්වා විකිණීම තහනම් කළ යුතුයයි කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කිරීමට විරුද්ධව වගඋත්තරකරු ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය.

මෙම ඇපැල් පෙත්සම ගැන නඩු විභාගය නිමා වට පත් නොවී තිබිය දී වගඋත්තරකරු දිස්ත්‍රික් උසාවියේ ඇති බුදල් නඩුවේ එවකට පැවැත්වී ගෙන යමින් තිබුණු විභාගය අත්හිටුවීම පිණිසත් ඉහත සඳහන් ඇපැල් පෙත්සමේ විභාගය කෙරෙන දිනය ළංකරවා ගැනීම පිණිසත් ඉල්ලීමක් ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරන ලදුව 3.8.62 වන දින ශ්‍රේෂ්ඨාධිකරණය පහත සඳහන් පරිදි නිර්දේශ දී තිබේ.

(1) දිස්ත්‍රික් උසාවියෙහි මේ පිළිබඳව තවදුරටත් පියවර ගැනීම අත්හිටුවාලීම පිණිස සහ

(2) මියගිය අයගේ බුදලයට අයත් සියලු ම දේපොළ පිළිබඳ ආදයම මෙම බුදල් නඩුවේ අය ශීර්ෂයන් ලෙස උසාවියට ඉදිරිපත් කිරීම ය.

මෙම ඇපැල් නඩු විභාග දෙක 29.3.63 වන දින සහ 1.4.63 වන දින විසඳීම පිණිස උසාවිය ඉදිරියට පමුණුවනු ලැබ දෙපක්ෂයේ නීති වේදීන් විසින් පහත සඳහන් පරිදි බැස ගන්නා ලද සම්මුතියක් නඩු වාර්තාවට ඇතුළත් කොට ඇපැල් පෙත්සම් දෙක ඉදිරිපත් කිරීමට හේතු වූ නියෝග දෙක නිෂ්ප්‍රභා කරන ලදී.

''දැනට සිටින අද්මිනිස්ත්‍රාසිකරු වන ඇපැල් කරු කුචිනාන්සි සහ රිසිට් පත් සමග අවසාන ගණන් හිලව් උසාවිය ඉදිරියට 31.10.63 වන දින හෝ ඊට කලින් පැමිණ විය යුතු බවට නිර්දේශ දිය යුතු අතර ඒ ගණන් හිලව් තීරණය කරන තුරු වගඋත්තරකරු විසින් තමාගේ භාරයේ තිබෙන දේපොළවල ආදයම උසාවියට ගෙන ආ යුතුය.''

මියගිය අයගේ පුත්‍රයෙක් වන පෙත්සම්කරු විසින් ඉදිරිපත් කරන ලද පෙත්සමකට හා දිවුරුම් පෙත්සමකට අනුව ඉහත සඳහන් නියෝග දෙකට එකහව ක්‍රියාකිරීම පැහැර හැරීමේ හේතුවෙනුත් එහි අඩංගු නිර්දේශවලට අකීකරුවීමේ හේතු වෙනුත් වගඋත්තරකරුට උසාවියට අපහාස කිරීමේ චෝදනාවට දඬුවම් නොකිරීමට ඇති හේතුවක් ඇත්නම් එය පෙන්වීමට යයි ඔහු වෙත නියෝගයක් නිකුත් විනි.

පළමුවන නියෝගය නිකුත් වූ 3.8.62 වන දිනට පසු, උසාවිය නිර්දේශ කළ අයුරින් වගඋත්තරකරු කිසිම ගෙවීමක් කර නැතැයි යන්න ප්‍රතික්ෂේප නොකැරිණි. දිස්ත්‍රික් විත්ශ්චයකාරවරයාගෙන් කීපවිටක් ම කල්ගෙන අවසාන ගණන් හිලව් නඩුවට අමුණන ලද්දේ 28.5.64 වන දින දීය. තමාගේ දිවුරුම් පෙත්සමින් අද්මිනිස්ත්‍රාසිකරු වශයෙන් තමාගේ අතේ රු. 20,000/- ක් වගඋත්තරකරු ඇති බව පිළිගත්තේ ය. (ඒ) එමතු ද නොව රු. 2,48,690/- ක මුදලක් නඩුහබ ආදියටත් අනික් වියදම් පිළිබඳවත් ඔහුගෙන් වැය වූ බව ද වගඋත්තරකරු කියා සිටියේ ය. (බී) අපරාධ නඩු විභාගයක දී නිදහස් කර හරින ලද පෙත්සම්කරු විසින් ද ඔහුගේ සහෝදරයන් දෙදෙනෙකු විසින් ද, සොරකම් කිරීම නිසා රු. 1,57,022/71 ක් නැති වූ බව ද වගඋත්තරකරු කියා සිටියේ ය.

තීන්දුව: (1) 1.4.63 වන දින දෙපයෙහි කැමැත්තෙන් නිමාවට පත්කළ ඇපැල් නඩු විභාග දෙක පවතින කාලයේ 3.8.62 වන දින කරන ලද නියෝගයක්ය යන කරුණ සැලකෙන නිසා ඒ අනුව වගඋත්තරකරු උසාවියට අපහාස කළ බැව් කියන පැමිණිල්ල පිළිබඳ තවදුරටත් ලුහුබැඳ යෑම අවශ්‍ය නැත්තේ එය තව අංශයකින් බලන කල යල්පැනපු නියෝගයක් ද වී ඇති නිසා ය.

(2) නමුත් ඉහත සඳහන් පරිදි 1.4.63 වන දින දෙන ලද නියෝගය ශ්‍රේෂ්ඨාධිකරණය විසින්, අද්මිනිස්ත්‍රාසිකරුවකුට — එහි නිලධරයකුට — දෙන ලද පැහැදිලි නිර්දේශයක් ගැබ් වූ නියෝගයක් නිසා (මෙය වගඋත්තරකරු තමාට ඉටුකිරීමට හැකි වෙනැ යි සිතා කරන ලද පාර්ශ්වකාරයින් දෙපක්ෂය අතර ඇති වූ හාර ගැනීමක් පමණක් නොවේ) එයට අභිකරු වීම උසාවියට අපහාස කිරීමක් වේ.

(3) 1.4.63 වන දින දෙන ලද නියෝගයෙහි සඳහන්ව ඇති 'දේපොළ වලින් ආදයම්' යන වචන කේරුම් ගත යුත්තේ, ආදයම් කිරීමට වැය වන මුදල අඩුකළ විට එම දේපොළවලින් ඉතිරි වන ශුද්ධ ආදයම යන කේරුම එන අයුරිනි. උසාවියේ නියෝගයක් නොලබා එයින් ලැබෙන ආදයමෙන් තුන්වන පාර්ශ්වකරුවන් සමග නඩුහබ කිරීමට යන මුදල යහ මුදලය යථා පරිදි පාලනය කිරීමට යන වැයවන මුදල අඩුකළ යුතුය යන කේරුම ඒ වචනවලින් ගත නොහේ.

(4) එම දේපොළවලින් ලැබෙන ශුද්ධ ආදයම උසාවියට ගෙන ඒම වගඋත්තරකරු පැහැර හැර තිබෙන නිසාත් තමා අතර තිබුනු මුදල් හැටියට ඔහු පිළිගත් රු. 40,000/- ක මුදලවත් අඩු වශයෙන් උසාවියේ තැන්පත් කිරීම පැහැර හැර තිබෙන නිසාත් ධනුගේ ක්‍රියා කලාපය උසාවිය විසින් දෙන ලද නිර්දේශයට ඔබ්බෙන් ම අභිකරු වීමකට ප්‍රමාණවත් වන නිසා ඔහු උසාවියට අපහාස කිරීමේ චෝදනාවට වැරදි කරු වේ.

ලාදමුත්තුපිල්ලෙ ආරුමුගයාම් එ. ලාදමුත්තුපිල්ලෙ කදිරගාමන්පිල්ලෙ 15

දණ්ඩනීති සංග්‍රහය

කොටස්කරුවෙක් තවත් කොටස් කරුවකු විසින් හවුල් ඉඩමක හිටවන ලද වැටක් කඩා දමූ විට ඔහු අනර්ථ කිරීමේ වරදට වරදකරු ද? — දණ්ඩ නීති සංග්‍රහය, 49 වෙනි වගන්තිය.

තීන්දුව: අනෙක් කොටස් කරුවකු විසින් හවුල් ඉඩමක හිටවන ලද වැටක් කඩා දමන කොටස් කරුවෙක් අනර්ථ කිරීමේ වරදට වැරදි කරු නොවන්නේ ය.

රොබට් පීරිස් ථ. ඒ. තෝමස් 22

පුරවැසි පණත

වර්ෂ 1948 අංක 18 දරණ **පුරවැසි පණත** — 12, 12(4) සහ 12(6) දරණ ඡේද — ඉන්දියානු පුරවැසියකු ලංකාවේ පාරම්පරික පුරවැසියකු හා විවාහවීම; එම ලාංකික පුරවැසියා විසින් ලංකා පුරවැසියකු ලෙස ලියා පදිංචිවීමට කළ ඉල්ලීමක් — එය ප්‍රතික්ෂේප වීම — පෙත්සම්කරු (ස්වාමි පුරුෂයා) ඇමතිවරයාට කළ අභියාචනය අසාර්ථක වීම — සර්ටියෝරේරයි සහ මැන්ඩාමුස් ආඥා ලබා ගැනීමට කළ ඉල්ලීම — ඇමතිවරයාගේ තීරණය ප්‍රශ්න කිරීමට ඇති අයිතිවාසිකම — මනුෂ්‍ය අයිතිවාසිකම් පිළිබඳව සමස්ත ලෝක ප්‍රකාශනය මෙයට බල පවත්වන අයුරු.

වර්ෂ 1958 නොවැම්බර් මාසයෙහි ලංකාවට පැමිණි ඉන්දියානු පුරවැසියකු වූ පෙත්සම්කරු වර්ෂ 1959 ජනවාරි මාසයේ දී ලංකාවේ පාරම්පරික පුරවැසියකු හා විවාහ විය. වර්ෂ 1960 ඇ පුරවැසි පණතේ (349 වන අධිකාරය) 12 වන ඡේදය අනුව ලංකාවේ පුරවැසියකු ලෙස ලියා පදිංචි වීමට අවසර ඉල්ලා සිටියා ය.

ආරක්ෂක හා විදේශ කටයුතු පිළිබඳ අමාත්‍යාංශය මෙම ඉල්ලීම ප්‍රතික්ෂේප කරන ලදුව ඇගේ ස්වාමිපුරුෂයා මෙම අංශය හාර ඇමතිවරයාට අභියාචනයක් ඉදිරිපත් කෙළේ ය. ඉතාම පරීක්ෂාවෙන් කරුණු සලකා බැලීමෙන් පසු රජයේ ප්‍රතිපත්තිය ක්‍රියාත්මක කිරීම පිණිස ගත් මෙම තීරණය වෙනස් කළ නොහැකැ යි ඔහුට 16.4.64 වන දින පිළිතුරු ලැබිණ. ඉන්පසු සර්ටියෝරේරයි ආඥාවක් සහ මැන්ඩාමුස් ආඥාවක් ලබා ගැනීමට මෙම ඉල්ලීම උසාවියට ඉදිරිපත් කරන ලදී.

මෙම ඉල්ලීම ඝනාථ කිරීමට පහත සඳහන් තර්ක ගෙනහැර දැක්වී ය.

(ඒ) ඇමතිවරයා විසින් ඉහත සඳහන් පරිදි ප්‍රතික්ෂේප කිරීමේ දී එයට හේතු නොදක්වා තිබීම සාමාන්‍ය යුක්ති ධර්මයේ ප්‍රඥප්තීන්ට පටහැනි ය.

(බී) එහි සඳහන් වී ඇති හේතුව — එනම් රජයේ ප්‍රතිපත්ති ක්‍රියාවේ යෙදීම — අයෝග්‍ය හේතුවකි — මක්නිසාද? එම ප්‍රතිපත්ති සහ මහජන ශුභ සිද්ධිය එක ම දෙය නොවන බැවිනි.

(සී) පුරවැසි පණතේ 12(6) ඡේදය පාලන සංස්ථාවේ පැණවීම්වලට විරෝධී වූවකි.

(ඩී) මෙසේ ප්‍රතික්ෂේප කිරීම මනුෂ්‍ය අයිතිවාසිකම් පිළිබඳ සමස්ත ලෝක ප්‍රකාශනය (Declaration of Human Rights) කඩ කිරීමකි.

තීන්දුව: (1) පුරවැසි පණතේ 12 වන ඡේදයේ 4 වන සහ 6 වන උප ඡේදයන්ට අනුව සලකා බලන කල එම ඉල්ලීම ප්‍රතික්ෂේප කිරීමට ඇමතිවරයා හේතු දැක්වීම අනවශ්‍ය ය.

(2) රජයේ ප්‍රතිපත්ති සහ මහජන ශුභ සිද්ධිය යන ප්‍රඥප්ති දෙකේ කිසිම ගැටීමක් ඇති බවක් නොපෙනෙන සේ ය. රජයේ ප්‍රතිපත්ති නිතර ම මහජන ශුභ සිද්ධියට අනුව ගත් දෙයක් බව පිළිගත හැකි ය.

(3) 12(6) වන ඡේදය ගැන පැනවීමක් අන්තර්ගත වූ ලිඛිත නීතියක් පැනවීමට පාර්ලිමේන්තුවට බලය තිබේ.

(4) මනුෂ්‍ය අයිතිවාසිකම් පිළිබඳ සමස්ත ලෝක ප්‍රකාශනය සදාචාර බල පැවැත්වීමක් ලෙස අති උච්චස්ථානයක ඇති ලේඛනයක් වුවත් එය ලංකා නීතියේ කොටසක් නොවන නිසා එය නීතිය ගැබ් වූ ලේඛනයක් නොවේ.

ඇම්. ආර්. ලිලාවති එ. ආරක්ෂක හා විදේශ කටයුතු භාර ඇමතිතුමා 26

බාල වයස් කරුවකු පිළිබඳ භාරකාරත්වය

බාලවයස්කරුවකු පිළිබඳ භාරකාරත්වය — මේ සඳහා පෙත්සම්කාර දෙමව්පියන් විසින් කරන ලද ඉල්ලීමක් — දරුවන් නොමැති සොහොයුරියක් වූ තුන්වන වගඋත්තරකරු විසින් ළමයා හද වැඩීමට කරන ලද ඉල්ලීමකට දෙමව්පියන් කැමැත්ත දීම — අවුරුදු බොහෝ ගණනක් තුළ ළමයා හැදීමේ වැඩීමේ බරපැණ සහ සන්තුෂ්ඨීය පෙත්සම්කරුවන් විසින් සහ වගඋත්තරකරුවන් විසින් බෙදා හුක්ති විඳීම — ළමයාගේ ශුභ සිද්ධියට පෙත්සම්කරුවන් විසින් කළ සැලකියයුතු ප්‍රදානය — දෙමාපිය අයිතිවාසිකම් අත්හළ බවට සාධක යක් නොතිබීම — මෙබඳු ඉල්ලීමකට ළමයාගේ කැමැත්ත කොතරම් දුරට අදළ වේද යන්න —

'ඩී' නමැති දූරිය පෙත්සම්කරුගේ හා ඔහුගේ බිරිඳගේ දියණිය ය. බිරිඳගේ දරුවන් නැති සොහොයුරියගේ ඉල්ලීම පිට ඇයට එම දූරිය තමාගේ ගෙයි රඳවා හැදීමට ඉඩ දෙන ලදී. නමුත් මෙය මෙසේ සිදු වී ඇත්තේ දෙමව්පියන් සතු අයිතිවාසිකම් අත්හැරීමට ප්‍රකටව හෝ අප්‍රකටව සලකා ගත හැකි සම්මුතියක් නොමැතිව ය. අවුරුදු බොහෝ ගණනක් ම පෙත්සම්කරුවෝ ද වගඋත්තරකරුවෝ ද (එම අඹු සැමී යුවළ) ළමයා හැදීමේ වැඩීමේ කායික දුෂ්කරතාවය හා සන්තුෂ්ඨීය එක්ව බෙදා ගත්හ. ළමයා ඇගේ දෙමව්පිය සහෝදර සහෝදරියන් බැලීමට යවන ලදී. ඇතැම් විට රැගෙන යන ලදී. ළමයාගේ ශුභ සිද්ධිය සඳහා දෙමාපියන් විසින් සැලකිය යුතු ප්‍රදානයන් ද කර තිබේ.

වග උත්තරකරුවන්ට ළමයාගේ දෙමව්පියන් විසින් හබෙයාස් කෝර්පුස් ආඥාවක් ලබා ගැනීම සඳහා කරන ලද ඉල්ලීමක දී තීන්දු වූයේ

(1) මෙහි කරුණු අනුව සලකා බලන කල ළමයා කෙරෙහි තිබුණු දෙමාපිය අයිතිවාසිකම් අත්හැර දැමීමට කවදවත් අදහසක් දෙමව්පියන් තුළ පහළ වී යයි කිය නොහේ. ළමයාගේ භාර කාරත්වය පියා සතු වේ.

(2) කාරණා කාරණා තේරුම් යන වයසට නොපිළිපන් ළමයාට නීතිය අනුව අන් අයගේ භාරකාරත්වය යටතේ සිටීමට කැමැත්ත දීමට හිමිකමක් නොමැත්තේ ය. ළමයාගේ කැමැත්ත

නීන්දුව: (1) පළමුවන තර්කය සම්බන්ධයෙන් කල්පනා කරන විට ලංකා නීති සම්පාදක අංශයේ ක්‍රියාකාරි හැකියාව එබඳු සීමා කිරීමකින් පරිපීඩිත වී නැත. වර්ෂ 1946 ලංකා (පාලන සංස්ථා) රාජාඥාවේ සහ වර්ෂ 1947 ලංකා ස්වාධීන පණතේ ඒකාබද්ධ ප්‍රතිඵලය වන්නේ ලංකා පාර්ලිමේන්තුවට අධිශ්වර ස්වාධීන විජිත යක ව්‍යවස්ථාදායක බලය ප්‍රදානය කිරීමට අදහස් කර තිබීම සහ ඒ අයුරින් එය පිරිනැමීම ඇති බව ය.

(2) දෙවන තර්කය සම්බන්ධයෙන් සලකා බලන කල ලංකා දේශපාලන සංස්ථාවට අනුව විධායක අංශයට ව්‍යවස්ථා සම්පාදක අංශයට පැහැර ගැනීමට හෝ ආක්‍රමණය කිරීමට නොහැකි වෙන් වූ බලයක් විනිශ්චය කායර්‍යාංශයෙහි ගැබ් වී තිබේ. ඉහත සඳහන් වර්ෂ 1962 පණවන ලද පණත් දෙක්හිම ඇති සාරය සහ සාරාංශය වන්නේ විසඳීමට භාජන වූ සිද්ධියෙන් පසු පණවන ලද නීතියකින් විශේෂ යෙන් සඳහන් කරන ලද පුද්ගලයන් වරදකරුවන් බවට පත්කොට ඔවුන්ගේ දඩුවම වැඩිකිරීමටත් ඔවුන් තමන්ගේ නඩුව විසඳීම අපේක්ෂා කරනවිට සිරකර තැබීම නීත්‍යානුකූල කිරීමටත් එම කාල පරිච්ඡේදයේ දී නීතියට අනුව ඇතුළත් කළ නොහැකි ආකාරයෙන් ලබාගත් ඔවුන්ගේ ප්‍රකාශ නඩුවට ඇතුළත් කිරීමට හැකිවන පිණිසත් ඔවුන් වරදට පත්කිරීම පහසුවෙන් කරගත හැකි පරිදි මූලික යාක්ති නීතිය වෙනස් කරන පිණිසත් සිදු වූ එම සිද්ධියෙන් පසු ඔවුන් පිට පැවැරෙන දඩුවම වෙනස් කිරීමේ පරමාර්ථයෙනුත් කරන ලද නීති සම්පාදක සැලැස්මක් බව ය. මේ නිසා නඩුවේ එම කරුණු අනුව සලකා බලන විට මෙබඳු නීති පැණවීම විනිශ්චය කායර්‍යාංශයේ කර්තව්‍යයන් ආක්‍රමණය කිරීමට එය සමාන වන බව සහ ඒ නිසා එම නීති පැණවීම බල ශූන්‍ය බව.

කරුණු මෙසේ තිබිය දී ඇපැල්කරුවන් ගේ තුන්වෙනි තර්කය පිළිබඳව රාජාධිකරණ විනිශ්චය මණ්ඩලය කිසිම මතයක් පළනොකරන ලදී.

රාජාධිකරණයේ අධිකරණ සාමි මණ්ඩලය විසින්,

(අ) ''මෙම නිදහස් කිරීමේ පැණවීම් වර්ෂ 1965 පණතේ තිබුණු නීති පැණවීමේ හැකියාව දුන් ප්‍රඥප්තීන් එහි ගැබ්කොට ඒවා තවත් පෘථුල තත්වයකට පෙරළා තිබෙනු පමණක් නොව වර්ෂ 1946 රාජාඥා පණත සහ වර්ෂ 1947 පණත ද ඒකාබද්ධව ගත් කල ඇතිවන ප්‍රතිඵලය වන්නේ ලංකාවේ පාර්ලිමේන්තුවට ස්වාධීන අධිශ්වර විජිතයකට හිමි සම්පූර්ණ නීති සම්පාදක බලය දීමට එයින් අදහස් කර ඇති බවත් එය එබඳු ප්‍රතිඵලයක් ඇති කොට ඇති බවත් පැහැදිලි ය. (ඉබ්‍රේ ලෙබ්බේ එ. මහ රැජින. (1964) ඒ. සී. 900 වන පිට බලන්න.)''

(ආ) ''පාලන සංස්ථාවේ 29(1) ඡේදයෙන් කියැවෙන්නේ මෙසේ ය:— ''මෙම රාජාඥාවේ පැණවීම් වලට අවනතව දිවයිනෙහි සාමය, විනය සහ මනා පාලනය පිළිබඳව නීති සෑදීමට පාර්ලිමේන්තුවට බලය තිබිය යුතුය. සිරින් පරිදි මෙම වචන වල තේරුම් කථනයකර තිබෙන්නේ ඒ වචනවල සම්පූර්ණ විෂය ගැනෙණ හැටියට ය. පාර්ලිමේන්තුවට 2/3 ක බහුතර ඡන්ද සංඛ්‍යාවක් ලැබුණු කල කථානායකතුමාගේ සහතිකයකුත් ඇතිව පාලන සංස්ථාවට සංශෝධනය කළ හැකි බව 29(4) ඡේදයෙන් පැණවී තිබේ. නමුත් 19(1) දරණ ඡේදයේ වචන විනිශ්චය කායර්‍යාංශයේ විනිශ්චයාත් මක බලය පැහැර ගැනීමක් කෙරෙන අන්දමට නීති පැණවීමට පාර්ලිමේන්තුවට බලය තිබේය යන්න තේරුම් යන අන්දමට කියවීමට මෙම විනිශ්චය මණ්ඩලයට පුළුවන් කමක් නැත. උදහරණයක් වශයෙන් ගතහොත් යම්කිසිවකුට විරුධව නඩුවක් නොඅසා දඩුවම් කළ හැකි ලෙස නීතියක් පැණවීමෙන් හෝ විභාග වීගෙන යන නඩුවක යම්කිසි පුද්ගලයෙකුට විරුද්ධව ඔහු වරදකරුවෙකු කොට නීන්දුවක් දීමට යැයි විනිශ්චයකාරවරයෙකුට උපදෙස් දීමෙන් මෙය කළ හැක. එබඳු බලපැහැර ගැනීමක් පාලන සංස්ථාවට පටහැනි නම් ඉහත සඳහන් ඡේදයේ වචන එම

බලය පාර්ලිමේන්තුවට දෙන බව එම ඡේදයෙන් තේරුම් ගැනීම උගහට ය. මෙම නඩුව විභාග කිරීමේ දී යම් හෙයකින් 2/3 ක බහුතර ඡන්ද සංඛ්‍යාවකින් පාලන සංස්ථාව වෙනස් කොට එබඳු ප්‍රතිඵලයක් ලබාගැනීමට පාර්ලිමේන්තුව සැරසුණහොත් ඇතිවන තත්වය කුමක් දැයි අනුමාන අදහස් පහළ කරන ලදී. නමුත් මෙම නඩුවේ එබඳු තත්වයක් උද්ගත නොවේ. මේ නයින් බලන විට පාලන සංස්ථාවේ 29(4) ඡේදයට අනුකූලතාවය නොමැතිව පණවන ලද පණතක් විනිශ්චයාත්මක බලය පැහැර ගැනීමට හෝ ආක්‍රමණය කිරීමට ඉව

අල්ලන සේ පෙනේ නම් එම පණත බල අතික්‍රාන්ත (අල්ට්‍රා-වයර්ස්) පණතක් වේ.''

දෙන් ජෝන් ප්‍රැන්සිස් ඩග්ලස් ලියනගේ සහ තවත් අය එ. මහ රැජින 1

ලංකා ස්වාධීන පණත

ලංකා පාලන සංස්ථා රාජාඥ පණත බලනු ... 1

ලංකා පාර්ලිමේන්තුවේ බලතල විෂයෙහි සීමාව

ලංකා පාලන සංස්ථා රාජාසන පණත බලනු ... 1

මැක්ඩර්මොට් සාමිවරයා, බෝදිගෙස්ටිහි මොරිස් සාමිවරයා, ගෙස්ට් සාමිවරයා, පියර්ස් සාමිවරයා සහ පියර්සන් සාමිවරයා ඉදිරිපිට

දෙන් ජෝන් ප්‍රැන්සිස් ඩග්ලස් ලියනගේ සහ තවත් අය එ. මහ රැජින*

රාජාධිකරණ ආඥාවනා අංක 25 — වර්ෂ 1965

ශ්‍රී ලංකාද්වීපයේ ශ්‍රේෂ්ඨාධිකරණයෙහි

රාජාධිකරණයේ අධිකරණ යාම් මණ්ඩලයේ රපෝර්තුව නිකුත් කිරීමට හේතුභූතවූ කරුණු

වර්ෂ 1965 දෙසැම්බර් මස 2 වෙනි දින ප්‍රකාශ කරන ලදි.

ලංකා පාලන සංස්ථා රාජාඥා පණත — 1947 ලංකා ස්වාධීන පණත — ලංකා පාර්ලිමේන්තුවේ බලතල විහිද යන සීමාව — මූලික යුක්ති ධර්මයේ ප්‍රතිපත්තීන්ට විරුද්ධ නීති සම්මත කිරීමට නොහැකි වීම — බලතල වෙන් කොට තැබීම — වර්ෂ 1962 අංක 1 දරණ පණතින් සහ වර්ෂ 1962 අංක 31 දරණ පණතින් විනිශ්චයාත්මක කර්තව්‍යයන් ආක්‍රමණය වී තිබේ ද යන්න — විනිශ්චයාත්මක කර්තව්‍යයන් ආක්‍රමණය වන නීති සාධනයෙහි ඇති බල ශූන්‍යතාව ය.

වර්ෂ 1962 ජනවාරි 27 වෙනි දින කරණ ලදුව අසාර්ථක වූ රාජ්‍ය විරෝධී කුමන්ත්‍රණයක් පිළිබඳව ඇපැල් කරුවන් එකොළොස් දෙනාගෙන් එක් එක් කෙනෙක් වරද තුනකට වරද කරුවන් බවට පත් කරණ ලදී. මෙම නඩුව විභාග වූයේ ජූරි සභාවක් නොමැතිව අසුන්ගත් ශ්‍රේෂ්ඨාධිකරණයේ විනිසුරුවන් තිදෙනෙකු ඉදිරිපිට ය. ලංකාවේ අපරාධ නීතිය පිළිබඳ අනෙක් පැණවීම් හැර වර්ෂ 1962 අංක 1 දරණ අපරාධ නීති (විශේෂ විධිවිධාන) පණත සහ වර්ෂ 1962 අංක 31 දරණ අපරාධ නීති පණත මෙම නඩුවට බලපවත්වා තිබේ. එම බලපැවැත්වීමට අදල පැනවීම් රාජාධිකරණ විනිශ්චය මණ්ඩලයේ මත ප්‍රකාශනයේ ගැබ් වී තිබේ. වර්ෂ 1965 අප්‍රෙල් මාසයේ වරදකරුවන් බවට පත්කරනලද ඇපල්කරුවෝ තමන් එසේ වරදට පත්කිරීමට විරුද්ධව අභියාචනා ඉදිරිපත් කළහ. යම්හෙයකින් ඉහත යඳහන් පරිදි නඩුව විසඳන ආකාරයට, කරන ලද අපචාරවලට, නඩුවෙහි සාක්ෂි ඇතුළත් කිරීමට සහ දණ්ඩන නියෝගවලට බලපැවැත් වූ නීති බලගුණය නම් එසේ වරදට පත්කිරීම ස්ථාපිත කළ නොහැකි බව පාර්ශ්වකරුවෝ ඇපැලෙහි දී පිළිගත්හ.

එසේ වරදට පත්කිරීමෙහි නීතියුක්තභාවයට රාජාධිකරණ විනිශ්චය මණ්ඩලය ඉදිරිපිටදී හේතු තුනක් අරමුණු කොට පහර දෙන ලදි.

පළමුවැන්න, ලංකා පාර්ලිමේන්තුව මූලික යුක්ති ධර්මයේ ප්‍රතිපත්තීන්ට විරුද්ධව නීති සම්මත කිරීමට නොහැකිවීමෙන් එහි බලය සීමිත තත්වයකට වැටී තිබීම.

දෙවැන්න, නීති සම්පාදක අංගය විසින් යුක්තියුක්ත නොවන ලෙස විනිශ්චයාත්මක බලය එය පිට පවරාගැනීම නිසා හෝ එය නීති සම්පාදන අංගයේ හැකියාවෙන් පිටස්තරවූත්, ව්‍යවස්ථාදායක අංගයේත් විධායක අංගයේත්, විනිශ්චය අංගයේත්, පාලන සංස්ථාවට අනුකූලව ඇති බලතල වෙන්කොට තැබීමට පරස්පර විරෝධිවීම නිසා බල රහිත තත්වයට වැටීම සහ,

තුන්වැන්න, මෙම පණත් සම්මත කිරීමට කලින් සිටම ඇපල්කරුවන්ට තිබූ අයිතිවාසිකමක් වන ජූරි සභාවක් ලබාගැනීම බවුත් වෙතින් ඉවත් කිරීම පිණිස එම පණත්වල විශේෂ පැණවීමක් නොමැති නිසා එම වර්ෂ 1962 පැණ වූ පණත්වල ඇතුළත් පද මාලාව එබඳු අයිතියක් අහෝසි කිරීමට ප්‍රමාණවත් නොවීම ය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 70 වෙනි කා., 1 වෙනි පිට බලනු.

තීන්දුව: (1) පළමුවන තර්කය සම්බන්ධයෙන් කල්පනා කරන විට ලංකා නීති සම්පාදක අංශයේ ක්‍රියාකාරී හැකියාව එබඳු සීමාකිරීමකින් පරිපීඩිත වී නැත. වර්ෂ 1946 ලංකා (පාලන සංස්ථා) රාජාඥාවේ සහ වර්ෂ 1947 ලංකා ස්වාධීන පණතේ ඒකාබද්ධ ප්‍රතිඵලය වන්නේ ලංකා පාර්ලිමේන්තුවට අධිශ්වර ස්වාධීන විධිතයක ව්‍යවස්ථාදායක බලය ප්‍රදානය කිරීමට අදහස්කර තිබීම සහ ඒ අයුරින් එය පිරිනැමීම ඇති බව ය.

(2) දෙවන තර්කය සම්බන්ධයෙන් සලකා බලන කල ලංකා දේශපාලන සංස්ථාවට අනුව විධායක අංශයට ව්‍යවස්ථා සම්පාදක අංශයට පැහැර ගැනීමට හෝ ආක්‍රමණය කිරීමට නොහැකි වෙන් වූ බලයක් විනිශ්චය කායර්‍යාංශයෙහි ගැබ් වී තිබේ. ඉහත සඳහන් වර්ෂ 1962 පණවන ලද පණත් දෙක්හිම ඇති සාරය සහ සාරාංශය වන්නේ විසඳීමට භාජන වූ සිද්ධියෙන් පසු පණවන ලද නීතියකින් විශේෂයෙන් සඳහන් කරන ලද පුද්ගලයන් වරදකරුවන් බවට පත්කොට ඔවුන්ගේ දඩුවම වැඩිකිරීමටත් ඔවුන් තමන්ගේ නඩුව විසඳීම අපේක්ෂා කරන විට සිරකර තැබීම නීත්‍යානුකූල කිරීමටත් එම කාල පරිච්ඡේදයේ දී නීතියට අනුව ඇතුළත් කළ නොහැකි ආකාරයෙන් ලබාගත් ඔවුන්ගේ ප්‍රකාශ නඩුවට ඇතුළත් කිරීමට හැකිවන පිණිසත් ඔවුන් වරදට පත්කිරීම පහසුවෙන් කරගත හැකි පරිදි මූලික සාක්ෂි නීතිය වෙනස් කරන පිණිසත් සිදු වූ එම සිද්ධියෙන් පසු ඔවුන් පිට පැවැරෙන දඩුවම වෙනස් කිරීමේ පරමාර්ථයෙනුත් කරන ලද නීති සම්පාදක යැලැස්මක් බව ය. මේ නිසා නඩුවේ එම කරුණු අනුව සලකා බලන විට මෙබඳු නීති පැණවීම විනිශ්චය කායර්‍යාංශයේ කර්තව්‍යයන් ආක්‍රමණය කිරීමට එය සමාන වන බව සහ ඒ නිසා එම නීති පැණවීම බල ශූන්‍ය බව.

කරුණු මෙසේ තිබිය දී ඇපල්කරුවන් ගේ තුන්වෙනි තර්කය පිළිබඳව රාජාධිකරණ විනිශ්චය මණ්ඩලය කිසිම මතයක් පළනොකරන ලදී.

රාජාධිකරණයේ අධිකරණ සාමි මණ්ඩලය විසින්,

(අ) ''මෙම නිදහස් කිරීමේ පැණවීම් වර්ෂ 1865 පණතේ තිබුණු නීති පැණවීමේ හැකියාව දුන් ප්‍රභූත්වයින් එහි ගැබ්කොට ඒවා තවත් ෂෘට්ල තත්වයකට පෙරළා තිබෙනු පමණක් නොව වර්ෂ 1946 රාජාඥා පණත සහ වර්ෂ 1947 පණත ද ඒකාබද්ධව ගත්කල ඇතිවන ප්‍රතිඵලය වන්නේ ලංකාවේ පාර්ලිමේන්තුවට ස්වාධීන අධිශ්වර විධිතයකට හිමි සම්පූර්ණ නීති සම්පාදක බලය දීමට එයින් අදහස් කර ඇති බවත් එය එබඳු ප්‍රතිඵලයක් ඇති කොට ඇති බවත් පැහැදිලි ය. (ඉබ්‍රි ලෙබ්බෙ එ. මහ රැජින. [1964] ඒ. සී. 900 වන පිට බලන්න.)''

(ආ) ''පාලන සංස්ථාවේ 29(1) ඡේදයෙන් කියැවෙන්නේ මෙයේය:— ''මෙම රාජාඥාවේ පැණවීම් වලට අවනතව දිවයිනෙහි සාමය, විනය සහ මනා පාලනය පිළිබඳව නීති සැදීමට පාර්ලිමේන්තුවට බලය තිබිය යුතු ය. සිරිත් පරිදි මෙම වචනවල තේරුම කථනය කර තිබෙන්නේ ඒ වචනවල සම්පූර්ණ විෂය ගැඹෙන හැටියට ය. පාර්ලිමේන්තුවට 2/3 ක බහුතර ඡන්ද සංඛ්‍යාවක් ලැබුණු කල කථානායක තුමාගේ සහතිකයකුත් ඇතිව පාලන සංස්ථාව සංශෝධනය කළ හැකි බව 29(4) ඡේදයෙන් පැණවී තිබේ. නමුත් 19(1) දරණ ඡේදයේ වචන විනිශ්චය කායර්‍යාංශයේ විනිශ්චයාත්මක බලය පැහැර ගැනීමක් කෙරෙන අන්දමට නීති පැණවීමට පාර්ලිමේන්තුවට බලය තිබේය යන්න තේරුම් යන අන්දමට කියවීමට මෙම විනිශ්චය මණ්ඩලයට පුළුවන් කමක් නැත. උදහරණයක් වශයෙන් ගතහොත් යම්කිසිවෙකුට විරුද්ධව නඩුවක් නොඅසා දඩුවම් කළ හැකි ලෙස නීතියක් පැණවීමෙන් හෝ විභාග වීගෙන යන නඩුවක යම්කිසි පුද්ගලයෙකුට විරුද්ධව ඔහු වරදකරුවෙකු කොට තීන්දුවක් දීමට යයි විනිශ්චයකාරවරයෙකුට උපදෙස් දීමෙන් මෙය කළ හැක. එබඳු බලපැහැර ගැනීමක් පාලන සංස්ථාවට පටහැනි නම් ඉහත සඳහන් ඡේදයේ වචන එම බලය පාර්ලිමේන්තුවට දෙන බව එම ඡේදයෙන් තේරුම් ගැනීම උගහට ය. මෙම නඩුව විභාග කිරීමෙහි දී යම් හෙයකින් 2/3 ක බහුතර ඡන්ද සංඛ්‍යාවකින් පාලන සංස්ථාව වෙනස් කොට එබඳු ප්‍රතිඵලයක් ලබාගැනීමට පාර්ලිමේන්තුව සැරසුණහොත් ඇතිවන තත්වය කුමක් දැයි අනුමාන අදහස් පහළ කරන ලදී. නමුත් මෙම නඩුවේ එබඳු තත්වයක් උද්ගත නොවේ. මේ නයින් බලන විට පාලන සංස්ථාවේ 29(4) ඡේදයට අනුකූලතාවය නොමැතිව පණවන ලද පණතක් විනිශ්චයාත්මක බලය පැහැර ගැනීමට හෝ ආක්‍රමණය කිරීමට ඉව අල්ලන සේ පෙනේ නම් එම පණත බල අතික්‍රාන්ත (අල්ට්‍රා-වයර්ස්) පණතක් වේ.''

නීතිඥවරු: රාජනීතිඥ ඊ. එෆ්. එන්. ගුණතිලක මහතා, රාජනීතිඥ එච්. ඩබ්ලියු. ජයවර්ධන මහතා, එම්. ඉ. සොලමන් සහ එස්. ජේ. කදිරගාමර් මහතුන් සමග ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ වික්ටර් තෙන්නකෝන් (ලංකාවේ සොලිසිටර් ජනරාල්) මහතා, ආර්. කේ. හැන්ඩූ මහතා සහ වී. එස්. ඒ. පුල්ලෙනායගම් මහතා සමග වගඋත්තරකාර රජය වෙනුවෙන්.

රාජාධිකරණයේ විනිශ්චයකාර ගරු පියර්ස් සාමිවරයා

මෙය ශ්‍රී ලංකාද්වීපයේ ශ්‍රේෂ්ඨාධිකරණය විසින් දෙන ලද තීන්දුවකට හා දඩුවමකට විරුද්ධව ඉදිරිපත් කර සිටින අභියාචනයකි. වර්ෂ 1962 ජනවාරි මස 27 වෙනි දින කරණ ලදුව අසාර්ථක වූ කුමන්ත්‍රණයක් පිළිබඳව චෝදනා තුනකට මෙම ඇපල්කරුවන් 11 දෙනා එක් එක්ෂනා බැගින් වරදකරුවෝ වූහ. එම චෝදනා නම් පළමුවැන්න, ඔවුන් මහ රැජිනියට විරුද්ධව යුද්ධයක් කරගෙන යාමට කුමන්ත්‍රණය කිරීම, දෙවැන්න, ශ්‍රී ලංකාද්වීපයෙහි ආණ්ඩුව සාපරාධී බලයෙන් හෝ සාපරාධී ලෙස බලපෙන් වීමෙන් හෝ තුස්න කිරීමට ඔවුන් විසින් කුමන්ත්‍රණ කරන ලදුයි යන්න යහ තුන් වෙනුව නිත්‍යානුකූලව ශ්‍රී ලංකා ද්වීපයෙහි ස්ථාපිතවූ ආණ්ඩුව හිතියුක්ත නොවන අන්දමකින් බිඳ හෙලීමට ඔවුන් සමග මෙම නඩුවේදී විභාග කරන ලද විත්තිකරුවන් දහතුන්දෙනෙක් නිදහස් කර හරින ලදහ. ඇපල්කරුවන් ගෙන් එක් එක් කෙනෙක් ම දහ අවුරුදු බරපතල සිර දඩුවමකට හා තමන් සතු දේපල රාජසන්තක වීමේ දඩුවමකට ද ගොදුරු කරන ලදී.

සාමාන්‍ය විශයෙන් අපරාධ නඩු විභාගයක් පැවැත්වෙන අන්දමට ඇපල්කරුවන් ගැන විනිශ්චයකාර වරයෙකු සහ ජූරියභාවක් මගින් නඩුවිභාගයක් නොකොට ශ්‍රේෂ්ඨාධිකරණයේ විනිශ්චයකාරවරයන් තිදෙනෙකු - ගෙන් යුත් මණ්ඩලයක් විසින් ජූරි සභාවක් නොමැතිව මෙම නඩුව විසඳා තිබේ. කියා ඇති අන්දමට මෙසේ උත්සාහ කරන ලද මෙම කුමන්ත්‍රණයෙහි නොයෙක් නොයෙක් ක්‍රියා කොටස් කිරීමට චිත්තිකරුවන් බොහෝ දෙනෙක් සම්බන්ධ වූ නිසා මෙම නඩුව දිර්ඝ වූ ද, පැටළිලි සහිත වූ ද, නඩුවක් විය. ඇත්ත විශයෙන් ම නීති චාර්තාවල උසාවියෙන් දෙන ලද මෙම නඩු තීන්දුව පිටු 200 ක් ඉක්මවා ගොස් ඇති බව පෙනේ. (මහරැජින එ. ලියනගේ සහ තවත් අය — 67 න.නී.වා. 193 පිට) මේ නිසා මෙහි ඇති එක් එක් අභියාචනයක් ම නඩුවෙහි දී ඉදිරිපත් වී ඇති සාක්ෂි සහ සවිස්තරව ඇති, කරුණු ඉතා පැටලිලි ලෙස සලකා බැලීම අවශ්‍ය වීමේ හේතු වෙන් මෙහි විසඳිය යුතු ප්‍රශ්න බොහෝ ගණනක් තිබේ.

කරුණු මෙසේ වුවද සෑම අභියාචනයකම එක් කරුණක් පොදුවේ සැළකර තිබෙන සේ පෙනේ. එනම්, කරුණු හෝ සාක්ෂි සම්බන්ධයෙන් ඇති විස්තර කෙසේ වුවත් වර්ෂ 1962 දී අසාර්ථක වූ මෙම කුමන්ත්‍රණයට සහභාගි වූ පුද්ගලයන් සම්බන්ධයෙන් ක්‍රියාකිරීම් සඳහා ම විශේෂයෙන් පනවන ලද එක්තරා නීති සංඛ්‍යාවක නීති විරහිත භාවය නිසා මෙම ඇපල්කරුවන් වරදට පත් කිරීම් නිෂ්ප්‍රභා කළ යුතුය යන්න ය. මෙම නඩුවෙහි විභාග විලාසය ද ඉදිරිපත් කරන ලද චෝදනා ද ඇතුළත් කළයුතු සාක්ෂි ද, දෙන ලද දඩුවම් ද එසේ පැනවුණු නීති කොටස් වලින් බලපැවැත්වී තිබේ. මෙම නීති කොටස් නීති විරෝධී වෙන්නම් ඒ අනුව කරන ලද ඇපැල්කරුවන් වරදට පත්කිරීම් නිෂ්ප්‍රභාවිය යුතු බව දෙපක්ෂය ම නිවැරදි ලෙස පිළිගැනීමට කැමති වූහ. එහෙයින් මෙම නඩුවෙහි කරුණු හා සාක්ෂි පිළිබඳව ඉතා ම සූක්ෂ්ම විස්තර සහිත පරීක්ෂණයක් ආරම්භ කිරීමට පෙර ප්‍රාථමික කරුණක් හැටියට සලකා මෙම නීති කොටස් පැනවීම නීති විරෝධී දැයි යන ප්‍රශ්නය පළමුවෙන් ම විසඳිය යුතුයයි මෙම සාමී මණ්ඩලය තීරණය කළේ ය.

වර්ෂ 1962 ජනවාරි මස 27 වෙනි දින කරන ලද කුමන්ත්‍රණය පිළිබඳව සවිස්තර ප්‍රකාශයක් සහ අවසාන අවස්ථාවේ දී එය බිඳ වැටුණු හැටි ප්‍රකාශවෙන ධවල පත්‍රිකාවක් වර්ෂ 1962 පෙබරවාරි මස 13 වෙනි දින ලංකාණ්ඩව මගින් නිකුත් කරන ලදී. මෙහි කුමන්ත්‍රණකරුවන් යයි කියන පුද්ගලයන් තිස් දෙනෙකුගේ නම් සහ ඔවුන් විසින් කරන ලද ක්‍රියාවන් ද අන්තර් ගත වී ඇත. එම පත්‍රිකාවෙහි කියන හැටියට එම කුමන්ත්‍රණය පොලිස් නිලධාරීන් හා යුද හමුදා නිලධාරීන් විසින් සංවිධානය කරන ලදුව එහි පරමාර්ථය වී ඇත්තේ ආණ්ඩුව බිඳහෙලීම සහ තවත් අය සමග විදේශ කටයුතු හා ආරක්ෂක කටයුතු පිළිබඳ පාර්ලිමේන්තු ලේකම්වරයා මෙම කුමන්ත්‍රණය අසාර්ථක වන අන්දමේ නියෝග නිකුත් කිරීමට පුළුවන් කම් ඇතුව සිටි නිසා ඔහුව අල්වා ගැනීම ය. වැඩිදුරටත් කුමන්ත්‍රණයට සහභාගි වූ පුද්ගලයන් විසින් කිරීමට අදහස් කරන ලද දේ කුමක් ද යන්න අනාවරණය කළ එම ධවල පත්‍රිකාව ඔවුන් අල්වා ගැනීමෙන් පසු ඇමතිවරුන් විසින් සැණෙකින් ම චිත්තිකරුවන්ගෙන් අසන ලද ප්‍රශ්න පිළිබඳ විස්තරයක් ද එහි ඇතුළත් විය. ධවල පත්‍රිකාව අවසාන වූයේ මෙබඳු ප්‍රකාශනයකිනි. ''මේ රටේ සෑම කෙන ම වාසය කරන අහිංසක ජනතාවගේ ලේ වැගිරීමට හා ඔවුනට දුෂ්කර කම් කිරීමට ප්‍රතිඝාතී ක්‍රියා මාර්ග හා පරමාර්ථ අනුගමනය කිරීමේ අපේක්ෂාවෙන් උත්සාහයක් ගත් සියලු දෙනාට ම ඉතාම බැරෑරුම් තත්වයක නිවර්තක දණ්ඩනයක් පැවරීම ද අවශ්‍ය කරුණකි. මෙම පරීක්ෂණය එහි තර්කානුකූල අවසානය දක්වා පැවැත්වීගෙන යායුතු අතර තමන්ට ඉටුවිය යුතු යුතුකම් රජයෙන් නොවළහා මහජනතාවට ඉටුවෙන බව ජනතාව ඒකාන්තයෙන් ම දැනගත යුතුවී ඇත.''

ජනවාරි මස 27 වැනි දින සිට සිරභාරයේ සිටි සියලු ම විත්තිකරුවෝ (මින් එක්කෙනෙක් පමණක් 1962 ජූලි 31 දින තමා ම ව්‍යසනයට ළඟා වූ බව සිහිකළයුතු ය. ඉන්පසු ඉතා ම බරපතල සිර අධ්‍යර්ථයක සිටියාහ.

(මහ රැජින ඵ. ලියනගේ සහ තවත් අය — 67 න.නී.වා. 259 වන පිට බලන්න) සිර අඩස්සියේ සිටියදී ම වර්ෂ 1962 ජනවාරි 27 වැනිදා රාත්‍රියෙහි සහ ඉන් පසු ද ඔවුන් ගෙන් ප්‍රශ්න විමසන ලදී.

වර්ෂ 1962 මාර්තු මස 16 වෙනි දින 1962 අංක 1 දරණ අපරාධ නීතිය (විශේෂ විධිවිධාන) පනත සම්මත කෙරිණි. (පහසුව සඳහා මෙම පනත මෙහි ''පළමු-වෙනි පනත'' යනුවෙන් සඳහන් වේ.) මෙම පනත යටෝක්ත කුමන්ත්‍රණයට සහභාගිවූවන්ට එල්ලවූ බව පැහැදිලි ය. එය අනිතයට ද බලපාන සේ සකස් කරන ලදුව එහි 19 වන ඡේදයෙහි මෙසේ කියැවේ.

> ''මෙම පනතෙහි සියලු ම පැණවීම් 17 වන ඡේදයෙහි ගැබ්වී ඇති පැණවීම් හැර සෑම කාරණයක් සඳහා ම වර්ෂ 1962 ජනවාරි මස 1 ද සිට බල පවත්වන සේ සලකා ගතයුතු ය.
>
> කෙසේ වෙතත් මෙම පනතෙහි 1 වන කොටසේ ඇතුළත්ව ඇති පැණවීම් වර්ෂ 1962 ජනවාරි 27 වැනි දින හෝ ඊට ආසන්න දිනක රජයට විරුද්ධව කරන ලද යම්කිසි වරදකට පමණක් සීමාවන ලෙස සහ එම වරදට සම්බන්ධ වෙන යම්කිසි කරුණක්. ක්‍රියාවක්, දෑයක් හෝ එම වරදට ආනුසංගිකව කෙරෙන වෙනත් ක්‍රියාවක් පමණක් අසුවන සේ සීමාසහිතව බලපැවැත්වේ.''

පනතෙහි පළමුවන කොටසෙන් පරිශ්‍රමයක් දරන ලද මෙම කුමන්ත්‍රණයට සහභාගි වී සිරහාරයේ සිටින පුද්ගලයන් එසේ නවතා තැබීම නීත්‍යානුකූල කිරීමට උපදෙස් දෙන්නකි. සාමාන්‍ය අපරාධ නීතියෙහි හැටියට වරදක් සඳහා අල්වා ගන්නා ලද පුද්ගලයෙකුට ඔහුගේ ආරක්ෂාව සඳහා පහත පෙනෙන විධිවිධාන විද්‍යමාන වේ.

අපරාධ නඩුවිධාන සංග්‍රහය යටතේ මෙසේ අල්වා ගන්නා ලද නැනැත්තා යුක්තියෙන් තොර ප්‍රමාදයක් නොමැතිව මහේස්ත්‍රාත්වරයෙකු වෙත යැවීම හෝ ගෙන යාම හෝ කළ යුතුය. (36 ඡේදය) මෙබඳු පුද්ගල-යෙකු වරෙන්තුවක් නොමැතිව අල්වා ගත් කල නවතා ගතහැකි කාලය පැය 24 ඉක්මවා නොයා යුතුය. (37 වන ඡේදය) මෙසේ අල්වා ගන්නා ලද බව පොලිසිය විසින් මහේස්ත්‍රාත් උසාවියට දැනුම් දිය යුතුය. (38 ඡේදය) නමුත් පළමුවන පනතේ පළමුවන කොටස රජයට විරුද්ධව කරන ලද යම්කිසි වරදකට සෑක කරන ලද පුද්ගලයෙක් ඒ පණතින් පසුව හැට දවසක් සිර හාරයේ නවතා ගත හැකි බවත් එසේ නවතා ගත්විට ඔහු අල්වා තිබෙන බව මහේස්ත්‍රාත් උසාවියට දැනුම් දිය යුතු බවත් නිගමනකොට තිබේ.

පළමුවන පණතේ දෙවන කොටසෙහි පහත සඳහන් පරිදි එහි ගැබ් වී ඇති වරද පිළිබඳ නඩු විභාගයෙහි ආකාරය 21 වන ඡේදයෙහි වෙනස් වී තිබේ. අපරාධ නඩුවිධාන සංග්‍රහයේ 440 ඒ දරණ ඡේදයෙන් ඇමති වරයාට චිත්තිකරුවා රාජද්‍රෝහිකමට හෝ මහජන කැළඹීම හෝ මහජන මතය විප්ලව තත්වයකට වැටීම හෝ එයට සමාන ක්‍රියාවක් හෝ සිදුකළ කලෙක ඔහු ජූරි සභාවක් නොමැතිව විනිශ්චයකාරවරුන් නිදහසකු-ගෙන් යුතු මණ්ඩලයකින් විභාග කිරීමට උපදෙස් දීමට පිළිවන. නමුත් මෙම ඡේදය විශේෂයෙන් රාජද්‍රෝහි කමට පමණක් නොව දණ්ඩ නීති සංග්‍රහයෙහි 6 වෙනි කොටසෙහි, රජයට විරුද්ධව කෙරෙන වෙන වරද යදහන් වී ඇති, එම කොටසෙහි ඇති අනිත් වරද, පිළිබඳව ද අදළවන සේ සංශෝධනය වී ඇත.

මෙහි ඇපල්කරුවන්ට විරුද්ධව චෝදනා ඉදිරිපත් කර ඇත්තේ පසුව කී වරද පිළිබඳව ය. මේ නිසා ජූරි සභාවක් නොමැතිව තුන්දෙනෙකුගෙන් යුත් විනිශ්චය-කාර මණ්ඩලයකින් ඇපල්කරුවන් විභාග කිරීමට නිර්දේශ දීමට හැකියාව ලැබිණි. මේ ඡේදය සමග ම පළමුවන පණතේ 9 වන ඡේදය ද කෙනෙකු විසින් කියවා බැලීම පහසු යයි සිතේ. එවිට ජූරි සභාවක් නොමැතිව නඩුවක් විසඳිය යුතුයයි නිර්දේශ දුන් කලෙක එම විනිශ්චයකාර වරුන් තිදෙනා පත්කළ යුත්තේ ද අධිකරණ ඇමතිවරයා විසින් ම ය. එමෙන් ම 17 වන ඡේදය ද මෙහි දී සලකා බැලීම වටනේ ය. එම ඡේදයෙන් කියැවෙන්නේ ශ්‍රේෂ්ඨාධිකරණයට තවත් විනිශ්චයකාර වරුන් දෙදෙනෙක් එකතු කළ යුතු බවකි. මෙසේ එකතු කළ යුතු ය යන පැණවීම ක්‍රියාත්මක වන්නේ ඇමතිවරයා විසින් නියමිත දිනක ය.

කලින් චිත්තිකරුවෙකු ඇල්ලීමට වරෙන්තුවක් අවශ්‍ය ව තිබුණු වරදක් වන මහරැජිනට විරුද්ධව ඝටන් වැදීම මෙම පනතේ 5 වන ඡේදයෙන් එසේ වරෙන්තුවක උපයෝගය නොමැතිව චිත්තිකරුවෙකු අල්ලාගත හැකි වරදක් බවට පෙරලී තිබේ.

(ලබන කලාපය බලන්න.)

(පසුගිය කලාපය හා සම්බන්ධයි)

6 වන ඡේදයෙන් දණ්ඩ නීති සංග්‍රහයෙහි 114 වන ඡේදය යටතේ විද්‍යමාන වන මහරැජිනට විරුද්ධව සටන් වැදීමේ වරදට ඒ සඳහා අවුරුදු 10 ක සිර දඬුවමක් දීමට පුළුවන් පරිදි දඬුවම වෙනස් වී තිබේ. එමෙන් ම දණ්ඩ නීති සංග්‍රහයේ 115 වන ඡේදයෙන් කියැවෙන වරදක් වන මහරැජිනට විරුද්ධව සටන් වැදීම හා සාපරාධී ලෙස බලපෑමෙන් ආණ්ඩුව ත්‍රස්තකිරීමේ වරදට දෙන දඬුවම් ද ඉතාම අඩු වශයෙන් දස අවුරුදු සිර දඬුවමක් සහ විත්තිකරු සතු සියළු දේපළ රාජසන්තක වීමේ දඬුවමක් ඇතුළත් කිරීමෙන් වෙනස් වී තිබේ. මෙපමණක් නොව මෙම වරද ද වෙනස් වී ඇති බව සිහියට ගතයුතු ය. දණ්ඩ නීති සංග්‍රහයේ 115 වන ඡේදය කලින් කියැවුනේ මෙසේය.

> ''මෙම ඡේදය ළඟින් ම ඉහතින් පෙනෙන ඡේදයෙන් දඬුවම් ලැබිය හැකි යම්කිසි වරදක් කිරීමට හෝ මහරැජිනියට ලංකාවෙහි හෝ එහි යම්කිසි කොටසක හෝ මහරැජිනිය සතු යම්කිසි රාජ්‍ය ඉඩමක හෝ ප්‍රදේශයක හෝ එතුමියට ඇති ආධිපත්‍යය එතුමියගෙන් බැහැර කිරීමට හෝ කුමන්ත්‍රණය කරන, එසේ නැතහොත් ශ්‍රී ලංකා ද්වීපයෙහි ආණ්ඩුවට සාපරාධී ලෙස බල පැවත් වීමෙන් හෝ ඒ බලපැවැත්මක් පෙන්වීමෙන් හෝ එය ත්‍රස්තකිරීමට කුමන්ත්‍රණය කරන, යම්කිසි පුද්ගලයෙකු බරපතල වැඩ ඇතිව හෝ නැතිව වීසි අවුරුදු සිර දඬුවමකට පත්කිරීමෙන් ඔහුට දඬුවමක් දිය හැක. ඔහු මේ නිසා දඩයකට ද යටත් කිරීමට පිළිවන් තැනැත්තෙකි.''

මෙය සංශෝධනය වී ඇත්තේ පහත සඳහන් පරිදි වේ:—

> ''ත්‍රස්ත කිරීමට කුමන්ත්‍රණ කරන'' යන වචනවල සිට ''පිළිඩන් තැනැත්තෙකි'' යන වචන දක්වා පහත පෙනෙන පරිදි ආදේශ විය යුතුය යන්නෙනි:—
>
> ''ත්‍රස්ත කිරීමට කුමන්ත්‍රණය කරන එසේ නැතහොත් එම ආණ්ඩුව පෙරළා දැමීමට හෝ එසේ පෙරළා දැමීමට පරිශ්‍රම දරණ හෝ තැත්කරන හෝ නීතියෙන් ස්ථාපිත වූ ශ්‍රී ලංකාද්වීපයෙහි ආණ්ඩුව නීති යුක්ත නොවන මාර්ගයෙකින් පෙරළා දැමීමේ චේතනාවෙන් හෝ පරමාර්ථයෙන් හෝ එසේ පෙරළා දමන ආකාරය ලෙස ගිණිය හැකි යම්කිසි ක්‍රියාවක් කරන හෝ එසේ කිරීමට කුමන්ත්‍රණ කරන නැතහොත් කිරීමට ප්‍රයත්නයක් හෝ උත්සාහයක් දරන එසේත් නැතහොත් ලංකාණ්ඩුකාර තුමා හෝ අග්‍රාමාත්‍ය පදවිය දරන පුද්ගලයා හෝ කැබිනට් මණ්ඩලයේ වෙන යම්කිසි ඇමතිවරයෙකු හෝ එබඳු ලංකාණ්ඩුකාරයා වශයෙන් හෝ අග්‍රාමාත්‍යධුරය දරන නැනැත්තා වශයෙන් හෝ කැබිනට් මණ්ඩලයේ අමාත්‍යධුරය දරන නැනැත්තෙකු වශයෙන් හෝ තම තමන් දරන නීත්‍යානුකූල බලතල ක්‍රියාත්මක කිරීමට පොළඹවන චේතනාවෙන් හෝ එසේ කිරීමට බලකරන චේතනාවෙන් හෝ එබඳු පුද්ගලයන් මරාදැමීමට කුමන්ත්‍රණය කරන හෝ එසේ මරාදැමීමට පරිශ්‍රමයක් දරන හෝ ඒ අයවලුන් අයථා අන්දමින් සිරකර තබන හෝ එසේ අයථා අන්දමින් සිරකර තැබීමට කුමන්ත්‍රණ කරන උත්සාහ දරන හෝ පරිශ්‍රමයක් දරන යම්කිසි පුද්ගලයෙකුට මරණීය දණ්ඩනය නියම කිරීමෙන් හෝ බරපතල වැඩ ඇතිව හෝ නැතිව ඉතා ම අඩු වශයෙන් දස වර්ෂයක කාලයක් තුළ පැවැත් වෙන, නමුත් විසි වර්ෂයකට අධික කාලසීමාවක් දක්වා නොපැවැත්වෙන සිර දඬුවමක් දීමට හෝ එබඳු පුද්ගලයෙකු සතුව පැවතෙන සැම ධනසම්භාරයක් රාජසන්තක කිරීමට හෝ දඬුවම් නියම කිරීමට පිළිවන.''

මෙසේ බලන කල අසාර්ථක වූ මෙම කුමන්ත්‍රණයෙහි උද්ගත වුණු කරුණුවලට මුහුණදීම සඳහා එම සිද්ධියෙන් පසු අලුත් වරදක් නිර්මාණය කොට තිබෙන බව කිව යුතු ය.

පළමුවන පණතෙහි 11 වන ඡේදයෙන් නඩුවට කලින් හෝ නඩුව විභාග වී යන කිනම් අවස්ථාවක හෝ මෙම වරදට උපකාරී වූ පුද්ගලයෙකුට ඔහුගෙන් සාක්ෂි ලබාගැනීමේ අධ්‍යාශයෙන් ඇටෝර්නි ජනරාල් වරයාට සමාව දීමට හැකිවන අන්දමට පැණවී තිබේ.

12 වන ඡේදයෙන් රජයට විරුද්ධව යම්කිසි වරදක් කෙරුණු කල්හි ඒ පිළිබඳව සාක්ෂි නීතිය වෙනස් කර තිබේ. සාමාන්‍ය අපරාධ නීතිය යටතේ චෝදනා ලැබ සිටින පුද්ගලයෙකුට පහත සඳහන් පරිදි රක්ෂාවරණ යැපයී තිබේ.

> ''කිසියම් වරදකට චෝදනා ලද පුද්ගලයෙකුට විරුද්ධව ඔහු විසින් පොලිස් නිලධාරියෙකුට කරන ලද පාපොච්චාරණයක් සාක්ෂියක් ලෙස ඉදිරිපත් කළ නොහේ. (සාක්ෂි නීති සංග්‍රහය 25(1) වන ඡේදය). මහේස්ත්‍රාත්වරයෙකු ඉදිරිපිට ඔහුට මුහුණ දී කරන ලද කලෙක හැර චෝදනා ලැබ පොලිස් අත් අඩංගුවේ සිටින පුද්ගලයෙකු විසින් පොලිස් නිලධාරියෙකුට කරන ලද ප්‍රකාශ-

යක් එම චෝදිතයාට විරුද්ධව ඔප්පු කළ නොහැක. (සාක්ෂි නීති සංග්‍රහය 26(1). සහායක චිත්තිකරුවන් කිපදෙනෙකු අතරින් එකෙකු විසින් කරන ලද පාපොච්චාරණයක් අනිකෙකුට විරුද්ධව ඔප්පුකිරීම තහනම් කොට තිබේ. (සාක්ෂි නීති සංග්‍රහය 30 වන ඡේදය) පරීක්ෂණයක දී පොලිස් නිලධාරියෙකුට කරන ලද සෑම ප්‍රකාශයක් ම සාක්ෂියක් ලෙස ඇතුළත් කිරීම වැළකී තිබේ. (අපරාධ නඩු විධාන සංග්‍රහය 122(3) වන ඡේදය). නවදුරටත් පාපොච්චාරණයක් චෝදිතයෙකු විසින් සිය කැමැත්තෙන්ම කළ බව ඔප්පු කිරීමේ කායභාරය පැවරී තිබේ.

මෙම රැකවරණ පළමුවන පණතින් සම්පූර්ණයෙන් අතු ගැවී ගොස් ඇත. එම පණතට අනුව උප පොලිස් අධිකාරිවරයෙකුගේ තත්වයෙන් පහත් නොවන පොලිස් නිලධාරියෙකුට ඔහුගේ අත්අඩංගුවේ සිටින කෙනෙකු විසින් කරන ලද ප්‍රකාශ සාක්ෂි ලෙස ඇතුළත් කිරීමට ඉඩ ලැබී තිබේ. (12(1) වන ඡේදය). මෙම පණතින් චෝදිතයෙකු විසින් කරන ලද ප්‍රකාශයක් සිය කැමැත්තෙන් නොකරන ලද්දක් බව ඔප්පු කිරීමේ කායභාරය චෝදිතයා පිට ම පැවරී තිබේ. (12(3) වන ඡේදය). ඉහත සඳහන් සාක්ෂි ආඥා පණතේ 25. 26 සහ 30 වන ඡේදවලින් ඇතිවන ප්‍රතිඵලය පළමුවන පණතින් බැහැර කොට තිබේ. (12(4) වන ඡේදය.

පළමුවන පණතෙහි 12(2) වන ඡේදයෙන් පැණ වෙන්නේ මෙසේය. රජයට විරුද්ධව යම්කිසි වරදක් කරන ලද කලක කිසියම් පුද්ගලයෙකු විසින් කරන ලද ප්‍රකාශයක් — එනම් මෙම ඡේදයෙහි (1) වන උප ඡේදය යටතේ ඔප්පු කළ හැකි ප්‍රකාශයක් — (එය කළ තැනැත්තා පොලිස් අත්අඩංගුවේ සිටි කලක වේවා, නොසිටි කලෙක වේවා) ඔහුට විරුද්ධව එය ඔප්පු කළ හැකි නම්, ඔහු සමග ඒකාබද්ධව චෝදනා ලබා සිටින තවත් කෙනෙකුට විරුද්ධව ද එය ඔප්පු කිරීමට ඕනෑවූ විට එම ප්‍රකාශය ඒ උප ඡේදය යටතේ ඔප්පු කිරීමට උවමනා වූ කල්හි පිටින් වෙනත් අයුරකින් ඔප්පු වන වෙනත් සාක්ෂි සමග වැදගත් කරුණු සම්බන්ධයෙන් එකට සැසඳේ නම්—එකට සැසඳේ නම් පමණක්—එය ඉහත සඳහන් දෙවැන්නාට විරුද්ධව ද ඔප්පු කළ හැක. ''අනාදිමත් කාලයක සිට සාක්ෂි නීතියෙහි පැවැත්වී ගෙන එන අත්‍යවශ්‍යම වූ ආරක්ෂක නීතියක් මේ නීයායෙන් බැහැර වී තිබේ.

යම්කිසි පරීක්ෂණයක් පැවැත්වීගෙන යන අවස්ථාවක අපරාධ නඩු විධාන සංග්‍රහයේ 122(3) ඡේදයෙන් පොලිස් නිලධාරියෙකුට කරන ලද ප්‍රකාශයක් පිළිගැනීම වැළැක්වීමේ රක්ෂාවරණය මෙම පණතේ 12(5) වන ඡේදයෙන් ඉවත් වී තිබේ. ශූරිසභාවක් නොමැතිව විනිශ්චයකරුවන් තිදෙනෙකුගෙන් යුත් මණ්ඩලයකින් අසන්න නඩුවක දී එය අපරාධ ඇපල් අධිකරණයට ඉදිරිපත් කිරීමට ඇති අයිතිය 15 වන ඡේදයෙන් මැකී ගොස් තිබේ.

අවසාන වශයෙන් පණතේ 21 වන ඡේදය පහත පෙණෙන පරිදි පණවා තිබෙන බව සැලකිය යුතුය.

> ''මෙම පණතෙහි ගැබ් වී ඇති ඉහත සඳහන් පැණවීම් එහි පළමුවන කොටස සහ 17 වන ඡේදය හැර වර්ෂ 1962 ජනවාරි මස 27 වන දින හෝ ඊට ආසන්න දිනක රජයට විරුද්ධව කරන ලද අපරාධයකට සම්බන්ධ වූ හෝ එයින් ඇතිවුණ සිද්ධියක් වශයෙන් හෝ කෙරෙන නීති යුක්ත ක්‍රියාපටිපාටිය නිමාවට ගියපසු හෝ එසේ නැතහොත් මෙම පණත ආරම්භ වී එක් වර්ෂයක් ගෙවී ගියවිට හෝ — මේ සිද්ධි දෙකින් කවරක් හෝ පසුව සිදු වූ විට—ඉන් ඔබ්බෙහි ක්‍රියාත්මක වීම නවතිනු ඇත. නමුත් ඒ කෙසේ වෙතත් උත්තර මන්ත්‍රණ සභාවට හා නියෝජිත මන්ත්‍රණ සභාවට ඒ ඔළිබඳ හේතු දක්වන යෝජනාවකින් පසු කලින්කලට මෙම පණතේ ක්‍රියාත්මකවීම වරකට එක් වසරකට වැඩිනොවන සේ මතු කාලපරිච්ඡේදයක දී දීර්ඝ කරගැනීමට බලය තිබේ.''

මේ අනුව කරුණු සලකා බලන විට පණතෙහි ආරම්භයෙන් එක් වසරකට පසුව යන සඳහන් තිරීම මෙම පැණවීම් ඉහත සඳහන් නඩුවේ විභාගය නිමාවට පත්වූ පසු බලපැවැත්වීමට කිසිම අදහසක් තිබුණු බව නොපෙන්වයි. එම නිසා 17 වන ඡේදයෙන් කරන ලද විනිශ්චයකරුවන් වැඩිකිරීම පසෙක තිබිය දී (මෙම වැඩි කිරීම තාවකාලික ව කළ දෙයකැයි නොපෙනී යන සේය.) පණතේ පළමුවන කොටස ගැන නොසලකා හැරියත් (මෙම කොටසෙන් රජයට විරුද්ධව අපචාරයක් කරන ලදයි සැක කරන පුද්ගලයින් අල්වා සිර අඩස්සියේ තැබීමට බලය දී තිබෙන අතර එම කොටස රජයට විරුද්ධව වර්ෂ 1962 ජනවාරි මස 27 වැනි දින හෝ ඊට ආසන්න දිනයක කරන ලද යම්කිසි අපචාරයකට පමණක් සීමා වී ඇති බව සැලකිය යුතුය). එහි ඇති අපචාරයෙහි ස්වභාවය වෙනස් කිරීම සඳහාත් ශූරි සභාවක් නොමැතිව නඩු විභාගයක් පැවැත්වීමට අවසර දීම සඳහාත් යාමාන්‍යයෙන් අනික් අවස්ථාවල දී නඩුවට ඇතුළත් කළ නොහැකි ප්‍රකාශ සහ පාපොච්චාරණ ඇතුළත් කිරීම සඳහාත් පැණවී ඇති විස්තර සහිත පැණවීම් සියල්ල ම කුමන්ත්‍රණ නඩුවේ විභාගය සමාප්තියට ඵළඹුණු පසු කෙළවරවන පරිදි පැණවී තිබේ.

ඒ කාලය වන විට, පෙනී යන පරිදි, ඒ පැණවීම් පදනම වී ඇති පරමාර්ථය ඉටුවීමට ඉඩ ඇති නිසා මෙසේ වූ සේ පෙනේ. මෙම පරමාර්ථය නම් ඉහතින් උපුටා දක්වන ලද ධවලපත්‍රිකාවේ අවසාන වගන්ති දෙකෙන් හැඟීයන පොරොන්දුව ය.

ඉන්පසු අධිකරණ ඇමතිතුමා විසින් මෙම චෝදිතයන්ගේ නඩුව විභාග කරවීම පිණිස විනිශ්චයකාරවරු තිදෙනෙක් නම් කරන ලදහ. මෙම නම් කිරීම සහ එසේ නම් කිරීම සඳහා උපයෝගී කර ගන්නා ලද ඡේදය ලංකා දේශපාලන සංස්ථාවට පරස්පර විරෝධී බව දක්වමින් මෙහි දී මූලික විරෝධයක් ඉදිරිපත්කොට තිබේ. වර්ෂ 1962 ඔක්තෝබර මස 1 වෙනි දින ඉතා පරීක්ෂාකාරීව ලියන ලද පරිපූර්ණ නඩු තීන්දුවකින් එම මූලික විරෝධය ශ්‍රේෂ්ඨාධිකරණයේ එම උගත් විනිශ්චය කාරවරුන් තිදෙනා විසින් ඒකච්ඡන්දයෙන් පිළිගන්නා ලදී. මෙම නඩු තීන්දුවෙහි ඔවුන් විසින් මෙම කරුණට අදළවන සියළුම සාධක පාඨ පරීක්ෂාකොට තිබේ. (මහරැජින එ. ලියනගේ සහ තවත් අය — 64 න.නී.වා 313) 359 වන පිටේ තම නඩු තීන්දුව සමාප්ත කළ විනිශ්චයකරුවෝ —

> "අප විසින් ඉහතින් දැක්වීමට යත්න දරන ලද හේතූන් අනුව පහත සඳහන් කරුණු නිසා මේ පිළිබඳ අපගේ මතය වනුයේ
>
> (ඒ) 1946 ලංකා (පාලන සංස්ථා) රාජාඥා පණතේ 52 වන ඡේදයෙන් කරන ලද තමන් පදවියට පත්වීමේ හේතුවෙන් තමන් පිට පැවරෙන උග්‍ර විනිශ්චයාත්මක බලය ශ්‍රේෂ්ඨාධිකරණයේ විනිශ්චයකරුවන් විසින් භාවිතා කිරීමට හෝ එසේ භාවිතා කිරීමට පටහැනිව හෝ දෙන ලද බලයක් මෙයින් ඇමතිතුමා වෙත පිරිනැමී තිබේ. එමෙන්ම—
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> (බී) පණතින් පිරිනැමී ඇති නම් කිරීමේ බලය මෙතෙක් විනිශ්චයකරණාංශය මගින් අඛණ්ඩව ක්‍රියාත්මක කරගෙන ආ රජයේ විනිශ්චයාත්මක බලතල ක්‍රියාවේ යෙදවීමක් නිසා එය විනිශ්චයකරණාංශයෙන් පිට කිසිවෙකුට පැවරිය නොහැක.
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> මේ නිසා වර්ෂ 1962 අංක 1 දරණ අපරාධ නීති (විශේෂ විධිවිධාන). පණතේ 9 වන ඡේදය දේශපාලන සංස්ථාවට පරස්පර විරෝධී ලෙස පැණවී තිබෙන්නකි" යනුවෙන් තම නඩු තීන්දුව අවසන් කළහ.

මෙසේ බැස ගන්නා ලද නිගමනයට විරුද්ධව අභියාචනයක් මෙම රාජාධිකරණ විනිශ්චය මණ්ඩලයට ඉදිරිපත්වී නැත. එහෙත් වර්ෂ 1962 නොවැම්බර මාසයෙහි 1962 අංක 31 දරණ අපරාධ නීති පණත පණවන ලදී. (පහසුව පිණිස අපි මෙම පණතට දෙවන පණතයයි සඳහන් කරමු.) පළමු පණතින් අපරාධ නඩු විධාන සංග්‍රහයේ 440 ඒ දරණ ඡේදය සම්බන්ධයෙන් බලපවත්වන පැණවීම් මෙම පණතෙන් අහෝසි කරන ලදී. එපමණක් ද නොව එම ඡේදයෙහි අඵතින් සංශෝධනය කිරීමක් ද සිදුවී තිබේ. මෙම අඵත් සංශෝධනයෙන් දණ්ඩ නීති සංග්‍රහයේ සමහර ඡේදයන් යටතේ ඇති— 115 වන ඡේදයත් ඇතුළුව—අපරාධ පිළිබඳව ජූරිසභාවක් නොමැතිව තිදෙනෙකුගෙන් යුත් විනිශ්චය මණ්ඩලයකින් නඩුව විසඳීමට හැකි වන සේ පැණවීම් කෙරී තිබිණි. නමුත් ලංකා ශ්‍රේෂ්ඨාධිකරණය විසින් ඉහත සඳහන් ලෙස ඉවත හෙලන ලද පරිදි අධිකරණ ඇමතිවරයා විසින් විනිශ්චයකරුවන් නම් කිරීම වෙනුවට මෙබඳු නඩුවක් විසඳීම සඳහා විනිශ්චයකරුවන් තිදෙනෙකු පත්කිරීමට අග්‍රවිනිශ්චයකාරයාට හැකිවන සේ එහි පණවා තිබේ. තීරණයක් ගතයුතු ත්තේ වැඩි දෙනාගේ තීරණය අනුව බව ද එහි ම පැණවී තිබෙනු පෙනේ. වැඩිදුරටත් බලන කළ දෙවෙනි පණතේ (6 වන ඡේදය) පැණවීම් අනුව අධිකරණ ඇමතිවරයාගේ උපදෙස් දීම තොරතුරු සැපයීම හා නම් කිරීම අහෝසි වූ අතර ඇමතිවරයාට ජූරිසභාවක් නොමැතිව විසඳන නඩුවකට විනිසකරුවන් පත්කිරීමට කිසිදිනක බලයක් නොතිබුණ බවත් එබඳු උපදෙස් දීමකින් තොරතුරු සැපයීමකින් හෝ නම් කිරීමකින් විභාගවේගන යන නඩුවක් හෝ ඒ අනුව දමන ලද නඩුවක් වෙතොත් එය එසේ කවදවත් නොදමන ලද හෝ ආරම්භ නොකරන ලද දෙයක් හැටියට සැලකිය යුතු බවත් පණවා තිබේ.

මේ හැර පළමුවන පණතේ තිබූ අනිත් විස්තර සහිත පැණවීම් කිසිවක් වෙනස් වී නැති සේ පැවතීමට ඉඩහැර තිබේ.

ඉන්පසු අග්‍රවිනිශ්චයකාරවරයා විසින් නම් කරන ලද විනිශ්චයකරුවන් තිදෙනෙකු ඉදිරියේ මෙම නඩුව විභාග විය. එහි ප්‍රතිඵලය වූයේ ඉතාම දීර්ඝ නඩු විභාගයකින් පසු වර්ෂ 1965 අප්‍රියෙල් මාසයේ දී මෙම ඇපල්කරුවන් වරදකරුවන් බවට පත්කොට දඩුවම් නියම කිරීමයි.

ඇපල්කරුවන් වෙනුවෙන් පෙනී සිටින ශ්‍රේෂ්ඨ මහතා, මෙසේ ඔවුන් වරදට පත්කිරීමේ නීතියුක්ත භාවයට පහර දෙන්නේ ප්‍රධාන කරුණු තුනක් ප්‍රතිෂ්ඨා කොට ගනිමිනි.

මින් පළමු වැන්න මූලික යුක්තිධර්ම ප්‍රතිපත්තීන්ට පටහැනිව නීති සම්පාදයක් ඇතිකිරීමට නොහැකි වීමෙන් ලංකා පාර්ලිමේන්තුව සීමාසහිත ආඥා චක්‍රයක් ඇති මණ්ඩලයක්ය යන්නය. එම නිසා ඔහුගේ තර්කය වූයේ වර්ෂ 1962 පැනවුණු පණත් එබඳු මූලික යුක්ති ධර්ම ප්‍රතිපත්තීන්ට පටහැනි වන්නේ එම පණත් යම් යම් නියමිත පුද්ගලයන්ට විරුද්ධව එල්ල වී ඇති නිසා පමණක් නොව යම් සිද්ධියක් ඇතිවූ පසු එය අපරාධයක් බවට පෙරළෙන, එමෙන්ම එයට දිය හැකි දඬුවම් පැණවෙන නිසාත් එසේ ම එම පණත් මේ පුද්ගලයන් සාමාන්‍යයෙන් ආරක්ෂා කරන රැකවරණයෙන් විනාශ මුඛයට පත් කරන නිසාත් ය.

ඇපැල්කරුවන්ගේ දෙවන තර්කයවූයේ වර්ෂ 1962 පණත් ලංකා පාලන සංස්ථාවට පටහැනිව පැනවී තිබෙය යනුවෙනි. මෙය සනාථ කිරීමට හේතුව වශයෙන් ඇපල්කරුවන් දක්වන්නේ මේ පණතින් ඇපල්කරුවන් වරදකරුවන් බවට පත්කිරීමට නිර්දේශ දීමට හෝ ඔවුන් වරදකරුවන් බවට පත්කිරීම ඉටුකරවාගෙන ඔවුනට උග්‍ර දඬුවම් පැනවීමට මෙහි නීතිය මගින් සැලැස්මක් සපයාගෙන ඇති නිසා ඒ නියායෙන් නීති සම්පාදක මණ්ඩලය විනිශ්චයාත්මක බලය යුක්තියෙන් තොර අන්දමින් උපුටා ගැනීමක් මෙම පැණවීම් වලින් කෙරී තිබීම හෝ එසේ නැතහොත් ඒ පැණවීම් වලින් විනිශ්චයාත්මක බලයට ඇහිලි ගැසීමක් සිදුවී තිබීම ය. මෙසේ ක්‍රියා කිරීම නීති සම්පාදක මණ්ඩලයේ හැකියාවෙන් පිටස්තර දෙයක් වන අතරම එය ලංකා පාලන සංස්ථාවෙහි ගැබ්වී ඇති නීති සම්පාදක අංශයේ, විධාන අංශයේ, සහ විනිශ්චය අංශයේ, බලතල වෙන්කෙරට පණවා ඇති පැණවීම්වලට ද පටහැනි වන බව අනික් හේතුවය.

ඇපල්කරුවන්ගේ තුන්වෙනි තර්කය වූයේ වර්ෂ 1962 පණවන ලද ඉහත සඳහන් පණත්වල භාෂාව "එහි එබඳු ප්‍රතිඵලයක් ඇති කරන විශේෂ පැණවීමක් නොමැති කල්හි" (අර්ථ කථන ආඥා පණත 6 (3) ඡේදය) ඇපල්කරුවන්ට එම පණත් පැනවීමට කලින් ලැබුණු අයිතිවාසිකමක් වන ජූරිසභාවක මාර්ගයෙන් නඩු විසඳීම ඔවුන්ගෙන් පැහැර ගැනීමට සමත් නොවේය යන්නය.

මේ තර්ක තුන අතුරෙන් පළමුවන තර්කයට කරුණු කීම පටන්ගත්තේ මැන්ස්පිල්ඩ සාමි විනිශ්චයකාර වරයාගේ කැම්බල් එ. හෝල් (1 කුප්. 204 රේ 209, 298 ඊ. ආර්. 1045) නඩු තීන්දුවෙන් ඉහාම පැහැදිලි පාඨයක් උපුටා දක්වමිනි. එනම් "යම්කිසි අවස්ථාවක මහරජතුමාට (මෙහිදී මහරජතුමාය කී විට මා අදහස් කරන්නේ පාර්ලිමේන්තුවේ අනුමතියක් නොලබා කටයුත්තක් කරන මහ රජතුමාය.) පරණ නීතියක් වෙනස් කොට දිනාගත් රටක අලුත් නීතියක් පැණවීමට බලය තිබේ නම් මේ ආකාරයෙන් නීති පැණවීම අප්‍රධාන පැණවීමක් නිසා—එයින් අදහස් කෙරෙන්නේ පාර්ලිමේන්තුවේ බලය ඇතුව කටයුතු කිරීමේ දී තමාට ඇති බලතාවය හා සසඳන විට එය අප්‍රධානවීමයි—එසේ කරන විට මූලික යුක්තිධර්ම පිළිබඳ ප්‍රතිපත්තීන්ට විරුද්ධව උත්වහන්සේට නීති පැනවිය නොහැකිය" යනුයි. මේ නියායෙන් බලන කල ඉංග්‍රීසි රජයට යටත් විජිතයක් හැටියට තිබූ ලංකාවට නීති සැදීමට එයට බලයක් නොතිබුණ නිසා එයට තිබුණාට වඩා උත්තරිතර බලයක් ලංකාවට ප්‍රදානය කිරීමට පුළුවන්කමක් නැතැයි ද මෙහිදී තර්ක මතුකරන ලදි. ලංකාවේ දේශපාලන සංස්ථාව පනවන ලද්දේ වෙනත් බොහෝ යටත් විජිතවල මෙන් පාර්ලිමේන්තු පණතකින් නොව රාජාඥා පණතකිනි. (ලංකා (පාලන සංස්ථා) රාජාඥා පණත 1946) මේ රාජාඥා පණතින් ලංකාද්වීපයෙහි සාමය, විනය හා මනා පාලනය පිළිබඳ නීති නිපැයීමට ලංකා පාර්ලිමේන්තුවට බලය ලැබිණි. මීට පසු වර්ෂ 1947 ලංකා ස්වාධීන පණත (මෙය එක්සත් රාජධානියේ පණතකි.) පනවන ලදී. මේ නිසා එක්සත් රාජධානියේ පාර්ලිමේන්තුව ලඞ්කා පාර්ලිමේන්තුවට නියම වචනවලින් ම එක්සත් රාජධානියේ පාර්ලිමේන්තුවේ අධිශ්වර බලය පිරිනමා නැති බව කියමින් අප ඉදිරියෙහි විවාද කරන ලදි. මේ නිසා ලංකාවේ නීති සම්පාදක බලය තාමත් සාමාන්‍ය යුක්තිධර්මයන්ට විරුද්ධ ප්‍රතිපත්තීන් පැණවීමට බලය නැතිව තිබීමෙන් සීමාවී තිබීම නිසා (මෙසේ සීමාවූයේ එය එක්සත් රාජධානියෙන් උරුමයක් සේ ලැබීම නිසා ය.) එබඳු පටහැනි නීති පැනවීමට ලංකා පාර්ලිමේන්තුවට අවකාශයක් නැකැයි කියමින් එම තර්කය නිමාවට ගෙන යන ලදි. අධිශ්වර බලමණ්ඩලයෙන් ඕනෑම රටක සම්මතවන සමහර පණත්වලට විරුද්ධව තර්කයක් වශයෙන් පමණක් මෙම නොපැහැදිලි අස්ථීර වාක්‍ය ඛණ්ඩය ගෙන හැර දැක්විය හැකි බව සැබෑ ය. එසේ ම ඇපැල්කරුවන් විසින් තම තර්කයන්ගෙන් මතු කරන තත්වය නිදහස ලැබීමේ දී ලංකාවට උදා වී තිබේ නම් ඇත්ත වශයෙන් ම එය ශෝචනීය තත්වයක් බව මෙහිලා කිවයුතු ය.

කෙසේ වෙතත් විනිශ්චය මණ්ඩලයෙහි සාමිවරුන්ගේ මතය ඉහත කී පරිදි තර්ක කිරීමක් සාර්ථක කරගත නොහැකි බව ය. වර්ෂ 1865 දී සම්මත කරන ලද යටත් විදේශ නීතිවල නීත්‍යානුකූලභාවය පිළිබඳ පණත (කොලෝනියල් ලෝස් වැලිඩිටි ඇක්ට්. 1865) සම්මත කිරීමට පෙර දකුණු ඕස්ට්‍රේලියාවේ විසූ යටත් විදේශ

විනිශ්චයකාරවරයෙකු විසින් යටත් විදේශ නීති පණත් ඉංග්‍රීසි නීතියට පටහැනි නොවිය යුතුයයි පුන පුනා කරුණු දක්වීම නිසා මේ පිළිබඳව සැලකියයුතු අමාරුකම් ඇති වී තිබේ. (වෙස්මිනිස්ටර් ආඥාව සහ විජිත පාලන තත්වය යන නමින් කේ. සී. වියර් මහතා විසින් ලියන ලද ග්‍රන්ථයෙහි 4 වන මුද්‍රණයේ 75 වන පිටෙ සිට 77 වන පිටුව දක්වා බලන්න.) එසේ අමාරුකම් තිබුණ ද එම පණතින් අදහස් කළේ ඒ දුෂ්කරතා අභිබවා ගැනීමටය. එය ඒ අයුරින් ම සාර්ථක විය. එහි පැණවී තිබුණේ යම්හෙයකින් එක්සත් රාජධානියෙහි පාර්ලිමේන්තුවේ යම්කිසි යටත් විජිතයකට අදළ පණතක් වේ නම් එයට පටහැනිව එම යටත් විජිතයෙහි පැනවෙන නීති බල ශූන්‍ය බව හා එසේ නොමැතිව කළ ''ඒවා බල ශූන්‍ය නොවේ.'' යන්නෙනි. (2 වන ඡේදයෙහි) යටත් විජිතයෙහි පැනවෙන එම නීති එංගලන්තයෙහි නීතියට පටහැනිවීමේ හේතුවෙන් ම බලශූන්‍ය නොවන අතර ම අක්‍රියාකාරී ද නොවේ (තුන්වන ඡේදය) මේ පිළිබඳව අදහස් දක්වන කීත් මහාවාග්‍යීවරයා මෙසේ ප්‍රකාශ කරයි. ''මේ පැනවීමේ අවශ්‍ය අංගය වී ඇත්තේ යටත් විජිතයක පනවන නීතියක් ඉංග්‍රීසි නීතියට එකඟ නොවීමේ හේතුවෙන් එය බලශූන්‍ය වේය යන නොපැහැදිලි නීති ප්‍රතිවිරෝධ ප්‍රතිපත්තිය එක්වරම සහමුලින් ම අකා මකා දැමීමයි..... එම නිසා මේ නියායෙන් (මහජනතාව) ලබන ලද වරප්‍රසාදය අති විශාල ය. දැන් යටත් විජිතවල නීති සම්පාදකයින් විසින් සොයා බැලිය යුත්තේ තමන් විසින් පනවනු ලබන නීතියට ගැලපෙන තමන්ගේ ප්‍රදේශයට අදළවන නීතියක් නැද්ද යන්න පමණකි. එසේ නොමැති කල ඔහුගේ කාර්‍ය ක්ෂේත්‍රය සහ තෝරා ගැනීමේ සීමාව අසීමිත අප්‍රමාණ විෂයක් තුළ ව්‍යාප්ත වූවක් වනු ඇත.'' (බ්‍රිතාන්‍ය විජිත පිළිබඳ ආධිපත්‍යය '''' මහාවාග්‍යී කීත් — වර්ෂ 1929 — 45 වන පිට බලන්න).

මේ නිසා ඉංග්‍රීසි නීතියට පටහැනි වීමෙන් ඇතිවන පරස්පර විරෝධතාවය දුරීභූත කළ බ්‍රිතාන්‍ය ව්‍යවස්ථාදායක මණ්ඩලය නොපැහැදිලි, අනියමිත ස්වාභාවික යුක්ති ධර්මයේ නීතියට පරස්පර විරෝධී වීමෙන් ඇතිවන සීමිත තත්වය එසේ ම නිබෙන්නට ඉඩ හරින්නට ඇතැයි යන මතය පිළිගැනීමට මෙම විනිශ්චය මණ්ඩලය සූදානම් නැත. යටත් විදේශ නීතිවල නීත්‍යානුකූල භාවය පිළිබඳ පණතේ (1865) (කලෝනියල් ලෝස් වැලිඩිටි ඇක්ට් 1865) වචන ගැන කල්පනා කරන විට සහ විශේෂයෙන් ම එහි දෙවන ඡේදයෙහි ගැබීවී ඇති ''එසේ නොමැති කල ඒවා බලශූන්‍ය නොවේ'' යන වචන ගැන ද සලකා බලන විට ඒ පණතින් බ්‍රිතාන්‍ය පාර්ලිමේන්තුව නීතිවල පරස්පර විරෝධතාවය පිළිබඳ ප්‍රශ්නය ගැන සම්පූර්ණයෙන් ම සලකා බලා තිබෙන බව පැහැදිලිව පෙනේ. තවද මැන්ස්පිල්ඩ් සාමිවරයා කීමට අදහස් කළේ ඉංග්‍රීසි නීතියට පරස්පර විරෝධී නොවන්නක් වුවද මූලික යුක්ති ධර්ම පිළිබඳ ප්‍රතිපත්තියට පටහැනි වීමට ඉඩ තිබේ යන්න ද නො එසේ නම් එතුමා, මෙම වාක්‍යයේ පසුව කියවුනු මූලික යුක්ති ධර්මය පිළිබඳ ප්‍රතිපත්තිය කලින් කියවුනු නීතියට වඩා වෙනස් පරීක්ෂණයක් හැටියට ඉදිරිපත් කරණ ලද්දේද යන්න ගැන මෙම විනිශ්චය මණ්ඩලය සැක කෙරේ. යටත් විදේශ නීතිවල නීත්‍යානුකූල භාවය පිළිබඳ පණත සම්මත වීමට පෙරාතුව කිසියම් විවාදයක් මේ සම්බන්ධයෙන් ඉදිරිපත් කිරීමට පුළුවන් කම තිබුණත් මෙම වර්තමාන දිනයේ දී එබඳු තර්කයක් ස්ථාපිත කිරීමට නොහැක. ඉකුත් වර්ෂ සියයක පමණ කාල සීමාවේ දී මැන්ස්පිල්ඩ් සාමිවරයාගේ නඩු තීන්දුවේ මේ කොටස ප්‍රතිෂ්ඨා කොට ගත් කිසිම නඩුවක් (හෝ, කෙනෙකුට පෙනී යන පරිදි කිසිම තර්කයක්) ඉදිරිපත් කරමින් සාධක පාඨයක් මෙහි දී දැක්වූයේ ද නැත. ලංකාවෙන් ඉදිරිපත් වී මෙම රාජාධිකරණයේ දී සාකච්ඡාවුණු **අඩෙසේකර එ. ජයතිලක** යන නඩුවේ (1932) ඒ.සී. 260 වන පිටෙ ඇති අතීත පර්යාවලෝචන බල සහිත රාජාඥාවක වලංගුතාවය සාකච්ඡාවට භාජන විය. ඒ නිසාම මූලික යුක්ති ධර්මය පිළිබඳව ඉදිරිපත් කළ හැකි තර්ක වැපිරීමට සාරවත් කෙතක් වූ එම නඩුවෙහි කැම්බල් එ. හෝල් යන නඩුවේ මැන්ස්පිල්ඩ් සාමිවරයාගේ නඩු තීන්දුව එයට හාත් පසින් ම විරුද්ධ ප්‍රශ්නයක් සම්බන්ධයෙන් පිළිගත හැකි සාධක පාඨයක් බව පමණක් සඳහන් වී තිබීම මෙහි ලා සැලකිය යුතු කරුණකි.

බ්‍රිතාන්‍ය පාර්ලිමේන්තුවේ වර්ෂ 1947 ලංකා ස්වාධීන පණතින් පහත සඳහන් පරිදි පැණවී තිබේ.

> ''1 — (1) එකී නියමිත දින හෝ ඊට පසු දිනක හෝ පැණවෙන එක්සත් රාජධානියේ පාර්ලිමේන්තුවේ කිසිම පණතක් එම පණතෙහි ලංකාව එබඳු පණතක් පැණවීමට ආයාචනා කර සිටි බව හෝ එකඟවුණු බව හෝ විශේෂයෙන් සඳහන් කර නොමැතිනම් ලංකාවේ නීතියේ කොටසක් හැටියට ලංකාවට බලපවත්වන්නේ හෝ බලපවත්වන හැටියට සලකනු ලබන්නේ හෝ නැත.
>
> (2) එකී නියමිත දින සිට එක්සත් රාජධානියේ මහරජතුමාගේ ආණ්ඩුව ලංකාවේ ආණ්ඩුව ගැන කිසිම වගකීමක් නැත.
>
> (3) එකී නියමිත දින සිට මෙම පණතේ පළමුවන උපග්‍රන්ථයෙහි ඇති පැණවීම් ලංකාවේ නීති සම්පාදක බලතල කෙරෙහි බලපවත්වනු ලැබේ.

"පළමු වන උපග්‍රන්ථය"

ලංකාද්වීපයේ නීති සම්පාදක බලතල

1. (1) නියමිත දිනට පසුව ලංකාද්වීපයේ පාර්ලිමේන්තුවේ පණවනු ලබන කිසිම නීතියකට යටත් විදේශ නීති පිළිබඳ නීත්‍යානුකූලතා පණත (1865) බලපවත්වන්නේ නැත.

(2) නියමිත දිනට පසුව ලංකාද්වීපයෙහි පාර්ලිමේන්තුව විසින් පණවනු ලබන කිසිම නීතියක් එංගලන්තයේ නීතියකට පරස්පර විරෝධී නිසා හෝ, එක්සත් රාජධානියේ පාර්ලිමේන්තුව මගින් දැනට පණවා ඇති හෝ මතුවට පණවනු ලබන හෝ යම්කිසි පණතක පැණවීම්වලට පරස්පර විරෝධී නිසා හෝ එමෙන් ම එබඳු පණතක් යටතේ සකස් කෙරෙන යම්කිසි නියෝගයකට, නීතියකට, රෙගුලාසියකට පරස්පර විරෝධී නිසා හෝ අක්‍රියාකාරී හෝ බලශූන්‍ය හෝ නොවෙන අතර එබඳු පණතක්, නියෝගයක්, රීතියක් හෝ රෙගුලාසියක් යම්හෙයකින් එය ලංකාවේ නීතියේ කොටසක් වී ඇතහොත් එය ඒ ප්‍රමාණයට අහෝසි කිරීමට හෝ සංශෝධනය කිරීමට හෝ ලංකාද්වීපයේ පාර්ලිමේන්තුවට බලය තිබේ.

2. ස්වදේශික ප්‍රදේශාතිරික්තව බලපවත්වන නීති පැණවීමට ද ලංකා පාර්ලිමේන්තුවට සම්පූර්ණ බලය තිබේ.

මෙම නිදහස් කිරීමේ පැණවීම් වර්ෂ 1865 පණතේ තිබුණු නීති පැණවීමේ හැකියාව දුන් ප්‍රඥප්තීන් එහි ගැබ්කොට ඒවා තවත් පෘථුල තත්වයකට පෙරලා තිබෙනු පමණක් නොව වර්ෂ 1946 රාජාඥා පණත සහ වර්ෂ 1947 පණත ද ඒකාබද්ධ ව ගත්කල ඇතිවන ප්‍රතිඵලය වන්නේ ලංකාවේ පාර්ලිමේන්තුවට ස්වායත්ත අධිශ්වර විජිතයකට හිමි සම්පූර්ණ නීති සම්පාදක බලය දීමට එයින් අදහස් කර ඇති බවත් එය එබඳු ප්‍රතිඵලයක් ඇති කොට ඇති බවත් ය යන්න පැහැදිලි ය. **(ඉබ්‍රාහිම් ලෙබ්බෙ එ. මහරූජින.** (1946) ඒ. සී. 900 වන පිට බලන්න.)

මේ අනුව සලකා බලන කල ඇපැල්කරුවන් ගේ පළමුවන තර්කය බිඳවැටේ.

ඒ කෙසේ වුව ද ලිඛිත දේශපාලන සංස්ථාවක් ඇති සෑම රටක කළ යුතුවාක් මෙන්ම එසේ ලැබී තිබෙන එම බලතල ක්‍රියාත්මක කළ යුත්තේ එසේ ක්‍රියාකිරීමට බලතල ලැබෙන දේශපාලන සංස්ථාවේ ප්‍රඥප්තීන්ට අනුවය. ඇපල්කරුවන්ගේ දෙවන තර්කය රඳාපවත්නේ මෙහි ප්‍රශ්නයට භාජනය වී ඇති පණත් දෙක සම්මත කිරීමේ දී පාර්ලිමේන්තුව එම බලතල යථා පරිදි ක්‍රියාත්මක නොකොට ඇති බවය, යන කරුණු මත වේ.

උදහරණයක් වශයෙන් යම්කිසි කෙනෙකුට අමෙරිකා එක්සත් ජනපදයේ හෝ ඕස්ට්‍රේලියාවේ අධිකරණයට පැවරී ඇති සේ පෙනී යන පරිදි ලංකාවේ අධිකරණයට විනිශ්චයාත්මක බලයක් විශේෂයෙන්ම පැවරී ඇති බවක් දේශපාලන සංස්ථාවේ පැණවී නැති බව පෙන්වා දෙමින් උගත් සොලිසිටර් ජනරාල් වරයා තමාගේ පැහැදිලි, සාධාරණ එමෙන් ම වෙගවත් තර්කවල දී පිළිසරණ සෙවීය. නමුත් මෙය අවශ්‍යයෙන්ම තීරණාත්මක ප්‍රකාශයක් හැටියට ගිණිය නොහේ. ඒ මන්ද? පසුව දක්වන ලද සිද්ධීන් දෙක්හි ම දේශපාලන සංස්ථාවෙන් පිට සංයුක්ත අධිකරණ ඇති බවක් පෙනෙන්නට නැති බැවිනි. එබඳු සංයුක්ත උසාවි ඇතිකොට දේශපාලන සංස්ථාවට අනුව එම උසාවිවලට බලතල නුදුන් විටෙක එබඳු උසාවිවල බලතලයක් හෝ එබඳු උසාවි හෝ පැවැත්වී ගෙන යාමක් හෝ නොකෙරේ.

නමුත් ලංකාවේ ඇතිවී ඇත්තේ මීට වඩා වෙනස් තත්වයකි. ලංකාවෙහි තිබූ අධිශ්වර බලය වෙනස් වීමෙන් විනිශ්චය අංශයේ ක්‍රියාකිරීමේ අංගවල වෙනස් වීමක් සිදුවී ඇති බවක් පෙනෙන්නට නැත. ලංකාවේ අධිකරණ සම්බන්ධයෙන් කල්පනා කරන විට අලුත් දේශපාලන සංස්ථාවෙන් එහි කටයුතුවලට කිසි අයුරකින් බලපැවැත්වී නැත. එසේ ම එම උසාවි යම්කිසි ආඥා පණතකට යටත්ව ක්‍රියාත්මක වී නම් එබඳු ආඥාපණත් ද එසේ ම ක්‍රියාකාරී වෙමින් පැවතිනි. ලංකාවේ විනිශ්චය අංශය පිළිබඳ ක්‍රියාපිළිවෙල ස්ථාපිත වූයේ වර්ෂ 1833 පණවන ලද අධිකරණ පත්‍රිකාව අනුවය. මෙම පත්‍රිකාවේ 4 වන ඡේදයෙහි මෙසේ පැණවී තිබුණි.

"අප සතු ඉහත කී දිවයින පිළිබඳව මෙයින් පසු යුක්තිය විසඳීම පිණිස පැණවීමක් කිරීම අවශ්‍යයයි අපගේ චිත්තප්‍රසාදය පහළ වී ඇති බැවින් අපි මෙයින් සම්පූර්ණ යුක්තිය පසඳීමේ බලය සිවිල් නඩු පිළිබඳව වේවා අපරාධ නඩු පිළිබඳව වේවා සම්පූර්ණයෙන් ම අපේ මේ පත්‍රිකාවට අනුව සංයුක්ත වී නිර්මාණය වන අධිකරණයන් පිට පැවරෙන හැටියටත්..... එමතුද නොව අපේ චිත්තප්‍රසාදය අනුව එකී අපේ දිවයිනෙහි ආණ්ඩුකාරවරයා විසින් එහි ඇති නීති සම්පාදක මන්ත්‍රණ සභාවේ අවවාදය ඇතිව හෝ එසේ නැතිව හෝ කිසිම අධිකරණ-

(ලබන කලාපය බලන්න).

(පසු ගිය කලාපය හා සම්බන්ධයි)

යක් සිවිල් නඩු පිළිබඳව වේවා අපරාධ නඩු පිළිබඳව වේවා මෙම පත්‍රිකාවෙන් විශේෂයෙන් පණවා වෙන් කොට අවසරදී තිබෙන පරිදි මිස, ඇති කිරීමට නොහැකි බවත් මතුවටත් එයේ නොහැකිවන බවත් මෙයින් ප්‍රකාශ කරන්ට යෙදුණා ඇත.'' මෙම පත්‍රිකාවේ 5 වන ඡේදයෙන් ශ්‍රේෂ්ඨාධිකරණය ඇතිවී ස්ථාපිත වූ අතර 6 වන ඡේදයෙන් අග්‍රවිනිශ්චයකාරවරයා සහ තවත් විනිශ්චයකාරවරු දෙදෙනෙකු පත්කිරීමට බලය දෙන ලදී. ඉන්පසු උසාවියේ පරිපාලනය, සම්ප්‍රදය හා ආඥා බලය සම්බන්ධයෙන් ඡේද කීපයක්ම සකස් වී තිබේ. අර්ධ ශතවර්ෂයකින් පමණ පසු පණවන ලද ආඥා පණත් (විශේෂයෙන් ම අධිකරණ ආඥා පණත) උසාවිවලට පැවරුණු ආඥා බලය සහ ක්‍රියා සම්ප්‍රදය පැහැදිලිගෙන යන හැටියට සකස් වී තිබේ. එම පණතට අනුව අද දක්වාත් අබණ්ඩව ලංකාවේ අධිකරණ අංශය ක්‍රියාත්මක වීගෙන යේ.

එමනියා නීති සම්පාදක හා විධායක අංගවල පාලනය අතින් අතට යාමේදී අධිකරණවල ඇති විනිශ්චයාත්මක බලය ගැන විශේෂයෙන් සඳහන් කිරීම අවශ්‍යයයි බල කිරීමේ තත්වයක් ඇති නොවී තිබේ. ''නමුත් විනිසකරුවන්ගේ සාධීනතාවය රැකගැනීමේ ඇති වැදගත්කම සහ විනිශ්චය අංශය සහ විධායක අංශය වෙන්වන පරිදි ගැසෙන ඉර ඒ තත්වයෙහි ම තබා ගතයුතුබව'' පාලන සංස්ථාව සම්පාදනය කළ අය තේරුම් ගෙන තිබෙන බව පෙනේ. (අල්ලස් කොමසාරිස් එ. රණසිංහ (1965) ඒ. සී. 172 දරණ නඩුවේ 190 පිට බලන්න) ලංකාවේ පාලන සංස්ථාව ඉතාම ප්‍රකට අන්දමින් කොටස්වලට බෙදී තිබේ — ''දෙවන කොටස අග්‍රාණ්ඩුකාරවරයා'' ''තුන්වන කොටස ව්‍යවස්ථාදායක අංශය'' ''4 වන කොටස මැතිවරණ කොට්ඨාශ සීමා කිරීම'' පස්වන කොටස විධායක අංශය'', ''හයවන කොටස විනිශ්චය අංශය'', ''හත්වන කොටස රාජ්‍ය සේවය'' සහ ''අටවන කොටස මූදල් පිළිබඳ අංශය'' යනාදි වශයෙනි. එවකට විනිශ්චය අංශයට තිබුණු ඒ නිසාම එම අංශය අධිකරණ ආඥා පණත යටතේ එහි කටයුතුවලට දිනපතාම ක්‍රියාත්මක කරවූ අධිකරණ බලය ඒ අංශය වෙත පැවරෙණ බව විශේෂයෙන් සඳහන් කර නැතත් විනිශ්චය කාරවරුන් පත් කිරීම මන්ත්‍රණ සභා දෙකින් එකකවත් මන්ත්‍රීවරයෙකුගෙන් යුක්ත නොවූ අග්‍රවිනිශ්චයකාරවරයාගෙන් සහ තවත් විනිශ්චය කාරවරයෙකුගෙන් සහ විනිශ්චයකාරවරයෙකුවත හෝ එසේ වී ඇති තවත් පුද්ගලයෙකුගෙන් යුක්ත අධිකරණ සේවා කොමිසමකින් කළ යුතු බවට පැණවීමක් පාලන සංස්ථාවෙහි තිබේ. මෙම අධිකරණ සේවා කොමිසම් මණ්ඩලයෙහි තීරණයක් සඳහා බලපැවැත්වීම සාපරාධී ක්‍රියාවක් බවත් එහි පැණවී තිබේ. මන්ත්‍රණ සභා දෙකින් ම කරණ ලද සම්මුති සාකච්ඡාවකින් පසු අග්‍රාණ්ඩුකාරවරයාට මිස විනිශ්චය කාරවරයකු අස්කළ නොහැකි බව ද එහි වැඩිදුරටත් පැණවී තිබේ.

දේශපාලන අංශයෙන්, ව්‍යවස්ථා සම්පාදක අංශයෙන් හෝ විධායක අංශයෙන් හෝ කෙරෙණ හැසිරවීමකින් විනිශ්චය අංශයට නිදහසක් ලබා දීමේ අදහසක් එහි ගැබ් වී ඇති බව මෙම පැණවීම් පැහැදිලි ලෙස අනාවරණය කරති. ඒ පැණවීම් විනිශ්චයාත්මක බලය විනිශ්චය අංශයට පමණක් පැවරීමට අදහස් කරණ පාලන සංස්ථාවකට සම්පූර්ණයෙන් ම උචිත ය. එම අධිකරණ බලය විධායක අංශය සමග හෝ ව්‍යවස්ථා සම්පාදක අංශය සමග හෝ බෙදා ගැනීමට අදහස් කරන ලද පාලන සංස්ථාවකට මෙම පැණවීම් උචිත නොවේ. විනිශ්චයාත්මක බලය පැවරීම සම්බන්ධයෙන් පාලන සංස්ථාවෙහි ඇති නිශ්ශබ්දතාවය එම බලය ශතවර්ෂාධික කාලයක් තිස්සේ ම පැවරී තිබුණු විනිශ්චය අංශයේ ම මතුවටත් තිබිය යුතු නිසාම එසේවී තිබීම හා හොඳින් ගැලපේ. නමුත් පාලන සංස්ථාව සම්මතවීමෙන් පසු එම අධිකරණ බලය විධායක අංශය පිට හෝ ව්‍යවස්ථා දායක අංශය පිට පැවරී යාම සමග හෝ එම අංශ දෙකත් සමග එය බෙදී යාම සමග මෙය කිසිසේත් නොගැලපේ. බ්‍රිතාන්‍ය පාලන සම්ප්‍රදයෙන් සමානතා උපුටා දැක්වීමට මෙම විවාදයෙහි ස්වාභාවික පරිශ්‍රමයක් දරණ ලද බව පෙනේ. නමුත් මෙසේ උපුටාගන්නා ලද යම්කිසි සමානතාවයක් වේනම් එය එක එල්ලේම මීට අදළ වන සමාන තාවයක් නොවිය යුතුමය. බ්‍රිතාන්‍යයේ පාලන සම්ප්‍රදය ලියන ලද සංස්ථාවකට ඇතුළත් නොවී ඇති අතර ලංකාව පිළිබඳව මෙම විනිශ්චය මණ්ඩලයට සලකා බැලීමට සිදුවී ඇත්තේ ව්‍යවස්ථා සම්පාදක අංශයට අනිවාර්‍යයෙන් ම ව්‍යවස්ථා සම්පාදක බලය ලැබෙන ලිඛිත ලේඛනයකි.

බලතල වෙන් කොට තැබීම සම්බන්ධයෙන් පැන නගින අමාරු ප්‍රශ්නය විත්තිකරුවන්ගේ නඩුව විභාග කිරීම පිණිස (අධිකරණ) ඇමතිවරයා විසින් විනිසකරුවන් තිදෙනෙකු නම්කර තිබීම සාර්ථක ලෙස අභියෝග කරණ ලද නඩුවෙහි ඉතා ප්‍රවේශමින් විවාද කොට තිබෙන්නකි (මහරැජින එ. ලියනගේ සහ තවත් අය (64 න.නී.වා. 313)). උගත් ඇටෝර්නි ජනරාල් තැන එහි දී තර්ක කෙළේ ''අපේ පාලන සංස්ථාවේ බලතල වෙන්කර තැබීමක් නොමැති බවත් එබදු බලතල වෙන්කර තැබීමක් පාලන සංස්ථාවට පිටින් (dehors) පවතී නම් මේ රට බ්‍රිතාන්‍ය ජාතිකයින් විසින් අල්වා ගන්නා ලද කාලසීමාවේ සිටම බ්‍රිතාන්‍ය සම්ප්‍රදය අනුව ඇති බලතල වෙන් කිරීමට අපේ හුරු පුරුදු කමක් ඇති වී තිබෙන හෙයින් එය එම සම්ප්‍රදය අනුව ඉබේ ඇතිවුනු දෙයක්'' යයි කියමිනි. (එම නඩුවේ 348 වන පිට)

නමුත් පාලන සංස්ථාවේ කර්තව්‍ය වෙන් කර තැබීමක් ගැබ් වී ඇති බව ඔහු ද පිළිගත්තේය. මෙය අධිකරණය කී වචන වලින් ම කිව්හොත් ඒ මෙසේය. ''අපේ පාලන සංස්ථාවේ රජයේ ප්‍රධාන කර්තව්‍යයන් වෙන් වෙන් වශයෙන් සලකා තිබෙන බව සත්‍ය වශයෙන්ම උගත් ඇටෝර්නි ජනරාල් වරයා ම පිළිගත්තේය. විනිශ්චයාත්මක බලය -- රජයේ විනිශ්චයාත්මක බලය ලෙස ගැණෙන විනිශ්චයාත්මක බලය—සලකා ගත් කල විනිශ්චය අංශයේ, එනම් රටේ ස්ථාපිතව ඇති සිවිල් අධිකරණයන්හි එය පැවරී තිබෙන බව ගැන ඔහු තර්ක නොකළ බව මෙහිලා කිව යුතුය. මෙම නඩුවට ප්‍රථමෝත්තරය. ජූරි සභාවක් නොමැති මෙම නඩුවේ විසඳිය යුතු සංඛ්‍යාත පරමාර්ථය අනුව කල්පනා කරණ විට ශ්‍රේෂ්ඨාධිකරණය ලෙස සංයුක්ත වී සිටින අප තිදෙනා පත්කර ඇත්තේ රජයේ එකී විනිශ්චයාත්මක බලය ක්‍රියාවේ යෙදීම පිණිස වේ. සත්‍ය වශයෙන් ම අප තිදෙනා ම කිසියම් අවදියක හෝ වේවා — නමුත් ඉන් එක් එක් අයෙක් ම ශ්‍රේෂ්ඨාධිකරණයට මෙහි විනිශ්චයාත්මක බලය ක්‍රියාවේ යෙදීමට අනුදැනීමට කලින් — අග්‍රාණ්ඩුනායකතුමා විසින් වර්ෂ 1946 රාජාඥා පණතේ 52(1) දරණ ඡේදයට අනුව පත් කරණු ලැබ එම පදවිය දරා සිටීම ගැන කිසිම අර්බුදයක් නැත.'' එම නඩුවේ යාධක පාඨ ඉතා පරීක්ෂා වෙන් සමාලෝචනය කළ එම උගත් විනිශ්චය කාරවරු තිදෙනා ඉහතින් උපුටා දැක්වූ නිගමනයට බැස ඇමතිවරයා විසින් විනිසකරුවන් පත් කිරීම විනිශ්චය කාර්‍යාංශයෙන් පිට කිසි ම පුද්ගලයෙකුට පැවරිය නොහැකි රජයේ විනිශ්චයාත්මක බලය ආක්‍රමණය කිරීමකැයි තීරණය කළාහ.

මෙම විනිශ්චය මණ්ඩලය ඉදිරියේ කරුණු දැක්වූ සොලිසිටර් ජනරාල්වරයා තර්ක කෙළේ එම තීරණය වැරදි බව සහ එය සනාථ කිරීමට හැකි අයුරු බලතල වෙන් කිරීමක් (සංස්ථාවේ) නොමැති බව කියමිනි. නමුත් මෙම විනිශ්චය මණ්ඩලයේ හැඟීමද එම තීරණය නිවැරදි බව සහ විනිශ්චය කාර්‍යාංශයේ එයට ම වෙන්වූ බලයක් රැඳී පවතින අතර එම බලය පාලන සංස්ථාවට අනුව දැන් පවත්නා ආකාරයට විධායක අංශයට හෝ ව්‍යවස්ථා සම්පාදක අංශයට පැහැර ගැනීමට හෝ ආක්‍රමණය කිරීමට හෝ නොහැකිය යන්නයි.

පාලන සංස්ථාවේ 29(1) ඡේදයෙන් කියැවෙන්නේ මෙසේය:— ''මෙම රාජාඥාවේ පැණවීම් වලට අවනතව දිවයිනෙහි සාමය වීනය සහ මනා පාලනය පිළිබඳව නීති සැදීමට පාර්ලිමේන්තුවට බලය තිබිය යුතුය.'' සිරින් පරිදි මෙම වචනවල තේරුම් කථනය කර තිබෙන්නේ ඒ වචනවල සම්පූර්ණ විෂය ගැණෙන හැටියට ය. පාර්ලිමේන්තුවට 2/3 ක බහුතර ඡන්ද සංඛ්‍යාවක් ලැබුණු කල කථානායකතුමාගේ සහතිකයකුත් ඇතිව පාලන සංස්ථාව සංශෝධනය කළ හැකි බව 29(4) ඡේදයෙන් පැහැදී තිබේ. නමුත් 29(1) දරණ ඡේදයේ වචන විනිශ්චය කාර්‍යාංශයේ විනිශ්චයාත්මක බලය පැහැර ගැනීමක් කෙරෙන අන්දමට නීති පැණවීමට පාර්ලිමේන්තුවට බලය නිඛෙය යන්න තේරුම් යන අන්දමට කියවීමට මෙම විනිශ්චය මණ්ඩලයට පුළුවන් කමක් නැත. උදාහරණයක් වශයෙන් ගතහොත් යම්කිසිවෙකුට විරුද්ධව නඩුවක් නොඅසා දඬුවම් කළ හැකි ලෙස නීතියක් පැණවීමෙන් හෝ විභාග විගණන යන නඩුවක යම්කිසි පුද්ගලයෙකුට විරුද්ධව ඔහු වරදකරුවෙකු කොට තීන්දුවක් දීමටයයි විනිශ්චයකාර වරයෙකුට උපදෙස් දීමෙන් මෙය කළ හැක. එබඳු බලපැහැර ගැනීමක් පාලන සංස්ථාවට පටහැනි නම් ඉහත සඳහන් ඡේදයේ වචන එම බලය පාර්ලිමේන්තුවට එම ඡේදයෙන් දෙන බව තේරුම් ගැනීම උගහට ය. මෙම නඩුව විභාග කිරීමේ දී යම්තෙයකින් පාලන සංස්ථාව වෙනස්කොට එබදු ප්‍රතිඵලයක් ලබාගැනීමට පාර්ලිමේන්තුව සැරසුණහොත් ඇතිවන තත්වය කුමක් දැයි අනුමාන අදහස් පහළකරන ලදී. නමුත් මෙම නඩුවේ එබදු තත්වයක් උද්ගත නොවේ. මේ නයින් බලන කල පාලන සංස්ථාවේ 29(4) ඡේදයට අනුකූලතාවය නොමැතිව පණවන ලද පනතක් විනිශ්චයාත්මක බලය පැහැර ගැනීමට හෝ ආක්‍රමණය කිරීමට ඉව අල්ලන සේ පෙනේ නම් එම පනත බල අතික්‍රාන්ත (අල්ට්‍රා වයිරේස්) පනතක් වේ.

ඉදින් වර්ෂ 1962 ඉහත සඳහන් පනත් ඇමතිවරයා විසින් විනිසකරුවන් නම් කිරීමේ හේතුවෙන් හැර වෙනත් අයුරකින් විනිශ්චයාත්මක බලය උදුරා ගැනීම හෝ ආක්‍රමණය කිරීම කරන්නේ ද? සාමාන්‍ය ප්‍රඥාව පිළිබඳ සලකා බලා අපරාධ මේ මේ යයි සනිටුහන් කොට එයට මේ මේ දණ්ඩන දිය යුතුයයි අදහස් කරමින් හෝ සාක්ෂි පිළිබඳව රීති පැණවීමේ මාර්ගයෙන් හෝ නීති සම්පාදනය කිරීමට නීතිසම්පාදක මණ්ඩලයට පුළුවන්කම් නිබෙ යයි අමුතුවෙන් කීමට උවමනාවක් නැත. නමුත් වර්ෂ 1962 යටෝක්ත පණත්වල එබදු පොදු අදහසක් ගැබ්වී නැත. පැහැදිලි ලෙස ම ඒවා එල්ලකොට ඇත්තේ ධවල පත්‍රිකාවකින් නම් කරන ලද එවකට නමාගේ ඉරණම අපේක්ෂා වෙන් සිපිරි ගෙයක සිටි දන්නා හඳුනන නියමිත පුද්ගලයන් වෙතය. ඕන් සමහර සිරකරුවන් වරදකරුවන් කිරීම උගත් විනිශ්චයකාරවරු ප්‍රතික්ෂේප කළැයි යන කිම මෙම කරුණට අදළ නොවේ. මෙසේ අදහස් කරන ලද නීතිය වෙනස් කිරීම ප්‍රඥාවට පොදුවේ අදහස් නොකරන ලද බව හෝ රටේ සාමාන්‍ය නීති සම්ප්‍රදයට

කරන ලද දියුණු කිරීමක් හෝ නොවන බව මෙම වෙනස් කිරීම ජනවාරි මාසයේ කරන ලද කුමන්ත්‍රණකාරකයින්ට සිමාවන ලද නිසා ද මේ පුද්ගලයන් ගැන විනිසකරුවන් විසින් ක්‍රියාකිරීමෙන් පසු නීතිය යළිත් සාමාන්‍ය තත්වයට පරිවර්තනය වීමෙන් ද පෙනීයයි.

අපරාධ අංශයේ නීති පැණවීමේ දී එබඳු පොදු නාවයක් නොඑනිවීම ම විනිශ්චයාත්මක බලයක් සමග පටලැවෙයයි නොසිතන මෙම විනිශ්චය මණ්ඩලය මෙම විෂයෙහි පණවන සෑම පැණවීමක්ම යම්කිසි පුද්ගලයෙකුට එල්ලකොට පැණවූ කලක සහ සිද්ධියක් නිමාවට ගියපසු පැණවූ කලක අනිවාර්යයෙන් ම විනිශ්චයාත්මක බලය පැහැර ගැනීමක් හෝ ආක්‍රමණය කිරීමක්ය යන්න පිළිගැනීමට මෙම විනිශ්චය මණ්ඩලය සූදානම් නැත. එපමණක් ද නොව එබඳු ආක්‍රමණයක් ලෙස ගිණිය හැක්කේ කුමක්ද, නොගිණිය හැක්කේ කුමක් ද යන්න අතර කොතැනින් ඉර ගැසිය යුතුද යන දුස්සාධ්‍ය කර්තව්‍යයක් කිරීමට පරිශ්‍රමයක් දැරීමට අවශ්‍යද යන්න දැනගැනීමට උවමනා යයි ද මෙම විනිශ්චය මණ්ඩලයට නොසිතේ. එක් එක් අවස්ථාවක් ඒ ඒ අවස්ථාවේ කරුණු අවලෝකනයෙන් පසු එගි පරිසරය, එබඳු නීතියක් පැණවීමේ සත්‍ය පරමාර්ථය, එම නීතිය යොමු කරන ලද්දේ කෙබඳු තත්වයක් පැන නැඟුණු කලක ද යන්න, එසේ නීතියක් පැණවීමට (එබඳු පැණවීමකින් පණත් බොහෝ ගණනක් කෙළෙසුණ විට) ඇති පොදු පරමාර්ථය සහ එබඳු නීති සම්පාදනයක් නීති සම්ප්‍රදායට නිර්දේශ කිරීමෙන් හෝ නීතිය සීමා කිරීමෙන් හෝ විශේෂ නඩු විභාගයක දී විනිශ්චය අංශයට පැවරෙන තීන්දුව දීම හෝ අභිමතය ක්‍රියාවෙහි යෙදවීම කෙරෙහි හෝ සොතරම් දුරට බලපැවත්වේ ද යන්න ගැන සලකා බැලීමෙන් ඉහත සඳහන් නිගමනයට බැසිය යුතුය. එම නිසා මෙම ඇපැලෙහි අභියෝගයට භාජනය වී ඇති නීති පැණවීමේ ස්වභාවය වඩාත් සියුම් ලෙස සලකා බැලීම අවශ්‍ය වේ.

ප්‍රශ්නයට භාජනය වී ඇති පණත්වලට තමා එල්ල කරන ප්‍රහාරය ශ්‍රේෂ්ඨ මහත්‍ය සංක්ෂේපයෙන් සම්පිණ්ඩනය කළේ පහත සඳහන් පරිදි ය. නියමිත අවස්ථාවක නියමිත අපරාධ පිළිබඳව චෝදනා එල්ල කරන ලද, කවුදයි හඳුනාගත හැකි (ධවල පත්‍රයේ අනුසාරයෙන්) නියමිත පුද්ගලයන් විසඳීම සඳහා විනිශ්චය කාර්‍යාංශයට දෙන ලද විශේෂ නිර්දේශයක් වී ඇති නිසා සාකල්‍යයෙන්ම පළමුවන පණත අයෝග්‍යය. පණත් දෙකේම සාරය සහ සාරාංශය ගත්කල එය සිද්ධියට අනතුරුව එකී නියමිත පුද්ගලයන් වරදට පත්කිරීම සහ ඔවුන්ට දියහැකි දඬුවම් වැඩිකිරීමේ ප්‍රස්ථාව ලබාගැනීමට කරන ලද නීති-සම්පාදක සැලැස්මකි. ඔවුන් තමන්ගේ නඩු විභාගය අපේක්ෂා කරණ අතර එම පණත ඔවුන් සිරකර තැබීම නීත්‍යනුකූල කෙළේ ය. එම කාල සීමාවේ දී නඩුවකට ඇතුළත් කළ නොහැකි විධියට ගත් ඔවුන්ගේ ප්‍රකාශ නඩුවට ඇතුළත් කිරීමට හැකි දේ බවට එය පත් කෙළේ ය. එය ඔවුන් වරදකරුවන් කිරීමට පහසු වන අයුරින් මූලික සාක්ෂි නීතිය වෙනස් කෙළේය. අවශ්‍යතා වශයෙන් සිද්ධිය සිදුවීමෙන් පසුව කරණ ලද පැණවීමකින් ඔවුන්ට පැණවීමට හැකිව තිබුණු දඬුවම ද එය වෙනස් කෙළේය.

මෙම විනිශ්චය මණ්ඩලයේ මතය අනුව මෙම අවබෝධදයක සම්පිණ්ඩනය එම පණත්වල ප්‍රතිඵලය සාධාරණ ලෙස විස්තර කෙරේ. මේ අයුරින් විශේෂයෙන් වෙන්කොට ගත් නඩු විභාගයකට යොමු කොට පුද්ගලන්වයට (hominem) එල්ලවන සේ නීති පැණවීම දැනටමත් මීට කලින් පෙන්වා දී ඇති පරිදි සෑම අවස්ථාවකම විනිශ්චය කාර්‍යාංශයේ කර්තව්‍යයන්ට ඇඟිලි ගැසීමක් වැනි දෙයක් නොවෙනු ඇත. නමුත් අප ඉදිරියෙහි ඇති මෙම නඩුවේ එබඳු දෙයක් සිදුවී ඇති බවට මෙම විනිශ්චය මණ්ඩලයට කිසිම සැකයක් නැත. එය ප්‍රහාරයට පාත්‍රවූණු පණත්වලින් සිදුවිය හැකි සේ පෙනෙනු පමණක් නොව, එය එම පණත්වලින් අදහස් කරණ ලද ප්‍රතිඵලය වන බවට ද මෙම විනිශ්චය මණ්ඩලය තුළ සැකයක් නැත. එසේ ම එසේ වීම එම පණත්වල නීතිගත බලනාවයට මාරක දෙයක්ය යන්න ගැන ද කිසිම සැකයෙක් නැත. මෙම පැණවීම් යම්කිසි විශේෂ නඩු විභාගයකට බලපවත්වන ලෙස විධානය කරණ ලද නම් එම නඩු විභාගය කෙරෙහි ඒවා අන්‍යොන්‍ය ආබද්ධ ලෙස ගැටෙන ආකාරයෙන් ඒවායේ නියම ස්වභාවය හා පරමාර්ථය ද අනාවරණය කෙරේ. විශේෂයෙන් ම එම පණත්වලට පැහැය දෙන්නේ ඒවායේ අවසාන පරමාර්ථය වන, වරදකරුවන් බවට පත්වන අයට දෙන දඬුවමට සිදුවී ඇති සේ සැලකෙන වෙනස් කම් වලිනි. මේ වෙනස් කිරීම් විනිශ්චය අංශයට ඕනෑ කමින් එල්ල කළ ගරුක ආක්‍රමණයකින් සංයුක්ත වී තිබේ. සියුම් නොවන අයුරින් ඔවුන් බලාපොරොත්තු වූ පරමාර්ථය වූයේ මෙසේ විශේෂ චෝදනාවන්ට ගොදුරු වූ මේ විශේෂ පුද්ගලයන් සම්බන්ධයෙන් නඩු විසඳන කල විනිශ්චය කරුවන්ට වරදට සරිලන දඬුවම් පිළිබඳව ඇති සාමාන්‍ය අභිමතය ක්‍රියා කරවීමෙන් ඔවුන් බැහැර වී සිටින බව සාක්ෂාත් කර ගැනීම ය. වරදකරුවකු බවට පත්වීමේ දී ඒ එක් එක් පුද්ගලයකුට දය අවුරුද්දකට අඩු නොවන සිර දඬුවමක් නියම කිරීමටත්, කුමන්ත්‍රණයේ තමා කළ කොටස ඉතා ලඝු වූවත් එසේ වරද කරුවකු බවට පත්වන්නකුගේ දේපළ රාජසන්තක කිරීමටත් විනිශ්චය කරුවන්ට පණත්වලින් බලයෙකොට තිබේ.

නඩුව විසඳූ උසාවිය එහි දීර්ඝ, ප්‍රවේසම් සහිත නඩු තීන්දුව පහත පෙනෙන පරිදි නිමාවට ගෙන ගියේය. (67 න.නී.වා. 194 පිට) 424 වන පිට බලන්න.)

"වර්ෂ 1962 පණත, සිද්ධියෙන් පසුව (post facto) මෙම විත්තිකරුවන් යටතේ සිටි දඩුවම මූලික වශයෙන් වෙනස් කර තිබීම ගැන අප විසින් අවධානය යොමු කළ යුතුය. දීමට අදහස් කරණ සිර දඩුවමේ කාල පරිච්ඡේදය සම්බන්ධයෙන් උසාවිය විසින් ක්‍රියාවේ යෙදවිය හැකි අභිමතය මෙම පණත නිසා ඉවත් වී අවුරුදු දහයකට සිර දඩුවමක් දීමට උසාවියට එයින් බල කෙරෙයි. නමුත් මෙම කුමන්ත්‍රණය සංවිධානය කළ අය අතරත් එයට සම්බන්ධවීමට පොළඹවනු ලැබූ අය අතරත් පැවරෙන දඩුවමේ යම්කිසි වෙනසක් ඇති කිරීමට අපේ කැමැත්ත ඇතිවූ බව මෙයිලා සඳහන් කළ යුතු ය. තව දුරටත් එයින් දේපොළ රාජසන්තක වීමක් ද අනිවාර්‍යයෙන් ම පැවරේ. මේවා අතීත පයිාකරණ, (retroactive) සංශෝධන වනවා පමණක් නොව විමසෙන සිද්ධියට ම (ad hoc) බලපාන, අප විසින් විසඳන ලද වෝදනා ප්‍රතිඥා කොටගත් කුමන්ත්‍රණයට පමණක් අදළවන දේ ද වෙති. මෙවැනි අවධාරණයක් ඇති වී ඇත්තේ මන්දැයි අපට තේරුම් ගැනීමට අපහසු ය. බලයට පත්වී ඇති ආණ්ඩුවේ ස්වරූපය කෙසේ වෙතත්, වරද කරුවන් කවරෙකු වූවත්, දේශපාලන බලපෑවැත්වීම් වලින් බැහැර විය යුතු උසාවිවලටත් රාජද්‍රෝහී අපරාධ අතිශෝර දරුණු අපරාධ වෙති."

මෙසේ පළ කරණ ලද විරෝධය ගැන සානුකම්පකත්වය පළ කරණ මෙම විනිශ්චය මණ්ඩලය සම්පූර්ණයෙන් ම ඊට එකඟ වන බව ද මෙහිලා කියමු.

"මෙම පණත් ව්‍යවස්ථාදායක අංගයේ නඩු තීන්දු ය. එමෙන් ම ඒවා විනිශ්චයාත්මක බලතල ක්‍රියාවේ යෙදීම ය" යි අමෙරිකා එක්සත් ජනපදයේ ශ්‍රේෂ්ඨාධිකරණයේ වෙස් විනිශ්චයකාර තුමා විසින් කියන ලදුව **කෝල්ඩර් එ. බුල්** අතර කියවී (1798) 1 කර්ටිස් වාර්තාවල 269 වාර්තා වී ඇති නඩු තීන්දුවේ ප්‍රකාශයට සටහන කම් දක්වීමට මෙය ද කෙණෙකුට සාධාරණ ලෙස යොදා ගත හැකිය.

බලැක්ස්ටන් ග්‍රන්ථ කර්තෘවරයා විසින් ලියන ලද නීති විවරණ ග්‍රන්ථයන්හි 44 වන පිටුවේ මෙසේ සඳහන් වී තිබේ. "එමනිසා ටිටියස් (ටිටියස්) නමැත්තකුගේ බඩු භාණ්ඩ රාජසන්තක කිරීම පිණිස හෝ ඔහුට උග්‍ර රාජද්‍රෝහීත්වයේ කැළලක් ඇති කොට වරද කරුවකු බවට පත් කිරීම පිණිස ව්‍යවස්ථාදායක අංගය විසින් පණවනු ලබන විශේෂ පණතක් වෙතොත් එය රාජ්‍ය පාලන නීතියට අන්තර්ගත නොවේ: එයට හේතුව මෙම පණත ක්‍රියාත්මක වීම වැය වන්නේ ටිටියස් කෙරෙහි පමණක් වීමත් එය සාමාන්‍ය ජන සමාජය සමග සම්බන්ධතාවයක් ඇති නොවීමත් ය— මෙය නීතියකට වඩා දණ්ඩන නියෝගයක් ලෙස ගිණිය හැක."

මෙබඳු පණත්වල බලතාවය නීතියුක්ත වන්නේ නම් ව්‍යවස්ථා සම්පාදක කායර්‍යාංශය මගින් විනිශ්චයාත්මක බලතල සම්පූර්ණයෙන්ම උදුරාගෙන ඒවා විනිශ්චයකාර වරුන්ගේ අත්වලින් බැහැර කිරීමට ඔවුන්ට පිළිවන. ව්‍යවස්ථාදායක අංශයතුළ මෙබඳු අදහසක් සාමාන්‍ය වශයෙන් නොනිබුණු බව අප විසින් තේරුම් ගන්නා ලදී. උග්‍ර තත්වයකට මුහුණ දීමට සිදුවූ ව්‍යවස්ථා සම්පාදක අංශය ඒ සම්බන්ධයෙන් ක්‍රියා කිරීමට ගරුක පියවර මේ අයුරින් ගෙන තිබෙන්නේ එයට එසේ කිරීමට බලය තිබේ යයි ද එසේ ක්‍රියා කිරීමෙන් එම අංශය නිවැරදි ලෙස එම පියවර ගන්නේ යයි ද සිතාගෙන බව කෙණෙකුට සලකාගත හැක. නමුත් ඒ ආකාරයෙන් කරුණු සලකා ගැනීම මෙයට අදාළ නොවේ. එසේ සලකා ගත්තත් එයින් පාලන සංස්ථාව උල්ලංඝණය වූ විට කිසිම පිළියරණක් නොලැබේ. වරක් කරණ ලද දෙය, එසේ කිරීමට අවසරය ලැබුනොත්, ඊට වඩා උග්‍ර කම්න් අඩු සන්දේහ සමයක ඊට වඩා බරපතල කම්න් අඩු කාරණා පෙරදැරි කරගෙන ද නැවත කිරීමට ඉඩ තිබේ. එවිට ඒ අනුසාරයෙන් විනිශ්චයාත්මක බලය ක්‍රම ක්‍රමයෙන් හීන වීගෙන යනු ඇත. එබඳු ක්‍රමවත් විනිශ්චයාත්මක බලතල ක්ෂය වීමක් පාලන සංස්ථාවේ අදහසට ඉදුරා විරුද්ධ බව කිය යුතුය. එමනිසා මෙම විනිශ්චය මණ්ඩලයේ මතය අනුව එම පණත් බලාතික්‍රාන්ත (ultra vires) ලෙස පැණවුණු පණත් ලෙස ගැනෙති.

ඇපැල් කරුවන්ට ජූරි සභාවක් ලබා ගැනීමට ඇති අයිතිවාසිකම පිළිබඳව ඉදිරිපත් කරණ ලද ඔවුන්ගේ කුන්වන තර්කය මේ හේතුවෙන් පැන නොනගින බැවින් ඒ කරුණ ගැන මෙම විනිශ්චය මණ්ඩලය කිසිම මතයක් ප්‍රකාශ නොකරයි.

පළමුවන පණතේ 17 වන ඡේදය, එයට පණතින් හිමි පද සම්බන්ධයෙන් වෙන්වී, **තම්බයියා එ. කුලසිංහම්** (5 න.නී.වා. 25, 37 වන පිට) අතර කියවුනු නඩුවේ බල මහිමයෙන් ක්‍රියාත්මක වෙමින් පැවතේ යයි සිතීමට ඉඩක් ඇතත් මෙම විනිශ්චය මණ්ඩලය ඉදිරියේ ඒ ගැන තර්කයක් පැන නොනැගී නිසා මෙම මණ්ඩලය ඒ සම්බන්ධයෙන් ද කිසිම අදහසක් පළකිරීමට නොකැමැත්තේ ය.

මෙම පණත් බලාතික්‍රාන්ත ලෙස පැණ වී ඇතැයි ද, එමනිසා නීතිගත බලයෙන් තොරයයි ද පෙනිගියහොත් මෙම නඩුවේ වරදකරුවන් බවට පත්කිරීම ස්ථාපිත නොවේ යයි පාර්ශ්වකරුවන් විසින් තීරණයට බැස ගන්නා ලදී. එබැවින් මෙම විනිශ්චය මණ්ඩලය මෙම අභියාචනයට ඉඩ දෙන ලෙස ද, නඩුවේ කෙරී ඇති වරද කරුවන් බවට පත්කිරීම් ඉවත හෙලන ලෙස ද අවනත පූර්වකව මහරැජිනියට අවවාද දෙන්නට යෙදුනා ඇත.

අභියාචනයට ඉඩ දී
වරදකරුවන් නිදහස් කරන ලදී.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා, තම්බයියා විනිශ්චයකාරතුමා සහ අලස් විනිශ්චයකාරතුමා ඉදිරිපිට

ලාදමුත්තුපිල්ලෙ ආරුමුගසාමි එ. ලාදමුත්තුපිල්ලෙ කදිරගාමන්පිල්ලේ*

අධිකරණ පණතේ 47 වෙනි ඡේදය යටතේ නිකුත් කළ නියෝගයක්

සු. උ. ඉල්ලීමේ අංකය: 118/1965

විභාගයට ගත් දිනය: 16. 11. 1965
තීන්දුව දුන් දිනය: 26. 11. 1965

උසාවියට අපහාස කිරීම — මිය ගිය තැනැත්තාගේ බූදලය සන්තක දේපොළවල සියලුම ආදයම් උසාවියට ගෙන ආ යුතු යයි ශ්‍රේෂ්ඨාධිකරණය විසින් 3.8.62 වැනි දින අද්මිනිස්ත්‍රාසිකාරයෙකුට දෙන ලද නියෝගයක් — ඉන්පසු අද්මිනිස්ත්‍රාසි කාරයාගේ කැමැත්තත් ඇතුව 1. 4. 63 වන දින ඔහුට 31. 10. 63 වන දින හෝ ඊට පෙර අවසාන ගණන් හිලව් උසාවියට ඉදිරිපත් කිරීමට යයි නිර්දේශ කිරීමක් — මෙම නියෝග දෙකම ක්‍රියාවේ යෙදීම පැහැර හැරීම — උසාවියට අපහාස කිරීමේ චෝදනාවක් — අධිකරණ ආඥ පණතේ 47 වන ඡේදය.

වැන්දඹු භාර්‍යාවත් දරු හයදෙනෙකුත් අත්හැර මිය ගිය අයගේ වැඩි මහල් පුත්‍රයා වූ මෙම නඩුවේ වගඋත්තර කරුට 9.5.53 වන දින අද්මිනිස්ත්‍රාසි බලපත්‍ර දෙන ලදී. වැන්දඹු භාර්‍යාවත් දරු තිදෙනෙකුත් මෙම අද්මිනිස්ත්‍රාසි බලපත්‍ර අවලංගු කොට වැන්දඹු බිරිඳ අද්මිනිස්ත්‍රාසිකරු හැටියට පත් කරන ලෙස උසාවියට කරන ලද ඉල්ලීම, සාර්ථක විය. මෙම පත්කිරීමට සහ ඊට පසුව තමාගේ දේපොළ අල්වා විකිණීම තහනම් කළ යුතුයයි කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කිරීමට ද විරුඬව වගඋත්තරකරු ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේ ය.

මෙම ඇපැල් පෙත්සම් ගැන නඩු විභාගය නිමාවට පත් නොවී තිබියදී වගඋත්තරකරු දිස්ත්‍රික් උසාවියේ ඇති බූදල් නඩුවේ එවකට පැවැත්වීගෙන යමින් තිබුණු විභාගය අත්හිටුවීම පිණිසත් ඉහත සඳහන් ඇපැල් පෙත්සම් විභාගය කෙරෙන දිනය ළංකරවා ගැනීම පිණිසත් ඉල්ලීමක් ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරන ලදුව 3.8.62 වන දින ශ්‍රේෂ්ඨාධිකරණය පහත සඳහන් පරිදි නිර්දේශ දී තිබේ.

(1) දිස්ත්‍රික් උසාවියෙහි මේ පිළිබඳව තවදුරටත් පියවර ගැනීම අත්හිටුවා ලීම පිණිස සහ

(2) මිය ගිය අයගේ බූදලයට අයත් සියලුම දේපොළ පිළිබඳ ආදයම මෙම බූදල් නඩුවේ අය ශීර්ෂයන් ලෙස උසාවියට ඉදිරිපත් කිරීමය.

මෙම ඇපැල් නඩු විභාග දෙක 29.3.63 වන දින සහ 1.4.63 වන දින විසඳීම පිණිස උසාවිය ඉදිරියට පමුණුවනු ලැබ දෙපක්ෂයේ නීති වේදීන් විසින් පහත සඳහන් පරිදි බැස ගන්නා ලද සම්මුතියක් නඩු වාර්තාවට ඇතුළත් කොට ඇපැල් පෙත්සම් දෙක ඉදිරිපත් කිරීමට හේතු වූ නියෝග දෙක නිෂ්ප්‍රභා කරන ලදි.

"දැනට සිටින අද්මිනිස්ත්‍රාසිකරුවන ඇපැල්කරු කුවිතාන්සි සහ රිසිට පත් සමග අවසාන ගණන් හිලව්උසාවිය ඉදිරියට 31.10.63 වන දින හෝ ඊට කලින් පැමිණ විය යුතු බවට නිර්දේශ දිය යුතු අතර ඒ ගණන් හිලව් තීරණය කරන තුරු වගඋත්තරකරු විසින් තමාගේ භාරයේ තිබෙන දේපොළවල ආදයම උසාවියට ගෙන ආ යුතුය."

මිය ගිය අයගේ පුත්‍රයෙක් වන පෙත්සම්කරු විසින් ඉදිරිපත් කරන ලද පෙත්සමකට හා දිවුරුම් පෙත්සමකට අනුව ඉහත සඳහන් නියෝග දෙකට එකඟව ක්‍රියාකිරීම පැහැර හැරීමේ හේතුවෙනුත් එහි අඩංගු නිර්දේශවලට අකීකරුවීමේ හේතුවෙනුත් වගඋත්තරකරුට උසාවියට අපහාස කිරීමේ චෝදනාවට දඬුවම් නොකිරීමට ඇති හේතුවක් ඇත්නම් එය පෙන්වීමට යයි ඔහු වෙත නියෝගයක් නිකුත් විනි.

පළමුවන නියෝගය නිකුත්වූ 3.8.62 වන දිනට පසු, උසාවිය නිර්දේශ කළ අයුරින් වගඋත්තරකරු කිසිම ගෙවීමක් කර නැතැයි යන්න ප්‍රතික්ෂේප නොකැරිණි. දිස්ත්‍රික් විනිශ්චයකාරවරයාගෙන් කිපවිටක් ම කල්ගෙන

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 70 වෙනි කා., 67 වෙනි පිට බලනු.

අවසාන ගණන් හිලව් නඩුවට අමුණන ලද්දේ 28.5.64 වන දින දිය. තමාගේ දිවුරුම් පෙත්සමින් අද්මිනිස්ත්‍රාසිකරු වශයෙන් තමාගේ අතේ රු. 40,000/- ක් වගඋත්තරකරු ඇති බව පිළිගත්තේ ය. (ඒ) එමතු ද නොව රු. 2,48,690/-ක මුදලක් නඩුහබ ආදියටත් අනික් වියදම් පිළිබඳවත් ඔහුගෙන් වැය වූ බව ද වගඋත්තරකරු කියා සිටියේ ය. (බී) අපරාධ නඩු විභාගයක දී නිදහස්කර හරින ලද පෙත්සම්කරු විසින් ද ඔහුගේ සහෝදරයන් දෙදෙනෙකු විසින් ද, සොරකම් කිරීම නිසා රු. 1,57,022/71 ක් නැති වූ බව ද වගඋත්තරකරු කියා සිටියේය.

නීන්දුව (1) 1.4.63 වන දින දෙපෙහි කැමැත්තෙන් නිමාවට පත්කළ ඇපැල් නඩු විභාග දෙක පවතින කාලයේ 3.8.62 වන දින කරන ලද නියෝගයක්ය යන කරුණ සැලකෙන නිසා ඒ අනුව වගඋත්තරකරු උසාවියට අපහාස කළ බැව් කියන පැමිණිල්ල පිළිබඳ තවදුරටත් ලුහුබැඳ යෑම අවශ්‍ය නැත්තේ එය තව අංශයකින් බලන කල යල්පැනපු නියෝගයක් ද වී ඇති නිසාය.

(2) නමුත් ඉහත සඳහන් පරිදි 1.4.63 වන දින දෙන ලද නියෝගය ශ්‍රේෂ්ඨාධිකරණය විසින්, අද්මිනිස්ත්‍රාසිකරුවකුට — එහි නිලධරයෙකුට — දෙන ලද පැහැදිලි නිර්දේශයක් ගැබ්වූ නියෝගයක් නිසා (මෙය වගඋත්තරකරු තමාට ඉටුකිරීමට හැකි වෙතැයි සිතා කරන ලද පාර්ශ්වකාරයින් දෙපක්ෂය අතර ඇතිවූ හාර ගැනීමක් පමණක් නොවේ) එයට අකීකරු වීම උසාවියට අපහාස කිරීමක්වේ.

(3) 1.4.63 වන දින දෙන ලද නියෝගයෙහි සඳහන් ව ඇති ''දේපොළ වලින් ආදයම'' යන වචන තේරුම්ගත යුත්තේ, ආදයම් කිරීමට වැයවන මුදල අඩුකළ විට එම දේපොළවලින් ඉතිරිවන ශුද්ධ ආදයම යන තේරුම් එන අයුරිනි. උසාවියේ නියෝගයක් නොලබා එයින් ලැබෙන ආදයමෙන් තුන්වන පාර්ශ්වකරුවන් සමග නඩුහබ කීමට යන මුදල සහ බුද්දලය යථා පරිදි පාලනය කිරීමට වැයවන මුදල අඩුකළ යුතුය යන තේරුම ඒ වචනවලින් ගත නොහේ.

(4) එම දේපොළවලින් ලැබෙන ශුද්ධ ආදයම උසාවියට ගෙන ඒම වගඋත්තරකරු පැහැර හැර තිබෙන නිසාත් තමා අතර තිබුනු මුදල හැටියට ඔහු පිළිගත් රු. 40,000/- ක මුදලවත් අඩු වශයෙන් උසාවියේ තැන්පත් කිරීම ඔහු පැහැර හැර තිබෙන නිසාත් ඔහුගේ ක්‍රියා කලාපය උසාවිය විසින් දෙන ලද නිර්දේශයට ඕනෑ කමින් ම අකීකරු වීමකට ප්‍රමාණවත් වන නිසා ඔහු උසාවියට අපහාස කිරීමේ චෝදනාවට වැරදි කරු වේ.

නීතිඥවරු: ඒ. සී. නඩරාජා මහතා, පෙත්සම්කරු වෙනුවෙන්

රාජනීතිඥ ජී. ඊ. චිට්ටි මහතා සමග, ඒ. ඇස්. වනිගසූරියර් මහතා සහ ඩී. ඇස්. විජේවර්ධන මහතා, වගඋත්තරකරු වෙනුවෙන්.

ජේ. ජී. ටී. වීරරත්න, රජයේ අධි නීතිඥතැන සමග ඇන්. බී. ද ඇස්. විජේසේකර රජයේ අධි නීතිඥ තැන, අධිකරණය වෙනුවෙන්

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

පහත සඳහන් කරුණු යටතේ මෙම උසාවියේ බල මහිමයට නින්ද වන පරිදි හෝ නිගරුවක් වන පරිදි වරදක් කරණ ලදැයි කියමින් පෙත්සම් කරු විසින් ඔහුට අධිකරණ අභ්‍යාපණයේ 47 වැනි ඡේදය යටතේ දඬුවම් නොකළ යුතු මන්ද යි දක්වන්නට හේතුවක් පෙන්වීමට යැයි ඉදිරිපත් කරණ ලද මෝසමක් සහ දිවුරුම් පෙත්සමක් අනුව වගඋත්තරකරු අප ඉදිරියට පැමිණ සිටියි.

එම කරුණු මෙසේය:—

(ඒ) වර්ෂ 1962 අගෝස්තු මස 3 වැනි දින කරණ ලද නියෝගයකින් 1962 අංක 128 දරණ ඉල්ලුම් පත්‍රයට අනුව, හලාවත නැසී ගිය මුතුවයිරන්ලාද මුතුපිල්ලෙට අයත් බුද්දලයට සම්බන්ධ ඉඩකඩම් වලින් හා දේපල වලින් ලැබිය යුතු සියලුම ආදයම වර්ෂ 1962 අංක 29 දරණ (අතුරු) ඇපැල සහ අංක 110 දරණ (අවසාන) ඇපැල නීන්දු වීමට පෙරාතුව කොළඹ දිස්ත්‍රික්

උසාවියේ අංක 14879 දරණ බුදල් නඩුවේ අය වශයෙන් ගෙනෙන ලෙස උපදෙස් දෙන ලදුව

(බී) වර්ෂ 1963 අප්‍රෙල් මස 1 වැනි දින මෙම උසාවිය මගින් කරන ලද නිර්දේශයකට අනුව ඉහත සඳහන් ඇපැල් නඩු බෙරුමක් කර ගන්නා අටියෙන් ඔහුගේ නීතිවේදීන්ගේ මාර්ගයෙන් එකී ලුතුවයිරන් ලාදමුත්තු පිල්ලේ නැමැත්තා ගේ බුදලයෙහි අද්මිනිස්ත්‍රාසිකරු වශයෙන් ඒ පිළිබඳ තමාගේ පරිපාලන සම්බන්ධයෙන් වර්ෂ 1963 ඔක්තෝම්බර් මස 31 වැනි දින හෝ එයට කලින්, එයට පසු එහි ගණන් පරීක්ෂණ විනිශ්චයාත්මකව නිගමනය කරගන්නා අටියෙන් කුවිතාන්සි සහ රිසිට්පත් සමග අවසාන ගණන් හිලව් ඉදිරිපත් කිරීමට එකඟවී එසේ ම ඔහුගේ භාරයේ ඇති දේපලවල ආදයම, ඉහත සඳහන් ගණන් හිලව් පිළිබඳ අවසාන තීරණයකට එළඹෙන තුරු මෙම උසාවියට ගෙන ඒමට ද එකඟවී

එම නියෝග සම්පූර්ණයෙන් නොසලකා හැරීම කරණකොටගෙන ඔහු

(1) ඉහත සඳහන් නැසීගිය අයගේ බුදලයෙහි දේපල පිළිබඳ ආදයම හෝ එයින් කොටසක් හෝ වර්ෂ 1963 නේ අප්‍රේල් මස 1 වැනි දින අංක 29 සහ 110 දරණ එකී ඇපැල් නඩු තීන්දු වනතුරුත් මෙම උසාවියට ගෙන ඒම නොකර දැනි බැවින් සහ

(2) වර්ෂ 1963 නේ ඔක්තෝම්බර් මස 31 වැනි දින හෝ එයට කලින් කුවිතාන්සි සහ රිසිට්පත් සමග තමාගේ පරිපාලනයේ අවසාන ගණන් හිලව් මෙම උසාවියට ඉදිරිපත් නොකිරීමේ හේතුවෙන් ද එදින වනතුරු තමාගේ භාරයේ තිබුණු දේපලවල ආදයම මෙම උසාවියට ඉදිරිපත් නොකිරීමෙන් ද යන කරුණු නිසා මෙය සිදුවී තිබේ.

වගඋත්තරකරු වනාහි වර්ෂ 1951 අප්‍රෙල් මස 8 වැනි දින වැනි ඇත දිනක අන්තිම කැමැති පත්‍රයක් නොලියා තමාගේ වැන්දඹු භාර්‍යාව සහ බාලවයස්කරුවන් දෙදෙනෙකු ඇතුලු දරුවන් 6 දෙනෙකුගෙන් වෙන්වී අභාවයට පත් තැනැත්තාගේ වැඩිමහල් පුත්‍රයායි. වර්ෂ 1953ක්වූ මාර්තු මස 9 වැනි දින තමාගේ ම ඉල්ලීමෙන් එකී මියගිය තැනැත්තාගේ බුදලය පාලනය කිරීමට අද්මිනිස්ත්‍රාසි බලපත්‍ර වගඋත්තරකරුට ලැබී ඇත. වර්ෂ 1951 රුපියල් (7,11198/–)ක් වටිනා බවට මිල කළ මෙම බුදලය සැලකිය යුතු තරම් දෙයකි. මියගිය තැනැත්තාගේ වැන්දඹු භාර්‍යාව සහ දරුවන් විසින් වර්ෂ 1961 සැප්තැම්බර් මස මෙම අද්මිනිස්ත්‍රාසි බලපත්‍ර අවලංගු කරන ලෙස දිස්ත්‍රික් උසාවියෙන් ඉල්ලීමක් කළහ. එම දරුවන් තුන් දෙනාගෙන් එක් කෙනෙක් මෙම පෙත්සම්කරුය. එම ඉල්ලීම කරන ලද්දේ පහත සඳහන් කරුණුවල හේතුවෙනි.

(ඒ) දේපොල ලැයිස්තුවක්, දේපල මිල කිරීමක් සහ ගණන් හිලව් උසාවියට ඉදිරිපත් නොකර සිටීම.

(බී) අද්මිනිස්ත්‍රාසිකරු විසින් තමාට ලැබෙන එහෙත් ඉහත සඳහන් උරුමක්කාරයන්ට අයිති මිල මුදල් උසාවියට ඉදිරිපත් කිරීම නොසලකා හැරීම.

(සී) අද්මිනිස්ත්‍රාසිකරු විසින් බුදලයට අයිති ඉඩම් වලින් ලැබෙන ලාභ වලින් තමා නමට ඉඩම් මිලටගැනීම.

(ඩී) අනික් උරුමක්කාරයින්ගේ නිත්‍යානුකූල අයිතිවාසිකම් නැතිකරන අදහසින් බුදලය ඕනෑකමින් ම ප්‍රමාද කර පාලනය කිරීම.

වර්ෂ 1962 ජනවාරි මස 18 වැනි දින දිස්ත්‍රික් උසාවිය විසින් කාරණාවට අනුකූලව කරණ ලද පරීක්ෂණයකින් පසුව වගඋත්තරකරුගේ අද්මිනිස්ත්‍රාත් බලපත්‍ර මියගිය තැනැත්තාගේ වැන්දඹුවගේ වාසිය පිණිස අවලංගුකොට ඇයට එම අද්මිනිස්ත්‍රාසි බලපත්‍ර පිරිනමා තිබේ. වගඋත්තරකරු මෙසේ අද්මිනිස්ත්‍රාති බලපත්‍ර අවලංගු කිරීමේ නියෝගයට විරුද්ධව අභියාචනයක් ඉදිරිපත් කරන ලදී. නොම්මර 110 වැනි (අවසාන) ඇපැල එයවේ. එපමණක් නොව දිස්ත්‍රික් උසාවිය විසින් ඊට අනතුරුව ඇස්කීසි ගැනීම නතර කිරීම ප්‍රතික්ෂේප කිරීමෙන් දෙන ලද නියෝගයට විරුද්ධව ද වග උත්තර කරු ඇපැලක් ඉදිරිපත් කොට තිබේ. එය අංක 29 දරණ අතුරු ඇපැල විය. මෙසේ අභියාචනා ඉදිරිපත් කිරීමට අතිරේක වශයෙන් වගඋත්තරකරුවා අංක 14879 දරණ බුදල් නඩුවේ සියලු ම වග විභාග ආදී කටයුතු ඇපැල් නඩු දෙක ඇසෙන තුරු නවත්වන ලෙස ඉල්ලමින් එසේම ප්‍රධාන ඇපැල් නඩුව ඇසීම ඉක්මණින් ක්‍රියාත්මක කිරීම සඳහා මෙම උසාවියට ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කොට තිබේ. එය වර්ෂ 1962 අංක 128 දරණ ඉල්ලීම වේ. මෙම ඉල්ලීම විභාගය පිණිස වර්ෂ 1962 අගෝස්තු මස 3 වැනි දින මෙම අධිකරණය ඉදිරියට පමුණුවන ලදුව අධිකරණය (1) දිස්ත්‍රික් උසාවියේ ඉන්මතු බුදල් නඩුවේ පියවරක් නොගන්නා ලෙසත් (2) මියගිය තැනැත්තාගේ

බුදලයට අයත් ඉඩම් වලින් ලැබෙන සියලුම ආදායම බුදල් නඩුවේ අය ශීර්ෂයන් හැටියට උසාවියට ගෙන ආ යුතු බවත් නියෝග කළේය. තවදුරටත් ඒ අතර කාලය තුළ යම්කිසි වරිපණම් බද්දක් හෝ වෙනත් බද්දක් ගෙවිය යුතු කාලය එළඹුණහොත් මියගිය අය ගේ බුදලය සම්බන්ධව ඇති ඉඩම් වලට ගෙවිය යුතු මුදල පෙත්සම්කරු—එයින් අදහස් කෙරෙන්නේ දැනට ඉන්න වගඋත්තරකරු—විසින් දිස්ත්‍රික් උසාවියේ අනුමැතිය ලබාගෙන බුදලයේ මුදලින් ගෙවිය යුතු බවත් නියෝග කොට තිබේ.

මෙම ඇපැල් නඩු විභාග දෙක වර්ෂ 1963 මාර්තු මස 29 වැනි දින මෙම උසාවිය ඉදිරියට විභාගය සඳහා ඉදිරිපත් කරන ලදුව එදින සහ 1963-4-1 වෙනි දිනත් වාදකර ඒහි දී නීතිවේදීන් යම්කිසි එකඟත්වයකට බැසැ ගැනීමක් නඩු පොතේ වාර්තා කොට අභියාචනයට භාජනය වී තිබුණ පහළ උසාවියේ නියෝග දෙක ඉවත හෙලන ලදහ. නීතිවේදීන් විසින් ඇති කරගත් එකඟත්වය මෙම උසාවියේ නඩු තීන්දුවෙහි ගැබ්කරන ලදුව කියැවෙන්නේ පහත පෙනෙන අයුරිනි.

''මෙම ප්‍රශ්නය පහත සඳහන් ප්‍රඥප්තීන්ට එකඟව තීරණයකට ගෙන ඒමට හැකිබව දෙපක්ෂයේ ම නීති වේදියෝ දැන් කල්පනා කරති. ඒ ප්‍රඥප්තීන් මෙසේය. මෙම නඩුවෙහි ඇපැල්කරු දැනට බුදලයේ පාලකයා හැටියට කුවිතාන්සි සහ රිසිට්පත් සමග අවසාන ගණන් හිලව් වර්ෂ 1963 ඔක්තෝම්බර් මස 31 වැනි දින හෝ එයට පෙර මෙම නඩුවට අමුණා ඉදිරිපත් කරන සේ නියෝග දිය යුතුයි. එයින් පසු එම ගණන් හිලව් විනිශ්චයාත්මකව පරීක්ෂා කොට තීරණය කළයුතුයි. එම ගණන් හිලව් සම්බන්ධයෙන් අවසාන තීරණයකට එළඹෙනතුරු තමා භාරයේ තිබෙන ඉඩකඩම් වලින් ලැබෙන ආදායම මෙම උසාවියට ගෙන ඒමට නියෝග කළයුතුය.''

නමුත් වර්ෂ 1963 ජූලි මස 17 වැනි දින දරණ දිවුරුම් පෙත්සමකින් වගඋත්තරකරු කියා සිටින්නේ එම ඇපැල් නඩු තීරණයකට ගෙන ඒමේ දී ඇති කරගත් ප්‍රඥප්තීන් පිළිබඳව තමාගෙන් නොවිමසන ලද බවකි. එම ඇපැල්කරු මෙම නඩුව විවාදයට භාජනය කළ දවස් දෙකෙහි ම උසාවියේ දිගට ම සිටි බව මම විටිටි මහතාට පෙන්වා දුනිමි. මේ දින දෙක වර්ෂ 1963, මාර්තු මස 29 වැනි දින හා අප්‍රෙල් මස 1 වැනි දින ය. මෙම ඇපැල් නඩු විවාදයට භාජනය වන අවස්ථාවේ මෙම ඇපැල්කරු උසාවියේ නොසිටි බවට අප ඉදිරියේ කරුණු දක්වා නැත. එම නිසා ඉහත සඳහන් කළ වගඋත්තරකරුගේ ප්‍රකාශය සත්‍යයයැයි පිළිගැනීමට අපට කිසිසේත් නුපුලුවන.

වර්ෂ 1962 අගෝස්තු මස 3 වැනි දින හා වර්ෂ 1963 අප්‍රෙල් මස 1 වැනි දින මෙම උසාවියෙන් දෙන ලද නියෝගවල ඇතුළත් උපදේශයන්ට අකීකරුවීම ගැන මෙසේ වගඋත්තරකරුට විරුද්ධව ආඥාවක් යවා තිබේ. මෙම නියෝග දෙකින් පළමු නියෝගය නිකුත් කළ දා සිට කුමන විධියේ ගෙවීමක් වත් උසාවියට කර නැතැයි කීම මෙහි දී ප්‍රතික්ෂේප කොට නොමැත. කරුණු අනුව කිවහොත් බුදලයේ පාලකයා අවසාන වරට මේ පිළිබඳ ගෙවීමක් කර ඇත්තේ වර්ෂ 1962 පෙබරවාරි මස 9 වැනි දය යන කීමට විරුද්ධව කරුණු දක්වා නැත. එදින එම ගෙවීම කරන ලද්දේ දිස්ත්‍රික් විනිශ්චයකාර වරයා පහත සඳහන් නියෝගය කිරීමෙන් පසුව ය.

''අමුණා ඇති ගණන් හිලව් අනුව පෙත්සම්කරුගේ අතේ රුපියල් 1,57022/71 ක මුදලක් ඇති බව මට පෙනී යයි. පළමුවෙන් ම මෙම මුදල උසාවියට ගෙන ආයුතුය. එය සැණකින් උසාවියේ තැන්පත් කළ හැකිසේ තැන්පත් කරලීමේ නියෝගයන් වහාම නිකුත් කරනු.''

විටිටි මහතාගේ තර්කය වූයේ ඉහත සඳහන් ඇපැල් නඩු දෙක දෙපක්ෂයේ ම කැමැත්තෙන් වර්ෂ 1963 අප්‍රෙල් මස 1 වැනි දින ලබාගත් නියෝගයකින් අවසන් වූ නිසා එයට අවුරුදු දෙකට පසුව (26.3.1965) දැනට සිටින පෙත්සම්කරු විසින් වගඋත්තරකරු වර්ෂ 1962 අගෝස්තු මස 3 වැනි දින මෙම උසාවිය මගින් කරන ලද නියෝගයකට අකීකරු වීමෙන් මෙම උසාවියට නිගරුවක් වන ලෙස ක්‍රියාකර තිබෙයැයි පැමිණිලි කිරීම යල් පැනපු පැමිණිල්ලක් වන අතර කෙබඳු කරුණක් අනුව බැලුවත් එදින නිකුත් වී ඇති හැටියට බලන කල ඇපැල් නඩු දෙක විසඳීම නිමාවට පත්වීමට පෙර දී ඇති නියෝග අනුව ඒ පිළිබඳව උසාවියට නිගරුවක් සිදුවියැ යි කියමින් ලුහුබැඳ යැම අවශ්‍ය නොවේයැයි ප්‍රකාශ කිරීමය. මෙම තර්කයෙහි සාරයක් ඇතුළත්ව ඇති බව පිළිගන්නා අපි එයට එකඟවීමට කැමැතිවෙමු. එබැවින් වර්ෂ 1963 අප්‍රෙල් මස 1 වැනි දින සිට මෙම උසාවියෙන් නිකුත් කරන ලද නියෝගයට අකීකරු වී යැයි කියන කරුණ ගැන පමණක් සලකා බැලීමට අපි අදහස් කරමු.

පසුව මෙම උසාවිය මගින් දෙන ලද නියෝගයෙහි ඉතාම පැහැදිලි නිර්දේශයන් ඇතුළත්වීම ගැන කිසිම ප්‍රශ්නයක් පැන නොනගියි. යම් යම් නියමිත කටයුතු කිරීමට පාර්ශ්වකරුවන් තුළ පහළ වූ අදහසක් පමණක්

එම නිශෝගයෙහි ගැබ් වී නැත. මෙහි දී ඉන්දියාවේ විසඳුණු, **බද්රිදාස් එ. ලැබුමල්** අතර කියවී (1959) 60 භාරතීය අපරාධ නීති සංග්‍රහයේ 899 වැනි පිටේ වාර්තාවී ඇති නඩුවකට අපගේ අවධානය යොමු කරන ලදී. මෙම නඩුව විසඳන ලද්දේ පංජාබ් ප්‍රදේශයෙහි ශ්‍රේෂ්ඨාධිකරණය මගිනි. එහි විසඳී ඇත්තේ මුදල් නඩුවක විත්තිකරු එහි පැමිණිලිකරු කරන ඉල්ලීමේ ණය මුදල කොටස් වශයෙන් ආපසු ගෙවීමට හා එම ගෙවීම් සම්පූර්ණවනතුරු තමාගේ නිශ්චල දේපල වලින් කිසිම කොටසක් අන්සතු නොකරවීමට පොරොන්දු වී ඇති කලක එම ප්‍රකාශය කරන ලද්දේ පාර්ශ්වකරුවන් අතර බැසගන්නා ලද පුද්ගලික සම්මුතියක් අනුව නම් එම ප්‍රකාශය කරමින් දී ඇති පොරොන්දුව උසාවියට දී ඇති දෙයක් නොවන බවයි. එය විත්තිකරු විසින් පැමිණිලි කරුට දී ඇති වැදගත් පොරොන්දුවකට වැඩි නොවන දෙයක් නිසා උසාවිය විසින් එසේ ඔවුන් බැස ගත්තා ලද සම්මුතිය පිළිගැනීමේ හේතුවෙන් හෝ එහි ඇති කොන්දේසි වලට අනුව තීන්දු ප්‍රකාශයක් නිකුත් කිරීමෙන් හෝ එම පොරොන්දුවේ හෝ එසේ භාර ගැනීමේ ස්වරූපය කවදාවත් වෙනස් කළ නොහැකි බව ද එහි විසඳී තිබේ. එබඳු පොරොන්දුවක් හෝ එසේ භාර ගැනීමක් කඩ කිරීම උසාවියට අපහාස කිරීමක් නොවන බව ද එහි විසඳී තිබේ. නමුත් මගේ මතයට අනුව එම තීන්දුව දුනට අප ඉදිරියේ ඇති නඩුවේ කරුණු වලට නොගැලපේ. මෙහි ඇත්තේ පාර්ශ්වකරුවන් අතර කෙරෙන පුද්ගලික භාර ගැනීමක් පමණක් නොවේ. එමෙන් ම මෙය පාර්ශ්වකරුවන් අතර කියවෙන සාමාන්‍ය පුද්ගලික නඩුවක් ද නොවේ. මෙය බුදුල් නඩුවකි. එබඳු නඩුවක බුදුල් පාලකයා උසාවියේ නිලධාරියෙකි. තවදුරටත් සලකා බලන කල මා දැනටමත් සඳහන් කර ඇති පරිදි මෙහි දී කඩ වී ඇත්තේ උසාවිය විසින් දෙන ලද නිර්දේශයකි. වගඋත්තරකරු තමාට ඉටු කළ හැකියැයි සිතා භාරගත් දෙයක් නොවේ. ප්‍රතිපත්තිය අනුව සලකා බලන විට මෙය බොට්සෙලි එ. රිබේරා අතර කියවී (1872) රාමණාදන් චාර්තා 12 වැනි පිටේ සඳහන්ව ඇති නඩුවේ තත්වයට මෙම නඩුවේ තත්වය වෙනස් නොවේ. එහි දී විත්තිකරුවකු වශයෙන් පෙනී සිටි භාරකරුවෙක් වංචනික ලෙස මුදල් පරිහරණය කිරීම නිසා උසාවියට අපහාස කිරීම පිළිබඳ වරදකරු කරණු ලැබීය. ඔහුට මෙම උසාවිය මගින් එම මුදල් උසාවියට ගෙවිය යුතුයැයි නියෝග කළ පසු ඔහු එම නියෝගය පිළිපදිනු වෙනුවට ඔහු විසින් ම පෙත්සමක් ඉදිරිපත් කොට තමා වංකොලොත් බවට නියෝගයක් ලබාගෙන එය ඉදිරිපත් කොට කලින් දෙන ලද නියෝගය නොකිරීම නිසා උසාවියට නින්ද වන අයුරු කටයුතු කළේ යැයි කියමින් නියෝගයන් දී දේපොල ඇල්වීය නොහැකි බව කියමින් කරුණු සැලකර සිටියේය.

මෙහි දී මතු කරන ලද අනික් තර්කය නම් ''ඔහුගේ භාරයේ තිබුන දේපල'' වලින් ලැබෙන ආදායම යනුවෙන් අදහස් කරන්නේ දළ ලාභය නොව ශුද්ධ ලාභය බව කීමය. මේ තර්කය ගෙනහැර පෑමෙන් පෙත්සම්කරු පෙන්වා දී ඇත්තේ මෙම උසාවිය විසින් කළින් නිකුත් කර තිබෙන නිවේදනය පිළිබඳවය. එනම් වර්ෂ 1962 අගෝස්තු මස 3 වැනි දින දෙන ලද නියෝගය පිළිබඳවය. එම නියෝගයෙහි ද ''සියලු දේපලවල ආදායම'' උසාවියට ගෙන ආ යුතුය යනුවෙන් නිර්දේශ දී තිබේ. තව ද උසාවියේ තැන්පත් කරන ලද මුදල් ගණන් වලින් ආපසු මුදල් ලබා ගත හැක්කේ කෙබඳු ස්වභාවයක වියදම් වලට ද යන්න ගැන ද එහි පැහැදිලි ලෙස උපදෙස් දී තිබේ. විශේෂයෙන් මෙබඳු අපරාධ නඩු විභාගයක දී එක් නියෝගයක් එයට කලින් දෙන ලද තවත් නියෝගයක් පසුබිම් කොට ගෙන සලකා බැලීමට අපට බලයක් නොමැත. වර්ෂ 1962 ජනවාරි 18 වැනි දින දෙන ලද තමාගේ නියෝගයෙන් දිස්ත්‍රික් විනිශ්චයකාර වරයා අද්මිනිස්ත්‍රාසි බලපත්‍ර වගඋත්තර කරුගෙන් ආපසු ගෙන මියගිය තැනැත්තාගේ වැන්දඹු භාර්යාවට එම බලපත්‍ර පවරා දෙද්දී ඇයට එම දේපල වලින් ලැබෙන ශුද්ධ ලාභය පමණක් තුන්මසකට වරක් උසාවියේ තැන්පත් කර තැබීමටයැයි උපදෙස් දී ඇති බව අපට පෙනී ගියේය. යම්කිසි දළ ආදායමක් උසාවියේ තැන්පත් කිරීම කළ නොහැකි දෙයක් වන අතර ම ගණන් හිලව් අවසානයේ දී විනිශ්චයාත්මකව තීරණය කළ යුතු නිසා එසේ කරන ලද කලෙක කොයි පාර්ශ්වයනටවත් ලැබෙන වාසියක් විද්‍යමාන නොවන අතර අධිකරණයට ඒ නිසා අනවරතයෙන් ගෙවීම් පිළිබඳ නියෝග දීමට සිදු වී ඒ නියෝගයෙන් උසාවිය පිට නිකරුණේ බර පැටවීමක් කෙරෙනු ඇත. එබැවින් වර්ෂ 1963 අප්‍රෙල් මස 1 වැනි දින මෙම උසාවිය විසින් නියෝග කරණ ලද්දේ එම දේපළ වලින් ලැබෙන ශුද්ධ ආදායම උසාවියට ගෙන ඒමට යැයි පදනම් කොට ගෙන දැන් අප ඉදිරියේ උද්ගත වී ඇති ප්‍රශ්නය නිරාකරණය කරන්නෙමි.

මෙහි මසකට දළ වශයෙන් ලැබෙන ආදායම රුපියල් 50,000 ක් පමණ යැයි කීම ප්‍රතික්ෂේප කොට නැත. වග උත්තරකරු විසින් ම දිස්ත්‍රික් උසාවියට දුනට ඉදිරිපත් කොට ඇති ගණන් හිලව් වලින් ද ඇති තත්වය ඒ බව පෙනියන සේ ය. නමුත් තමාගේ දිවුරුම් පෙත්සමින් ඔහු තර්ක ඉදිරිපත් කරන්නේ මසකට ලැබෙන සාමාන්‍ය ශුද්ධ ආදායම රුපියල් 9623.63 යැයි කියමිනි. මේ නිසා වර්ෂ 1963 අප්‍රෙල් මස 1 වැනි දින උසාවිය විසින් කරන

ලද නියෝගය එසේ කිරීමෙන් පසු බලපවත්වන නියෝග යන් හැටියට සලකා බැලූ කල පවා අද වගඋත්තරකරු අතේ රුපියල් 9623 ක මුදල 30 න් ගුණ කිරීමෙන් ලැබෙන ආදයම හෝ රුපියල් 288,690 තිබිය යුතුය. වර්ෂ 1965 ජූලි මස 17 වැනි දින දරණ ඔහුගේ දිවුරුම් පෙත්සමේ ඔහු විසින් ප්‍රකාශ කර ඇත්තේ ඉතුරු මුදල් වශයෙන් ඔහු අතේ රුපියල් 24,695.45 ක් ඇති බවය. මෙම ඉතුරු මුදල් වර්ෂ 1965 නොවැම්බර් මස 15 වැනි දින දරණ ඔහුගේ දිවුරුම් පෙත්සමෙන් පෙනී යන අයුරු එයින් පසු රුපියල් 40,000 දක්වා වැඩි වී තිබේ. නියම ගණනට වඩා ඉනාම අඩු මුදල් ප්‍රමාණයක් තමාගේ අතේ තිබුණත් ඒ මුදලින් එකම ශතයක්වත් ඔහු උසාවියට ගෙනවිත් නොමැත.

ඔහුගේ උත්සාහය වී ඇත්තේ රුපියල් 2,48,690 වන අඩු මුදලත් (2,88,690 — 40,000) ඔහුට වියදම් වී ඇත්තේ නඩුහබ කටයුතුවලට හා අනිත් වියදම් වලට බව කිමටය. ඔහු මෙසේ ඉදිරිපත්කර සිටින ප්‍රකාශනයෙහි නිරවද්‍යතාවය නියම උසාවියක දී පරීක්ෂණයකට භාජනයවීම ගැන සැකයක් නොමැත. මෙහි ශුද්ධ ලාභය යනුවෙන් කියැවෙන්නේ එම දේපල වල දළ ආදයමින් ඒ ආදයම ඉපද වීමට යන වියදම් අතහැරුණු පසු ඉතිරිවන ආදයම් යැයි කියනු මිස එය වෙන දෙයකැයි කියවෙන නිගමනයකට බැසීමට මට අපහසුය. උසාවිය අදහස් කළේ ද විත්තිකරු තේරුම් ගත්තේ ද දේපල වලින් ලැබෙන ආදයම් හැටියට ගැනෙන්නේ එයින් ලැබෙන ආදයමින් එම ආදයම උසාවියට ඉදිරිපත් කිරීමට යන වියදම් අඩුවූ කල ලැබෙන ආදයම යන්න ගැන මට කිසිම යුක්තියුක්ත සැකයක් නැත. වගඋත්තරකරු උසාවියෙන් දෙන ලද නියෝගය සලකා ගත්තේ එසේ නැතහොත් එය තේරුම් ගත්තේ එසේ දෙපැත්තේ ම අනුමැතිය ඇතිව දෙන ලද උසාවියේ නියෝගයෙන් අදහස් කෙරෙන්නේ තුන්වැනි පාර්ශ්වයන් සමග නඩු කීමට යන වියදම හෝ වගඋත්තරකරුගේ නීතිවේදියා කියන අන්දමට යථාපරිදි බුදලය පාලනය කිරීමේ දී දැරීමට සිදුවන වියදම් **උසාවියේ නියෝගයක් නොමැතිව** දළ ආදයමෙන් අඩු වියයුතු යැයි සිතා ගැනීමෙන් බව ඒත්තු ගැනීමට හෝ සලකා ගැනීමට මට නුපුලුවන. මියගිය අයගේ බුදලයෙන් එහි පාලනයට අවශ්‍ය වන අතර හෝ එසේ අවශ්‍ය වූ කලක එහි යථා පරිපාලනය පිණිස බුදලයෙන් මුදල් ගැනීමට උසාවියට ඉල්ලීම් ඉදිරිපත් කිරීමට තමාට අයිතියක් ඇති බැව් සෑම අද්මිනිස්ත්‍රාසි කරුවෙකු ම දන්නා දෙයකි. මෙම උසාවියේ අණ පරිදි වර්ෂ 1963 ඔක්තෝම්බර් මස 31 වැනි දිනට හෝ ඊට කලින් හෝ අවසාන ගණන් හිලව් උසාවියට ඉදිරිපත් කිරීමට නුපුලුවන්වූ විට ඔහු මේ සඳහා තවදුරටත් කාලය ලබා ගැනීම පිණිස දිස්ත්‍රික් උසාවියට ඉල්ලීමක් කිරීමට ප්‍රමාද වී නැත. දිස්ත්‍රික් විනිශ්චයකාරවරයා වර්ෂ 1963 ඔක්තෝම්බර් මස 31 වැනි දයින් පසුවත් නොයෙක් අවස්ථාවලදී ඔහුට කල් දී තිබෙන බැව් නඩු පොතින් පෙනී යයි. අවසාන ගණන් හිලව් උසාවියට ඉදිරිපත් කර ඇත්තේ වර්ෂ 1964 මැයි මස 28 වැනි ද ය. වර්ෂ 1965 අගෝස්තු මස 25 වැනි දින ඔහු විසින් ඉදිරිපත් කරන ලද දිවුරුම් පෙත්සමේ ඔහු විසින් ම සඳහන් කර ඇති පරිදි ඔහු මෙසේ කියා තිබේ. ''උතුමාණන්වහන්සේගේ අධිකරණයෙන් නියම කළ දිනවල මට යම්කිසි කටයුත්තක් කිරීමට නොහැකි බව පෙනී ගිය සෑම අවස්ථාවක ම ඒ සඳහා වැඩි දුරකාලය ලබා ගැනීමට මෙම බුදල් නඩුව කියාගෙන යාමේදී දිස්ත්‍රික් උසාවියට මා විසින් කරන ලද ඉල්ලීම් අනුව එම උසාවිය මට එසේ කල් දුන්නේය.'' නමුත් අනික් අතින් බලන කල අවසානයේදී සුප්‍රීම් උසාවිය විසින් කරන ලද නියෝගයක් වෙනස් කිරීමට දිස්ත්‍රික් උසාවියට බලය නැතැයි කියා නිගමනයට බැසීමට එම උසාවියට සිදුවූවත් එසේ ඉල්ලීමත් බුදලයේ දේපලවලින් ලැබෙන ආදයම උසාවියට ගෙන ඒමට යැයි කරන ලද නියෝගයෙන් කිසියම් සහනයක් ලබා ගැනීම පිණිස කළ බවත් පෙනෙන්නට නැත. මෙම උසාවියෙන් ඇපැල් නඩු දෙක නිමාවට ගෙන ගිය පසු දිස්ත්‍රික්විනිශ්චයකාරවරයා විශේෂ නියෝග දෙකක් දී ඇති බව ප්‍රකටව පෙනේ. මින් පළමුවැන්න 1963 නොවැම්බර් මස 6 වැනි දිනත්, දෙවැන්න 1964 අගෝස්තු 19 වැනි දිනත් නිකුත් වී තිබේ. මේ නියෝග දී ඇත්තේ වගඋත්තරකරු අත තිබෙන මුදල් නඩුවේ අය ශීර්ෂයන් හැටියට තැන්පත් කිරීම සඳහාය. වගඋත්තරකරු විසින් මෙම නියෝග ද සම්පූර්ණයෙන් ම නොසලකා හැර තිබේ.

වර්ෂ 1965 ජූලි මස 17 වැනි දින දරණ දිවුරුම් පෙත්සමින් වගඋත්තරකරු තමා අතේ ඇති මුදල රුපියල් 24,695.45 ක් බව කියමින් ''මෙම මුදල එවකට නිමවී නොනිබුණ නඩුවල වියදමත් ඇතුලු අනික් කාලීන වියදම් වලට දිනපතා මුදල් අවශ්‍ය වන නිසා'' උසාවියට ගෙන ඒමට නොහැකිබව ප්‍රකාශ කොට තිබේ. මෙම ප්‍රකාශයම වර්ෂ 1965 නොවැම්බර් මස 15 වැනි දින දරණ තමාගේ දිවුරුම් පෙත්සමෙහි නැවතත් සඳහන් කරන ඔහු එය සඳහන් කොට ඇත්තේ අප විසින් නඩුව අසන ලද දිනට කලින් දින දී ය. එදින ඔහු කියා ඇත්තේ ඔහුගේ අතේ තිබුණ මුදල දහ රුපියල් 40,000 ක් බවත්, එය ''අද්මිනිස්ත්‍රාතිකරුගේ යුතුකම් ඉටුකිරීමට ගණන් හිලව් සමකර බැලීමේදී කුඩා මුදලක් ලෙස ගැණෙන මෙය තමා අතේ තිබිය යුතු දෙයකි යනුය.'' නමුත් අද්මිනිස්ත්‍රාසිකරු හැටියට යුතුකම් ඉටුකරන්නේ නම් ශුද්ධ

(ලබන කලාපය බලන්න.)

(පසුගිය කලාපය හා සම්බන්ධයි.)

ආදයම උසාවියේ තැන්පත් කොට අද්මිනිස්ත්‍රාසිකරු පිට පැවරී ඇති කර්තව්‍යයන් යථාපරිදි ඉටුකිරීමට උසාවියට සාධාරණ යැයි වැටහෙන අයුරු මුදලක් ලබා ගැනීමට ඉල්ලීමක් කළයුතු බව ඉහාම පැහැදිලි ලෙස ඔහුගේ බලාපොරොත්තුව විය යුතු බව මට නොකියා සිටීමට නොහැක.

වර්ෂ 1965 ජූලි මාසයේ ඔහු අත තිබුණ ඉතිරි මුදල ගණන් ගැනීමේ දී එය රුපියල් 24,695.45 ක් ලෙස ගණන් ගැනීමෙන් ඔහු මෙම නඩුවේ පෙත්සම්කරු විසින් සහ ඔහුගේ අනිත් සහෝදරයන් දෙදෙනා විසින් ද සොරකම් කරනු ලැබ රුපියල් 1,57,000 ක් පමණ නැති වූ ලෙස ගණන් හිලව් පෙන්වා තිබේ. වර්ෂ 1965 ජූලි මස 17 වන දින දරණ ඔහුගේ දිවුරුම් පෙත්සමේ 15 වන ඡේදය බලන්න. මෙම සොරකම් පිළිබඳ වගඋත්තර කරුගේ එම දිවුරුම් පෙත්සමේම 5 වන ඡේදයේ ගැබ් වී තිබේ. ඔහු කියන අන්දමට මෙසේ මුදල් නැතිවූයේ වර්ෂ 1961 මාර්තු මස 26 වෙනි දිනය. එනම් වගඋත්තරකරු විසින් තවත් රුපියල් 1,57022.71 ක් උසාවියේ තැන්පත් කොට මාස දෙකක් ගත වූ පසුව ය. තමාගේ සහෝදරයන් විසින් මෙසේ සොරකම් කරන ලදැයි කියා සිටීම ගැන පෙත්සම්කරු කියන්නේ ඔහු හා ඔහුගේ සහෝදරයන් දෙදෙනා මේ සඳහා දමන ලද අපරාධ නඩු විභාගයකින් නිදහස් වූ බවකි. වර්ෂ 1965 අගෝස්තු මස 3 වැනි දින දරණ ඔහුගේ දිවුරුම් පෙත්සමේ 5 වන ඡේදය බලන්න. එකී අපරාධ නඩු විභාගයේ දී එය විභාග කළ විනිශ්චය කාරවරයා එබඳු සොරකමක් වී යයි කියා සිටීම ''වගඋත්තරකරු විසින් ද ඔහුගේ සහෝදරිය සහ මස්සිනා විසින් ද මවා කියන ලද්දක් ලෙස පිළිගෙන තිබේ. දිස්ත්‍රික් විනිශ්චයකාරවරයා පෙත්සම්කරු සහ ඔහුගේ සහෝදරයන් නිදහස් කොට ඉහත සඳහන් ප්‍රකාශය කළ බව නැතැයි කී බවක් මෙහි නොපෙනේ. රුපියල් 1,57,022.71 ක් වන මෙම මුදල සොරකම් නොකරන ලද නම් — මෙම දූෂමාණ චෝදනාවේ සත්‍ය හෝ ඊට ප්‍රතිවිරුද්ධ තත්වය ගැන හෝ කිසිවක් කීමට මම නොකැමැත්තෙමි — වගඋත්තරකරු මෙම මුදල ද මීට බොහෝ කලකට කලින් බුදල් නඩුවේ අය ශීර්ෂයක් හැටියට උසාවියට ඉදිරිපත්කළ යුතුව තිබුණි.

ඉහතින් මා කියන ලද සියළු කරුණු ම සලකා ගැනීමෙන් පසු එමෙන් ම වර්ෂ 1963 ඔක්තෝම්බර් මස 31 වෙනි ද වගඋත්තරකරු විසින් අවසාන ගණන් හිලව් උසාවියට ඉදිරිපත් කිරීම නොසලකා පැහැර හැරීම ගැන මා නොසලකා හිටියත් (මෙම ගණන් හිලව් දිස්ත්‍රික් උසාවියෙන් වැඩිදුරටත් කාලය ලබා ගත් පසු දැන් ඉදිරිපත් කර තිබේ). තමාගේ භාරයේ තිබුණු දේපළවලින් ලැබුණු ආදයම උසාවියට ගෙන ඒමට වගඋත්තරකරු පැහැරහැර තිබේ යයි මම තෘප්තියට පත්වූනෙමි. මෙම ආදයම යන්නෙන් මා අදහස් කරන්නේ බුදලයේ දේපළවලින් ලැබෙන ආදයමින් එම ආදයම උසාවියට ඉදිරිපත් කිරීමට වැයවන ආදයම අඩුකළ පසු ඉතිරිවන ආදයමය. උසාවියෙන් දෙන ලද නියෝගය එම ආදයම බුදලය යථාකාරයෙන් පාලනය කිරීමට වැයවන වියදම් අඩුකළ පසු ඉතිරිවන ආදයම බව පෙත්සම්කරු තර්කානුකූලව තේරුම් ගත්තායයි මා පිළි නොගන්නා අතර ඇත්ත වශයෙන් ඔහු එසේ තේරුම් නොගත්තේය. වර්ෂ 1963 අප්‍රෙල් මස 1 වෙනි දින මෙම උසාවියෙන් දෙන ලද එම නියෝගයට ඒ අයුරින් අර්ථකථනය කළහොත් වන්නේ කිනම් මුදලක් උසාවියේ තැන්පත් කළ යුතු ද යන්න විසඳන විනිශ්චයකාරයා බවට වගඋත්තරකරු ම පත්වන බව බැලූ බැල්මට ම පෙනේ. දැනට බුදලයේ පරිපාලකයා වශයෙන් ඔහු අතේ ඇති මුදල රුපියල් 40,000 ක් පමණ යයි කරුණු සලකාගෙන කල්පනා කළත් ඔහු ම කරුණු ගෙනහැර දක්වන අන්දමින් පෙනී යන්නේ තමා අතේ ඇතැයි ඔහු විසින් පිළිගන්නා ලද මෙම මුදලවත් අඩුවශයෙන් උසාවියේ තැන්පත් කිරීමට නොහැකිවීම නිසා ඔහු මෙම උසාවියට අපහාස කිරීමේ වරදට වැරදිකරු බව ය. මාගේ මතය අනුව වගඋත්තරකරු ගේ මෙම ප්‍රමාදය ඕනෑකමින් ම එසේ ම නින්දනීය ලෙස කරන ලද දෙයකි. මෙම උසාවියේ නිර්දේශයට ඕනෑකමින් ම අකීකරුවීම වඩාත් බරපතල අපහාසයක් වන්නේ ඇත්ත වශයෙන් ම එය ඔහුගේ ද කැමැත්ත ඇතිව කෙරුණ නිර්දේශයක් නිසා ය. ඉහත සඳහන් කළ කරුණු විසඳීම අනුව වගඋත්තරකරු උසාවියට අපහාස කිරීම ගැන වරදකරු හැටියට මම තීරණය කරමි. ඔහු දෙලොස් මසක කාලයක් සිරදඬුවම විඳියයුතු යයි මම නියෝග කරමි. මෙම සිරදඬුවම බරපතල වැඩ ඇතිව විඳිය යුතු සිර දඬුවමකි.

තම්බයියා විනිශ්චයකාරතුමා,
මම එකඟවෙමි.

අලස් විනිශ්චයකාරතුමා,
මම එකඟවෙමි.

වරදකරු හැටියට තීරණ වී දෙලොස් මසක සිර දඬුවමක් දුන්නේය.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා ඉදිරිපිට

රොබට් පිරිස් එ. ජී. තෝමස්*

ශ්‍රේෂ්ඨාධිනරණයේ අංකය 1119/65. ගම්පහ මහේස්ත්‍රාත් උසාවියේ අංකය 96661/බී.

විවාද කොට තීරණය කළ දිනය 1966. පෙබරවාරි 14.

කොටස් කරුවෙක් තවත් කොටස් කරුවකු විසින් හවුල් ඉඩමක හිටවන ලද වැටක් කඩා දැමූ විට ඔහු අනර්ථ කිරීමේ වරදට වරදකරු ද? — දණ්ඩ නීති සංග්‍රහය, 409 වෙනි වගන්තිය.

තීන්දුව: අනෙක් කොටස් කරුවකු විසින් හවුල් ඉඩමක හිටවන ලද වැටක් කඩා දමන කොටස් කරුවෙක් අනර්ථ කිරීමේ වරදට වැරදිකරු නොවන්නේය.

නීතිඥවරු: එන්. ඊ. වීරසූරිය (කණිෂ්ඨ), සී. වී. ආර්. අයිසැක්ස් සමඟ චෝදිත ඇපැල්කරු වෙනුවෙන්. එෆ්. ඩබ්ලිව්. ඔබේසේකර වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා:

තීන්දුව දීමේදී මහේස්ත්‍රාත්තුමා පහත සඳහන් නිගමනයට පැමිණියේය. ''ලියා අත්සන් තබන ලද ඔප්පු වලින්ද ඒවා පරීක්ෂා කිරීමෙන් ද අඹගහ වත්තෙන් නොබෙදූ කොටස් වලට චෝදිතයා ඉල්ලා සිටින අයිතිය සම්පූර්ණයෙන්ම හේතු විරහිත නොවන බව D 2 දරණ අවහිරකම්වල සහතිකයෙන් (Certificate of Encumbrances) පෙණේ. එම නිසා පැන නැගෙන ප්‍රශ්නය නම් කොටස්කාරයෙකු වූ විට අනිකකු විසින් සිටවන ලද වැටක් ඔහුට ඕනෑ විටක උවමනා පරිදි කැඩීමට තමාට නිදහසක් තිබුණේද යන්නයි.

සී. ආර්. ඔබේසේකර අඹගහ වත්තෙන් නොබෙදූ 1/16 සහ වෙනත් 1/32 උකසට ගත්බව උකස් ඔප්පු 2 කින් අවහිරකම්වල සහතිකය (Certificate of Encumbrances) පෙන්වා දෙයි. වෙනත් ඔප්පුවක් පෙන්වන්නේ භාරකාරයින් හැටියට ජේ. එස්. ඔබේසේකර සහ සී. එන්. ඔබේසේකර ද, ජේ. පී. ඔබේසේකර, සී. ඩ. පිරිස්, එච්. ඩී. පිරිස් (නැතහොත් ඔබේසේකර) සහ පී. ඊ. පිරිස් අඹගහ වත්තේ නොබෙදූ සමහර කොටස් සම්බන්ධව ඔප්පු ගණු දෙනු ඇතිවූ බවය. එම නිසා මහේස්ත්‍රාත්තුමාගේ නිගමනය කරුණු විරහිත නොවේ.

තම ස්වාමියා හෝ ස්වාමිවරුන් තම තමන්ගේ අයිතිය කියා සිටින ඔප්පු පැමිණිලිකරු වන මුරකාරයා දැක ඇත. ඒ ඔප්පු (උසාවියට) ඉදිරිපත් කොට නැත. ඉඩම අයිතිකරුවන් අතර සාමයෙන් කිසි විටෙක බෙදූ බවෙක් පෙනෙන්නට නැත. මේ කරුණු උඩ දඩුවම එයේම තිබෙන්ට ඉඩ නොදිය යුතුයි.

මේ තීරණයට සාධක උවමනා නම් 2 සී.ඒ.සී. 163 පිටේ **පොරෝලිස් එ. රොමානිස්** නඩු තීරණයේ කියා ඇත්තේ, ''කෙනකු අනර්ථයක් කළේ යයි කිවහැකි වනුයේ ඔහු එදිරි සහගතව, වෛෂ සහිතව නොසැලකිල්ලෙන් ක්‍රියා කරන විට පමණය. ඔහු වැරදි අලාභ යක් කළ යුතුය නැතහොත් කෙනෙකුට අයුතු අලාභ යක් විය හැකි යයි දැන සිටිය යුතුය. හවුල් අයිති කරුවකු විසින් වට කොට තිබෙන පොදු ඉඩමක කොටසකට තමාට තිබෙන හෝ තමාට තිබේ යයි සිතා අයිතියක් විඳහා පැමට වැට අස්කරන විට අනර්ථ යක් නොකරන්නේය'' යනුයි.

2 C. W. R. 99 පිටේ **ඊබ්‍රහිම් ලෙබ්බේ එ. සයිබෝ** යන නඩුවේ දී මෙය අනුගමනය කර තිබේ. එහි පැමිණිලිකරු විසින් බෙදන ලද ඉඩමක ඔහුගේ කොටසකට තමාගේ අයිතිය දැක්වීම වස් සිටුවන ලද වැට චුදිතයා විසින් තමාගේ අයිතිය ද පෙන්වීමට වැට බිඳ දමන ලදී. බුක්තියට සවිවීම වැලැක්වීම සඳහා තමාගේ අයිතිය තරයේ ප්‍රකාශ කිරීමට කරන ලද ක්‍රියාවක් කළවිට අනර්ථ කිරීමේ වැරැද්ද නොකෙරේ.

මේ හේතු උඩ වැරදිකරුවකු බවට තීරණය කිරීමත් දඩුවමත් ඉවත දමමි.

වරදකරු නිදහස්කර
දඩුවම ඉවත්කරන ලදී.

පරිවර්තනය: **ජී. ඔ. ෆොන්සේකා** අධිනීතිඥතුමා විසිනි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 70 වෙනි කා., 95 වෙනි පිට බලනු.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු වැඩ බලන අග්‍ර විනිශ්චයකාර තුමා ඉදිරිපිට දී ය

ඔස්කාර් ජෝකිම් ප්‍රනාන්දු එ. තෙරේස් දයිලන්ති ප්‍රනාන්දු සහ තවත් අය*

හබෙයාස් කෝර්පුස් ආඥාවක් ඉල්ලීම අංක 450/63

බාලවයස්කාරියක් වූ තෙරේස් දයිලන්ති ප්‍රනාන්දුගේ භාරකාරත්වය පිළිබඳ කරන ලද ඉල්ලීමක් සම්බන්ධයෙනි.

විවාද කළ දිනය: 30 අගෝස්තු 1965
හේතු දක්වා තීන්දුව දුන් දිනය: 3 සැප්තැම්බර් 1965

බාලවයස්කරුවකු පිළිබඳ භාරකාරත්වය — මේ සඳහා පෙත්සම්කාර දෙමව්පියන් විසින් කරන ලද ඉල්ලීමක් — දරුවන් නොමැති සොහොයුරියක් වූ තුන්වන වගඋත්තරකරු විසින් ළමයා හද වැඩීමට කරන ලද ඉල්ලීමකට දෙමව්පියන් කැමැත්ත දීම — අවුරුදු බොහෝ ගණනක් තුළ ළමයා හැදීමේ වැඩීමේ බරපැණ සහ සන්තුෂ්ටිය පෙත්සම්කරුවන් විසින් සහ වගඋත්තරකරුවන් විසින් බෙදා හුක්ති විඳීම — ළමයාගේ ශුභ සිද්ධියට පෙත්සම්කරුවන් විසින් කළ සැලකිය යුතු ප්‍රදානය — දෙමාපිය අයිතිවාසිකම් අත්හළ බවට සාධකයක් නොතිබීම — මෙබඳු ඉල්ලීමකට ළමයාගේ කැමැත්ත කොතරම් දුරට අදාළවේද යන්න —

"ඩී" නමැති දැරිය පෙත්සම්කරුගේ හා ඔහුගේ බිරිඳගේ දියණිය ය. බිරිඳගේ දරුවන් නැති සොහොයුරියගේ ඉල්ලීම පිට ඇයට එය දැරිය තමාගේ ගෙයි රඳවා හැදීමට ඉඩ දෙන ලදී. නමුත් මෙය මෙසේ සිදුවී ඇත්තේ දෙමව්පියන් සතු අයිතිවාසිකම් අත්හැරීමට ප්‍රකටව හෝ අප්‍රකටව සලකා ගත හැකි සම්මුතියක් නොමැතිව ය. අවුරුදු බොහෝ ගණනක් ම පෙත්සම්කරුවෝ ද වගඋත්තරකරුවෝ ද (එම අඹු සැමි යුවළ) "ළමයා හැදීමේ වැඩීමේ කාර්‍ය දුෂ්කර තාවය හා සන්තුෂ්ටිය එක්ව බෙදා ගත්හ. ළමයා ඇගේ දෙමව්පිය සහෝදර සහෝදරියන් බැලීමට යවන ලදී. ඇතැම් විට රැගෙන යන ලදී. ළමයාගේ ශුභ සිද්ධිය සඳහා දෙමාපියන් විසින් සැලකිය යුතු ප්‍රදානයන් ද කර තිබේ.

වගඋත්තරකරුවන්ට විරුද්ධව ළමයාගේ දෙමව්පියන් විසින් හබෙයාස් කෝර්පුස් ආඥාවක් ලබා ගැනීම සඳහා කරන ලද ඉල්ලීමක දී තීන්දු වූයේ

(1) මෙහි කරුණු අනුව සලකා බලන කල ළමයා කෙරෙහි තිබුණු දෙමාපිය අයිතිවාසිකම් අත්හැර දැමීමට කවදවත් අදහසක් දෙමව්පියන් තුළ පහළ වී යයි කිය නොහේ. ළමයාගේ භාරකාරත්වය පියා සතු වේ.

(2) කාරණා කාරණා තේරුම් යන වයසට නොපැමිණි ළමයාට නීතිය අනුව අන් අයගේ භාරකාරත්වය යටතේ සිටීමට කැමැත්ත දීමට හිමිකමක් නොමැත්තේ ය. ළමයාගේ කැමැත්ත අදාළ වන්නේ දැන් ඈ දෙමාපියන්ගේ භාරකාරත්වය යටතේ තැබීම ඇයගේ සෞඛ්‍යයට හා සදාචාර වර්ධනයට අහිතකර ද නැද්ද යන්න කල්පනා කිරීම පිණිස පමණකි.

නීතිඥවරු: ජේ. ඩබ්ලිව්. සුබසිංහ මහතා, පෙත්සම්කරු වෙනුවෙන්
රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇල්. ඩබ්ලිව්. ඇතුළත් මුදලි මහතා සමග, වගඋත්තරකරුවන් වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 70 වෙනි කා., 91 වෙනි පිට බලනු.

ගරු එච්. එන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා

දෙවන සහ තුන්වන විගඳන්තරකරුවන්ගේ වාසියට තමන්ගේ දූරිය වන දයිලන්ති කෙරෙහි මෙම නඩුවෙහි පෙත්සම්කරු වෙත සහ ඔහුගේ භාර්‍යාව වෙත ඇති දෙමව්පිය සෙනෙහස පිළිබඳව පවත්නා අයිතිවාසිකම් අත්නොහැරිය බව යුක්තියුක්ත ලෙස පෙත්සම්කරුගේ නීතිවේදියා සැලකර සිටියේ ය. දෙමව්පියන්ට ඇති අයිතිය අත්හැරීමට කිසිම සම්මුතියක් හෝ හැඟීමක් ඇති නොවන ලෙස පෙත්සම්කරුගේ භාර්‍යාව ඇගේ දරුවන් නොමැති සොහොයුරියට ඇති ආදරය සහ කරුණාව හේතුවෙන් එම සොහොයුරියට තමාගේ නිවසෙහි ඉහත කී දූරිය හද වඩා ගැනීමට ඉඩදෙන පිණිස කරන ලද ඉල්ලීමට එකඟ වූ බව සාක්ෂිවලින් සම්පූර්ණයෙන් ම පැහැදිලි වේ. කොන්දේසිවලින් තොර වීම නිසා ම විග්‍රහවකට යටත්ව නොමැති මෙම ක්‍රියා පිළිවෙළට අවුරුදු බොහෝ ගණනක් යන තුරු ඉනා ම අගේ කොට සැලකිය හැකි ලෙස ක්‍රියාවේ යෙදීගෙන යන ලද නිසා ළමයාගේ දෙමහල්ලන් විසින් ද විගඳන්තරකාර අඹු සැමි යුවළ විසින් ද ළමයා පිළිබඳ බරපතලකම් සහ ළමයා හැදීමෙන් ලබන ප්‍රීතිය ද එක්ව බෙදාගෙන තිබේ. සැම අවුරුද්දක ම නිතරම පාහේ කළ හැකි තරම් අවස්ථා රාශියක ම ළමයා දෙමව්පියන් සහ සහෝදර සහෝදරියන් වෙතට ගෙන යන ලද බව තුන්වන විග උත්තරකාරිය පිළිගත්තා ය. ළමයාගේ දියුණුවට දෙමව්පියන් විසින් ද සැළකිය යුතු ආධාර කර ඇත. තමන්ගෙන් ඉටුවිය යුතු යුතුකම් අනුව හෝ තමන් තුළ ඇති ආදරය ගැන බලන විට හෝ ළමයාගේ දෙමව්පියන් විසින් තමන් එම තත්ත්වයෙන් බැහැර වී සිටියා යයි සිතා ගැනීම තාත්ත්විකත්වයෙන් තොර වූ කරුණක් ලෙස හැඟෙන සේ ය.

කරුණු මෙසේ තිබිය දී පෙත්සම්කරුගේ ඉල්ලීම හොඳ හිතින් තොරව කරන ලද්දක් යයි කීමට මට නුපුළුවන. කලින් පෙත්සම්කරුගේ භාර්‍යාව ඇ තුළ පිහිටි කරුණාබර ගතිය නිසා දූරියට ඇති ආදරය, තමාගේ සොහොයුරිය සමග බෙද ගැනීමට කැමැත්තක් දක්වා ඇති නමුත් මෙම කරුණාබර ගතිය ලැබීමට තමාගේ සොහොයුරිය නුසුදුසු යයි යම් කිසි හැඟීමක් (සත්‍ය වශයෙන් හෝ මනඃකල්පිත වශයෙන් හෝ) ඇති වූ පසු අතීතයේ තම සොහොයුරියට දැක් වූ එම උපකාරය හා දයාව දැන් ලැබීමට ඇ නුසුදුසු යයි කීම ගැන මම පුදුම නොවෙමි. එපමණක් ද නොව තමාගේ ළමයාගේ සිත තමන් කෙරෙහි බිඳුවා ඇතැයි පෙත්සම්කරු සහ ඔහුගේ බිරිඳ විශ්වාස කරන ලෙස පෙනීගිය බැවින් මේ හේතුව නිසා ද ඔවුන් ළමයාගේ භාරකාරත්වය පිළිබඳ අයිතිවාසිකම් හා වගකීම් තමන්ගේ සුභ සිද්ධියට මෙන් ම ළමයාගේ සුභ සිද්ධිය ද පතා දැන් තමන් වෙත පවරා ගැනීමට බලාපොරොත්තුවක් ද ඇති කරගෙන සිටි බවක් සැළකෙන සේ ය.

බැලූ බැල්මට තමාගේ ළමයාගේ භාරකාරත්වයේ අයිතිවාසිකම මෙම නඩුවෙහි පෙත්සම්කරුට තිබේ. කාරණාකාරණා තේරෙන වයස් හැටියට මෙම උසාවිය පිළිගත් වයස සීමාවෙන් අඩු මෙම ළමයා එම වයස සීමාවට මෙතෙක් එළඹී නැත. එම නිසා වෙන අයවලුන්ගේ භාරකාරත්වයෙහි තව දුරටත් ජීවත්වීමට කැමැත්ත දීමට ළමයාට නීතියෙන් සුදුසු තත්වයක් ලැබී නැති බව කිව යුතු ය. (ගුණරත්න එ. ක්ලේටන් 31 න.නී.වා. 132 සහ මහ රැජින එ. ජයකොඩි 9 ශ්‍රේෂ්ඨාධිකරණ චක්‍ර ලේඛන 148). එම නිසා ළමයාගේ කැමැත්ත අදල වන්නේ දැන් දෙමව්පියන්ගේ යටතට ඇය පත් කළහොත් එය ඇගේ ජීවිතයට සහ සදාචාරයට අහිතකර ද යන ප්‍රශ්නය ගැන සලකා බැලීමට පමණකි. මේ සඳහා මම ළමයා සමග කථාකොට බැලීමි. ඈ හොඳ සාමාන්‍ය තත්වයක ප්‍රීතිමත් ලීලාවකින් සිටින බුද්ධිමත් දූරියක් බව මට පෙනිණ. දැනට ඈ සිටින තැන වාසය කිරීමට ඈ බලවත් කැමැත්තක් දක්වන්නී ය. තමා මැරීමට ඔවුන් තර්ජනය කළත් ඔවුන් සමග වාසය කිරීමට තමා නොකැමැති බව දෙමව්පියන්ට ඈ කී බව කියමින් ඇය කර ඇති ප්‍රකාශය ද මම විශ්වාස කරමි. නියැකව ම දූරියගේ කැමැත්ත මෙසේ වුව ද දැන් ඇයට දෙමව්පියන් ළඟ වාසය කිරීමට සිදුවූවොත් ඒ නිසා ඇයට බලවත් සිත් වේදනාවක් හෝ සෞඛ්‍ය පීඩාවක් ඇති වේ යයි මම නොසිතමි. (එහෙත් ඒ සමගම මේ අවස්ථාවේ දී මේ ගැන අවසාන මතයකට බැසීමට මම නොරිසියෙමි යයි ද කිව යුතුව තිබේ.)

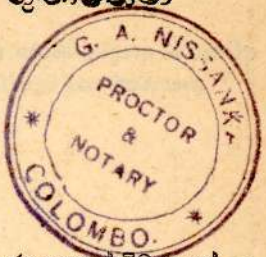
තමා ඉකුත් වර්ෂයේ දී ඔවුන් සමග ජීවත් වන විට තමන්ගේ දෙමව්පියන් සහ සහෝදරියන් තමාට අකාරුණික වූ බව ද ඔවුන් තමා ගැන නොසලකා හැරිය බව ද ළමයා විසින් ප්‍රකාශ කර තිබේ. නමුත් මෙම ළදරිය තමාගේ පවුලේ උදවිය සමග වාසය කිරීමට කැමැත්ත දීමට අකමැතිවීමේ ප්‍රතිඵලයක් ලෙස මෙම අප්‍රසාදය ඇති වන්ට ඇති බව හිතා ගැනීමට හොඳා කාර ඉඩ තිබේ. ළමයාගේ පවුලේ අය මෙබඳු අසන්තුෂ්ටියට හේතුවන කරුණු වලින් වැළැක්වීමට ප්‍රයත්නයක් දරාවි යයි මම විශ්වාස කරමි.

මේ අනුව ළමයා දෙමව්පියන්ගේ භාරකාරත්වයට නැවතත් නොපමාව දිය යුතු යයි මම නියෝග කරමි. උසාවියෙන් තව දුරටත් මැදිහත් වීමට ඉඩ නොහැර ලබන සතියේ ම මෙය ඉටුවේ ය යන්න මාගේ විශ්වාස යයි. නමුත් 1965 නොවැම්බර් මස 8 වැනි සඳු දින පෙත්සම්කරු ළමයා මගේ නිල කාර්‍යාලයේ දී මා ඉදිරියට පැමිණවිය යුතු ය. ඒ අතර ම දැනට ළමයා ශාස්ත්‍රෝද්ග්‍රහණය කරන ශාන්ත බ්‍රිජට් ගේ කන්‍යාරාමයෙන් ඉවත් නොකෙරේ යයි ද මම විශ්වාස කරමි. මෙම නඩුවේ ගාස්තුව ගැන කිසිම නියෝගයක් මගෙන් නොකෙරේ.

ළමයා දෙමව්පියන්ගේ භාරකාරත්වයට දියයුතුයයි නියෝග කරන ලදී.

ගරු ශ්‍රී ස්කන්ධරාජා සහ ගරු අලස් විනිශ්චයකාර තුමන් ඉදිරිපිට

දයාවතී සහ තවත් අසෙක් එ. විජයසිංහ ආරච්චිලාගේ ගුණරත්න*



ශ්‍රේෂ්ඨාධිකරණය 581/1964 (F) — කුරුණෑගල දි.ඇ. 1656/ඩී

විවාද කළ දිනය : 1965.9.1
තීරණය කළ දිනය : 1966.2.9

විවාහ ලියා පදිංචි කිරීමේ පනත (112 වෙනි අධිකාරය) 42 වෙනි 46 වෙනි ඡේද—බාල වයස්කාරයෙකුගේ විවාහයක්—පියාගේ හෝ භාරකාරයෙකුගේ හෝ කැමැත්ත නැතුව ලියා පදිංචි කිරීම — එම විවාහය නීතියෙන් අවලංගු කර තිබේ ද?

තීන්දුව: පියාගේ හෝ භාරකාරයෙකුගේ කැමැත්ත නොමැතිව ලියා පදිංචි කළ බාල වයස්කාරයෙකු ගේ විවාහයක් නීතියෙන් අවලංගු කර නැත.

නීතිඥවරු: ඩබ්ලිව්. ඩී. ගුණසේකර මහතා සමග ඩබ්ලිව්. එස්. වීරසූරිය මහතා, ඇපැල් පැමිණිලිකරු වෙනුවෙන්

ටී. බී. දිසානායක මහතා, විත්තිකාර වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා

වයස අවුරුදු 18 මාස 2 ක් වූ ඇපැල් පැමිණිලිකාරිය සහ වගඋත්තරකරු අතර විවාහය 1963 අගෝස්තු මස 23 වැනි දින ලියා පදිංචි කරන ලදී. ඇගේ පියා ගේ අනුමතිය නොමැතිව විවාහය කරන ලදැයි යන කරුණ උඩ එම විවාහය අහෝසි කරන මෙන් යාඥා කොට නඩුව පවරන ලදී. මීට සම්බන්ධ වන අවකාශය 112 පරිච්ඡේදයේ 42 වැනි කොටයෙහි විවාහ ලියා පදිංචි කිරීමේ ආඥා පනතෙහි මෙසේ කියැවේ — ''මේ ආඥා පනත යටතේ කුමන හෝ විවාහයක් ලියා පදිංචි කළායින් පසු ඕනෑම නීතියක් අනුව විවාහයකට උවමනා කරන ඕනෑම කෙනකුගේ අනුමතියක් ලත් බවක් එම විවාහයට රුකුල් දීම සඳහා උවමනා නොවේ..... එමෙන් ම එවැනි විවාහයක ස්ථාවරත්වය ගැන විමසන නඩුවක දී හෝ උසාවියක විභාගයක දී හෝ යමෙකුගේ කැමැත්ත නොලත් බවට සාක්ෂි දීම තහනම් ය.''

ඉහත සඳහන් කරන ලද පාඨයෙන් ම පමණක් කරුණ යක් සුදක් සේ පැහැදිලි වේ. ආඥා පනතෙන් ම සාක්ෂි වළක්වා ඇත්නම් ඉන් ඒකාන්ත නිගමනය වන්නේ එම කරුණ උඩ විවාහය අක්‍රමවත් යැයි ප්‍රකාශ කිරීමට නොහැකි බවයි.

46 වෙනි ඡේදය යටතේ විවාහයක් අවලංගු වීමට ඒත්තු වන අවස්ථාවන් අතර ලබාගත යුතු කැමැත්ත එක් කරුණක් වශයෙන් සඳහන් නොවේ.

(1941) 42 න.නී. වාර්තාවෙහි 487, 493 වන පිටුවල සෙල්වරත්නම් සහ තවත් අය එ. ආනඳුවේඵ නඩු තීරණයේ ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා පෙන්වා දී ඇත්තේ මෙසේ ය: ''ආඥා පනතේ ගැබ් වූ අවස්ථාවන්ට එකහෙළා ම 42 වෙනි ඡේදයෙන් (46 වෙනි අළුත් ඡේදයෙන්) එවැනි විවාහයයන් අවලංගු කර ඇත. කැමැත්ත නොමැති වීම ඒ තරම් බරපතල ලෙස නොසලකන ලදි.'' මම ද ගෞරව පූර්වකව මේ පිරුළ අනුගමනය කරමි.

මේ හේතූන් නිසා ගාය්තු නොමැතිව ඇපැල් පෙත්සම නිෂ්ප්‍රභා කරමි.

ගරු අලස් විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඇපැල නිෂ්ප්‍රභා කරන ලදී.

පරිවර්තනය: ජී. ඕ. පොන්සේකා අධිනීතිඥ මහතා මිසිනි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 70 වෙනි කා., 96 වෙනි පිට බලනු.

ගරු සන්සෝනි අග්‍ර විනිශ්චයකාරතුමා සහ සිරිමාන්න, විනිශ්චයකාරතුමා ඉදිරිපිට

ඇම්. ආර්. ලීලාවතී එ. ආරක්ෂක හා විදේශහාර ඇමතිතුමා*

අධිකරණ ආඥා පණතේ (පළමුවන කාණ්ඩය—6 වන අධිකාරය) 42 වන ඡේදය යටතේ සර්ටියෝරේරයි (Certiorari) ආඥාවක් සහ මැන්ඩමුස් (Mandamus) ආඥාවක් නිකුත් කරන ලෙස ආයාචනා කිරීමක්

ශ්‍රේෂ්ඨාධිකරණයේ අංකය 148/64.
විවාද කළ දිනය: 6 දෙසැම්බර්, 1965.
තීන්දුව ප්‍රකාශ කළ දිනය: 10 දෙසැම්බර්, 1965.

වර්ෂ 1948 අංක 18 දරණ පුරවැසි පණත — 12, 12(4) සහ 12(6) දරණ ඡේද — ඉන්දියානු පුරවැසියකු ලංකාවේ පාරම්පරික පුරවැසියකු හා විවාහවීම ; එම ලාංකික පුරවැසියා විසින් ලංකා පුරවැසියකු ලෙස ලියා පදිංචිවීමට කළ ඉල්ලීමක් — එය ප්‍රතික්ෂේප වීම — පෙත්සම්කරු (ස්වාමිපුරුෂයා) ඇමතිවරයාට කළ අභියාචනය අසාර්ථකවීම — සර්ටියෝරේරයි සහ මැන්ඩාමුස් ආඥා ලබාගැනීමට කළ ඉල්ලීම —ඇමති වරයාගේ තීරණය ප්‍රශ්නකිරීමට ඇති අයිතිවාසිකම — මනුෂ්‍ය අයිතිවාසිකම් පිළිබඳව සමස්ත ලෝක ප්‍රකාශනය මෙයට බල පවත්වන අයුරු.

වර්ෂ 1958 නොවැම්බර් මාසයෙහි ලංකාවට පැමිණි ඉන්දියානු පුරවැසියකු වූ පෙත්සම්කරු වර්ෂ 1959 ජනවාරි මාසයේ දී ලංකාවේ පාරම්පරික පුරවැසියකු හා විවාහ විය. වර්ෂ 1960 දී පුරවැසි පණතේ (349 වන අධිකාරය) 12 වන ඡේදය අනුව ලංකාවේ පුරවැසියෙකු ලෙස ලියා පදිංචි වීමට අවසර ඉල්ලා සිටියා ය.

ආරක්ෂක හා විදේශ කටයුතු පිළිබඳ අමාත්‍යාංශය මෙම ඉල්ලීම ප්‍රතික්ෂේප කරන ලදුව ඇගේ ස්වාමිපුරුෂයා මෙම අංශය භාර ඇමතිවරයාට අභියාචනයක් ඉදිරිපත් කෙළේ ය. ඉතා ම පරික්ෂාවෙන් කරුණු සලකා බැලීමෙන් පසු රජයේ ප්‍රතිපත්තිය ක්‍රියාත්මක කිරීම පිණිස ගත් මෙම තීරණය වෙනස් කළ නොහැකැ යි ඔහුට 16.4.64 වන දින පිළිතුරු ලැබිණ. ඉන්පසු සර්ටියෝරේරයි ආඥාවක් සහ මැන්ඩාමුස් ආඥාවක් ලබා ගැනීමට මෙම ඉල්ලීම උසාවියට ඉදිරිපත් කරන ලදී.

මෙම ඉල්ලීම ඝනාථ කිරීමට පහත සඳහන් තර්ක ගෙනහැර දැක්වී ය.

(ඒ) ඇමතිවරයා විසින් ඉහත සඳහන් පරිදි ප්‍රතික්ෂේප කිරීමේ දී එයට හේතු නොදක්වා නිබීම සාමාන්‍ය යුක්ති ධර්මයේ ප්‍රඥප්තීන්ට පටහැනි ය.

(බී) එහි සඳහන් වී ඇති හේතුව — එනම් රජයේ ප්‍රතිපත්ති ක්‍රියාවේ යෙදීම — අයෝග්‍ය හේතුවකි — මක්නිසා ද? එම ප්‍රතිපත්ති සහ මහජන ශුභ සිද්ධිය එක ම දෙය නොවන බැවිනි.

(සී) පුරවැසි පණතේ 12(6) ඡේදය පාලන සංස්ථාවේ පැණවීම්වලට පරස්පර විරෝධී වූවකි.

(ඩී) මෙසේ ප්‍රතික්ෂේප කිරීම මනුෂ්‍ය අයිතිවාසිකම් පිළිබඳ සමස්ත ලෝක ප්‍රකාශනය (Declaration of Human Rights) කඩ කිරීමකි.

තීන්දුව: (1) පුරවැසි පණතේ 12 වන ඡේදයේ 4 වන සහ 6 වන උප ඡේදයන්ට අනුව සලකා බලන කල එම ඉල්ලීම ප්‍රතික්ෂේප කිරීමට ඇමතිවරයා හේතු දැක්වීම අනාවශ්‍යය.

(2) රජයේ ප්‍රතිපත්තිය සහ මහජන ශුභ සිද්ධිය යන ප්‍රඥප්ති දෙකේ කිසිම ගැටීමක් ඇති බවක් නොපෙනෙන බව ය. රජයේ ප්‍රතිපත්තිය නිතර ම මහජන ශුභ සිද්ධියට අනුව ගත් දෙයක් බව පිළිගත හැකි ය.

(3) 12(6) වන ඡේදය වැනි පැනවීමක් අන්තර්ගත වූ ලිඛිත නීතියක් පැනවීමට පාර්ලිමේන්තුවට බලය තිබේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 70 වෙනි කා., 112 වෙනි පිට බලනු.

(4) මනුෂ්‍ය අයිතිවාසිකම් පිළිබඳ සමස්ත ලෝක ප්‍රකාශනය සඳහාර බල පැවැත්වීමක් ලෙස අති උච්චස්ථානයක ඇති ලේඛනයක් වුවත් එය ලංකා නීතියේ කොටසක් නොවන නිසා එය නීතිය ගැබ් වූ ලේඛනයක් නොවේ.

නීතිඥවරු: රාජනීත්ඥ සී. ත්‍යාගලිංගම් මහතා, ඊ. ඒ. ජී. ද සිල්වා මහතා සහ ඇන්. ආර්. ඇම්. දලුවත්ත මහතා සමඟ, පෙත්සම්කරු වෙනුවෙන්.

ජේ. ජී. ටී. වීරරත්න, ජ්‍යෙෂ්ඨ රජයේ අධිනීතිඥ මහතා, රජයේ අධිනීතිඥ ඇf්. සී. පෙරේරා මහතා සමඟ, වග උත්තරකරු වෙනුවෙන්.

ගරු සන්සෝනි අග්‍ර විනිශ්චයකාරතුමා

වර්ෂ 1958 නොවැම්බර් මාසයෙහි ලක්දිවට ආ ඉන්දියානු පුරවැසියෙක් වන පෙත්සම්කාරිය පරම පරානුකූලව ලංකාවේ පුරවැසියකු වන තැනැත්තකු සමඟ වර්ෂ 1959 ජනවාරි මස ආවාහ වූවා ය. වර්ෂ 1960 දී 349 වන අධිකාරයෙහි ඇති පුරවැසි පණතේ 12 වන ඡේදයට අනුව ඈ ලංකාවේ පුරවැසියෙකු ලෙස ලියා පදිංචි වීමට ඉල්ලා සිටියා ය.

ආරක්ෂක හා විදේශ කටයුතු භාර අමාත්‍යාංශය සහ ඇය අතර කෙරුනු ලියුම් ගනුදෙනුවකින් පසු එම අමාත්‍යාංශයේ ස්ථාවර ලේකම් තැන වෙනුවෙන් ලියන ලද වර්ෂ 1964 මාර්තු 4 දනම දරණ ලිපියකින් ඇය විසින් ලංකාවේ පුරවැසියෙකු වීමට කරන ලද ඉල්ලීමට ඉඩ නොදෙන ලද බව ඇයට දන්වනු ලැබී ය. ඇයගේ ස්වාමිපුරුෂයා නියෝජිත මන්ත්‍රීවරයකුගේ මාර්ගයෙන් මෙම නියෝගයට විරුද්ධව අභියාචනයක් ආරක්ෂක හා විදේශ කටයුතු භාර ඇමතිවරයාට ඉදිරිපත්කළේ ය. වර්ෂ 1964 අප්‍රෙල් 16 වන දින එම නියෝජිත මන්ත්‍රීවරයාටත්, එසේ ම ඇයගේ ස්වාමිපුරුෂයාටත්, ඇයගේ ඉල්ලීම ප්‍රතික්ෂේප කිරීමට ගන්නා ලද තීරණය ඉතා ම ප්‍රවේශමෙන් කළ පරීක්ෂණයකට පසුව රජයේ ප්‍රතිපත්තිය ක්‍රියාත්මක කිරීමේ බලාපොරොත්තුවෙන් ගන්නා ලද තීරණයක් බවත් එය වෙනස් කිරීමට නොහැකි බවත් දන්වනු ලැබී ය.

මෙය සර්ටියෝරේරයි (Certiorari) ආඥාවක් සහ මැන්ඩාමුස් ආඥාවක් යදිමින් දැනට අප ඉදිරියෙහි ඇති ඉල්ලීමකි. පනතෙහි 12(4) ඡේදයෙන් ''තමාට යම්කිසි ඉල්ලීමක් මහජනයාට ප්‍රයෝජනවත් නොවේ යැයි සැහීමකට පත්වීමට හැකිවූවහොත් එය ප්‍රතික්ෂේප කිරීමට ඇමතිතුමාට පුළුවන.'' යනුවෙන් පැන වී තිබේ. එසේ ම පනතේ 12(6) ඡේදයෙන් මෙසේ පැන වී තිබේ. —

> ඉහත සඳහන් පරිදි මෙම ඡේදයේ (4) වන උප ඡේදයට අනුව ඇමතිවරයා විසින් යම්කිසි පුද්ගලයකු ලංකාවේ පුරවැසි බවට පත්වීමේ ඉල්ලීමක් ප්‍රතික්ෂේප කරන ලද කලක එය අවසාන තීරණයක්වා පමණක් නොව එය කිසිම උසාවියක තර්කයට භාජන කළ නොහැක.''

මෙහි දී පෙත්සම්කරු වෙනුවෙන් කරුණු සැල කරන ලද්දේ ඇමතිවරයා එම ඉල්ලීම ප්‍රතික්ෂේප කිරීමට හේතු වූ කාරණා ප්‍රකාශ කළ යුතු බවත් එසේ ප්‍රකාශ කිරීම පැහැර හැරීම සාමාන්‍ය යුක්ති ධර්මයට ප්‍රතිවිරුද්ධ බවත් දක්වමිනි. මෙරික්ස් එ. නොට්-බවර් (1964) 1 සම්ස්ත එංගලන්ත වාර්තා 717 වන පිටෙහි ඇති නඩුව මීට පිළිසරණ වශයෙන් උපුටා දක්වන ලදී. යම්කිසි රජයේ දෙපාර්තමේන්තුවකට ලිපි ලේඛන වගයක් ඉදිරිපත් කිරීමට යයි කරන ලද ඉල්ලීමකට එම දෙපාර්තමේන්තුව එයට ඇති විශේෂ වරප්‍රසාදයක් යටතේ කරුණු දැක්වීමක් ගැන එම නඩුවෙහි ඇපැල් උසාවියෙහි අවධානය යොමු වීය. මහජන යහපතට හේතුවන රජයේ සේවයේ යෝග්‍ය ක්‍රියා සම්ප්‍රදයකට අනුකූලව එබඳු ලිපියක් ඉදිරිපත් නොකිරීම අවශ්‍ය බව දක්වමින් සෑම කරුණට ම පොදු ආකාරයෙන් ලියන ලද සහතික පත්‍රයක් ප්‍රදර්ශනය කිරීම වැනි පුරුද්දක් වගා වී තිබෙන සේ පෙනීයන බව ප්‍රකාශ කළ ඩෙනිංග් සාමි විනිශ්චයකාරතුමා ඒ ක්‍රියා පිළිවෙලට විරුද්ධ විය. නමුත් අප විසින් සලකා බලන මෙම නඩුවට එම නඩු තීන්දුව අදළ වේ යයි මම නොසිතමි. මෙම නඩුවෙහි ලංකාවෙහි පුරවැසි භාවය ලියාපදිංචි කිරීමෙහි ඉල්ලීමකට කුමන කරුණු පිළිවෙලක් යෙදුණු කල ඇමතිවරයා එය ප්‍රතික්ෂේප කළ යුතුද යන්න සඳහන් වූ ලිඛිත නීතියක් ගැන අපේ අවධානය යොමු වී තිබේ.

එම නඩු තීන්දුවේ කලින් සඳහන් වන කොටසක ඩෙනිංග් සාමි පහත පෙනෙන පරිදි කියා ඇති බව සැලකිල්ලට භාජනය විය යුතු ය. එනම්:—

> ලිඛිත නීතියකින් හෝ රෙගුලාසියකින් විධායක නිලධාරියෙකුට හෝ පරිපාලන නිලධාරියකුට, පවරා දී තිබෙන යම්කිසි බලතලයක් වෙතොත් එය එසේ දී තිබෙන පරමාර්ථය උදෙසා නිර්ව්‍යාජ චේතනාවෙන් ක්‍රියා කරවිය යුතු බව අපේ නීතියෙහි ඇති සුප්‍රකට ප්‍රඥප්තියකි. ඒ බලතල යටිකුටිටු ක්‍රියාවකට වරදවා පාවිච්චි කිරීම හෝ එයින් එබඳු දෙයකට අයථා ප්‍රයෝජනයක් ගැනීම හෝ නොකළ යුතු ය.

තමාගේ ඉල්ලුම් පත්‍රයෙහි එක් කරුණක් වශයෙන් ඇමතිවරිය ව්‍යාජ චේතනාවකින් ආඥා බලයෙන් තොරව අයථා පරිදි ක්‍රියාකොට ඇතැයි පෙත්සම්කරු චෝදනා

විලාශයෙන් කියා සිටින නමුත් එබඳු චෝදනා සංඛ්‍යාත ප්‍රකාශ සනාථ කිරීමට ඇට කිසිම හේතුවක් හෝ කරුණක් දක්වා නැත. එබඳු ප්‍රකාශවල සාරයක් ගැබ් වී ඇතැයි දැක්වීමට ද කිසිම පරිශ්‍රමයක් දරා නැත. කොටින් කිවහොත් ඇමතිවරයා මනා චේතනාවෙන් තමාගේ අභිමතය යෝග්‍ය ලෙසත් සුදුසු ලෙසත් නොකරන ලදැයි පෙන්වීමට අප ඉදිරියේ කිසිම දෙයක් නොමැත.

මෙම ඉල්ලීම ඇමතිවරිය විසින් ප්‍රතික්ෂේප කිරීමේ දී ඇය විසින් ඒ සඳහා හේතු දක්විය යුතුයයි අපි නොසිතමු. මෙම පණතෙහි ප්‍රතිපත්තිය මෙබඳු ඉල්ලීමක් පිළිබඳව ඇමතිවරයා එක ම තීරණාත්මක විනිශ්චය කරුවෙකු කිරීම සහ ඔහුගේ තීරණයෙහි නිරවද්‍යතාවය ගැන අධිකරණයක් විසින් පරීක්ෂණ පැවැත්වීම වැළැක්වීම බව 12 වන ඡේදයෙහි (4) වන සහ (6) වන උප ඡේදයන්ගෙන් පැහැදිලිව පෙනේ. මෙබඳු ඉල්ලීමක දී නියෝගයක් කිරීමට බලය පවරා ඇත්තේ ද එබඳු වගකීමක් දී ඇත්තේ ද අග්‍රාමාත්‍යවරයාට බව කෙනෙකු සලකා ගත්තොත් මෙය පුදුම වීමට කරුණක් නොවේ. මෙවැනි ඉතා වැදගත් කරුණක් තීරණය කිරීමට ඔහුට භාර දීම ආරක්ෂා සහිතව කළ හැකි බවත් ඔහුගේ එබඳු තීරණයක් නීතිය පසිඳින අධිකරණයක පරීක්ෂණයට භාජනය වීමට සැලැස්වීම නුවුවමනා බවත් පාර්ලිමේන්තුව සිතා ගන්නට ඇත. **ඇස්. ඒ. ද ස්මිත්** මහතා විසින් ලියන ලද **පරිපාලන ක්‍රියා පිළිබඳ විනිශ්චයාත්මක විවේචනයක්** (**Judicial Review of Administrative Action**) නමැති ග්‍රන්ථයෙහි පහත සඳහන් ඛණ්ඩය දෙස ප්‍රධාන නීතිවේදියා විසින් අපේ අවධානය යොමු කරවන ලදී. එය මෙසේ ය:—

> ''පෘථුල අභිමත බලතල පවා රජයේ ඇමති වරයකු පිට පැවරුණු කල එම බලතල විනිශ්චයාත්මකව ක්‍රියා කරවිය යුතු ය යන ප්‍රතිපත්තිය පැරණි නඩුවල කිප විටක් ස්පීර් කොට ඇතත් එය ක්‍රියාවට යෙදෙන්නේ කලාතුරකිනි. ඇමති වරයකු තමාගේ අභිමතය අනුව ක්‍රියා කළ විට එය සංශෝධනය කිරීමට නොහැකි බව නොයෙක් විට කියන අධිකරණය මේ සඳහා පිළිසරණ සොයන්නේ ඇමතිවරයකු පාර්ලිමේන්තුවට වග කිව යුතු ය යන ප්‍රඥප්තියෙහි වේ''.

අපට ඉදිරිපත් කළ තවත් තර්කයක් නම් නියෝජිත මන්ත්‍රිවරයාට ලියා යවන ලද ලියමනෙහි සඳහන්කොට ඇත්තේ රජයේ ප්‍රතිපත්තිය ක්‍රියාවෙහි යෙදවීමට මෙම තීරණය ගන්නා ලද බව නිසා මෙය සහ මහජන යහපත යන දෙක ම එක ම සංකල්පනයක් නොවන හෙයින් ඉල්ලීම ප්‍රතික්ෂේප කිරීම වැරදි හේතුවක් උඩ සිදු වී ඇත්තෙන් එය අයෝග්‍ය බව ය. මෙම සංකල්පනා දෙකෙහි පරස්පර විරෝධාභාවයක් මට නොපෙනේ. රජයේ ප්‍රතිපත්ති නිතර ම පාගේ මහජන යහපත පිණිස යැයි සලකාගත හැකි වේ. රජයේ ප්‍රතිපත්තියෙහි ප්‍රධාන පරමාර්ථය රටේ සුභසිද්ධිය බව සලකා ගැනිම මැනවි. එම ප්‍රතිපත්තිය කුමක් ද යන්න සාමාන්‍යයෙන් තීරණය කරන්නේ එසේ නැතහොත් එයට අනුමැතිය දෙන්නෙන් ආරක්ෂක හා විදේශ කටයුතුභාර ඇමතිවරයා ය. එම නිසා මෙහි දී එම ඇමතිවරයා මහජන යහපත කුමක් දැයි තීරණයකට බැසගත් විට ඈ කෙරෙහි රජයේ ප්‍රතිපත්තිය බලපවත්වනු නොලැබේ යැයි සිතිය නොහැක. එබඳු ප්‍රතිපත්තියක් කල්පනාවට ගැනීමට යෝග්‍ය වූත් එසේ ම කල්පනා කිරීමට අදල වූත් කරුණක් බවත් පෙනියේ.

ත්‍යාගලිංගම් මහතා පණතෙහි 12(6) දරණ ඡේදයෙහි ඇති පැනවීම් අපේ පාලන සංස්ථාවට විරුද්ධ බවත් ඒ පැනවීම්වලින් පුරවැසියකුට උසාවියට යෑමට ඇති අයිතිවාසිකම් බැහැර කෙරෙන බවත් කියමින් තර්ක කළේ ය. අපි මෙම තර්කයට එකඟ නොවෙමු. මෙම පණතෙහි 12(6) දරණ ඡේදයෙහි ඇති පැනවීම් බඳු පැනවීම් කිරීමට පාර්ලිමේන්තුවට බලයක් තිබෙන සේ අපට පෙනේ. එබඳු වාක්‍ය ඡේද දැන් දැන් ඉතා ප්‍රකට බව පෙනෙන අතර ඒවා යෙදී ඇති පද සම්බන්ධ ය අනුව එහි අර්ථ කථනය කළ යුතු බව ද කියනු කැමැත්තෙමු. පෙත්සම්කාරිය ඉන්දියානුකාරියක් නිසා ඇයගේ ඉල්ලීම ප්‍රතික්ෂේප කරන ලදැයි ද හැඟීමක් පෙත්සම්කාරියගේ වාසියට අපට ඉදිරිපත් කරන ලදී. එබඳු හැඟීමකින් කිසිවක් ඔප්පු නොවන අතර එය කුමන පදනමක් උඩ කරන ලද්දක් දැයි පැහැදිලි කළේ නැත. තමාගේ ඉල්ලීම ප්‍රතික්ෂේප කිරීමට හේතු වූ කරුණු දැනගැනීමට පෙත්සම්කාරියට ඇති බලාපොරොත්තුව කෙනෙකුට හොඳින් තේරුම් ගත හැක. සමහර විට එම තීරණය යුක්තියෙන් තොරයැයි ද තර්කානුකූල නොවේයැයි ද කියමින් එයට පහර දීමට ඇයට පිළිවන්වීම නිසා පමණක් මෙසේ වුවද මෙය තේරුම් ගත හැක. නමුත් පෙත්සම්කාරියට එසේ හේතු දැනගැනීමට කිසිම අයිතියක් ඇතැයි මම නොසිතමි.

අවසාන වශයෙන් මෙම ඉල්ලීම ප්‍රතික්ෂේප කිරීම මිනිස් අයිතිය පිළිබඳ සමස්ත ලෝක ප්‍රකාශනය (Universal Declaration of Human Rights) උල්ලංඝණය කිරීමක් බව කියමින් කරුණු සැලකරන ලදී. එම ලේඛනයෙහි ඇති ප්‍රතිපත්ති මෙම කරුණට කොයි ලෙසින් හෝ අදල වූවත් ඒවා ඉතා ම උසස් සදාචාර යුතුකම් හැටියට ගිනිය හැකි වුවත් එය නීතිගත ලේඛනයක් නොවන නියා මේ රටේ නීතියෙහි එය කොටසක් නොවන නියා එහි අනුගම්‍ය නීති බලයක් ගැබ් වී නැති බව පමණක් මෙහි ලා සඳහන් කිරීම ප්‍රමාණවත් ය. පෙත්සම්කාරිය සහ ඇගේ ස්වාමිපුරුෂයා වැටී තිබෙන තත්ත්වය ඇත්ත වශයෙන් ම ශෝචනීය වුවත් ඔවුන් කරකාර බැන්දේ එබඳු අවදානමකට මුහුණ දී බැවින් මෙම ඉල්ලීම අසාර්ථක වුවොත් අඹු-සැමි දෙදෙනාට වෙන්ව වාසය කිරීමට සිදුවේය යන්න සැලකියයුතු තර්කයක් නොවේ. එබැවින් මෙහි ප්‍රතිඵලය වන්නේ පෙත්සම්කාරියගේ ඉල්ලීම ගාස්තුවටත් යටත් කොට නිශ්ප්‍රභා කිරීමට අවශ්‍යවීම ය.

ඉල්ලීම ගාස්තුවටත් යටත් කොට නිශ්ප්‍රභා කිරීමට මම කැමැත්තෙමි.

සිරිමාන්න විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඉලිලීම නිශ්ප්‍රභා විය.