G. A. Nissanka

The Ceylon Law Weekly

containing cases decided by the Court of Criminal Appeal, the Supreme Court of Ceylon, and Her Majesty the Queen in the Privy Council on appeal from the Supreme Court of Ceylon and foreign judgments of local interest.

with a Section in Sinhala

VOLUME LXXV

WITH A DIGEST

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

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

B. P. PEIRIS, LL.B. (LOND.)
V. RATNASABAPATHY, B.A. (CEYLON) LL.B. (LOND.)
U. A. S. PERERA, M.A. (LOND.)
NIHAL JAYAWICKRAMA, LL.B. (CEYLON)
M. H. M. NAINA MARIKAR, B.A. LL.B.(CANTAB.)
S. S. BASNAYAKE, B.A., B.C.L. (OXON.)
N. S. A. GOONETILLEKE, LL.B. (CEYLON)
VARUNA BASNAYAKE.

Advocates of the Supreme Court
(*Asst. Editors*)

1969

Subscription payable in advance, Rs. **17/50** per Volume. Past Volumes (10-75) are available at Rs. **17/50** per Volume. Copies may be obtained at: 50/3, Siripa Road, Colombo 5.

INDEX OF NAMES

DIGEST

Administrative Districts Act

Can Court take judicial notice that a particular place is situated within a particular administrative district.

HAMZA NAINA *vs.* INSPECTOR OF POLICE, GAMPAHA 90

Advocate

Appearance of — at inquest proceedings.

SENEVIRATNE *v.* THE ATTORNEY-GENERAL & ANOTHER 1

Appeal

Point raised for the first time in the Supreme Court.

SAHIB *vs.* THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS .. 81

Attorney-General

Position of — At inquest of death.

SENEVIRATNE *v.* ATTORNEY-GENERAL & ANOTHER 1

Bail

Bail — Courts Ordinance, section 31 *— Accused committed to stand trial in the Supreme Court —Failure to bring him to trial at the first Criminal Sessions after committal — Effect of section* 31 *— Is failure to prepare and serve indictment sufficient ground to oppose application for bail by accused*?

This is an application for bail under section 31 of the Courts Ordinance, and made on the following facts: (*a*) that plaint was filed on 23/2/66 in the Municipal Magistrate's Court against the appellant and 3 others alleging offences of conspiracy to commit murder.

(*b*) that on 23/6/66, the applicant and the three accused were committed to stand their trial in the Supreme Court.

(*c*) that the accused were not brought to trial at the Criminal sessions commenced on 10/7/66; 10/10/66; 10/1/67; or at the then current session commenced on 20/3/67.

(*d*) that no indictment had yet been served on him and that the evidence against him was very weak.

Crown Counsel, relying on the decision of Manickavasagar, J. (*Mendis* v. *The Queen*, 66 *N.L.R.* 502) resisted the application purely on a legal ground, viz., that an indictment not having been served on the applicant, he could not properly have been tried at any of the Sessions referred to in the application.

Held: (1) That the effect of Section 31 of the Courts Ordinance is that a prisoner committed for trial before the Supreme Court who is not brought to trial at the first Sessions at which he might be properly tried should be admitted to bail.

(2) That the words "Criminal Sessions at which the prisoner might properly be tried" refer to a Session for the circuit within the limits of which the crime or offence with which the prisoner is charged was committed.

(3) That the omission to take a step involved in the preparation and service of the indictment is not a sufficient ground for holding that the prisoner could not properly have been tried at a Criminal sessions of the Supreme Court.

(4) That, if there may not be sufficient time in particular cases between the commitment and the first Criminal Sessions to bring a prisoner to trial, either because for framing of the indictment or for recording of further evidence more time is required, then such circumstances would constitute "good cause" why the accused should not be admitted to bail in such cases.

PERERA *v.* ATTORNEY-GENERAL 9

Betting on Horse—Racing Ordinance

Betting on Horse Racing Ordinance, section 3(3) *read with section* 11(2) *— Charge of receiving a bet on a horse race other than a taxable bet — Race run in a foreign land — Copies of newspapers produced in support of charge — Conviction — What prosecution has to prove — Evidentiary value of newspapers produced.*

Where the accused was convicted for the offence of receiving a bet on horse race other than a taxable bet, run in a foreign land.

Held: (1) That it was incumbent on the prosecution to prove not only that the names on the betting slips were names of horses, but also that those horses ran in a horse race.

(2) That the contents of the newspapers produced in evidence constituted hearsay evidence and could not therefore have been relied on to prove the facts which prosecution had to prove.

LIYANAGE *v.* INSPECTOR OF POLICE, BORELLA .. 11

Certiorari

Writ does not lie to quash finding under section 362(1) *of the Criminal Procedure Code.*

SENEVIRATNE *v.* ATTORNEY-GENERAL & ANOTHER 1

Paddy Lands Act as amended by Act No. 11 *of* 1964 *—Retrospective Effect of Amending Act — Assumption of jurisdiction by Assistant Commissioner of Agrarian Services — Validity of order made by Assistant Commissioner.*

PUNCHIMAHATMAYO *v.* WIJEDORU 104

Civil Procedure Code

Sections 6, 9 *and* 584.

Section 34.

Section 85 *and* 87.

Section 377(*a*) *and* (*b*) — *Requirement that Order nisi or Interlocutory order be entered — Can such requirement be waived?*

Held: That the right to have notice of a petition under section 377 of the Civil Procedure Code by means of an order nisi or of an interlocutory order is capable of waiver just as much as a defendant in an action may by appearance in Court waive service of summons.

Control of Prices Act

Charge of selling beef above controlled price — Evidence of decoy that he asked for beef and accused handed over a quantity of flesh which decoy said was beef — Is this evidence sufficient to sustain conviction — Admission by conduct.

Control of Prices Act (*Cap.* 173) *as amended— Imperative provision in the price order requiring a receipt to be given to the customer — Accused charged with selling for a price in excess of the controlled price — Failure of the prosecution to produce the receipt — Evidence Ordinance, section* 114(*g*).

The accused was convicted of having sold two incandescent mantles for Re. 1/-, a price in excess of the maximum controlled price of -/82.

In appeal, it was submitted on behalf of the accused that the evidence led for the prosecution fell short of proving a sale; that the alleged cashier who accepted the money should have been joined as a co-accused if a completed act of sale was to be proved; and that the prosecution had failed to prove beyond reasonable doubt the price alleged to have been charged. The price order required the accused to give the customer a receipt in which were to be set out the particulars of the sale, including the price charged. The accused was not charged with having failed to issue a receipt, nor did the prosecution produce the receipt at the trial. It was submitted that, in the circumstances, the accused was entitled to the benefit of the presumption under section 114(g) of the Evidence Ordinance.

Held: (1) That on the evidence the elements of a sale were present. The alleged cashier who accepted the money need not have been joined as a co-accused as he was merely a collecting agent on behalf of the seller.

(2) That, however a reasonable doubt arose as to the price charged, and the accused was therefore entitled to be acquitted.

Control of Prices Act (*Cap.* 173) — *Charge under* 8(2)(*b*)(*i*) *for refusing to sell a box of matches though having them in possession—Prices of match boxes set out in Gazette varying from five cents to one cent according to number of sticks contained — Failure to prove number of matches in the boxes.*

The accused was charged under section 8(2)(b)(i) of the Control of Prices Act for having refused to sell a box of matches although he had in his possession 120 Safety Match boxes. According to the Gazette dated 23/7/65 (P3) produced, the price of a box of matches varied from five cents to one cent depending on whether the box contained 50 or 10 sticks.

There was no evidence that any of the boxes of matches contained the required number of sticks, nor evidence that in the market there were no match boxes which contain less than 10 or more than 50 matches.

Held: That the prosecution has failed to prove the charge.

Control of Prices Act, No. 29 *of* 1950 *and* 31 *of* 1952 — *Price Order published in Gazette* (*Extra-ordinary*) *No.* 14199 *of* 15.10.1964 — *Charge of sale of beef above controlled price at Yakkala, a place within the Colombo District but outside Colombo Municipality — Absence of proof that place where alleged sale took place was within Colombo District — Presumption — Judicial notice, Evidence Ordinance, Section* 57 — *Administrative Districts Act* (*Cap.* 392).

The accused was charged with and convicted of selling beef at No. 3 Yakkala, on the Gampaha—Kirindiwela Road above the controlled price fixed by Price Order of 15.10.64 made by the Assistant Food Controller of Prices, Colombo District under Section 4 read with section 3(2) of the Control of Prices Act No. 29 of 1950 and No. 31 of 1952 published in Ceylon Government Gazette (Extra-Ordinary) No. 14199 of 15.10.64.

In appeal it was contended on his behalf (*a*) that according to the Schedule, the Price Order applied to the Colombo District outside the Municipal limits of Colombo.

(*b*) that the prosecution has failed to prove that the place where the beef was alleged to have been sold is within the Colombo District.

The only evidence on this point was that of the Sub-Inspector of Police who confessed that he could not say what the limits of the Colombo District were. The prosecution failed to produce in evidence a map of the Colombo District showing the Administrative Divisions or the evidence of anyone who could authoritatively speak to the limits of the Colombo District though the Administrative Districts Act sets out the limits of each administrative district. The learned Magistrate in his reasons observed as follows:— "There cannot be any doubt that No. 3 Yakkala where the accused's beef stall is situated is not a place within the limits of the Colombo Municipality" and administratively Gampaha comes within the jurisdiction of the Government Agent Colombo District."

Held: That in the circumstances, the Magistrate was not justified in presuming that this stall is within the Colombo District, as the Judicial Districts of Ceylon, with which the magistrate may be familiar do not correspond to the Administrative Districts of Ceylon as set out in the Administrative Districts Act No. 22 of 1955.

HAMZA NAINA *v.* INSPECTOR OF POLICE, GAMPAHA .. 90

Control of Prices — Charge of selling box of matches at 8 cents when controlled price was 5 cents — Controlled price varies from 5 cents to 1 cent according as the box contained 50 to 10 sticks — Absence of evidence of number of sticks in box — Conviction not sustainable.

The accused was charged with and convicted of selling a box of match sticks (P1) for 8 cents, a price in excess of the controlled price by 3 cents.

Held: (1) That the conviction could not be sustained in the absence of evidence of the number of matches the box P1 contained as the controlled price varied from five cents to one cent according as the box contained 50 to 10 sticks. (Vide Government Gazette No. 14459 of 23.7.65).

(2) That the imprint on the box P1 stating the maximum price of five cents at which it could be sold does not establish the charge in the absence of evidence as to who fixed the imprint and the maximum price thereon and that it was placed on boxes which contained 50 matches or more only.

INSPECTOR OF POLICE, MORATUWA *v.* WANNIARATCHI 92

Coroner

See under — INQUESTS

Court of Criminal Appeal Decisions

Court of Criminal Appeal — Vague and sketchy evidence — Cricumstantial evidence only — Medical evidence at variance with direct evidence — Duty of Judge to give adequate direction on common intention — No direction on how to apply law to facts regarding common intention and extent of participation of accused in offence charged — Non-direction that common intention must be necessary, not possible, inference — Penal Code, section 32.

The two accused-appellants were found guilty of jointly committing the murder of one Udulawathie, the daughter of the 2nd accused. To establish its case, the Crown relied on rather vague and sketchy evidence of a circumstantial nature.

The medical evidence revealed that only incised injuries were observed upon the body of the girl. A sister of the deceased testified that the 2nd accused assaulted her with a rice pounder. The medical evidence ruled out the possibility of the deceased having been struck by any such heavy blunt weapon.

A brother of the deceased testified to his having seen the two accused holding the deceased by her shoulders and dragging her towards the house of the 1st accused, while she appeared to be senseless. Soon afterwards, the 2nd accused returned and made certain statements to this witness. The evidence of this witness was inherently improbable.

The only evidence upon which the Crown claimed to rest the charge of murder against the 1st accused was an alleged familiarity between the two accused, and the dragging of the deceased towards his house.

Held (i) That in this state of the evidence, it was imperative for the Jury to have received adequate direction in respect of the element of common intention implied in the joint charge against the two accused.

(ii) That except for a statement of the law in general terms, there was a complete absenoe of the manner in which the law was to be applied to the particular facts of the case.

(iii) That in a case dependent solely on circumstantial evidence, and that too of a vague and unsatisfactory nature, the Jury should undoubtedly have received assistance on the manner of the application of law relating to common intention, and, particularly to the extent of participation of the two accused in the offence charged.

(iv) That there was also a complete absence of a direction that the inference of common intention must be not merely a possible, but a necessary, one.

DHARMADASA & ANOTHER *v.* THE QUEEN .. 14

Court of Criminal Appeal — Conspiracy to commit robbery — Attempted robbery — Attempted theft — Misdirections of Fact — Good character put in issue by accused — Non-direction amounting to misdirection — Recalling of witness by trial Judge — When exercisable — Direction to Jury re-conflicting versions of witness so recalled — Non-direction regarding gaps and defects in prosecution case — Circumstantial evidence — Criminal Procedure Code, section 429 — Penal Code, sections 113A and sections 366, 379, 490.

Five persons were indicted on charges of conspiracy to commit robbery of cash Rs. 69,674/91 and attempted robbery of the said sum. One accused (4th accused) applied for a separate trial. The four appellants were tried and found guilty on count 1 and of attempted theft on count 2.

The Court of Criminal Appeal dismissed the appeals of the 1st, 2nd and 3rd accused on the first count.

(*A*) **On count 1:** (1) With reference to the conviction of the 5th accused (the driver of the taxi in which the accused had travelled) on the first count, the 5th accused had given evidence and stated that after the incident he drove away and when he saw a Police jeep halted on a road, he halted his car voluntarily. The defence suggested to the Police Constable who had halted the car that though he ordered the car to halt, there was the possibility that the car was in fact halted by the driver of his own accord. The answer was that it was possible.

The trial Judge in his summing up referred to the suggestion and told the Jury that they had heard the evidence of the Police Constable, who had specifically denied that, and asked them whether there was any reason to disbelieve the Police Constable.

Held: That this was a misdirection of fact which would undoubtedly have affected the credibility of the 5th accused.

(2) The 5th accused also put his character in issue. No reference was made in the summing-up to the good character of the accused.

Held: (i) That a man's good character must accrue to his credit and it is the duty of the trial Judge to draw the attention of the Jury to this fact, and that the possession of a good charcter by an accused person is primarily a matter which affects his credibility.

(ii) That in the circumstances of this case the omission to refer to the good character of the 5th accused was a non-direction which would have seriously affected the credibility of the accused in the eyes of the Jury.

(3) **Held:** That it was impossible to say that had the Jury been properly directed on the above matters, they would have convicted the 5th accused on the evidence led, and his conviction on count 1 should be set aside.

(*B*) **On Count 2:** (1) **Held:** That although a trial Judge has an undoubted right (under section 429 of the Criminal Procedure Code) to recall any witness at any time, once a witness has given categorical and unambiguous evidence which favour the accused, this right should not be exercised in order to afford the prosecution an opportunity to whittle down the effect of that evidence.

(2) That where such a witness, on being recalled gives evidence which results in whittling down the effect of his earlier evidence, it is the duty of the trial Judge to place the two versions before the Jury and leave it to the Jury to decide which version they were disposed to accept. It is wrong not to make any reference at all to that evidence or not to give any direction concerning it.

(3) That there was also a failure on the part of the prosecution to call two witnesses to fill a gap in the prosecution case, there was certain evidence of a witness which contradicted the Police evidence on certain links in the circumstantial evidence and that there was non-direction on these points, and misdirection regarding the effect of the Police Inspector's evidence.

(4) That as the prosecution evidence on count 2 depended entirely on an inference from an impression created in the minds of two Police Officers, and there was misdirection on the evidence relating to that count the convictions of all the accused-appellants on that could not stand.

Criminal Procedure Code, section 238 — *Conditions under which a demonstration at the scene is permissible — Procedure to be followed upon the return of the jurors to Court.*

Summing-up — Proper direction regarding an acceptable verdict.

Held: (1) That a demonstration during a view of the scene must be held in comparable conditions.

(2) That if during a view of the scene, certain places are pointed out by witnesses, they should, on the return of the jurors to Court, be recalled and examined on oath as to what they did, and thereafter permitted to be cross-examined.

(3) At the end of his charge to the jury, the trial judge addressed them thus:

"Try to be unanimous in your decision; but if you cannot be unanimous, at least bring in a five to two verdict. Any other verdict is not acceptable in law. You may retire and consider your verdict."

That the above direction was inadequate.

Per **T. S. Fernando, J.** "What is an acceptable verdict cannot be said to be a matter of common knowledge on the part of jurors. It is a question on which jurors may well be instructed by a trial judge, and where such instruction is attempted it should be, fuller than in the instant direction. They should be informed that the returning of a legal verdict is not obligatory, and that, if they are finally divided 4 to 3, their duty is to say to the judge on their return that they are unable to reach a verdict by reason of the nature of their division."

Courts Ordinance

Section 19 — *Application of — To inquest proceedings.*

Section 31 — *Bail —Accused committed to stand trial before Supreme Court — Failure to bring him to trial at first criminal sessions after committal.*

Criminal Procedure

Criminal Procedure Code

Sections 9, 356, 361, 362, 363, 364 — *Inquest of death — Can a finding as to the cause of death entered by a Magistrate be quashed by the Supreme Court* (*a*) *by way of a Writ of Certiorari or* (*b*) *by acting in revision — Object and procedure at an inquest of death — Non-judicial nature of inquest proceedings— Exclusion of inquest inquiries from the purview of section* 356 *Criminal Procedure Code and section* 19 *of the Courts Ordinance — Test as to when a Writ of Certiorari would lie.*

Duties of a Magistrate in inquest proceedings — Appearance of lawyers in such proceedings — Position of the Attorney General's Department at inquest stage — Facts.

On 16.4.66, the Joint Magistrate of Colombo received a letter from the Officer in Charge, Fort Police, which stated that ".....one Lokugama Vidanelage Podi Appuhamy who was brought to the C.I.D. office for questioning in connection with the suspected coup d'etat, had leapt out of the C.I.D. office window..... and that he had died at the General Hospital after admission." Thereupon the Magistrate inspected the scene of the incident and also viewed the body of the deceased at the mortuary. The Magistrate ordered the J.M.O. to hold a post mortem examination and proceeded to record evidence pertaining to the inquest of death. In these proceedings Crown Counsel appeared as *amicus curiae* assisted by the Police and led the evidence of a number of police witnesses to the effect that the deceased leapt to his death through the window of the room where he was being interrogated by the police. Acting on this evidence the Magistrate came to a finding that the deceased had committed suicide.

On 22.8.66, the Magistrate re-opened the inquiry and proceeded to hear further evidence acting on a petition furnished by the brother of the deceased that further evidence was available as to the manner of the deceased's death. On this occasion, counsel appeared on the basis that he was watching the interests of the petitioner and led the evidence of a number of witnesses whose evidence suggested that the deceased had been assaulted by the police and forced out of the window. After the evidence had been concluded the Magistrate altered his former finding of suicide to one of culpable homicide.

These inquest proceedings are sought to be quashed (a) by way of a Writ of *Certiorari* or (b) by invoking the revisionary powers vested in the Supreme Court.

Held: (1) That a Writ of *Certiorari* does not lie to quash a finding under section 362(1) of the Criminal Procedure Code, as (a) the Magistrate or inquirer is not called upon to determine any question affecting the rights of the subject and (b) the functions of the Magistrate or inquirer in conducting an inquest of death are non-judicial in character.

(2) That neither section 356 of the Criminal Procedure Code nor section 19 of the Courts Ordinance bring within the Supreme Court's appellate or revisionary powers, inquest proceedings, even when held by a Magistrate. The powers of revision invested in the Supreme Court by virtue of section 356 of the Criminal Procedure Code are restricted to pending trials or cases already tried and an inquest of death cannot be considered a proceeding pending trial. The provisions of section 19 of the Courts Ordinance enable the Supreme Court acting in revision to take cognizance of all causes, suits actions prosecutions matters and things of which the original *court* may have taken cognizance. As the word 'Court' in this context has been defined in section 2 to mean a judge or body of judges acting *judicially*, inquest proceedings which are of a non-judicial character, do not come within its purview.

(3) That the duty cast upon a Magistrate at an inquest of death by the provisions of section 362(1)(c) was purely to hold an inquiry into the cause of death. The purpose of sections 362 and 363 is to secure reliable material as to the cause of death of a human being, when death has occurred in unusual circumstances or places mentioned in these sections, so that this material will be readily available in case such death was the result of an act of another amounting to an offence. It is therefore not the function of an inquirer or Magistrate acting under Chapter 32 of the Criminal Procedure Code, to include in those proceedings an investigation into an alleged crime or offence. The recording of the finding as to the cause of death, concludes the inquest of death.

(4) That if such a finding as to the cause of death, whether by an inquirer or Magistrate, gives rise in a Magistrate's mind to a reasonable suspicion that a crime has been committed, the Magistrate shall then act under the provisions of section 362(3) and initiate criminal proceedings. But the right to initiate criminal proceedings upon a finding at an inquset of death cannot alter the nature of the inquest proceedings themselves.

Held further: (5) That the provisions of section 363(1), reserving for Magistrates or inquirers authorised by them the right of inquiry into the death of persons dying while in police custody or in the mental

or leprosy hospitals or prison, emphasizes the need for special care in the conduct of such inquiries. No Magistrate or Inquirer conducting such an inquiry should permit a lawyer or Crown Counsel who might appear as *amicus curiae* to direct the course of such an inquiry, and reduce the magistrate or inquirer to a passive participant.

SENEVIRATNE *v.* ATTORNEY-GENERAL .. 1

Criminal Procedure Code, sections 157(3) *and* 287 *— Non-summary proceedings — Plaint filed at scene of offence and witness examined — Accused unrepresented — Questions to witness by accused — Proctor appearing when second witness gave evidence and applying for date to cross-examine — Postponement allowed — Queen's Counsel appearing on next date — Second witness cross-examined — Application by counsel to cross-examine* 1*st witness — Refusal by Magistrate — Should accused be deprived of statutory right to be defended by pleader — Scope of section* 278.

Courts Ordinance (*Cap.* 6), *sections* 19, 21, 40 — *Powers exercisable by Supreme Court in respect of non-summary proceedings.*

This appeal involves the right of an accused person to be defended by a pleader at the stage of non-summary proceedings.

The accused stood charged with murder by shooting one R on 9/4/1968. The same evening he was arrested with two others but only he was detained overnight in police custody and plaint was filed before the learned Magisrate at the scene on the following morning, charging him with the murder of R. On the same day the prosecution led the evidence of witness K, who claimed to have seen the accused firing the fatal shot. The accused was unrepresented at the time, but this witness had been questioned presumably by the accused in terms of section 157(3) of the Criminal Procedure Code.

After K. was questioned a proctor appeared for the accused and was present when the 2nd witness who claimed to have seen the shooting by the accused was called by the prosecution. At the conclusion of this witness' deposition, the proctor for the accused applied for a date to cross-examine the witness and this was allowed. On the next date learned Queen's Counsel appeared for the accused and under cross-examination the second witness admitted that he did not see the shooting and attributed his untruthfulness to his anger at the incident that had occurred.

The inquiry was thereafter adjourned and on the resumed date learned counsel for the accused applied to cross-examine K the first witness as (*a*) the accused, on the 1st day, was not in a position to ask certain questions vital to the defence, as he had no assistance from counsel.

(*b*) the accused was unaware that by asking a few questions he would be depriving himself of the right of cross-examining a witness.

(*c*) the accused had been brought to the scene from the police cell.

The learned Magistrate reserved his order and subsequently refused the request *inter alia* for the following reasons:

(*a*) that the 2nd witness who went back in his evidence had done so "too obligingly", the implication being that the witness had been suborned.

(*b*) that he feared that the witness K. if recalled would "succumb to the same sort of pressure."

(*c*) that since the accused would have an opportunity of cross-examining K later on, no grave prejudice would be caused to the accused.

(*d*) that in view of these circumstances he felt justified in refusing the application although ordinarily he would have permitted counsel to cross-examine him.

Held: (1) That the reasons given by the learned Magistrate for the refusal to permit cross-examination of the witness are not sustainable as —

(i) the fact that one witness is thought by the learned Magistrate to have been suborned is no reason for presuming that all the other witnesses or that other crucial witnesses have also been suborned:

(ii) the denial of the right of cross-examination the most powerful weapon in the armoury of our legal procedure, subject to the limits allowed by law, is not conducive to the ascertainment of truth, and may well result in entrenching falsehood;

(iii) unless a Magistrate has very strong reasons for arriving at the conclusion of subornation he should generally incline in favour of the view that it is the process of cross-examination rather than the use of illicit pressure which results in a witness' change of front;

(iv) it is the right of every accused person in non-summary proceedings to hope and expect with confidence that if the evidence against him proves insufficient to justify a committal, the Magistrate will discharge him without putting him through the ordeal of a trial in a higher court on a grave crime and to deny that right merely because the Superior Court will undoubtedly go through the normal process of trial, amounts to a serious violation of such right.

(2) That the refusal by the learned Magistrate to permit the cross-examination of the witness had resulted in a denial of the right conferred on an accused by section 287 of the Criminal Procedure Code to retain a pleader, a right described by the Supreme Court as being "now ingrained in the rule of law and recognised in the Law of Criminal Procedure of most civilised countries." (*Premaratne* v. *Gunasekera*, 68 C.L.W. p. 53).

(3) That the questions asked by the accused himself on the 1st day, when he was not represented by counsel, could not be held to be in any way a substitute for cross-examination by a lawyer and could not result in a loss of the statutory right to be defended by a pleader under section 287 of the Criminal Procedure Code.

(4) That it is unquestionable that the powers of the Supreme Court under sections 21 and 40 of the Courts Ordinance could be exercised in respect of non-summary proceedings.

Per **Weeramantry, J.** "(*a*) In testing, in a given case, whether the right so assured has in fact been enjoyed, a Court will guide itself by the spirit of the law rather than by a regard to technicalities, and will not conclude that the right has been afforded unless it has been effectively afforded."

(*b*) "Thus the right to a pleader means nothing if it is not associated with the time and opportunity to retain one *The Queen* v. *Prins* (1962) 61 C.L.W. 26, nor can there be a true exercise of this right where a pleader has in fact been retained but been clearly afforded insufficient time for the preparation of his case and for obtaining instructions, from the accused *The Queen* v. *Peter* (1961) 64 N.L.R. 120."

(*c*) "The Indian Courts have taken the principle of representation so far as to hold it to be essential at the stage of examination in-chief no less than in cross-examination, for the reason that the skill and knowledge of a lawyer confer real advantages on an accused person at the stage of examination in-chief, through objection being taken to inadmissible and irrelevant evidence and to leading questions, *Re Mangaram* (1925) 27 Criminal Law Journal 33.

Likewise, in recent years the American Supreme Court has handed down some outstandingly important decisions relating to the scope of the right to the assistance of Counsel, as provided in the Sixth Amendment to the American Constitution."

(*d*) "In regard however to section 157(3) read in relation to section 287, it is not a technical requisite that must be satisfied but the fundamental question whether the right of representation conferred by section 287 has been truly and substantially enjoyed."

Sections 121(1), 122(1), 122*A* — *Writ of Mandamus — Order sought against Police to furnish certified copies of Information Book and statements recorded under sections* 121(1) *and* 122(1) *of the Criminal Procedure Code — Proceedings instituted in cases under section* 148(1)(*b*) *of the Criminal Procedure Code against petitioner for offences against Police Officers and another — All except one cognisable offences — Denial by respondent by way of affidavit that any information under* 121(1) *was given to Police or that any such statements recorded under* 122*A — Reasonable to assume the contrary.*

In this application for a Writ of Mandamus, the petitioner prayed for an order of Court directing the above respondents to furnish him or his Proctor with certified copies of information given and statements made in terms of section 121(1) and 122(1) respectively of the Criminal Procedure Code in respect of three cases, viz. 68125, 68267 and 68269, instituted under section 148(1)(b) of the Criminal Procedure Code by the Inspector of Crimes, Kegalle in the Magistrate's Court of Kegalle against the Petitioner, charging him with offences (under sections 484, 344, 220A, 314 of the Penal Code) committed against police officers and another. Except the charge under section 484, the rest were cognisable offences.

The 2nd respondent stated in his affidavit that no information under section 121(1) of the Criminal Procedure Code was given to any Police officer, nor were statements recorded by any police officer in respect of the offences with which the petitioner was charged. It was therefore argued that provisions of section 122A of the Criminal Procedure Code, which entitled an accused person or his proctor to obtain a certified copy of the information given under section 121(1) or any statement under 122(1) did not apply.

It was also admitted in the affidavit that the petitioner applied for the certified copies referred to above, but that his application was not granted.

Held: (1) That having regard to the matter of the charges preferred against the petitioner in the 148(1)(b) reports, one can reasonably assume that statements must have been made by the persons against whom or in respect of whom the petitioner is alleged to have committed the cognisable offences contained in the reports.

(2) That section 121 of the Criminal Procedure Code does not make exceptions in the case of Police officers.

(3) That the amendment to the Criminal Procedure Code by section 122A has expressly provided that the accused is entitled in law to obtain the information given under section 121(1) of the Code and the statements made under section 122(1) by persons against whom or in respect of whom the accused is alleged to have committed the offence.

His Lordship observed in the course of his order that "*Justice requires that the Courts should be vigilant that the legal rights of an accused person are not circumvented by any mistaken view of the law by over zealous officials*" and proceeded to direct the respondents to forward to the Registrar of the Supreme Court the Information Book of the Kegalle Police Station containing all investigations relating to the said cases and reports made by the police officers thereon for perusal by His Lordship before making a final order, which order was subsequently made granting the application of the petitioner.

Section 238 — *Conditions under which a demonstration at the scene is permissible — Procedure to be followed upon the return of the jurors to court.*

Sections 152(3), 180(1) *and* 425 — *Accused charged in Magistrate's Court with several offences, committed in course of same transaction — One of the offences not triable by Magistrate — Failure to assume jurisdiction*

under section 152(3) *owing to erroneous view — Conviction of all offences after trial — Effect — Illegality — Is it curable under section* 425 *— Is it permissible to separate illegal trial from trial of other offences?*

The appellants were charged with six offences, one of which was an offence, under section 145 of the Penal Code in respect of which the Magistrate had no jurisdiction to try as it was triable by the District Court. The Magistrate proceeded to trial in the erroneous belief that it was not necessary to assume jurisdiction under Section 152(3) of the Criminal Procedure Code and convicted them of all the offences:—

Held: (1) That the failure on the part of the Magistrate to act under the terms of Section 152(3) of the Criminal Procedure Code is an illegality not curable under Section 425 of the Criminal Procedure Code, as the Magistrate's Court is not a Court of competent jurisdiction in respect of the offence under Section 145 of the Penal Code.

(2) That there is no law which makes it permissible to separate an illegal trial of the offence under Section 145 from the trial of the remaining counts as the trial by the Magistrate must be treated as one trial and not as separate trials in respect of separate offences joined together under Section 180(1) as forming part of the same transaction.

(3) That the case *Madar Lebbe* v. *Kiri Banda*, 18 N.L.R. 376 (Full Bench) lays down the procedure to be adopted in such cases viz. to adopt the procedure laid down in Section 152(3) of the Criminal Procedure Code, provided the Magistrate inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose.

RAMASAMY & OTHERS *v.* GUNARATNE .. 85

Sections 191, 194 — *Acquittal or discharge — Acquittal of accused under Section* 194, *Criminal Procedure Code — Cancellation of order of acquittal.*

Held: That a genuine mistake on the part of a complainant about the date of the trial was a good ground for cancelling an order of acquittal made under the proviso to section 194 and that such a mistake was a "cause over which he had no control" within the meaning of the proviso.

SENEVIRATNE, I.P. & OTHERS *v.* FERNANDO .. 93

Section 306(1) — *Sufficiency of reasons given by Magistrate.*

SIRISENA *v.* HEMACHANDRA S.I. POLICE PELIYAGODA 95

Curator

See under — MINOR.

Customs Ordinance

Customs Ordinance, section 166(1) — *Charge of theft thereunder — Ingredients of the offence.*

Held: (1) That Section 166(1) of the Customs Ordinance postulates two requirements as being necessary to the conviction of a person in possession of an article suspected to have been stolen. *Firstly* — that such person does not give an account to the satisfaction of the Magistrate as to how he came by such article; *Secondly* — that the Magistrate should be satisfied that having regard to all the requirements of the case there are reasonable grounds for suspecting such article to be stolen.

(2) That the mere acceptance of the prosecution version and the rejection of the defence does not amount to a finding by the Magistrate that he is satisfied that there were reasonable grounds for suspecting the article to have been stolen. The latter involves an independent inquiry on which independent findings are required. An answer adverse to the accused on the question how he came to be in possession does not necessarily lead to an answer against him on the question whether the property is reasonably suspected to have been stolen.

Per **Weeramantry, J.** "When special offences of this nature are created by the Legislature and in particular in the case of offences involving a reversal of the usual rules of proof, it is of the utmost importance that there should be the strictest and most scrupulous insistence on those factors which the Legislature itself has postulated as pre-requisites to a conviction."

VICTOR *v.* INSPECTOR OF CRIMES, HARBOUR POLICE 66

Debt Conciliation Ordinance

Debt Conciliation Ordinance (*Cap.* 81) — *Settlement of mortgage debt recorded in terms of Section* 30 — *Payment by instalments — In case of single default creditor at liberty to seek remedy — Default after one payment — Application by creditor under Section* 43 *for hypothecary decree — Decree entered for sale of property mortgaged — Has District Court jurisdiction to enter such decree — Mortgage Act* — (*Cap.* 89) *Its applicability.*

The defendant executed a Mortgage Bond in 1954 in favour of the plaintiff to secure a debt of Rs. 20,000/-. They were parties to a settlement under Section 30 of the Debt Conciliation Ordinance. According to the settlement *inter alia* the debtors had to pay jointly and severally a sum of Rs. 100/- on or before 4.5.54 and thereafter they should pay by quarterly instalments of Rs. 500/- each. The 1st of such instalments to be paid on or before 4.8.59. In the event of a single default the creditor is at liberty to seek legal remedy.

No payments were made by the debtors (defendants) and on an application by the creditor, (plaintiff) to the District Court for a decree to be entered under Section 43 of the Debt Conciliation Ordinance a decree *nisi* was entered on 14.9.61, in terms of the settlement and asking for a hypothecary decree for sale of the property mortgaged by said Bond. Accordingly decree *nisi* including a hypothecary decree for the sale of the land mortgaged was entered and later made absolute.

Held: (1) That the effect of Section 40 of the Debt Conciliation Ordinance in the facts of the present case is that not only the obligation of the debtors to pay the sum of Rs. 20,000/- with interest, but also the obligation arising from the hypothecation of the land became merged in the settlement.

(2) That the words in the proviso to Section 40(1) clearly establish that a settlement under the Debt Conciliation Ordinance, unless it expressly provides otherwise, does not extinguish the right of a creditor to obtain a hypothecary decree for the sale of the property mortgaged as security for the debt.

(3) That the absence of a provision in the settlement in this case authorising a court to enter a hypothecary decree itself is a sufficient ground to hold that Section 43 of the Ordinance did not vest the District Court with jurisdiction to enter a hypothecary decree.

Held further: (4) That a settlement under the Ordinance cannot confer jurisdiction on a Court, even by express provision to enter a hypothecary decree otherwise than in an action maintained in conformity with the special procedure laid down in Part II of the Mortgage Act (Cap. 89)

(5) That therefore, the decree appealed from should be amended by deleting all provisions relating to the mortgaged property and its sale thereunder.

Per **H. N. G. Fernando, C.J.** "I should add that since the original debt becomes merged in a settlement under the Debt Conciliation Ordinance, such a settlement should clearly set out the amount of the debt to be payable according to its terms."

SAWDOON UMMA *v.* FERNANDO 109

Divorce

Divorce — Action by wife on ground of malicious desertion—Counter-claim by husband on same ground— Legal advice leading to consensual arrangement to live in temporary separation — This thought to be conducive to resumption of cohabitation — Disagreement regarding one of the conditions — Defendant's insistence that it should not be omitted — Negotiations coming to a standstill — Unreasonableness of defendant's conduct — Does it amount to malicious desertion by defendant?

The plaintiff wife sued her husband the defendant for a divorce on the ground of malicious desertion. He made a counter-claim for divorce on similar grounds. The husband had assaulted his wife on two occasions causing injury to her face and head. On legal advice leading to a written consensual arrangement, the wife continued to live in the matrimonial home with their younger daughter while the husband with the elder daughter took up residence with his parents in the home which was next door. The consensual separation was to be temporary and was thought by the legal advisers of both parties to be conducive to a consideration of the conditions on which there could be a resumption of married life. The document prepared by the legal advisers contained six conditions for the resumption of cohabitation and was signed by the wife but not by the husband. There was disagreement between the parties regarding one of the conditions marked (d), viz. that the plaintiff and the defendant should not communicate any views to their children concerning their grandparents. The disagreement arose as a result of the plaintiff's insistence that, if she were questioned by the children she would tell them the truth about the defendant's parents, viz, their ill-treatment of her. The defendant refused to agree on the plea that the plaintiff, under cover of telling the truth, would convey her own derogatory opinions to the children. Thereupon the negotiations of the legal advisers came to a standstill and the separation of the plaintiff and the defendant continued. During the temporary separation, the defendant acquiesced in or connived at the conduct of his parents when they used physical violence on the plaintiff on certain occasions. The trial judge accepted the evidence led by the plaintiff and found that the defendant had maliciously deserted her. His counter-claim was dismissed.

Held: That the condition (d) was unreasonable as it had the effect of preventing the plaintiff from telling the truth, even when questioned by the children, about the conduct of the defendant's parents towards her. The defendant's insistence on the observance by the plaintiff of an unreasonable condition for the resumption of cohabitation indicated his firm intention not to resume married life with the plaintiff. The defendant therefore was guilty of malicious desertion. His counter-claim was dismissed.

Per **Alles, J.** "All the offers of a reconciliation came from the wife. The trial judge rightly held that the defendant was to blame for the failure of the attempts to bring about a reconciliation since the consensual separation. I therefore agree with the order of the trial judge."

(Editorial Note: There is no other Ceylon case on the points raised and decided in the judgments though there are similar cases in the English reports cited at the trial and in appeal).

CANAKERATNE *v.* CANAKERATNE 60

Evidence

Evidentiary value of newspapers.

LIYANAGE *v.* INSPECTOR OF POLICE BORELLA .. 11

Labour Tribunal — Not bound by provisions of Evidence Ordinance.

CEYLON TRANSPORT BOARD *v.* CEYLON TRANSPORT WORKERS' UNION 33

Admission by conduct.

FERNANDO, FOOD & PRICE CONTROL INSPECTOR *v.* SAMEENA 37

Recalling of witness by trial judge — When exercisable.

QUEEN *v.* JAYASENA & OTHERS 44

Evidence Ordinance

Section 57 — Judicial notice that a particular place is situated within a particular administrative district.

HAMZA NAINA *v.* INSPECTOR OF POLICE, GAMPAHA .. 90

Section 25(1) — Confession to security officer — Admissibility.

SIRISENA *v.* HEMACHANDRA S.I. POLICE, PELIYAGODA 95

Excise Ordinance

Possession of excisable article — First offender — — Sufficiency of fine in ordinary cases.

Held: That in excise offences an option of a fine should ordinarily be given to a first offender.

AGNES FONSEKA *v.* PERERA 88

First Offenders

Offender under Excise Ordinance — Sufficiency of fine in ordinary cases.

AGNES FONSEKA *v.* PERERA 88

Habeas Corpus

Habeas Corpus — Custody of child of tender years — Paramount consideration interests of child — Preferent right of father may be overlooked, if unfitness of mother not established.

Where the mother of a child, about one year and a half old, sought its custody from her husband on the ground that the child is being wrongfully kept away from her by him.

Held: That in matters of custody of children, the paramount consideration is the interests of the child. In the present case therefore the custody of a child of tender years ought to be awarded to the mother despite the preferent right of the father, if there is no convincing evidence of unfitness on the part of the mother to be entrusted with the child.

BOTEJU *v.* JAYAWARDENA & OTHERS .. 55

Housing and Town Improvement Ordinance

Municipal Councils Ordinance, (Cap. 252), section 47 — Housing and Town Improvement Ordinance (Cap. 199) section 5 — Where statute expressly creates a right or provides specific remedy for breach — Is a person entitled to insist on other remedies?

Municipal Council — Resolution to open new road adopted — No steps taken to acquire land and demarcate street lines for several years — Owner of land over which proposed road would run applying for permission to build on such land — Permission not granted pending demarcation of street lines — Owner laying foundation in view of delay in approving plans — Prosecution of owner and conviction under Housing and Town Improvement Ordinance — Subsequent civil action for declaration that council entitled to construct road, that owner not entitled to construct building without permission from Chairman and for injunction to stop building operations — Is the Council entitled to the reliefs prayed for?

In July 1959, a Municipal Council adopted a resolution of its Works Committee that a new road be opened and that street lines be demarcated for the purpose. The proposed road ran over a part of the land owned by the defendants. the Council however, did not take any steps to acquire the land from the owners even at the date of the institution of this action which was in January, 1963.

On 3/4/62 the defendants forwarded to the Chairman of the Council for his approval under section 5 of the Housing and Town Improvement Ordinance plans and specifications to erect a building on their land. The approval was not granted pending the laying down of street lines and in view of this delay, the defendants laid the foundation for a building which took in a strip of land within the proposed street lines. The defendant was prosecuted under section 13 of the said Ordinance and was convicted.

The Council then instituted this action praying —

(*a*) for a declaration that the plaintiff is entitled to construct the proposed road after paying compensation to the defendants;

(*b*) for a declaration that the defendants are not entitled to construct the building without a permit from the plaintiff under section 5 of the said Ordinance;

(*c*) for a declaration that the unauthorised building be removed;

(*d*) for an interim injunction against defendants to stop building operations on the said land, and

(*e*) for a permanent injunction to stop all building operations on the said land.

The learned District Judge gave judgment in terms of the prayer and the defendants appealed.

Held: (1) That the plaintiff is not entitled to the declaration in (a) above in view of section 47 of the Municipal Councils Ordinance which expressly empowers the Council *inter alia* to lay out and construct new roads.

(2) That the plaintiff is not entitled to the declaration in (b) as a specific remedy has been provided by the statute where, in contravention of the obligation created by section 5 of the Housing and Town Improvement Ordinance, any person erects a building within the limits administered by a local authority except in accordance with plans, drawings and specifications approved by the Chairman.

(3) That the plaintiff is not entitled to the prayers in (c), (d) and (e) for the same reason as these reliefs are claimed on the basis that the defendants erected a building in contravention of the obligation imposed on them by the said section 5.

Per **Siva Supramaniam, J.** "Where an obligation does not arise under the common law but is created by Statute, one must look to the Statute to see if there is a specific remedy contained in it for a breach of that obligation. If a specific, remedy has been provided, no other remedy is available."

PERERA & ANOTHER *v.* THE MUNICIPAL COUNCIL OF NEGOMBO 28

Immigration and Emigration Act

Charge — Duplicity — Immigration and Emigration Act — Charge under sections 9 and 20 or alternatively under section 15(e) of the Act as amended by Act No. 68 of 1961, punishable under section 45 A(1)(b) — Is said charge bad for duplicity?

The accused appellant was convicted on a charge of concealing or harbouring ten persons, all of South India, knowing that such persons had entered Ceylon in contravention of sections 9 and 10 of the Immigration and Emigration Act, or has remained in Ceylon in contravention of section 15(*e*) of the said Act as amended by Act No. 68 of 1961 punishable under section 45A(1) of the Act as so amended.

The evidence established that the appellant was the chief occupant of the premises where the ten persons were living at the time they were arrested.

In appeal it was contended on behalf of the appellant that the words "conceals" or "harbours" in section 45A(1)(b) create two distinct offences and therefore the charge was bad for duplicity.

Held: That the words 'conceals' or 'harbours' in the aforesaid section 45A(1)(b) allege one activity, namely "of keeping away.' Therefore, the submission that the charge is bad for duplicity fails.

Per **Pandita-Gunawardena, J.** "The gravamen of the charge under this section can be rightly said to be one, of 'keeping away.' It would appear to me that the words 'conceal' and 'harbour' are used adjectively to describe more fully the one act complained of."

YOGAGURU *v.* KANDIAH, INSPECTOR OF POLICE .. 31

Indian and Pakistani Residents

Indian and Pakistani Residents (Citizenship) Act of 1949 (Cap. 350), Sections 5, 7, 10 and 15 — Application for registration as citizen of Ceylon made after expiry period prescribed in Section 5 — Refusal to register by Commissioner on grounds other than that application out of time — Appeal to Supreme Court — Point that application out of time taken for first time in appeal and upheld — Appeal to Privy Council — Correctness of Supreme Court view affirmed — Imperative nature of words in Section 5 — Duty of Court to take notice of limitation of jurisdiction.

The Indian and Pakistani Residents (Citizenship) Act of Ceylon was enacted on 5/8/1949 making provision for granting of the status of a citizen of Ceylon by registration to Indians and Pakistanis who had the qualification of past residence in Ceylon for a certain minimum period.

Section 5 of the Act provided as follows: "The privilege or extended privilege conferred by this Act shall be exercised in every case before the expiry of a period of two years reckoned from the appointed date (defined in Section 24 as 5th August, 1949): and no application made after the expiry of that period shall be accepted or entertained, whatsoever the cause of the delay."

The appellant made an application on 4/12/1956 for registration under the Act, more than 5 years after the expiry of the period referred to in Section 5 above.

The Deputy Commissioner served the appellant a notice dated 5/8/1957 stating that he had decided to refuse the application on four grounds (other than the ground that the application was out of time.) unless the appellant showed cause to the contrary within a specified period.

After inquiry at which a substantial amount of evidence led the Commissioner refused the application as he was not satisfied as to the alleged extent of past residence in Ceylon and consequently that the appellant was permanently resident in Ceylon.

On an appeal to the Supreme Court against this refusal the Counsel for the respondent, after notice given to the appellant's counsel shortly before hearing, took the objection for the first time that the application was out of time. The Supreme Court, per Tambiah, J. rejecting a contention on behalf of the appellant that the appellant had made an earlier application through his brother, held that the application should not have been entertained by the Deputy Commissioner, nor should it be entertained by the Supreme Court and dismissed the appeal.

Before the Privy Council it was contended (*a*) that the Supreme Court ought not to have considered the application out of time (i) as the necessary evidence was not available to the appellant as the point was raised for the first time at the hearing of the appeal (ii) as the scope of the inquiry and the resulting appeal was limited to the four grounds set out in the Commissioner's notice.

(*b*) that the maxim *omnia praesumuntur rite esse acta* should be applied in support of the appellant's argument and accordingly it should be inferred that the Commissioner entertained the application because he had special facts before him such as an earlier application of or to which this application was a mere amplication, which justified him in doing so,

Held: (1) That there is nothing to suggest that the appellant's application is an amplification of or supplement to a previous application or that there was any previous application.

(2) That the provisions of section 5 of the Act are clear and emphatic and their effect is unmistakable. They are imperative provisions and they restrict the jurisdiction of the Commissioner and consequently that of the Supreme Court. The Court must take notice of a limitation of its jurisdiction.

(3) That the maxim "*omina praesumuntur rite esse acta*" can be turned against the appellant, because

it must be assumed *prima facie* that the complete file on complete set of relevant records was produced from the Commissioner's office and there was no trace of any earlier application.

SAHIB *v.* THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS .. 81

Industrial Disputes Act

Sections 31B, 31C and 39(1) — Labour Tribunals — Application for relief thereto — Regulation 16 made by Minister of Labour under Section 31C(2) and 39(1) of Act prescribing time limit for the making of such application — Whether such regulation ultra vires.

SILVA *v.* MUTHUPALA 13

Labour Tribunals — Duties of such Tribunals in regard to admission and rejection of evidence — Not bound by provisions of Evidence Ordinance — Discretion given to admit evidence that cannot be regarded as judicial evidence — Discretion to be exercised reasonably — Industrial Disputes Act (Cap. 131) as amended, Section 36(4).

Industrial Disputes Act, Section 31C(1) — Duty of Tribunal to act judicially in its approach to the evidence — Questions of fact to be decided apart from extraneous considerations — "Just and equitable" order must be in regard to facts so found.

Section 36(4) of the Industrial Disputes Act provides that a Labour Tribunal "shall not be bound by any of the provisions of the Evidence Ordinance."

In the present case the President of the Labour Tribunal had not acted on a statement signed by the workman and produced by the employer at the inquiry before him, in which the workman had admitted complicity in the offence he had been accused of. The workman gave evidence in the Tribunal denying complicity in any offence and also stated that he had been forced to put his signature on a blank paper. For the employer, evidence was led of the circumstances in which the workman came to make the confession and also of his complicity in the offence of theft.

After summing up the evidence the President of the Tribunal had said that this statement "would probably not have been admissible in a criminal case" and that although the Tribunal was not bound by the rules of evidence "such a statement must be received with caution."

Held: (1) That the two questions that arose for determination by the Tribunal in regard to the alleged admission were whether the statement had in fact been made by that particular workman and, if so, whether it could safely be relied on as containing the truth. In the present case the Tribunal had failed to deal with either question.

(2) That on a full evaluation of the evidence the answer to both questions should have been in favour of the employer.

(3) That sections 36(4) was only intended to give the Tribunal a discretion which had to be exercised, reasonably, to admit as evidence matter which the Tribunal considers material even though a Court of law would not regard it as judicial evidence. The section must not be regarded as a provision which enabled a Tribunal to apply exclusionary rules of evidence more rigorous than those contained in the Evidence Ordinance.

Section 31C(1) of the Industrial Disputes Act reads as follows:

"Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as may appear to the tribunal to be just and equitable."

Held: (1) That this section must not be read as giving the Labour Tribunal a power to ignore the weight of evidence or the effects of cross-examination on the vague and insubstantial ground that it would be inequitable to the other party to so consider it. The President of the Tribunal must decide all questions of fact "solely on the facts of the particular case, solely on the evidence before him and apart from any extraneous considerations."

(2) That the Tribunal must act judicially in its approach to the evidence. It is only after the facts have been so ascertained that the next stage, which is to make an order that is just and equitable upon the facts so found, is entered upon.

Per **Tennekoon, J.** "The reference in many texts and judgments to the powers of industrial courts and similar tribunals as 'arbitral' as opposed to 'judicial' must not be understood to mean that these tribunals are licensed to act arbitrarily."

CEYLON TRANSPORT BOARD *v.* CEYLON TRANSPORT WORKERS' UNION 33

Industrial Disputes Act Section 31H — Reference for settlement of dispute arising out of intended retrenchment — Suspension for two months of Employer's right to retrench — Necessity for award to be made within such two month period.

Held: That where an industrial dispute arising out of an intended retrenchment is referred for settlement under Section 31H of the Industrial Disputes Act, the award must itself be made before the expiry of the two months period specified in the Section.

JONES & CO. *v.* DE SILVA 89

Inquests

Can finding as to the cause of death entered by a Magistrate be quashed by Supreme Court (a) by way of a Writ of Certiorari or (b) by acting in revision.

Object and procedure of an inquest of death.

Non-judicial nature of inquest proceedings.

Duties of a Magistrate in inquest proceedings — Appearance of lawyers at such proceedings.

SENEVIRATNE *v.* THE ATTORNEY-GENERAL & ANOTHER 1

Interpretation Ordinance

Section 2(ii) — Singular includes the plural.

PUNCHIMAHATMAYO *v.* WIJEDORU 104

Judicial Notice

Can Court take judicial notice that a particular place is situated within a particular administrative district.

HAMZA NAINA *v.* INSPECTOR OF POLICE, GAMPAHA .. 90

Jurisdiction

Of District Court within which minor resides to deal with minor's property outside the jurisdiction.

FERNANDO *v.* FERNANDO 51

Limitation of jurisdiction by Statute — Duty of Court to take notice of.

SAHIB *v.* THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS .. 81

Kandyan Law

Kandyan Law Declaration and Amendment Ordinance of 1939 (*Cap.* 59), *Sections* 4 *and* 5 *— Kandyan Gift, described as gift irrevocable and subject to fideicommissum— Is the word 'irrevocable' sufficient to constitute an express renunciation of the right to revoke within the meaning of Section* 5(1)(*d*) *of the Ordinance*?

A Kandyan deed of Gift in respect of certain lands in favour of R made in 1941, contained the following material words in its recital:— "the donor ..... doth hereby grant convey assign, transfer set over and assure unto the said donee as a gift irrevocable" and further provided that it was subject to a fideicommissum in favour of R's legal issue failing whom the premises were to devolve absolutely on T.

R having died in May, 1943, the donor purported to revoke the said gift by a deed in October, 1943 and on the same date conveyed these lands to the appellant.

In 1959 R's only child (the respondent), appearing by her next friend sued the appellant for a declaration of title to the said lands basing her claim on the said gift of 1941. The appellant relied on the said purported revocation and the conveyance on the same day.

The determination of the rights of the parties depended on (*a*) the construction of the said deed of gift of 1941. (*b*) the construction of section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance of 1939.

The material words of the said Section 5(1)(d) are as follows:— ..... "it shall not be lawful for a donor to cancel or revoke any of the following gifts when any such gift is made after the commencement of this Ordinance:

(*a*) ..... (*b*) ..... (*c*) .....

(*d*) any gift the right to cancel or revoke which shall have been expressly renounced by the Donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words "I renounce the right to revoke" or words of susbstantially the same meaning....."

The District Court held that the use of word "irrevocable" in the deed of gift was sufficient to constitute an express renunciation of the right to revoke the gift within the meaning of section 5(1) (d) of the said Ordinance of 1939. The Supreme Court on appeal confirmed the decision of the District Court following a previous decision of its own in *Punchi Banda* v. *Nagasena* (1963) 64 N.L.R. 548.

On an appeal to the Privy Council.

Held: (Lord Donovan *dissentiente*) (1) That prior to the passing of the Kandyan Law Declaration and Amendment Ordinance of 1939, gifts being treated as contracts, the courts looked at the intention of the parties as expressed in deeds by which the gifts were effected. Judicial decisions appear to have been influenced in some cases by the English doctrine of consideration.

(2) That since the passing of the said Ordinance of 1939, the position has changed, and in construing the Ordinance it is necessary to consider whether its requirements have been complied with irrespective of the intention which can be found on a reading of the original document. The intention may have been to give up the right to revoke, but this is not the same as the express revocation of a right. The renunciation is to be expressed not implied.

(3) That, therefore the word "irrevocable" used in the deed is not a sufficient compliance with the requirement of the said Ordinance of 1939.

DULLEWE *v.* DULLEWE & ANOTHER 97

Labour Tribunals

See under — INDUSTRIAL DISPUTES ACT.

Land Acquisition

Land Acquisition Act — Award made by acquiring officer under Section 17 *after inquiry under Section* 9 *— Appeal against award to Board of Review — Sections* 23*A* (*introduced by Amendment Act of* 1964) *and* 24(4) *— Is the making of an award a Judicial decision*?

Regulations made by Minister under Section 63(2) *of the Act regarding evidence required in proceedings before Board — Regulations* 2, 6 *and* 7 *— Evidence before Board restricted to one expert on either side — Appellant in addition permitted to rely on documentary evidence of comparable transactions and evidence led*

at inquiry — Do these regulations affect only the right of the appellant — Can acquiring officer call evidence of non-expert to speak to facts at the hearing of appeal.

Landlord and Tenant

Landlord and Tenant — Action for ejectment by landlord on ground of sub-letting — Second defendant admittedly carrying on business in premises let to defendant — No proof that 2nd defendant had exclusive possession of a portion of premises — Can the landlord maintain action.

Held: That in a case where it was alleged by the landlord that his tenant had sublet a portion of the premises to another person for the purpose of the latter's business, the landlord could not succeed in obtaining a decree for ejectment on this ground even though the alleged sub-tenant was carrying on business in the said premises, if there was no proof that the alleged sub-tenant had the exclusve possession and occupation of a separate portion of the premises.

Legal Maxims

Omnia praesumuntur rite esse acta.

Magistrate

Duties of — in inquest proceedings.

Minor

Courts Ordinance Section 69(1) — Application to appoint Curator made to District Court of Negombo where minor resides — Prayer for permission to sell minor's immovable property situated at Puttalam — Court's refusal to grant permission on the ground that property situated outside its territorial jurisdiction — Is the refusal valid—Roman Dutch Law—Desirability that same Court should exercise all supervisory functions — Civil Procedure Code, Section 584 — Effect.

Civil Procedure Code, Sections 6 and 9 — Whether such application is an "action" as defined therein — Jurisdiction of Court under Section 9.

The petitioner-appellant made application to the District Court of Negombo praying (a) that he be appointed curator of the property of the 1st respondent, a minor resident within the Jurisdiction of that Court;

(b) for permission to sell an item of immovable property belonging to the minor situated in the Puttalam District.

The learned District Judge dismissed the prayer for permission to sell on the ground that the land was situated outside the territorial limits of his jurisdiction.

Held: (1) That the learned District Judge was wrong in his view that he had no jurisdiction to grant permission.

(2) That the words "within its district" in the paragraph in section 69 of the Courts Ordinance providing for the care of the persons of minors and wards and the charge of their property, have been on more than one occasion held by the Supreme Court to qualify the words "minors" and "wards" rather than the word "property". It is well settled law that under section 69 of the Courts Ordinance the jurisdiction of a District Court to appoint guardians and curators of minors and their estates depends on the residence of, the minor within the territorial limits of the jurisdiction of such Court.

(3) That even under the Roman Dutch Law, the appointment of a curator over the property of a minor would ordinarily give that curator control over all the property of the minor even though some items of property be situate outside the territorial limits of the court making the appointment.

(4) That as a practical reason it is desirable that the supervisory function of the Court, over 'minors' as their proper guardian, should not be split as between different Courts, but the court should be able to have that overall view of the minor's affairs and of the conduct and activities of the guardian or curator which would be neccessary for a proper assessment of the necessity for sale or other disposition of property.

(5) That the said application constitutes an action as defined in section 6 of the Civil Procedure Code. The minor respondent would be in the position of a defendant and the Court of the minor's residence would have jurisdiction in terms of section 9(a) of the Civil Procedure Code to hear and determine the application.

(6) That the mere existence of section 584 of the Civil Procedure Code is not sufficient of itself to justify a departure from the above view that the intention of section 69(1) of the Courts Ordinance was to vest jurisdiction in the Court of residence.

Custody of child of tender years — Paramount consideration interests of child.

Misdirection

See under — COURT OF CRIMINAL APPEAL DECISIONS

Mortgage

Hypothecary Action — Default by defendant on date of filing answer — Case fixed for ex parte trial — On the day of ex parte trial defendant filing affidavit and praying for time to pay balance due — No application for purge of default — Court granting defendant's application — Has the Court power to grant such relief before ex parte hearing and entering of decree absolute — Mortgage Act (Cap. 89) Sections 48(1) and 59 — Civil Procedure Code, Sections 85 and 87(1).

On the day allowed for filing the answer in a hypothecary action, the defendant and his proctor were absent and the Court fixed the case for *ex parte* trial on 5/8/65. The defendant appeared on this day and tendered an affidavit admitting the claim subject to certain payments after institution of action, praying for six months' time to pay the arrears of the instalments and to pay the balance in annual instalments as agreed at the execution of the bond. He set out no grounds for his default.

The plaintiff objected to the defendant being heard until he had purged his default, but the learned District Judge held that he was entitled to consider the application before the *ex parte* trial and granted the relief prayed for. The plaintiff appealed.

Held: (1) That the learned District Judge was wrong in considering the affidavit tendered by the defendant before he heard the case *ex parte* and passing a decree absolute as required by section 85 of the Civil Procedure Code.

(2) That the Court had no power to grant relief except under section 48(1) of the Mortgage Act, which requires an application to be made in that behalf by the defendant.

(3) That the words "shall proceed to hear the case *ex parte*" in section 85 of the Civil Procedure Code (made applicable to hypothecary actions by section 59 of the Mortgage Act) mean that *the next step the Court shall take is to hear the case ex parte*, which need not necessarily be on the same day, but is an imperative direction.

(4) That after decree absolute is entered in terms of section 85 of the Civil Procedure Code, no application for relief under section 48(1) is permissible until the decree is vacated by making an application under section 87(1) of the Code and succeeding thereon.

CEYLON SAVINGS BANK *v.* NAGODAVITANE .. 38

Mortgage Act — Settlement of mortgage debt recorded in terms of Debt Conciliation Ordinance — application by creditor for hypothecary decree entered by District Court — Has the court jurisdiction.

SAWDOON UMMA D/O/ THAMBY RAJA *v.* FERNANDO .. 109

Municipal Councils Ordinance

Section 47 — Council is not entitled to a declaration that it is entitled to construct a road—Where a statute expressly confers a right, a declaration from a court is not required to establish the existence of that right.

PERERA & ANOTHER *v.* MUNICIPAL COUNCIL OF NEGOMBO 28

Negligence

Allegation of gross negligence against notary—Action for damages — Failure to discover, while searching in Land Registry, two deeds affecting title of mortgagor relating to seven out of eight lands mortgaged to secure loan.

GETAGAHAWALA ESTATE *v.* RAFEEK & ANOTHER .. 17

Newspapers

Evidentiary value of —

LIYANAGE *v.* INSPECTOR OF POLICE, BORELLA .. 11

Non-Direction

See under — COURT OF CRIMINAL APPEAL DECISIONS

Notaries

Notary — Allegation of gross negligence against — Action for damages — Failure to discover, while searching in Land Registry, two deeds affecting title of mortgagor relating to seven out of eight lands mortgaged to secure loan by plaintiff —Hypothecary decree — Sale in execution — Absence of bidders — Leaflets informing prospective buyers regarding said two deeds and defect in mortgagor's title — Two deeds not-registered in folios relating to the seven lands mentioned therein — Registered in separate folios — Cross-references suspicious — Effect — Whether damages suffered by plaintiff — Mortgage Act (Cap. 89), section 16 — Evidence Ordinance, sections 35 and 114(d).

Deeds combining undivided shares of some lands with divided interests of other lands to form separate corpus — Whether permissible — Are they registrable instruments? — Registration Ordinance (Cap. 119), section 49, rules 5, 6(3), 10(9), 13(3), 14 made thereunder — Procedure adopted by Registrar in registering deeds and making cross-references — By whom and when can cross-references be made?

The plaintiff Company sued the executors of the estate of the deceased Notary A, claiming damages in a sum of Rs. 25,302/78 for alleged gross negligence on his part in that he failed to discover two deeds while searching the Land Registry, which search he undertook for the purpose of recommending title to eight lands in connection with a Mortgage Bond executed by one P in 1960 to secure a loan of Rs. 25,000/- from the plaintiff Company. By the said two deeds produced as P18 and P19, P had transferred his title in seven of these lands to his two sons. This was brought to light when in consequence of a hypothecary decree subsequently entered against P. the properties were put up for sale in execution. At the sale there were no bidders for the said seven lands, due to some leaf-

lets being published informing prospective buyers that P had only "limited interests in the lands put up for sale."

The said two deeds P18 and P19 were not registered in any of the folios relating to the seven lands dealt with in those deeds. P had purported to consolidate his undivided interests in some lands with his divided interests in others to form a separate corpus as depicted in a plan and purported to transfer to each of his sons a share of that corpus.

The two deeds however, were registered in an entirely different folio but with certain cross-references the authenticity of which was challenged as having been made on a later date by an unauthorised person.

From an examination of the documents produced it became clear (a) that not one of the cross entries or the dates on the folios relating to the seven separate lands had been signed or initialled by the Registrar who is the only person empowered to make a cross-reference under the provisions of the Registration of Documents Ordinance and the Rules made thereunder.

(b) that in the certified copy produced of the folio in which P18 and P19 were registered, there was nothing to indicate that the cross entry appearing therein had been initialled by any one at the time the certified copy was issued in September, 1963, but in the original produced at the trial there appears an initial.

The evidence of the Managing Director of the plaintiff Company showed that the Notary had informed him that he had made the search and that one of the lands was subject to a life interest.

Held: (1) That in the circumstances, the relevant cross references are exceedingly suspicious and as these suspicions have not been removed by the parties relying on those entries by calling evidence to prove that they are genuine, the Court should not draw the presumption under Section 114(d) of the Evidence Ordinance that they had been made in the regular performance of official duties.

(2) That the plaintiff had failed to establish gross negligence on the part of the deceased notary.

(3) That it is a physical and legal impossibility to combine undivided shares of some lands with divided interests in other lands and thus create a new land on paper as was attempted in P18 and P19.

(4) That, therefore, the Registrar should not have opened a new folio to register those 2 deeds. They could have been correctly registered in the 7 different folios, with cross references duly made at the time of registration as the schedules in the deeds described these 7 lands as well.

(5) That the plaintiff had suffered no damages as the mortgage bond has, by virtue of due registration, priority over the deeds P18 and P19 and any purchaser at the sale in execution will therefore get good title.

Per **Sirimane, J.** (*A*) "Learned counsel for the appellant contended that the purchasers would be reluctant to buy lands with a defective title. But the defect must be shown to be a legal defect and not merely a suspicion of bad title."

(*B*) "The action being brought against the estate of a dead man, the evidence must 'be looked at with great jealousy and care' (vide *Murugappah Chettiar* v. *Muththal Achy* 58 N.L.R. page 25)."

GETAGAHAWALA ESTATE *v.* RAFEEK & ANOTHER .. 17

Paddy Lands Act

Paddy Lands Act — Complaint by tenant cultivator of eviction by petitioner in 1963 *— Inquiry by Commissioner of Agrarian Services — Finding that person was joint cultivator with Petitioner's husband — Order restoring him to possession — Unsuccessful appeal by petitioner to Board of Review.*

Certiorari, application by way of, for quashing said proceedings and orders on ground that at time of complaint, Act recognised no joint cultivators — Amending Act of 1964 *— Applicability — Purpose of Amendment in Section* (1*A*) *— Jurisdiction — Retrospective operation.*

On an application made in 1963 by the 2nd respondent (a tenant cultivator) to the 1st respondent, (the Commissioner of Agrarian Services) for restoration to possession of a field from which he alleged he was evicted by the petitioner, the 1st respondent after a prolonged inquiry, ending in August, 1965 held that the 2nd respondent was wrongly evicted as he was a joint tenant cultivator with the husband of the petitioner and ordered restoration to possession of the said field.

After an unsuccessful appeal to the Board of Review constituted under the Paddy Lands Act, the petitioner made this applicaton to the Supreme Court praying for the quashing of the proceedings held and orders made by the 1st respondent restoring the 2nd respondent to the possession of the field.

It was submitted on behalf of the petitioner (*a*) that at the time of the said application by the 2nd respondent, no provision existed in the Paddy Lands Act recognising the rights of a joint tenant cultivator, and therefore, the 2nd respondent would not come within the definition of a tenant cultivator in section 3(1) of the Act.

(*b*) that the Amending Act, No. 11 of 1964 was intended to fill this gap and bring in joint cultivators within its scope,

(*c*) that as the Amending Act was not retrospective in operation, the 1st respondent had no jurisdiction to entertain the application or to make orders in terms of the Amendment.

Held: (1) That submission (*a*) above could not be accepted in view (i) of the provisions of Section 2(ii) of the Interpretation Ordinance that words in the singular number shall include the plural and (ii) the necessity for joint participation in the various operations of ploughing ,sowing and reaping inherent in the nature of paddy cultivation.

(2) That the purpose in introducing the new subsection (1A) immediately after section 3(1) by the Amending Act of 1964 seems to be to define clearly the position of cultivators in rotation.

(3) That as the original Act, which became law on 1/2/1958 was itself retrospective in its nature in that relief was given by it to persons whose grievances arose nearly two years before the passing of the Act, even if the Amending Act created a new class of tenants who were entitled to the reliefs set out in the original Act, in the absence of anything to the contrary as to the operative date from which such reliefs could be given it is reasonable to assume that the date already specified in the original Act, which now embodies the amending Act, is the operative date.

(4) That therefore, the 1st respondent was acting within his jurisdiction when he entertained the application and made the orders under review.

Per **G. P. A. Silva, A.C.J.** "Although it is not necessary to deal with this matter in order to decide on the initial contention of the petitioner, in view of the submission made by counsel, the question arises as to what the purpose was in introducing the new sub section 1A immediately after section 3(1) of the original Act. To my mind, it may well have been intended to define clearly the position of cultivators in rotation."

PUNCHIMAHATMAYO *v.* WIJEDORU, ASST. COMMISSIONER OF AGRARIAN SERVICES, KANDY & ANOTHER .. 104

Partition

Partition Action — Action filed under the Partition Act No. 16 *of* 1951 *— Can it be converted into a vindicatory action.*

The plaint in a partition action disclosed five co-owners, namely the plaintiff and the 1st to 4th defendants. The plaintiff and the second to fourth defendants were said to own 1/6th of the corpus each, and the first defendant to 2/6 share thereof. Answer was filed only by the 1st defendant who claimed the entirety of the corpus. At the trial a "settlement" was effected by converting the partition action to a *rei vindicatio* action and allotting the entire corpus to the plaintiff and the 1st defendant in specific shares, without any evidence having been led.

Held: That there is no provision in law to convert a partition action filed unter the Partition Act No. 16 of 1957 into a vindicatory action, and the plaintiff should proceed with the partition action.

MUTHUMENIKA *v.* PEIRIS & ANOTHER .. 80

Partnership

Partnership — Action to recover share of capital termination of partnership in 1949 *— Action instituted after seven years against partner who managed entire business — Two earlier actions by plaintiff against the same partner earlier to recover profits for two half years respectively in terms of partnership agreement — Defence pleas that plaintiff's claim is prescribed and also barred by section* 34 *of Civil Procedure Code — Partner — Does one partner stand towards another partner in relation of trustee or fiduciary?*

The plaintiff instituted this action on 1.6.1956 against the 1st defendant for the recovery of a sum of Rs. 13,423/60 together with legal interest thereon from 1.10.1949 alleging that this sum was due to him as his contribution to the capital of a partnership entered into by deed P1 of1948 by the 1st defendant, 5th defendant, a person named P and the plaintiff to carry on the business of buying and selling Government arrack as renters for the year October, 1948 to September, 1949.

P died and 3 and 4 defendants are his heirs. 2nd defendant is the husband of the 3rd defendant. No relief was claimed against the 2, 3, 4 and 5 defendants. P1 provided for all monies of the partnership should be in the custody of the 1st defendant and the trial Judge also held that the 1st defendant managed the entire business.

The plaintiff had successfully sued the 1st defendant earlier in case No. 5896 D.C. Jaffna for his half-share of the profits for 1st half year of the partnership and filed case 8646 D.C. Jaffna for profits for the 2nd half-year. The latter case had been laid by pending the determination of the present action:

It was contended *inter alia* by the 1st defendant:

(*a*) that the plaintiff's claim was prescribed:

(*b*) that the plaintiff could not maintain this action as it was barred by section 34 of the Civil Procedure Code.

The learned trial Judge held against the 1st defendant on both these pleas. On the question of prescription he referred to Sections 90 and 111 of the Trusts Ordinance and took the view that the defendant being the sole Manager of the partnership funds was in the position of a constructive trustee in respect thereof or in a fiduciary position. The 1st defendant appealed.

Held: (1) That the learned District Judge misdirected himself in reaching the conclusion that the 1st defendant (appellant) was in the position of a constructive trustee or in that of a fiduciary towards the plaintiff.

(2) That section 90 of the Trusts Ordinance is of no avail to the appellant as this section deals with what are in the nature of secret gains made by persons who are bound to others in a fiduciary position which position has to be decided according to English Law which is the law governing partnership.

(3) That section 111 of the Trusts Ordinance does not assist the plaintiff because sub-section 5 thereof excludes the application to constructive trusts except in so far as such trusts are treated as express trusts by the law of England. Text-books and decided cases are all against the view that one partner stands towards another partner in the relation of an express trustee.

(4) That the ordinary Statutes of Limitation apply to actions of account after dissolution of partnership or the exclusion of a partner.

(5) That therefore, this action having been filed after the expiry of six years from the date of termination of the partnership, section 6 of the Prescription Ordinance rendered it unmaintainable.

On the 2nd contention of the appellant aforesaid —

Held: (6) That section 34 of the Civil Procedure Code provides no bar to the claim in the present action as it is founded on a cause of action entirely different from the two earlier actions wherein the plaintiff sought to recover profits for the two half years respectively of the partnership in terms of the agreement P1.

KANDIAH *v.* KANDASAMY 73

Penal Code

Section 345 — *Charge of using criminal force with intent to outrage the modesty of a woman — Unsafe to act on the uncorroborated testimony of woman.*

Held: That when a person is charged with using criminal force with intent to outrage the modesty of a woman, it is usually unsafe to act on the uncorroborated testimony of the woman.

SAMSUDEEN *v.* NALLIAH, I.P. UPPUWELY .. 94

Section 367 — *Theft — Confession to security officer — Admissibility — Evidence Ordinance section* 25(1) — *Whether sufficient reasons given by Magistrate for this decision — Criminal Procedure Code, section* 306(1).

The accused, a mechanic, working at a depot of the Ceylon Transport Board, was apprehended by security officers after he had committed theft of a radiator belonging to the C.T.B. It was in evidence that the security officers had seen the accused remove the radiator from the bus in which it had been conveyed out of the depot, and attempt to hide it by the way side. It was also in evidence that the security officers had questioned the accused in answer to whom he had said "that he brought the radiator by himself." It was argued that the latter statement was a confession and inadmissible under section 25(1) of Evidence Ordinance.

Held: That as there was other evidence besides the alleged "confession" sufficient to establish guilt, and as the learned magistrate had not referred to the alleged "confession" at all in coming to a finding, it could not be said that the material evidence in the case had been affected by the admission of the accused's statement.

Held further: That where the magistrate stated in his Judgment that as the facts of the case were simple, and fell within a narrow compass beside the fact the prosecution case consisted of only two witnesses that for the defence only the accused gave evidence and proceeded to give reasons based on the demeanour of the witnesses it was a sufficient compliance with the provisions of section 306(1) of the Criminal Procedure Code.

SIRISENA *v.* HEMACHANDRA, S.I. POLICE, PELIYAGODA 95

Prescription

The ordinary statutes of limitation apply to actions of account after dissolution of partnership or the exclusion of a partner.

Privy Council Decisions

Proctor

Appearance of—On inquest proceedings

Registration of Documents

When should a new folio not be opened to register a deed — Authenticity of cross-references to different folios — Deeds combining undivided shares of some lands with divided interests of other lands to form separate corpus — Is this permissible — Are they registrable instruments — Procedure to be adopted by Registrar in registering deeds and making cross-references.

Rent Restriction

Rent Restriction Act (Cap. 274) as amended by Act No. 12 of 1966, section 12A(2) — Power of Court to grant relief to tenant in arrears of rent — Tenancy deemed to continue on payment of arrears if such relief granted — Has the Court power to make order that writ of ejectment issue against tenant after certain period even if arrears paid.

Section 12A(2) of the Rent Restriction Act (which was brought in by amending Act No. 12 of 1966 and which applies to premises of which the standard rent is under Rs. 100/-) enables the Court to give relief to a tenant where it is satisfied that the tenant has been in arrears of rent "on account of the tenant's illness or unemployment or other sufficient cause." The section goes on to provide that if the tenant pays to the Court the arrears of rent on such dates his tenancy of the premises shall, notwithstanding its termination by the landlord, be deemed not to have been terminated.

In the present case the defendant (tenant) was held to be in arrears of rent for more than a period of 3 months but had pleaded the benefit of section 12A(2). The learned trial Judge was satisfied that the defendant was entitled to relief under that section. However while granting relief under that section the learned Judge made order *inter alia* "that in any event writ of ejectment would issue after 21st October, 1968."

Held: That where a Court decided to grant relief under section 12A(2) of the Rent Restricton Act as amended by Act No. 12 of 1966, it must necessarily follow that, if its order regarding payment of the arrears is complied with, the tenancy is deemed to continue in force. The Court therefore had no power to order writ to issue against the tenant after a certain date "in any event". If the tenant complied with the conditions laid down by the trial Judge, his tenancy must be deemed not to have been terminated.

Landlord and Tenant — Sub-tenancy — Action for ejectment on ground of sub-letting— No notice terminating tenancy required — Proof of exclusive possession and occupation of separate portion necessary — Mere permissive user insufficient — Lease of business, not sub-letting of premises — Rent Restriction Act (Cap. 274) section 9.

The plaint sued the two defendants for ejectment from certain premises and also prayed for arrears of rent and damages from the 1st defendant. The plaintiff relied on an alleged sub-letting of the premises by the 1st defendant to the 2nd defendant.

Held: (1) That where a tenant sub-lets the leased premises in contravention of section 9 of the Rent Restriction Act No. 29 of 1948, the landlord is entitled to institute proceedings in ejectment without terminating the tenancy by notice.

(2) That in a case of sub-tenancy the essential test is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has by agreement placed the alleged sub-tenant in exclusive possession. Mere permissive user does not create the relationship of tenant and sub-tenant. There should be proof that the sub-tenant had the exclusive possession and occupation of a separate portion of the premises.

(3) That the lease of a business does not amount to sub-letting of the premises in which the business was carried on.

Revision

Does not lie to quash inquest proceedings even when held by a Magistrate.

Present: **Tennekoon, J.**

In the matters of Application for Revision in J.M.C. Colombo Case No. 6653/B and Application for a Mandate in the nature of a Writ of Certiorari on the Colombo Joint Magistrate and others.

S. C. Application No. 28/'67

E. A. SENEVIRATNE *vs.* THE ATTORNEY-GENERAL & ANOTHER

S. C. Application No. 29/'67

E. A. SENEVIRATNE *vs.* K. VINCENT SWARNADHIPATHI & ANOTHER

Argued: 15th, 22nd, 29th, & 30th September, and 1st & 13th October, 1967.
Decided on: 23rd May, 1968.

Criminal Procedure Code, sections 9, 356, 361, 362, 363, 364—*Inquest of death—Can a finding as to the cause of death entered by a Magistrate be quashed by the Supreme Court (a) by way of a Writ of Certiorari or (b) by acting in revision—Object and procedure of an inquest of death—Non-judicial nature of inquest proceedings — Exclusion of inquest inquiries from the purview of section* 356 *Criminal Procedure Code and section* 19 *of the Courts Ordinance— Test as to when a Writ of Certiorari would lie.*

Duties of a Magistrate in inquest proceedings — Appearance of lawyers in such proceedings — Position of the Attorney General's Department at inquest stage — Facts.

On 16.4.66, the Joint Magistrate of Colombo received a letter from the Officer in Charge, Fort Police, which stated that ".....one Lokugama Vidanelage Podi Appuhamy who was brought to the C.I.D. office for questioning in connection with the suspected coup d'etat, had leapt out of the C.I.D. office window ..... and that he had died at the General Hospital after admission." Thereupon the Magistrate inspected the scene of the incident and also viewed the body of the deceased at the mortuary. The Magistrate ordered the J.M.O. to hold a post mortem examination and proceeded to record evidence pertaining to the inquest of death. In these proceedings Crown Counsel appeared as *amicus curiae* assisted by the Police and led the evidence of a number of police witnesses to the effect that the deceased leapt to his death through the window of the room where he was being interrogated by the police. Acting on this evidence the Magistrate came to a finding that the deceased had committed suicide.

On 22.8.66, the Magistrate re-opened the inquiry and proceeded to hear further evidence acting on a petition furnished by the brother of the deceased that further evidence was available as to the manner of the deceased's death. On this occasion, counsel appeared on the basis that he was watching the interests of the petitioner and led the evidence of a number of witnesses whose evidence suggested that the deceased had been assaulted by the police and forced out of the window. After the evidence had been concluded the Magistrate altered his former finding of suicide to one of culpable homicide.

These inquest proceedings are sought to be quashed (a) by way of a Writ of *Certiorari* or (b) by invoking the revisionary powers vested in the Supreme Court.

Held: (1) That a Writ of *Certiorari* does not lie to quash a finding under section 362(1) of the Criminal Procedure Code, as (a) the Magistrate or inquirer is not called upon to determine any question affecting the rights of the subject and (b) the functions of the Magistrate or inquirer in conducting an inquest of death are non-judicial in character.

(2) That neither section 356 of the Criminal Procedure Code nor section 19 of the Courts Ordinance bring within the Supreme Court's appellate or revisionary powers, inquest proceedings, even when held by a Magistrate. The powers of revision invested in the Supreme Court by virtue of section 356 of the Criminal Procedure Code are restricted to pending trials or cases already tried and an inquest of death cannot be considered a proceeding pending trial. The provisions of section 19 of the Courts Ordinance enable the Supreme Court acting in revision to take cognizance of all causes, suits actions prosecutions matters and things of which the original *court* may have taken cognizance. As the word 'Court' in this context has been defined in section 2 to mean a judge or body of judges acting *judicially*, inquest proceedings which are of a non-judicial character, do not come within its purview.

(3) That the duty cast upon a Magistrate at an inquest of death by the provisions of section 362(1)(c) was purely to hold an inquiry into the cause of death. The purpose of sections 362 and 363 is to secure reliable material as to the cause of death of a human being, when death has occurred in unusual circumstances or places mentioned in these sections, so that this material will be readily available in case such death was the result of an act of another amounting to an offence. It is therefore not the function of

an inquirer or Magistrate acting under Chapter 32 of the Criminal Procedure Code, to include in those proceedings an investigation into an alleged crime or offence. The recording of the finding as to the cause of death, concludes the inquest of death.

(4) That if such a finding as to the cause of death, whether by an inquirer or Magistrate, gives rise in a Magistrate's mind to a reasonable suspicion that a crime has been committed, the Magistrate shall then act under the provisions of section 362(3) and initiate criminal proceedings. But the right to initiate criminal proceedings upon a finding at an inquest of death cannot alter the nature of the inquest proceedings themselves.

Held further: (5) That the provisions of section 363(1), reserving for Magistrates or inquirers authorised by them the right of inquiry into the death of persons dying while in police custody or in the mental or leprosy hospitals or prison, emphasizes the need for special care in the conduct of such inquiries. No Magistrate or Inquirer conducting such an inquiry should permit a lawyer or Crown Counsel who might appear as *amicus curiae* to direct the course of such an inquiry, and reduce the magistrate or inquirer to a passive participant.

Per **Tennekoon, J.** (*a*) ".....the true test to my mind of whether the writ lies is what kind of function the law has imposed upon the authority when acting within its statutory powers. If the answer to that question is that the function imposed by law is judicial in character the writ will lie to quash determinations and orders made outside or in excess of its statutory authority, or in breach of the rules of natural justice or where there is error of law on the face of the record.''

(*b*) "The appearance of lawyers pedalling a case for some client and directing the course of the inquiry is something which no inquirer should permit. The term *amicus curiae* can sometimes be only a Latin guise for a Greek friend. It is of course permissible for a lawyer to appear, declare his interest and suggest any questions or line of inquiry for the inquirer to adopt in his discretion."

(*c*) It is hardly necessary to add that the Attorney General's Department (and its members) should avoid, at the early stages of any death in unusual circumstances, allying itself with any persons who are interested in establishing a particular cause as the cause of death; this can only lead to stultifying that department, much to the public disadvantage, in the performance of any duties that may arise for it under the Criminal Procedure Code in relation to that death."

Cases referred: *N. Q. Dias* vs. *C. P. G. Abeywardene*, (1966) 68 N.L.R. 409.
Attorney-General vs. *Kanagaratnam* (1950) 52 N.L.R. 121

George E. Chitty, Q.C., with *R. A. Kannangara, A. M. Coomaraswamy, C. A. Amerasinghe* and *Miss Mano Barr-Kumarakulasinghe*, for the petitioner.

Colvin R. de Silva, with *Sidat Sri Nandalochana, S. S. Sahabandu, Mrs. Sarath Muttetuwegama* and *S. S. Wijeratne*, for the 2nd respondent.

V. S. A. Pullenayagam, Crown Counsel with *R. Abeysuriya, Crown Counsel*, for the Attorney-General.

Tennekoon, J.

These two applications were heard together as they relate to the identical matter, and the parties are substantially the same. The application No. 28/1967 is an application in revision, and application No. 29/1967 is one for a mandate in the nature of a Writ of Certiorari. Substantially the relief claimed in both applications is the same viz: The quashing of a finding made on the 15th of September 1966 by the Joint Magistrate Colombo at the conclusion of a purported inquest held under Chapter 32 of the Criminal Procedure Code.

The circumstances in which the 'verdict' came to be pronounced are as follows:— On the 16th of April 1966 a letter was received by the Magistrate from the Officer in charge Fort Police Station which stated that "one Lokugama Vidanalage Podi Appuhamy *alias* Dodampe Mudalali of No. 228, Main Street, Ratnapura who was brought to the C.I.D. Office for questioning in connection with the suspected coup d'etat had leapt out of the C.I.D. Office Window at the New Secretariat Building at about 2.30 a.m., and that he had died at the General Hospital after admission." Officer in charge, Fort Police Station requested that a Magisterial inquiry be held into this death. This letter was received at 10.30 a.m.; the Magistrate visited the place where the death had occurred at 1 p.m. Here he inspected the room from which the deceased was alleged to have leapt out. This was on the 4th floor. He also examined the place near the foot of the building where the deceased had lain fallen. The Magistrate then proceeded to the hospital mortuary, and viewed the body of the deceased L. V. Podiappuhamy. He noted that the deceased was bleed-

ing from his mouth, had multiple grazed abrasions on the right groin, and thigh, and on the inner side of the left upper arm. He also noted the presence of scattered abrasions on the back of the left leg and also some abrasions on the inner side of the left leg; also an abrasion on the scrotum. The Magistrate ordered the J.M.O. to hold a post mortem examination. He then proceeded to record evidence of witnesses. A Crown Counsel appeared at this stage claiming to be *amicus curiae* assisted by the police. Another Counsel watched the interest of the relatives of the deceased. Crown Counsel called certain Police Officers, and also the J.M.O. who had held the post mortem examination. The substance of the evidence of the Police Officers was that the deceased had been brought by the Police, under what powers it is not disclosed, all the way from Ratnapura to Colombo for purposes of 'interrogation' in connection with a suspected conspiracy to over-throw the Government by use of criminal force. He was alleged to have been brought to the C.I.D. Office at about 2.20 p.m. on 15th April, 1966; S. G. Senanayake, a Sub-Inspector of Police of the C.I.D. started questioning him at 11 p.m. on 15th April 1966; Inspectors C. Weeratunga and I. M. R. de Silva also came into the room off and on during the interrogation which was held on the 4th floor of the New Secretariat Building. Sub-Inspector Senanayake stated that about 2.15 a.m. on the 16th April he was alone with the deceased, interrogating him; and that the deceased suddenly darted across to one of the open windows, and got on to the ledge, and leapt out; he had no chance of stopping him, because it happened so suddenly. The deceased had first landed on an asbestos roof of a garage and had crashed through that to the ground. The deceased was then rushed to the General Hospital. The House officer at the Casualty Ward at the General Hospital stated that the deceased was brought to the Casualty Ward of the General Hospital at 3 a.m., he was alive, but in a state of shock. He asked him what had happened to him, but the deceased did not answer that question, but only asked for some water. The J.M.O. stated that externally he found multiple abrasions; internally he had a fracture of the 7th to 12th ribs on the right side, laceration of the lower lobe of the right lung, laceration of the right lobe of the liver, laceration of the right kidney, and laceration of the adrenal gland. He was of opinion that death was due to shock and haemorrhage from multiple injuries, and that the injuries could have been caused by a fall from great height, and the grazed external injuries were consistent with the body passing through broken asbestos sheeting.

Crown Counsel after having called the Police evidence, and the two doctors, stated that, that was all the evidence available. The Magistrate called upon any persons present in Court who could give any evidence regarding the death of the deceased to come forward, and give evidence, but no one came forward. He then stated that he would deliver his "verdict" on the 18th of April. On 18/4/66 the Magistrate inquired whether there had been any non-police persons in the C.I.D. Office capable of giving any relevant evidence. The Police stated that there were, and the Magistrate fixed the matter for further inquiry for 20th April 1966. On that day Crown Counsel again appearing as *amicus curiae* called one Bopattevidanalage Dingiri Mahatmaya. He was also apparently a person brought in for questioning, but he added nothing to the evidence already given before the Magistrate. All he said was that he saw the deceased in a certain room in the C.I.D. Office and that when he was taken away for questioning to another room he fell asleep on a bench and did not wake till about 5.30 or 6.00 a.m. on 16/4/66. Crown Counsel also called the Superintendent of Police Special Branch, C.I.D., the petitioner in these two applications who was in charge of the investigations into the alleged coup. He himself was in another room interrogating one Sergeant Hondamuni. He had sent for the deceased at about 11 p.m. in the course of interrogation of Sergeant Hondamuni and the deceased had been brought into his room in order to be confronted with some things that Sergeant Hondamuni was alleged to have stated. He then says that at about 2.30 a.m. on 16/4/66 he heard a sound like that of an explosion, and some one came into his room, and informed him that Dedampe Mudalali had jumped out of the window. On this material the Magistrate made the following finding:—

> "On the evidence available in this case I accept the position that the deceased has leapt out of the window on his own. Why the deceased took this step could only be a matter of speculation. According to the medical evidence the death was due to shock and haemorrhage resulting from injuries the deceased has sustained as a result of a fall. On the evidence before me I hold this is to be a case of suicide."

The record was then in accordance with the usual practice forwarded to the Attorney-General. About 3 1/2 months later, that is, on 3rd of August

1966, an affidavit was tendered to the Magistrate from one L. V. Stephen a brother of the deceased, asking for a fresh inquest. The affidavit stated that the deponent had "read in the newspapers, of statements made at the opening of the non-summary inquiry into the alleged conspiracy against the Government, that lawyers representing certain of the accused have stated that their clients were in a position to give evidence regarding the manner of my brother's death." A further affidavit was filed on the 12th of August 1966. This affidavit stated that five persons — (1) Sergeant Hondamuni (2) Sergeant Sirisena (3) Corporal Silvester Batuwatte (4) Corporal D. M. Wijeratne, and (5) Sergeant Hendrick Singho, all under detention under Emergency Regulations, at the New Magazine Prison, were in a position to throw fresh light on the manner of L. V. Podiappuhamy's death. On 22/8/66 the Magistrate proceeded to hear the evidence of the new witnesses. An advocate instructed by a proctor stated that he was watching the interests of the Petitioner that is of the deponent. A Crown Counsel was also present in Court, and stated that he was available to assist Court if necessary. The advocate who was watching the interests of L. V. Stephen called Sergeant Hondamuni and examined him. Crown Counsel was permitted to suggest further questions. On a further date this advocate called and examined A. D. Sirisena, W. M. Wijeratne, and M. Hendrick Singho. Crown Counsel was permitted to suggest further questions to these witnesses. The Magistrate thereupon proceeded to pronounce a fresh "verdict" on 15th September 1966 in the course of which he said:

> "The evidence that has been made available to court since the returning of the verdict of suicide in this case makes it necessary to consider whether the earlier verdict could be allowed to stand.
>
> At the earlier stage of the inquiry S.I. Senanayake testified to having seen the deceased jumping out of a window on the 4th floor of the building. The evidence of H. M. Hondamuni and A. D. Sirisena which was subsequently recorded is in conflict with the earlier evidence. H. M. Hondamuni states that when he was being questioned by S.P. Seneviratne he heard sounds of assault and cries of murder from the adjoining room, and that a little later when he happened to open the door of that room he saw the deceased Dodampe Mudalali lying naked inside the room on the floor with his face upwards. He adds that he heard S.P. Seneviratne saying 'put him on the roof'. According to H. M. Hondamuni sometime after he had heard the "crash" S.P. Seneviratne gave orders first to I.P. Fareed and then to I.P. Rahula Silva to go down and see whether the deceased was dead.
>
> Sirisena's evidence is that he heard sounds of assault and cries of murder from the room into which he had earlier seen the deceased being taken and that later when he himself was taken into that room he saw the deceased lying naked inside the room. Sirisena states that he saw three officers inside the room and one of them raised the deceased into a sitting position and questioned the deceased, struck him on his neck, pushed him violently into a prone position and kicked him.
>
> It may be noted that H. M. Hondamuni and Sirisena were not cross-examined to test the credibility of their evidence. At any inquiry of this nature the law does not expect the Court to satisfy itself that a crime has been committed. The court is required only to ascertain whether the evidence discloses a "reasonable suspicion" that an offence has been committed as contemplated under section 362(3) of the Criminal Procedure Code.
>
> In my view the evidence available to court now is sufficient to create such "reasonable suspicion". I therefore act on that "reasonable suspicion" and alter the verdict of suicide to one of culpable homicide."

On the 17th of September 1966 Crown Counsel moved that in view of the finding of culpable homicide the Magistrate do take steps under Chapter 15 and 16 of the Criminal Procedure Code. The learned Magistrate stated that he has already forwarded the record to the Attorney-General, and declined to take any further steps on the ground apparently that the Attorney-General was free to initiate criminal proceedings if he thought fit. Thereafter on the 12th of November, 1966, the present petitioner applied to the Magistrate to lead further evidence touching the death of Dodampe Mudalali, and the Magistrate made order on the 12th of December, 1966. This was to the effect that "the application to reopen the inquest proceedings is refused."

At the hearing of these two applications before this Court, Counsel for L. V. Stephen (2nd Respondent in Application No. 28 of 1967 and 3rd Respondent in Application No. 29 of 1967) submitted that neither revision nor certiorari was available to quash the proceedings relating to an inquest of death whether the inquest was held by an ordinary inquirer or by a Magistrate. Crown Counsel appearing for the Attorney-General (who is named as 1st Respondent in Application No. 28 of 1967 and as 2nd Respondent in Application No. 29 of 1967) stated that the position of the Attorney-General was that it was not within the jurisdiction of the Supreme Court to exercise powers of revision over proceedings at an inquest of death; he however contended that certiorari lay.

It is necessary before considering this part of the case to examine the nature of an inquest of death contemplated by law as set out in the Criminal Procedure Code.

Chapter 32 of the Criminal Procedure Code is headed inquests of deaths; section 361 states that no inquests of death shall be held except under the provisions of this Code. Section 362 provides as follows:—

"362(1) Every inquirer on receiving information that a person —

(*a*) has committed suicide; or

(*b*) has been killed by an animal or by machinery or by an accident; or

(*c*) has died suddenly or from a cause which is not known, shall immediately proceed to the place where the body of such deceased person is and there shall make an inquiry and draw up a report of the apparent cause of death, describing, such wounds, fractures, bruises, and other marks of injury, as may be found on the body and such marks, objects and circumstances as in his opinion may relate to the cause of death and stating in what manner such marks appear to have been inflicted.

(2) The report shall be signed by such inquirer and shall be forthwith forwarded to the nearest Magistrate.

(3) If the report discloses a reasonable suspicion that a crime has been committed the Magistrate shall take proceedings under Chapter XV and XVI.

(4) Nothing herein contained shall preclude a Magistrate from forthwith holding an inquiry under the powers vested in him by section 9 of this Code, whenever any of the events mentioned in paragraphs (a), (b), and (c) of subsection (1) of this section have been brought to his notice."

The 4th paragraph of section 9 of the Criminal Procedure Code reads as follows—

"Every Magistrate's Court shall have ..... jurisdiction, under and subject to this Code, to inquire into all cases in which any person shall die in any prison or mental or leprosy hospital or shall come to his death by violence or accident, or when death shall have occurred suddenly, or when the body of any person shall be found dead without its being known how such person came by his death."

Section 363 reads as follows:—

"363(1) When any person dies while in the custody of the police or in a mental or leprosy hospital or prison the officer who had the custody of such person or was in charge of such hospital or prison, as the case may be, shall forthwith give information of such death to a Magistrate of the Magistrate's Court within the local limits of whose jurisdiction the body is found, and such Magistrate or an inquirer authorized by him shall view the body and hold an inquiry into the cause of death.

(2) For the purposes of an inquiry under this section a Magistrate or inquirer shall have all the powers which he could have in holding an inquiry into an offence."

Section 364(1) then goes on to state that the Magistrate or inquirer holding an inquiry prescribed under this Chapter **shall record the evidence and his findings thereon.**

It is not disputed in this case that the Magistrate was acting under section 363(1) of the Criminal Procedure Code. It is conceded on all sides that although the deceased was not under arrest at the time of his death, he had been taken in for questioning, removed far away from home, friends, relations, and advisers, and was under the complete and compulsive control of the police, and consequently was *de facto* if not *de jure* in the custody of the police.

The duty of the Magistrate upon being informed of a death of a person whilst in police custody is to view the body, and to hold an inquiry into the cause of death.

It seems to me that the main purpose of both sections 362 and 363 is that where the death has occurred in the circumstances or in the places mentioned in these two sections that there should be an immediate view of the body prior to burial or cremation, and that there should come into existence a record of any wounds, fractures, bruises, and other marks of injury as may be found on the body and such marks, objects and circumstances as may relate to the cause of death, so that burial or cremation or the lapse of time may not obscure the cause of death. These provsions occurring as they do in a Code dealing with the investigation and punishment of crimes, appear to be directed largely to the prompt securing of material as to the cause of the death of a human being in unusual circumstances or places so that this material will be readily available in case such death was the result of an act of another amounting to an offence.

However, it must be noted immediately that the function of an inquirer or a Magistrate acting under Chapter 32 of the Criminal Procedure Code is not to investigate an alleged crime or offence. Indeed the whole inquiry proceeds upon the basis that the cause of death is yet to be ascertained. The learned Magistrate was mistaken when in his second 'verdict' he stated — "The court is required only to ascertain whether the evidence discloses a "reasonable suspicion" that an *offence* has been committed". It is clear from the sections of law quoted above that the function of an inquirer or Magistrate under Chapter 32 is to hold an enquiry into the cause of death and to state as a finding

what in his opinion was the cause of death. The recording of the finding concludes the inquest of death. If the finding of an inquirer forwarded to a Magistrate under section 362(2) or of a Magistrate acting under section 9 or 363 of the Code gives rise in the Magistrate's mind to a reasonable suspicion that the crime has been committed, the magistrate may assume the powers of a Magistrate's Court under section 148(1)(c) and initiate criminal proceedings himself. But the right to initiate criminal proceedings that is available to an inquirer under section 148(1)(c) and to a Magistrate under section 148(1)(v) cannot alter the nature of an inquest of death that may precede such initiation of criminal proceedings; it only emphasises the investigative nature of those proceedings.

Does *certiorari* lie to quash such a finding? I am of opinion it does not. The Magistrate or inquirer holding an inquest is not called upon to determine any question affecting the rights of the subject. He is only called upon to enter upon a voyage of discovery; there are no parties before him claiming any right or liberty and no proposition advanced by any person the correctness or otherwise of which he is called upon to pronounce upon definitively. A person who is examined by the inquirer or Magistrate at an inquest and who gives evidence tending to show that the cause of death was suicide or homicide or accident cannot be regarded as a party propounding a question for determination by the investigator. It was submitted by Counsel for the petitioner that *certiorari* lies for the following reasons: (1) that it is a Magistrate i.e. a judicial officer who held the inquest (ii) that the word *jurisdiction* is used in section 9 of the Criminal Procedure Code in referring generally to the powers of a Magistrate to inquire into cause of death in unusual circumstances and places (iii) that the Magistrate has in fact found the cause of death to be the offence of culpable homicide which in the context of his 'verdict' implied that the petitioner was a party or abettor of that offence.

As to (i) I think it is a mistake to lay too much stress on the office held by the person against whom *certiorari* is sought. It is more important to have regard to the nature of the function with which the law has invested him. As to (ii) the use of the word jurisdiction is a neutral fact having regard to the different meanings that that word can have in different contexts. In the 4th para of section 9 of the Criminal Procedure Code there is to my mind no doubt that the word is used in sense of a power or authority rather than of a judicial function. In this context it must be borne in mind that the authority to hold an inquest of death is one that Magistrates share with inquirers who under our law are not judicial officers at all. They are persons appointed not by Judicial Service Commission but by the Minister of Justice under section 120 of the Criminal Procedure Code for the *investigation* of alleged offences. Even the inquests under section 363(1) which Magistrates are specially required to hold are capable of being delegated by them to an inquirer; Vide the words ".....and such Magistrate *or an inquirer authorised by him* shall view the body and hold an inquiry into the cause of death" appearing in section 363(1) of the Criminal Procedure Code.

As to the third ground on which it is contended that *certiorari* lies, the true test to my mind of whether the writ lies is what kind of function the law has imposed upon the authority when acting within its statutory powers and not what it has actually done acting outside of its powers. If the answer to that question is that the function imposed by law is judicial in character the writ will lie to quash determinations or orders made outside or in excess of its statutory authority, or in breach of the rules of natural justice or where there is error of law on the face of the record. Where the function is not judicial in character, whatever other remedies may be available, the prerogative writs of *certiorari* or prohibition will not be available to question acts of such authority which are *ultra vires* of its legal powers. The existence of the right to summon witnesses and to examine them on oath can never by itself be conclusive of the question whether a statutory function is judicial. The more reliable test is to inquire to what end or purpose these powers are given. If the legislature gives such powers in order to facilitate the making of determinations which are intended by the law to affect the rights of subjects, then the writs are available. To my mind the functions of a Magistrate or inquirer holding an inquest of death are of a non-judicial character. In the ordinary progression of a criminal case from initiation of criminal proceedings, non summary inquiry, indictment, trial and appeal, the inquest of death finds no place; if at all it precedes or is concurrent with the investigation of a crime. It seems to me that the duty to inquire into the 'cause of death' is no different from the functions of a commission appointed under the Commissions of Inquiry Act. The Writs of Prohibition and *Certiorari* do not issue to such commissions — see *N. Q. Dias* vs.

C. P. G. Abeywardene, 68 N.L.R. 409, and the cases cited therein; nor in my opinion can they, by a parity of reasoning, issue to proceedings of an Inquirer or Magistrate holding an inquest of death.

A submission was also made that in England the Writ of *Certiorari* issues to a Coroner's Court. While it is correct that the law in relation to *Certiorari* to be applied by our courts is that which prevails in England, the constituion and functions of a Coroner's Court and of an Inquirer or Magistrate holding an inquest of death are materially different. There is no power in an Inquirer or Magistrate to pronounce any 'verdict'; his duty is only to record a finding of the cause of death; the finding by itself does not automatically initiate any legal proceedings as does the 'inquisition' of a Coroner's Court in England.

The next question for consideration is whether this court can exercise its powers of revision over an inquest of death when a Magistrate holds such inquest, it being conceded and rightly conceded, that revision does not lie when an inquirer holds such inquest.

Section 356 of the Criminal Procedure Code reads as follows:—

> "The Supreme Court may call for and examine the record of any case, whether already tried or pending trial in any court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein or as to the regularity of the proceedings of such court."

In the case of *Attorney-General* vs. *Kanagaratnam*, 52 N.L.R. 121, Nagalingam, J. said of this section:

> "I should myself construe the words "pending trial" in this section as the equivalent of "not finally disposed of by an order of acquittal, conviction or discharge", and to embrace every stage of the case from the presentation of a report to Court, and in the case of a non-summary offence through the entire gamut of non-summary proceedings in the Magistrate's Court, and in respect of both summary and non-summary cases to the final order made by a Magistrate or by a higher Court, ending in a verdict of acquittal or conviction or in an order of discharge."

It is I think obvious that even on this very wide and liberal interpretation of the words "pending trial", an inquest of death is not caught up by them. It is suggested however that the revisionary powers of the Supreme Court are wider than those set out in section 356 of the Criminal Procedure Code. Reliance is placed on section 19 of the Courts Ordinance the relevant portions of which in relation to Criminal Courts read as follows:—

> "The Supreme Court shall have and exercise sole and exclusive cognisance by way of appeal and revision of all ..... prosecutions matters and things of which such original *court* may have taken cognisance."

The word 'court' is defined as follows:—

> " 'Court' shall denote a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body *when such Judge or body of Judges is acting judicially.*"

For reasons already stated, I do not think that a Magistrate holding an inquest of death, any more than an inquirer performing the same functions, in acting judicially. Some assistance was sought to be derived from the words "matters and things" appearing in section 19 of the Courts Ordinance. These words to my mind are used only to make it clear that the appellate and revisionary powers of the Supreme Court in criminal matters were not confined to 'prosecutions' but would extend to certain other proceedings in which the court is called upon to act judicially. Some of these are set out at pages 125 and 126 of Justice Nagalingam's judgment in *Attorney-General* vs. *Kanagaratnam*, 52 N.L.R. 121, and do not need repetition here. These words are however insufficient to bring within the Supreme Court's appellate or revisionary powers inquest proceedings even when held by a Magistrate.

Before concluding this judgment I feel constrained to pass some comment upon the manner in which the inquest of death was held in this case.

It is fairly obvious that when section 363(1) enacted in effect that where "any person dies while in the custody of the police or in a mental or leprosy hospital or prison" the inquest shall be

held by the "Magistrate or an inquirer authorised by him" the legislature was taking special care that the inquest should be carried out by a person of responsibility and experience because the opportunities for concealing the real cause of death, if the persons in charge of and employed at these institutions were so disposed, are greater than in the ordinary case. It is therefore somewhat regrettable that when the Magistrate first held his inquest in the present case he did little or nothing towards making this inquiry as searching and thorough as possible; instead he seems to have surrendered his functions to 'Crown Counsel assisted by the Police'. The selection of persons to be questioned was thus left entirely to the police; the Magistrate himself seems to have sensed the dangers of this procedure when he at one stage said he would like to examine at least one non-police witness. But even here he left the selection of that person to the police. In the result the finding of suicide made by the Magistrate leaves the impression that he remained a passive instrument in the hands of the police anxiously — though perhaps honestly — wanting such a finding. When in August 1967 the inquiry was re-opened the Magistrate again repeated his performance; he adopted a procedure which resulted in his reaching a finding devoutly to be wished for by those agitating for a re-opening of the inquiry. At this stage the Magistrate left the selection of persons to be examined in the hands of the advocate watching the interests of L. V. Stephen and briefed to establish the allegation made by certain coup suspects that Dodampe Mudalali was assaulted by the police in the course of an interrrogation and thrown out of the 4th floor window to his death. There was no attempt particularly in the face of his own previous finding of suicide to probe the evidence of the witnesses who were paraded before him; the Magistrate did not even think it fit in the face of this new material to recall and re-examine the police witnesses who had made statements at the earlier stages of the inquest. The whole inquiry was at this stage channelled for him by the Advocate who called the witnesses and was intent on establishing a case against the police. Here again his finding was a foregone conclusion.

The appearance of lawyers pedalling a case for some client and directing the course of the inquiry is something which no inquirer should permit. The term *amicus curiae* can sometimes be only a Latin guise for a Greek friend. It is of course permissible for a lawyer to appear, declare his interest and suggest any questions or line of inquiry for the inquirer to adopt in his discretion. In the present case while it was quite proper for Crown Counsel to appear and ask that the evidence pertaining to certain matters be taken in camera 'in the interests of a pending investigation, it was unfortunate that the Magistrate substantially left the course of the inquiry in the hands of Crown Counsel as though he were one appearing at a non-summary inquiry; his appearance was marked *amicus curiae* assisted by the police. It is also unfortunate that the Magistrate did nothing to pursue obvious lines of inquiry. What, for instance, did Inspector Senanayake mean by the word 'interrogating' particularly when this was carried out for no stated reason in the small hours of the morning while the rest of the city was asleep? Was it merely questioning or did it involve the use of certain other methods which our police are not unknown to use in the course of their investigations. The Magistrate also became aware, that there were a number of non-police persons in the C.I.D. premises at the time of the incident; yet he left it to the police to select one from among them to be called and that one only stated that he heard and saw nothing. One is left with the impression that Crown Counsel was in reality there to watch the interests of the police. It is hardly necessary to add that the Attorney-General's Department (and its members) should avoid, at the early stages of any death in unusual circumstances, allying itself with any persons who are interested in establishing a particular cause as the cause of death; this can only lead to stultifying that department, much to the public disadvantage, in the performance of any duties that may arise for it under the Criminal Procedure Code in relation to that death. If a police officer or group of police officers wish to have their interests watched at an inquest they should retain private counsel for that purpose.

The two findings, first of suicide and later of 'culpable homicide' are thus upon an examination of the whole of the proceedings at the inquest utterly unreliable and unconvincing. It is with regret therefore that I have reached the conclusion that in these proceedings the law does not permit me to quash either of these findings.

My order in respect of each of the applications is as follows:—

S.C. Application No. 28/67 (Revision) is dismissed.
S.C. Application No. 29/67 (*Certiorari*) is also dismissed.

There will be no order for costs in either case.

Applications dismissed.

Present: **Samerawickrame, J.**

C. S. PERERA *v.* THE ATTORNEY-GENERAL*

S.C. 290/66 — *M.C. Colombo* 36626

In the matter of an Application under section 31 *of the Courts Ordinance*

Argued on: 3rd July, 1967
Decided on: 7th July, 1967

Bail — Courts Ordinance, section 31 *— Accused committed to stand trial in the Supreme Court — Failure to bring him to trial at the first Criminal Sessions after committal — Effect of section* 31 *— Is failure to prepare and serve indictment sufficient ground to oppose application for bail by accused?*

This is an application for bail under section 31 of the Courts Ordinance, and made on the following facts: (*a*) that plaint was filed on 23/2/66 in the Municipal Magistrate's Court against the appellant and 3 others alleging offences of conspiracy to commit murder.

(*b*) that on 23/6/66, the applicant and the three accused were committed to stand their trial in the Supreme Court.

(*c*) that the accused were not brought to trial at the Criminal sessions commenced on 10/7/66; 10/10/66; 10/1/67; or at the then current session commenced on 20/3/67.

(*d*) that no indictment had yet been served on him and that the evidence against him was very weak.

Crown Counsel, relying on the decision of Manickavasagar, J. (*Mendis* v. *The Queen*, 66 N.L.R. 502) resisted the application purely on a legal ground, viz., that an indictment not having been served on the applicant, he could not properly have been tried at any of the Sessions referred to in the application.

Held: (1) That the effect of Section 31 of the Court Ordinance is that a prisoner committed for trial before the Supreme Court who is not brought to trial at the first Sessions at which he might be properly tried should be admitted to bail.

(2) That the words "Criminal Sessions at which the prisoner might properly tried" refer to a Sessions for the circuit within the limits of which the crime or offence with which the prisoner is charged was committed.

(3) That the omission to take a step involved in the preparation and service of the indictment is not a sufficient ground for holding that the prisoner could not properly have been tried at a Criminal sessions of the Supreme Court.

(4) That, if there may not be sufficient time in particular cases between the commitment and the first Criminal Sessions to bring a prisoner to trial, either because for framing of the indictment or for recording of further evidence more time is required, then such circumstances would constitute "good cause" why the accused should not be admitted to bail in such cases.

Per **Samerawickreme, J.** — "But even if delays are not attributable to remissness on the part of those concerned, they cannot operate to deprive a prisoner of his claim to be admitted to bail."

Disapproved: *W. P. Mendis* v. *The Queen*, (1964) 66 N.L.R. 502.

Cases referred to: *The Queen* v. *Jinadasa*, (1958) 60 N.L.R. 125.
De Mel v. *Attorney-General*, (1940) 47 N.L.R. 136.

Dr. Colvin R. de Silva with *Malcolm Perera*, *P. K. Liyanage*, *P. O. Wimalanaga*, and *W. P. Goonetilleke*, for the accused-appellant.

V. S. A. Pullenayagam, Crown Counsel, with *L. D. Gurusamy*, Crown Counsel, for the Attorney-General.

* For Sinhala translation, see Sinhala section, Vol. 17, Part 1 p. 1

Samerawickrame, J.

This is an application for bail made by the 1st accused in S.C. 290/66 M.C. Colombo 36626. under Section 31 of the Courts Ordinance. The application states that information was filed in the Municipal Magistrate's Court of Colombo on 23rd February, 1966 against the applicant and three others alleging that they had committed two offences of conspiracy to commit murder punishable under Section 113B of the Penal Code read with Sections 296 and 108 of the said Code. It further states that on 23rd June, 1966, the applicant and the other three accused were committed by the Magistrate to stand their trial in this Court. It further states that the applicant was not brought to trial at Criminal Sessions of the Western Circuit of this Court which commenced on 10th July, 1966, 10th October, 1966, and 10th January, 1967, as well as at the present session which commenced on 20th March, 1967.

Learned Counsel for the applicant further submitted that no indictment had yet been served on his client and that the evidence against him was that of an accomplice and that there was only slight corroborative evidence if the evidence in question was in fact corroboration at all.

Learned Crown Counsel resisted this application on a purely legal ground, namely, that an indictment not having been served on the applicant he could not properly have been tried at any of the Sessions referred to in his application. He was, therefore, not entitled to be released on bail under Section 31 of the Courts Ordinance. Learned Crown Counsel relied on the decision of Manicavasagar, J. in W. *P. Mendis* v. *The Queen*, 66 N.L.R. p. 502, where he held that the section required, *inter alia*, that at the time of the Sessions the case should be ripe for trial.

The effect of Section 31 of the Courts Ordinance is that a prisoner committed for trial before this Court who is not brought to trial at the first sessions at which he might properly be tried should be admitted to bail. It appears to me that according to our criminal procedure, the bringing to trial of a person committed by a Magistrate is a process which involves the taking of at least three steps. They are:—

(1) the drawing up of an indictment and its service on the accused at least fourteen days before the day specified for trial,

(2) the service of a notice on the accused specifying the date fixed for trial before this Court.

(3) the arraignment of the accused before this Court on the indictment served on him.

The relevant part of Section 31 of the Courts Ordinance reads:—

> 31. If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried ..... the said Court or any Judge thereof shall admit him to bail, unless good cause be shown to the contrary .....

In deciding whether a prisoner should be admitted to bail under this provision, a Court must consider two questions (1) has the prisoner not been brought to trial at a sessions held after he was committed by the Magistrate (2) was that sessions one at which he could properly have been tried. In deciding the second question, it seems to me that one must consider whether he could properly have been tried had he been brought to trial at it. It is, therefore, in my view, not permissible to give as a ground for holding that a prisoner could not properly have been tried at a sessions the omission to take a step involved in bringing the prisoner to trial, namely, the preparation and service of the indictment.

I am, therefore, of the view that the words 'Criminal sessions at which the prisoner might properly be tried' refer to a sessions for the circuit within the limits of which the crime or offence with which the prisoner is charged was committed, In *Queen* v. *Jinadasa*, 60 N.L.R. p. 125, Gunasekara, J. said, "The offences are alleged to have been committed within the judicial division of Galle, which is in the Southern Circuit. The accused could therefore "properly be tried" at a criminal session of this Court held for that circuit". The view I have taken is also consonant with that taken by Nihil, J. in *De Mel* v. *Attorney-General*, 47 N.L.R. p. 36. With respect, I am unable to agree with the interpretation placed upon the section by Manicavasagar, J.

It may well be that upon the view which I have taken there may not be sufficient time in particular cases between the commitment and the first criminal sessions to bring a prisoner to trial either because the framing of the indictment requires more time or because further evidence is required to be led in terms of Section 389 of the Criminal Procedure Code. If such circumstances

exist, they would constitute "good cause" why the accused should not be admitted to bail in those cases.

Learned Crown Counsel mentioned that though the accused were committed on the 23rd June, 1966, the brief was received in the Attorney-General's Department only on the 7th November, 1966, and that on 21st April, 1967 instructions were issued on behalf of the Attorney-General to the Magistrate to record further evidence. There may be administrative difficulties or other causes to explain why the brief was sent from the Magistrate's Court to the Attorney-General's Department only over four months after the commitment. Again there may be circumstances that explain the delay of over five months before directions to record further evidence issued. I have not inquired into these matters and I therefore express no opinion on them. But even if delays are not attributable to remissness on the part of those concerned, they cannot operate to deprive a prisoner of his claim to be admitted to bail. Learned Crown Counsel, mentioned the circumstances which led to no indictment being prepared for a period of one year after commitment. Quite rightly he did not rely on them as constituting "good cause" under the Section.

I am satisfied upon a careful consideration of all matter relevant that the applicant who is the first accused in the case is entitled at this stage to be admitted to bail. I direct that he should be released on his entering into a recognizance in a sum of Rs. 10,000/- with two sureties.

Accused admitted to bail.

Present: **Abeyesundere, J.**

MICHAEL LIYANAGE *v.* INSPECTOR OF POLICE, BORELLA*

S.C. 990/67 — *Colombo M.M.C.* 42849

Argued and decided on: 29th February, 1968

Betting on Horse Racing Ordinance, section 3(3) *read with section* 11(2)— *Charge of receiving a bet on a horse race other than a taxable bet — Race run in a foreign land — Copies of newspapers produced in support of charge — Conviction — What prosecution has to prove — Evidentiary value of newspapers produced.*

Where the accused was convicted for the offence of receiving a bet on horse race other than a taxable bet, run in a foreign land.

Held: (1) That it was incumbent on the prosecution to prove not only that the names on the betting slips were names of horses, but also that those horses ran in a horse race.

(2) That the contents of the newspapers produced in evidence constituted hearsay evidence and could not therefore have been relied on to prove the facts which the prosecution had to prove.

C. E. de Silva, for the accused-appellant.

Ranjith Gunatilleke, Crown Counsel, for the Attorney-General.

Abeyesundere, J.

In this case the accused was convicted of an offence punishable under section 3(3) read with section 11(2) of the Betting on Horse Racing Ordinance and sentenced to pay a fine of Rs. 1,000/- and in default of the payment of the fine to 6 weeks' rigorous imprisonment. The offence alleged to have been committed by the accused is that he received a bet on a horse race other than a taxable bet. The horse race is one that is alleged to have been run in Doncaster. Copies of two newspapers containing the names appearing on the betting slips as being the names of horses which ran in a horse race in Doncaster were also produced. It was incumbent on the prosecution to prove not only that the names on the betting slips were names of horses but also that those horses ran in a horse race. The contents of the newspapers produced in evidence constituted hearsay evidence and could not therefore have been relied on to prove the facts which the prosecution had to prove.

* For Sinhala translation, see Sinhala section, Vol. 17, part 1, p. 4

Crown Counsel appearing for the Attorney-General submitted that the fact that the accused had accepted betting slips was tantamount to an admission by him, as contemplated in section 17 of the Evidence Ordinance, that the bets accepted were on horses which ran in a horse race. The belief of the accused is not evidence of the fact that the names appearing on the betting slips are those of horses and that such horses ran in a horse race.

For the aforesaid reasons I set aside the conviction and sentence and acquit the accused.

Set aside.

Present: **H. N. G. Fernando, C.J.**

MRS. LILIAN JAYAWARDENA AND ANOTHER *vs.* V. KANDIAH

S.C. 2/67 (*R.E.*) — *C.R. Colombo* 87630

Argued on: 5th May, 1968.
Decided on: 16th May, 1968

Landlord and Tenant — Action for ejectment by landlord on ground of sub-letting — Second defendant admittedly carrying on business in premises let to defendant — No proof that 2nd defendant had exclusive possession of a portion of premises — Can the landlord maintain action.

Held: That in a case where it was alleged by the landlord that his tenant had sublet a portion of the premises to another person for the purpose of the latter's business, the landlord could not succeed in obtaining a decree for ejectment on this ground even though the alleged sub-tenant was carrying on business in the said premises, if there was no proof that the alleged sub-tenant had the exclusive possession and occupation of a separate portion of the premises.

C. Ranganathan, Q.C. with *N. S. A. Goonetilleke*, for the defendant-appellants.

H. W. Jayawardene, Q.C., with *R. D. C. de Silva* and *Miss C. Lenaduwa*, for the plaintiff-respondent.

H. N. G. Fernando, C.J.

The learned Commissioner of Requests has entered decree for the ejectment of the 1st defendant from premises No. 144, Panchikawatte Road, Colombo, on the ground that a portion of the premises was let to the 2nd defendant without the consent of the landlord.

The defendant did not in their evidence deny that the 2nd defendant carried on the purchase and sale of motor spare parts in the premises. It would appear that the premises consists of three rooms. In this first room there is a counter, on one side of this counter is a space in which there are cupboards and a table, and on the other side of the counter is a space which provides access to a door leading to the two other rooms. In these two rooms the 1st defendant (the tenant) carries on the process of electro-plating of articles, and the two rooms are occupied exclusively by her for this purpose.

The evidence of the 1st defendant concerning the use of the counter and of the cupboards in the front room was uncontradicted. The 1st defendant stated that her husband had for many years carried on the business of electro plating in these premises and that the 2nd defendant used to help her husband in the business and also keep his own goods in the premises. She said that after her husband died, the 2nd defendant used to help her in the business of electro-plating by collecting orders for her and by attending on the customers who bring articles for plating. She further said that the cupboards belonged to her but that she permitted the 2nd defendant to keep some of his articles in the cupboards. Having regard to the nature of the premises there can be no doubt as to the truth of the evidence that the 1st defendant's receipt books and letter heads are kept on the table which stands by the side of the counter.

As I have pointed out, the plaintiff called no evidence to contradict the defence testimony that the 1st defendant had a right of access to the entire

space in the front room and that the furniture in that room was used by both defendants.

It is clear therefore that the 2nd defendant had no exclusive right to the use of the front room or even to the use of the space and the furniture on one side of the counter.

The learned Judge's conclusion of fact that the 2nd defendant did carry on business in the premises, however correct it was, did not justify the finding that there has been a sub-letting to the 2nd defendant; whatever the arrangement between the parties may have been, it conferred no right on the 2nd defendant to the exclusive possession and occupation of a separate portion of the premises.

The judgment and decree are set aside and the plaintiff's action is dismissed with costs in both Courts.

Appeal allowed.

Present: **Sirimane, J.**

MARTIN SILVA *vs.* SAINERIS MUTHUPALA

S.C. 28/66 — *Labour Tribunal Case No. G/2218*

Argued and decided on: 16th September, 1968.

Industrial Disputes Act, sections 31*B*, 31*C and* 39(1) — *Labour Tribunals — Application for relief thereto — Regulation* 16 *made by Minister of Labour under sections* 31*C*(2) *and* 39(1) *of Act prescribing time limit for the making of such application — Whether such Regulation ultra vires.*

Held: (1) That Regulation 16 made under sections 31(c)(2) and 39(1) of the Industrial Disputes Act by the Minister of Labour enacted a rule of substantive law rather than procedure and would not therefore come within the scope of the rule-making powers conferred on the Minister by the said two sections.

(2) The time limit of three months from the date of dismissal, which the said Regulation 16 laid down for the making of an application for relief to the Labour Tribunal, therefore did not apply.

Followed: *Ram Banda* vs. *The River Valleys Development Board* (1968) LXXIV C.L.W. 81.

L. W. Athulathmudali, for the applicant-appellant.

No appearance for the respondent.

Sirimane, J.

This was an application by a workman under Section 31(B)(1) A of the Industrial Disputes Act for relief in respect of the termination of his services by his employer. The President has held that the application had been made after the lapse of three months from the date of dismissal, and as far as one can gather, has dismissed the application for that reason.

Rule 16 made by the Minister under Section 31C(2) and 39(1) of the Industrial Disputes Act states that such application should be made within three months of the date of termination of services of a workman. My attention has been drawn to the case of *Ram Banda* vs. *The River Valleys Development Board* 74 C.L.W. page 81 where Weeramantry, J. has held that regulation 16 enacted a rule that was one of substantive law rather than procedure and would not therefore come within the scope of the rule making powers conferred on the Minister by the two sections referred to above. I am in agreement with the reasoning of Weeramantry, J. in that case.

I set aside the order of the President dismissing the application and direct that the application of the appellant be heard on its merits.

Set aside and sent back.

Present: **T. S. Fernando, J. (President), Tambiah, J. and Sirimane, J.**

S. MARTIN SILVA *alias* DHARMADASA & ANOTHER *vs.* THE QUEEN

C.C.A. Appeals Nos. 15 *and* 16 *of* 1968 (*with Applications Nos.* 18 *and* 19 *of* 1968) — *S.C. No.* 19/67 — *M.C. Gampaha* 10100.

Argued & decided on: May 5, 1968.
Reasons delivered on: May 15, 1968.

Court of Criminal Appeal — Vague and sketchy evidence — Circumstantial evidence only — Medical evidence at variance with direct evidence — Duty of Judge to give adequate direction on common intention —No direction on how to apply law to facts regarding common intention and element of participation of accused in offence charged — Non-direction that common intention must be necessary, not possible, inference — Penal Code, section 32.

The two accused-appellants were found guilty of jointly committing the murder of one Udulawathie, the daughter of the 2nd accused. To establish its case, the Crown relied on rather vague and sketchy evidence of a circumstantial nature.

The medical evidence revealed that only incised injuries were observed upon the body of the girl. A sister of the deceased testified that the 2nd accused assaulted her with a rice pounder. The medical evidence ruled out the possibility of the deceased having been struck by any such heavy blunt weapon.

A brother of the deceased testified to his having seen the two accused holding the deceased by her shoulders and dragging her towards the house of the 1st accused, while she appeared to be senseless. Soon afterwards, the 2nd accused returned and made certain statements to this witness. The evidence of this witness was inherently improbable.

The only evidence upon which the Crown claimed to rest to charge of murder against the 1st accused was an alleged familiarity between the two accused, and the dragging of the deceased towards his house.

Held: (i) That in this state of the evidence, it was imperative for the Jury to have received adequate direction in respect of the element of common intention implied in the joint charge against the two accused.

(ii) That except for a statement of the law in general terms, there was a complete absence of the manner in which the law was to be applied to the particular facts of the case.

(iii) That in a case dependent solely on circumstantial evidence, and that too of a vague and unsatisfactory nature, the Jury should undoubtedly have received assistance on the manner of the application of law relating to common intention, and, particularly to the element of participation of the two accused in the offence charged.

(iv) That there was also a complete absence of a direction that the inference of common intention must be not merely a possible, but a necessary, one.

Case referred to: *M. J. Fernando* v. *The Queen* (1952) 54 N.L.R. 260.

E. R. S. R. Coomaraswamy, with *N. Wijenathan*, *V. Shanmuganathan* and *S. Sinnathamby*, for the 1st accused-appellant.

S. Sinnathamby (assigned), for the 2nd accused-appellant.

T. A. de S. Wijesundere, Senior Crown Counsel, for the Crown.

T. S. Fernando, J.

The 1st and 2nd accused-appellants stood their trial before a judge and jury on a charge of jointly committing the offence of murder by causing the death of one Udulwathie, a girl aged between 15 and 20 years, the daughter of the 2nd accused. The jury by a divided verdict of 6 to 1 found both accused guilty of murder, and sentence of death was accordingly pronounced on them by the trial judge.

The medical evidence revealed that only incised injuries were observed upon the body of the girl which had been fished out from a stream about a mile and a quarter from her house on the afternoon of the 25th of August 1966. There was some evidence led that the deceased did not like her mother and used to keep away from home for hours, but had never failed to return at any rate by dinner time. According to the case for the Crown the girl was seen alive about 7 p.m. on the 23rd August and must have been killed shortly thereafter, probably by about 8.30 or 9 p.m. The fatal injury was a cut with a heavy weapon on the front of her neck severing all vital structures up to the vertebral column, and death would of course have been instantaneous on receiving that injury. Neither of the other two injuries could by itself have led to her death. The medical testimony ruled out the possibility of the deceased having been struck by a heavy blunt weapon like a rice-pounder.

To establish its case, the Crown relied on rather vague and sketchy evidence of a circumstantial nature. A sister of the deceased, Lilian, a girl of about 12 years of age, testified that on the evening of the 23rd April, the deceased was assaulted in the back compound of their house by their mother the 2nd accused, upon a refusal by the deceased to comply with her mother's request to pound some rice. Lilian was unable to say where the blow alighted, but she saw the deceased fall for the blow. She attempted to go up to the spot where the deceased fell, but she was chased away by the 2nd accused who asked her to get inside and sleep which, she said, was what she in fact did thereafter. The 2nd accused told her not to mention about the assault to anyone, and therefore when her father returned home later that night she refrained from telling him anything of what she had herself seen or been told by the 2nd accused. When the Police questioned her after the 25th August she said she was unable to say how the deceased came by her death, and in fact had said that the deceased did not return home that evening after she had gone out on an errand of her mother.

The other witness of some importance called for the Crown was Somaweera, an 18 year old son of the 2nd accused and a brother of the deceased girl. He had been out that evening at his mother's request to buy some flour and returned home about 8 or 8.30 p.m. When he was quite close to their house he saw, by the aid of the lamp alight in the house itself which lit up the path thereto, the 1st and the 2nd accused holding by her shoulders the deceased who appeared to be senseless and carrying (dragging?) her towards the house of the 1st accused which is some 87 feet from their house. He left the flour in the house and came out to see what was happening to the deceased when he saw his mother on the compound of their house coming from the direction of the 1st accused's house. (It may be stated straightaway that if, as the Crown suggested, the girl's neck was cut only in the house of the 1st accused after the deceased had been taken or dragged there, it appears to follow almost inevitably that the 2nd accused could not have been present at any such killing. There was no suggestion that Somaweera dallied about the house before coming out again after depositing the parcel of flour there, and the interval of time between his seeing the deceased being dragged and his mother return home was hardly sufficient for the mother to go up to the house of the 1st accused and return home.) To continue Somaweera's story, his mother placed close to his neck a knife which she had in her hand at the time she was so returning and said to him:— "I did not intend to kill Udulawathie, but I dealt a blow and she died. Therefore I took

her to Dharmadasa's (1st accused's) house and left her there. If you tell anybody about this I will cut you also and I will do something to myself. Father has gone to the village to search for her." Somaweera did not tell his father a word about what he had seen or heard. He sought to explain his silence by stating that, as his father was fond of the deceased, he was afraid his father would inflict some harm on himself. He actually joined the 2nd accused in what he termed a pretended search for the deceased and saw his mother go by herself into the house of the 1st accused and stay there for about half an hour requesting the other searchers to stay outside.

The 1st accused is a person to whom the 2nd accused used to supply cooked meals. Sometimes the 1st accused came to the house of the 2nd accused for his meals; at other times the meals were taken to him by the 2nd accused or one of her children.

If the deceased's neck had not been cut at the time Somaweera claimed to have seen her being dragged by her shoulders, then the Crown case must have been that the fatal injury and indeed all three cut injuries were caused inside the house of the 1st accused and the body disposed of shortly thereafter. On the night of the 25th August the Police visited this house, but the Inspector of Police did not observe any stains resembling blood-stains. According to the medical evidence blood should have spurted out at the time the neck of the deceased was cut. The same Inspector inspected this house again on the 28th August and claimed to have noticed that one of the rooms had been throughly cleaned. He had not noticed this feature on the occasion of his earlier inspection.

It is unnecessary here to refer to the other items of evidence except to observe that the only evidence upon which the Crown claimed to rest its charge of murder against the 1st accused was the alleged familiarity between the 1st and 2nd accused and the dragging of the deceased towards his house. I have already referred to the inherent improbability of Somaweera's story. In this state of the evidence it was imperative for the jury to have received adequate direction in respect of the element of common intention implied in the joint charge against the two accused. Except for a statement of the law in general terms, there was a complete absence of the manner in which the law was to be applied to the particular facts of the case. As this Court indicated in *M. J. Fernando* v. *The Queen* — (1952) 54 N.L.R. at p. 260, "what is of importance is that, with or without a preliminary general disquisition, the trial judge should apply the relevent law to the relevant facts in as simple a manner as possible and in the course of the analysis of those facts. The closer he keeps to this narrow path the more likely is it that the jury will arrive at a correct conclusion and more clearly will it appear to this Court that justice has been done." Except for a general explanation, fairly early in his summing-up, of the principle of law embodied in section 32 of the Penal Code, there was a omplete absence of any reference to the manner of the application of that law to the facts of the instant case. In a case dependent solely on circumstantial evidence, and that too of a vague and unsatisfactory nature, the jury should undoubtedly have received assistance on the manner of the application of the law relating to common intention, particularly to the element of participation of the two accused in the offence charged. And, we note, there was also a complete absence of a direction that the inference of common intention must be, not merely a possible, but a necessary one.

For these reasons we quashed the convictions and sentences and acquitted the accused-appellants.

Accussed acquitted.

Present: **H. N. G. Fernando, C.J. and Sirimane, J.**

THE GETAGAHAWALA ESTATE, RANGALA *vs.* MOHAMED RAFEEK & ANOTHER*

S.C. 118 *of* 1964 — *D.C. Kandy* 9085

Argued on: June 8, 9, 10, 11, 12 and 20, 1967.
Decided on: July 19, 1967.

Notary—Allegation of gross negligence against — Action for damages — Failure to discover, while searching in Land Registry, two deeds affecting title of mortgagor relating to seven out of eight lands mortgaged to secure loan by plaintiff — Hypothecary decree—Sale in execution — Absence of bidders— Leaflets informing prospective buyers regarding said two deeds and defect in mortgagor's title—Two deeds not registered in folios relating to the seven lands mentioned therein — Registered in separate folios — Cross-references suspicious— Effect — Whether damages suffered by plaintiff — Mortgage Act (Cap. 89), section 16—Evidence Ordinance, sections 35 and 114(d).

Deeds combining undivided shares of some lands with divided interests of other lands to form separate corpus—Whether this permissible—Are they registrable instruments?— Registration Ordinance (Cap. 119), section 49, rules 5, 6(3), 10(9), 13(3), 14 made thereunder—Procedure adopted by Registrar in registering deeds and making cross-references—By whom and when can cross-references be made?

The plaintiff Company sued the executors of the estate of the deceased Notary A, claiming damages in a sum of Rs. 25,302/78 for alleged gross negligence on his part in that he failed to discover two deeds while searching the Land Registry, which search he undertook for the purpose of recommending title to eight lands in connection with a Mortgage Bond executed by one P in 1960 to secure a loan of Rs. 25,000/- from the plaintiff Company. By the said two deeds produced as P18 and P19, P had transferred his title in seven of these lands to his two sons. This was brought to light when in consequence of a hypothecary decree subsequently entered against P. the properties were put up for sale in execution. At the sale there were no bidders for the said seven lands, due to some leaflets being published informing prospective buyers that P had only "limited interests in the lands put up for sale."

The said two deeds P18 and P19 were not registered in any of the folios relating to the seven lands dealt with in those deeds. P had purported to consolidate his undivided interests in some lands with his divided interests in others to form a separate corpus as depicted in a plan and purported to transfer to each of his sons a share of that corpus.

The two deeds however, were registered in an entirely different folio but with certain cross-references the authenticity of which was challenged as having been made on a later date by an unauthorised person.

From an examination of the documents produced it became clear (a) that not one of the cross entries or the dates on the folios relating to the seven separate lands had been signed or initialled by the Registrar who is the only person empowered to make a cross-reference under the provisions of the Registration of Documents Ordinance and the Rules made thereunder.

(b) that in the certified copy produced of the folio in which P18 and P19 were registered, there was nothing to indicate that the cross entry appearing therein had been initialled by any one at the time the certified copy was issued in September 1963, but in the original produced at the trial there appears an initial.

The evidence of the Managing Director of the plaintiff Company showed that the Notary had informed him that he had made the search and that one of the lands was subject to a life interest.

Held: (1) That in the circumstances, the relevant cross references are exceedingly suspicious and as these suspicions have not been removed by the parties relying on those entries by calling evidence to prove that they are genuine, the Court should not draw the presumption under Sec. 114 (d) of the Evidence Ordinance that they had been made in the regular performance of official duties.

(2) That the plaintiff had failed to establish gross negligence on the part of the deceased notary.

(3) That it is a physical and legal impossibility to combine undivided shares of some lands with divided interests in other lands and thus create a new land on paper as was attempted in P18 and P19.

(4) That, therefore, the Registrar should not have opened a new folio to register those 2 deeds. They could have been correctly registered in the 7 different folios, with cross references duly made at the time of registration as the schedules in the deeds described these 7 lands as well.

* For Sinhala translation, see Sinhala section, Vol. 17, part 2, p. 5

(5) That the plaintiff had suffered no damages as the mortgage bond has, by virtue of due registration, priority over the deeds P18 and P19 and any purchaser at the sale in execution will therefore get good title.

Per **Sirimane, J.** (*A*) "Learned Counsel for the appellant contended that the purchasers would be reluctant to buy lands with a defective title. But the defect must be shown to be a legal defect and not merely a suspicion of bad title."

(*B*) "The action being brought against the estate of a dead man, the evidence must 'be looked at with great jealousy and care' (vide *Murugappah Chettiar vs. Muththal Achy* 58 N.L.R. page 25)."

Cases cited: *Murugappah Chettiar* v. *Muththal Achy* (1956) 58 N.L.R. 25 (P.C)
Fernando vs. *Perera* (1917) 20 N.L.R. 119.
Punchihamy vs. *Premaratne Hamine* (1925) 27 N.L.R. 1; 3 Times of Cey. L.R. 107
Mudalihamy v. *Punchi Banda* (1922) 5 C.L.Rec. 73; 24 N.L.R. 274; 1 Times of Cey. L.R. 99

C. Ranganathan, Q.C., with *K. Thevarajah* and *T. N. Wickremasinghe*, for the appellant.

H. V. Perera, Q.C., with *H. W. Jayawardene, Q.C., D. R. P. Goonetilleke* and *N. R. M. Daluwatte*, for the respondent.

Sirimane, J.

The plaintiff filed this action against the executors of the estate of a deceased notary, one Mr. Ameen, claiming a sum of Rs. 25,302/78, which they alleged, represented the damages that they had suffered as a result of the negligence of the deceased notary.

The facts are shortly as follows: one Periyasamy wanted to borrow a loan of Rs. 25,000 from the plaintiff, and offered as security his right, title and interest in eight different lands. In at least four of them, Periyasamy owned only undivided interests. According to the Managing Director of the plaintiff company, he asked the deceased on 13.7.60 to search the Land Registry, and the deceased undertook to do so, and requested him to return a couple of hours later. When he returned the deceased informed him that he had made the search, and that money could be lent on a mortgage of the lands, but added that one land (land No. 2 in the mortgage bond P1) was "subject to a life interest". It is likely that the deceased had informed this witness that Periyasamy had only a life interest in one land, for a layman can easily make a mistake in regard to the exact words used in a matter like this. (In fact, Periyasamy had executed a deed (P20) in favour of his daughter in respect of land No. 2 in P1, reserving to himself a life interest, which deed is correctly registered).

The mortgage bond P1 was then drawn up, on which Periyasamy's interests in the 8 lands were mortgaged to the plaintiff for a sum of Rs. 25,000. The bond was duly registered in the correct folios relating to the eight different lands.

There was some collateral agreement by Periyasamy to supply green leaf to the plaintiff in liquidation of the debt, and Periyasamy having defaulted the plaintiff put the bond in suit a few months later and obtained a hypothecary decree. At the sale, however, the plaintiff found that only one land — the one in which Periyasamy had a life interest — was sold. There were no bidders for the other seven. Some leaflets had been distributed apparently at the instance of Periyasamy's widow (P6 is one of them) informing prospective purchasers that Periyasamy had only limited interests in the lands put up for sale. There was also some reference to deeds 197 and 198 of 9.1.58, probably a reference to deeds P18 and P19 though the numbers are incorrect and an allegation that the lands were sold "without the permission of Court" — which is not quite intelligible. The property was put up for sale only on one occasion.

This action is brought on the footing that Mr. Ameen had not searched the Land Registry, or had been so grossly negligent in doing so that he failed to discover the two deeds Nos. 167 and 168 (P18 and P19) both dated 9.1.58 by which Periyasamy had transferred his title in 7 of these lands (Nos. 1 and 3 to 8 in the mortgage bond) to his two sons.

The action being brought against the estate of a dead man, the evidence must "be looked at with great jealousy and care" (vide *Murugappah Chettiar* vs. *Muththal Achy* 58 N.L.R. page 25).

P18 and P19 are not registered in any of the seven folios relating to the seven lands dealt with on those deeds. Periyasamy had purported to consolidate his undivided interests in some lands with divided interests in others, to form a separate

corpus as depicted in a plan, and purported to transfer to each of his two sons a half share of that corpus. The two deeds are registered in an entirely different folio but with certain cross references, the authenticity of which was challenged and to which I shall refer later.

It is a physical and legal impossibility to combine undivided shares of lands with divided lots, and thus create a new land on paper, as Periyasamy has attempted to do. This has been pointed out before by this Court (vide *Fernando* vs. *Perera*, 20 N.L.R. 119, and *Punchihamy* vs. *Premaratne Hamine*, 27 N.L.R. page 1). The Registrar should, therefore, not have opened a new folio to register these deeds. It has been urged on behalf of the respondents that P18 and P19 were not "registrable instruments" and the Registrar's act in registering them was not an entry made in official book or register by a public servant in the discharge of his public duty. It was urged that the cross references, even on the assumption that they were made by the Registrar, were also not official acts as contemplated by section 35 of the Evidence Ordinance.

I do not think, however, that P18 and P19 can be described as "non-registrable instruments". They could have been correctly registered in the seven different folios, for the schedules in the two deeds describe these seven lands as well. Even if the Registrar was mistaken in opening a new folio, if there were cross references made *at the time of registration* in the seven other folios which would lead a person making a search to the folio in which P18 and P19 were registered, one would expect a diligent notary to inform his client of the existence of these two deeds, however wrong the registration may be.

But the authenticity of the cross references that now appear on the folios has been strongly challenged both in the lower Court and in the argument before us.

Were these cross references there on 13.7.60, i.e., the date on which the mortgage bond was executed?

On the one hand there is the evidence of the plaintiff's Managing Director that Mr. Ameen assured him that he had searched the land registry and that title was good except for a "life interest" in one land. Mr. Ameen is a notary who had acted for the plaintiff on several occasions before this and discharged his duties satisfactorily. There is also the fact that Mr. Ameen had referred (in regard to the land No. 2) to "a life interest", which is strongly indicative of his having searched the Land Registry.

On the other hand, there is the fact that the cross references are there now, and, if genuine, should have been there at the time of the search.

The original registers had been produced in the lower Court and returned to the Land Registry, and as we wished to see them ourselves we summoned the present Registrar, who produced them before us and gave evidence.

I might set out here the procedure adopted by a Registrar when a deed is tendered for registration: a clerk in the Registry designated "The Day Book Clerk" receives the deed tendered for registration, and enters the date in the Day Book register. That would be the relevant date for deciding questions of prior registration, though the actual registration of the deed in a particular volume and folio (called the Register) takes place on a later date. The length of time that elapses between the tendering of the deed and the actual registration depends on the work in a particular Registry. In Kandy, according to the present Registrar, it would take about two weeks, but when the registration is made the date of registration is entered as the date appearing in the Day Book entry. The other particulars on the deed such as the names of the transferor, transferee, the description of the land etc. as appearing in the certified copies, are then filled in and the Registrar signs a column at the right-hand end of the folio just before the "remarks" column which is the last.

A cross entry is made across the top left-hand corner of the page. In this case, the cross entry in the folio where P18 and P19 are registered E 386/207 (P10) reads as follows:

> "This is comprised of the land registered in E 322/285, half share of the land in E 370/163, portions of the lands registered in E 322/286, E 322/287, land in E 275/89, lands in E 264/288, E 354/212."

In the other 7 folios the entries are to this effect:

> "The land registered in E 386/207 is comprised of this and several others" (vide P11, for example).

These entries have been made in red ink with the letters "R L" at the end, and a space left between the entry and the two letters for the Registrar to sign or initial. Under the letters "R L" in each entry is the date 11.1.58.

Under the provisions of the Registration of Documents Ordinance, Chapter 117, and the rules made thereunder, it is only the Registrar who is empowered to make a cross reference. Where a clerk is empowered to do any act, the rules expressly say so, e.g. rule 5 made under section 49 of the Ordinance and appearing in Chapter 101 of the First Volume in the Subsidiary Legislation empowers the Registrar *or the Day Book Clerk* to enter an instrument for registration in the Day Book, Rule 6(3) empowers the Registrar or the *Day Book Clerk* to cancel the stamps affixed to an instrument and enter it in the day book, and rule 10(1) empowers the Registrar *or the Day Book Clerk* to issue a receipt to a person tendering an instrument for registration.

Cross references are made under rule 13(3) under which the Registrar (not a clerk) can make such a cross reference if he finds that the description of the land differs in some respect from a description of a similar land or again under rule 14 the Registrar is empowered to make a cross reference when a divided portion of a larger land is registered in a new folio. This is also the practice according to the Registrar of Lands Mr. Dissanayake, and is as it should be, for a cross reference can vitally affect titles to lands, and one cannot lose sight of the fact that several persons such as clerks in the Land Registry, clerks of Proctors and Notaries etc. have access to these registers. It is permissible for a clerk in the Registry to do the physical act of writing out the entry, but in such a case the Registrar must authenticate it by signing or initialling the entry. When a cross entry is made by the Registrar or under his authority it is reasonable to assume that it was done at the time it should have been done, namely, at the time of the registration of the deeds P18 and P19 (vide *Mudalihamy* vs. *Punchi Banda*, 5 C.L.R. at page 74).

But in this case it is quite clear on the face of the entries themselves that they have been made by some person other than the Registrar (who was one Mr. Fernando at the relevant time) and not authenticated by him.

Not one of the cross entries on the folios relating to the seven separate lands — and it is only these entries which would lead one to the new folio where P18 and P19 are registered — has been signed or initialled by the Registrar. The date under the letters "R L" is of little significance, without authentication, for that date (11.1.58) would have been entered under the cross entry at whatever time the entry was made. Mr. Dissanayake, the present Registrar of Lands, Kandy, says that when a cross entry is made in a new folio by a clerk, all the other relevant folios to which this entry relates are placed before the Registrar who would authenticate them by initialling all the cross entries *at the same time*. Mr. Dissanayake says that those are the departmental orders which they follow.

It is difficult to believe that the Registrar in this instance failed to authenticate a single of the cross entries relating to the seven separate lands, if they had been written at his instance at the time P18 and P19 were registered in a new folio, or that he initialled one folio and failed to initial all the others.

I find these apparently unauthorised cross references exceedingly suspicious.

There is another matter which cannot be lightly overlooked. A certified copy of the folio in which P18 and P19 are registered (marked P10) was produced at the trial. There is nothing in the certified copy to indicate that the cross entry appearing therein had been initialled by anyone at the time the certified copy was issued, which was on the 13th of September, 1963, according to the certificate at the end of P10. The evidence of the clerk of the Land Registry who produced the original entries in the lower Court was that "in all these extracts of encumbrances the originals show that the entries..... have not been signed or initialled by the Registrar of Lands." In the original of P10, which was produced before us, there *now* appears an initial. Mr. Dissanayake who is familiar with the handwriting of the previous Registrar Mr. Fernando, is unable to identify that writing.

The plaintiff made no effort at all to call any evidence, which would have been easily available, if the entries were genuine, to prove who made those cross-entries and when they were made. He relied on section 35 of the Evidence Ordinance under which an entry in an official book or register made by a public servant in performance of a duty enjoined by the law is a relevant fact; and the presumption that a Court may draw under section 114(d) that official acts have been regularly performed.

But when it is shown that entries appearing in an official record are suspicious, and the suspicion is not removed by the party relying on the entries, a Court should not, in my opinion, draw the presumption that they had been made in the regular performance of official duties.

Counsel for the appellant in support of his contention that Mr. Ameen had failed to search the Land Registry pointed out that in the volume and folio numbers indicating the "Prior Registration" in mortgage bond P1, the numbers in respect of the eight lands are not the numbers of the last folio relating to those lands. That is indeed an error, but there can be several explanations for it. These numbers are placed on a deed to indicate to the Registrar the volume and folio in which the instrument should be registered. Notaries, often, though erroneously, give the number appearing in any one of the earlier title deeds which would lead the Registrar to the correct folio. In the view I have taken that the cross-entries are suspicious, this circumstance is not strong enough to draw the inference that the deceased did not search the Registry.

I am of opinion that on a balance of evidence the plaintiff has failed to establish negligence on the part of the deceased.

In this view of the matter the question of damages does not arise but I would like to state that I am in agreement with the conclusion reached by the learned District Judge that the plaintiff has suffered no damages.

The mortgage bond has, by virtue of due registration, priority over the deeds P18 and P19. Under section 16 of the Mortgage Act (Chapter 89) a person having any interest in a mortgaged land to which the mortgage in suit has priority is bound by the mortgage decree if he had not taken steps to get himself added as a party before entering of the decree.

Any purchaser at the sale in execution will, therefore, get good title. Learned Counsel for the appellant contended that the purchasers would be reluctant to buy lands with a defective title. But the defect must be shown to be a legal defect and not merely a suspicion of bad title.

The order to sell, as stated earlier, was issued only once. It is a common experience in our courts to find debtors or their nominees trying to delay or defeat execution sales on one pretext or another, and orders to sell have to be issued three or four times before a sale takes place. Besides, as the learned District Judge pointed out the plaintiff himself could have bought these properties. The submission made on his behalf that Periyasamy's children *may* allege that priority for the mortgage bond by registration had been obtained by some fraud between the plaintiff and their father, and thus involve the plaintiff in litigation, is not, in my view, a reasonable ground for not purchasing the properties.

The plaintiff has a good and a valid hypothecary decree which is still capable of execution.

I would affirm the decree of the District Court, and dismiss the appeal with costs.

H. N. G. Fernando, C.J.

I agree.

Appeal dismissed.

Present: **Weeramantry, J.**

K. V. SUBRAMANIAM *vs.* THE INSPECTOR OF POLICE, KANKESANTURAI

S.C. Application No. 274/68—*M.C.Mallakam* 4001

Argued on: 7th & 11th July, 1968
Decided on: 11th August, 1968

Criminal Procedure Code, sections 157(3) *and* 287—*Non-summary proceedings—Plaint filed at scene of offence and witness examined — Accused unrepresented — Questions to witness by accused — Proctor appearing when second witness gave evidence and applying for date to cross-examine— Postponement allowed — Queen's Counsel appearing on next date—Second witness cross-examined — Application by counsel to cross-examine* 1*st witness—Refusal by Magistrate—Should accused be deprived of statutory right to be defended by pleader — Scope of section* 287.

Courts Ordinance (*Cap.* 6), *sections* 19, 21, 40 — *Powers exercisable by Supreme Court in respect of non-summary proceedings.*

This appeal involves the right of an accused person to be defended by a pleader at the stage of non-summary proceedings.

The accused stood charged with murder by shooting one R on 9/4/1968. The same evening he was arrested with two others but only he was detained overnight in police custody and plaint was filed before the learned Magistrate at the scene on the following morning, charging him with the murder of R. On the same day the prosecution led the evidence of witness K, who claimed to have seen the accused firing the fatal shot. The accused was unrepresented at the time, but this witness had been questioned presumably by the accused in terms of section 157(3) of the Criminal Procedure Code.

After K. was questioned a proctor appeared for the accused and was present when the 2nd witness who claimed to have seen the shooting by the accused was called by the prosecution. At the conclusion of this witness' deposition, the proctor for the accused applied for a date to cross-examine the witness and this was allowed. On the next date learned Queen's Counsel appeared for the accused and under cross-examination the second witness admitted that he did not see the shooting and attributed his untruthfulness to his anger at the incident that had occurred.

The inquiry was thereafter adjourned and on the resumed date learned counsel for the accused applied to cross-examine K the first witness as (*a*) the accused, on the 1st day, was not in a position to ask certain questions vital to the defence, as he had no assistance from counsel.

(*b*) the accused was unaware that by asking a few questions he would be depriving himself of the right of cross-examining a witness.

(*c*) the accused had been brought to the scene from the police cell.

The learned Magistrate reserved his order and subsequently refused the request *inter alia* for the following reasons:

(*a*) that the 2nd witness who went back in his evidence had done so "too obligingly", the implication being that the witness had been suborned.

(*b*) that he feared that the witness K. if recalled would "succumb to the same sort of pressure."

(*c*) that since the accused would have an opportunity of cross-examining K later on, no grave prejudice would be caused to the accused.

(*d*) that in view of these circumstances he felt justified in refusing the application although ordinarily he would have permitted counsel to cross-examine him.

Held: (1) That the reasons given by the learned Magistrate for the refusal to permit cross-examination of the witness are not sustainable as—

(i) the fact that one witness is thought by the learned Magistrate to have been suborned is no reason for presuming that all the other witnesses or that other crucial witnesses have also been suborned;

(ii) the denial of the right of cross-examination the most powerful weapon in the armoury of our legal procedure, subject to the limits allowed by law, is not conducive to the ascertainment of truth, and may well result in in entrenching falsehood;

(iii) unless a Magistrate has very strong reasons for arriving at the conclusion of subornation he should generally incline in favour of the view that it is the process of cross-examination rather than the use of illicit pressure which results in a witness' change of front;

(iv) it is the right of every accused person in non-summary proceedings to hope and expect with confidence that if the evidence against him proves insufficient to justify a committal, the Magistrate will discharge him without putting him through the ordeal of a trial in a higher court on a grave crime and to deny that right merely because the superior Court will undoubtedly go through the normal process of trial, amounts to a serious violation of such right.

(2) That the refusal by the learned Magistrate to permit the cross-examination of the witness had resulted in a denial of the right conferred on' an accused by section 287 of the Criminal Procedure Code to retain a pleader, a right described by the Supreme Court as being "now ingrained in the rule of law and recognised in the Law of Criminal Procedure of most civilised countries." (*Premaratne* vs. *Gunasekera*, 68 C.L.W. p. 53).

(3) That the questions asked by the accused himself on the 1st day, when he was not represented by counsel, could not be held to be in any way a substitute for cross-examination by a lawyer and could not result in a loss of the statutory right to be defended by a pleader under section 287 of the Criminal Procedure Code.

(4) That it is unquestionable that the powers of the Supreme Court under sections 21 and 40 of the Courts Ordinance could be exercised in respect of non-summary proceedings.

Per **Weeramantry, J.** "(*a*) In testing, in a given case, whether the right so assured has in fact been enjoyed, a Court will guide itself by the spirit of the law rather than by a regard to technicalities, and will not conclude that the right has been afforded unless it has been effectively afforded."

(*b*) "Thus the right to a pleader means nothing if it is not associated with the time and opportunity to retain one *The Queen* v. *Prins* (1962) 61 C.L.W. 26, nor can there be a true exercise of this right where a pleader has in fact been retained but been clearly afforded insufficient time for the preparation of his case and for obtaining instructions, from the accused *The Queen* v. *Peter* (1961) 64 N.L.R. 120."

(*c*) "The Indian Courts have taken the principle of representation so far as to hold it to be essential at the stage of examination in chief no less than in cross-examination, for the reason that the skill and knowledge of a lawyer confer real advantages on an accused person at the stage of examination in chief, through objection being taken to inadmissible and irrelevant evidence and to leading questions, *Re Manargan* (1925) 27 Criminal Law Journal 33.

Likewise, in recent years the American Supreme Court has handed down some outstandingly important decisons relating to the scope of the right to the assistance of Counsel, as provided in the Sixth Amendment to the American Constitution."

(*d*) "In regard however to section 157(3) read in relation to section 287, it is not a technical requisite that must be satisfied but the fundamental question whether the right of representation conferred by sction 287 has been truly and substantially enjoyed."

Cases referred to: *Alles* v. *Palaniappa Chetty* (1917) 19 N.L.R. 334
Attorney-General v. *Kanagaratnam* (1950) 52 N.L.R. 121.
The Attorney-General v. *Don Sirisena* (1968) 70 N.L.R. 347.
Premaratne v. *Gunasekera* (1965) LXVIII C.L.W. 53
The Queen v. *Prins* (1962) LXI C.L.W. 26.
The Queen v. *Peter* (1961) 64 N.L.R. 120; LIX C.L.W. 112
Jayasinghe v. *Munasinghe* (1959) 62 N.L.R. 527; LVII C.L.W. 111
In re Rangasamy Padayachi (1916) 16 Cr. L.J. 786.
Rajabansi v. *The Emperor* (1921) 22 Criminal Law Journal 228.
Agarawal v. *Emperor* (1937) A.I.R. Allahabad 436.
Re Manargan (1925) 27 Criminal Law Journal 33.
Hamilton v. *Alabama* (1961) 368 U.S. 52
White v. *Maryland* (1963) 373 U.S. 59.
Escobedo v. *Illinois* (1964) 378 U.S. 478
Miranda v. *Arizona* (1966) 384 U.S. 436.
Pointer v. *Texas* 380 U.S. 400.
Ratnam v. *Cumarasamy* (1965) 1 W.L.R. 8

Dr. Colvin R. de Silva, with *S. Sharvananda*, *R. R. Nalliah*, *Bala Nadarajah* and *Ananda Paranavitarne*, for the accused-petitioner.

L. D. Gurusamy, Crown Counsel, for the Attorney-General.

Weeramantry, J.

This application raises a matter of fundamental importance in our criminal law, for it involves the right of an accused person to be defended by a pleader at the stage of non-summary proceedings.

In this case the accused stands charged with the murder of one Raman who is alleged to have been shot dead by the accused on the 9th of April 1968. That same evening the accused and two others were arrested but these two others were released and the accused was detained overnight in police custody and produced in custody the next morning before the learned Magistrate.

Plaint was filed before the learned Magistrate at the scene on the morning of the 10th April charging the accused with the murder of Raman and on that same day the prosecution led the evidence of Ramu Kandasamy the son of the deceased. This witness claimed to have seen the accused firing the fatal shot.

During the recording of the deposition of this witness the accused was unrepresented. The record shows however, that the witness has been questioned on his deposition and this was presumably done by the accused in terms of section 157(3) of the Criminal Procedure Code.

After the questioning of the first witness was concluded a proctor appeared for the accused and was present during the recording of the deposition of Kathirapillai, a brother of the deceased who was called by the prosecution as its second witness. This witness too claimed to have seen the accused levelling his gun at the deceased and firing the fatal shot.

After the conclusion of Kathirapillai's deposition the proctor appearing for the accused stated to the learned Magistrate that he would like to cross examine this witness later, as he did not at the stage have the necessary instructions. This application was allowed and on the next date the accused was represented by learned Queen's Counsel who cross examined Kathirapillai. Under cross examination Kathirapillai went back completely upon his claim to have been an eye witness and admitted that he did not see the shooting. He further admitted specifically that his statement to the learned Magistrate that he had seen the accused levelling the gun and firing at the deceased was false. He attributed the untruthful evidence he had earlier given to his anger at the incident that had occurred.

The son of this witness, a boy by the name of Ambikaipathy, was called next. He did not claim, however, to have seen the shooting and in fact stated that he saw a person other than the accused with a gun in hand immediately after the incident.

The matter was adjourned and on the resumed date of enquiry the accused was represented by learned counsel who made an application that the first witness Kandasamy, who had given evidence at the scene, be recalled for further cross examination as it was necessary to cross examine him on certain matters vital to the defence. Learned counsel stated also that the accused had not been in a position on that day to ask these questions as he had had no assistance from his counsel and had not known the nature of the proceedings. It was also stated to the learned Magistrate that the accused had been unaware of the fact that by asking a few questions he ran the the risk of depriving himself of the right of cross-examining the witness. The attention of the learned Magistrate was also drawn to the fact that the accused had been brought to the scene from the police cell.

The learned Magistrate reserved his order upon this application and made order subsequently refusing this request of the defence. It would appear also from the order of the Magistrate, though there is no record to that effect in the proceedings themselves, that on the date when learned Queen's Counsel appeared he too had made an application that the witness Kandasamy be recalled by Court and tendered for further cross-examination. It is observed by the Magistrate in the course of his order that at that stage he had indicated to Queen's Counsel that after hearing the other two eye witnesses he would recall Kandasamy if he felt that it was necessary to do so in the interests of justice.

This order of the learned Magistrate is now canvassed on the ground that in the circumstances of this case the Magistrate's refusal to permit Kandasamy to be cross-examined by Counsel is in effect a denial to the accused of the fundamental right of representation by a pleader, which is assured to all accused persons by section 287 of the Criminal Procedure Code.

The order of the learned Magistrate sets out certain reasons for his refusal to permit the cross-examination requested by the defence. One of these reasons is that the witness Kathirapillai who went back on his evidence had done so "too obligingly" and for reasons best known to him, the implication of this observation being that the witness had been suborned. The learned Magistrate in view of this circumstance expressed a fear that the witness Kandasamy if recalled in that court would "succumb to the same sort of pressure". The learned Magistrate observed that he did not feel justified in exercising his discretion and recalling this witness.

A further reason adduced by the learned Magistrate was that since the accused would have an opportunity of cross examining Kandasamy later on, no grave prejudice would be caused to the accused if Kandasamy was not recalled at that stage. The learned Magistrate finally observed that in view of the circumstances set out by him he felt justified in refusing the application although ordinarily he would have recalled this witness and permitted Counsel to cross examine him.

Before I consider the main question involved in this application I should state preliminarily that it is undoubtedly within the province of this Court to make orders in regard to non-summary proceedings pending before a Magistrate. It is of course clear that this Court will not lightly interfere in non-summary matters but at the same time it is unquestionable that the province of this Court under sections 21 and 40 of the Courts Ordinance may be exercised in respect of non-summary proceedings and that, to quote Nagalingam, J, this power exists in the case of non-summary offences "through the entire gamut of non-summary proceedings in the Magistrate's Court". (*Alles* v. *Palaniappa Chetty* (1917) 19 N.L.R. 334; *Attorney-General* v. *Kanagaratnam* 52 N.L.R. 121).

I need not dwell further on this aspect of the matter except to refer finally to the judgment of a Divisional Bench of this Court in *The Attorney-General* v. *Don Sirisena* (1968) 70 N.L.R. 347, where this Court used its revisionary power and directed a Magistrate to comply, in non-summary proceedings, with the instructions of the Attorney-General. The Court held that section 19 of the Courts Ordinance read with section 5 of the Criminal Procedure Code was wide enough to afford powers of revision in relation to non-summary proceedings.

I come now to the main question which I must determine, namely whether there has been a denial to the accused of the right conferred on him by section 287 of the Criminal Procedure Code, a right which this Court has described as being "now ingrained in the rule of law and recognised in the law of criminal procedure of most civilized countries" (*per* T. S. Fernando, J., in *Premaratne* v. *Gunasekera* SC 93/64-MC Anuradhapura 2985/SCM of 19.3.65*). In testing, in a given case, whether the right so assured has in fact been enjoyed, a Court will guide itself by the spirit of the law rather than by a regard to technicalities, and will not conclude that the right has been afforded unless it has been effectively afforded. It seems to me therefore that the question to be answered in the present case is whether the accused has had in substance and in fact rather than in the niceties of legal theory the right of representation by a pleader when Kandasamy deposed before the learned Magistrate.

It needs little reflection to realise that the right we are here considering is a many faceted one, not truly enjoyed unless afforded in its many varied aspects. Thus the right to a pleader means nothing if it is not associated with the time and opportunity to retain one, (*The Queen* v. *Prins* (1962) 61 C.L.W. 26), nor can there be a true exercise of this right where a pleader has in fact been retained but been clearly afforded insufficient time for the preparation of his case and for obtaining instructions from the accused, (*The Queen* v. *Peter* (1961) 64 N.L.R. 120). Indeed this Court has, despite the complainant, a foreign tourist, being scheduled to leave the country within 24 hours, nevertheless held that an accused person who was in police custody from the time of his arrest, should be granted time to retain a lawyer, (*Jayasinghe* v. *Munasinghe* (1959) 62 N.L.R. 527). Hence the right does not mean merely that an accused person is entitled in theory to be defended by a pleader but also that he must enjoy all those concomitant privileges without which the right is reduced to a cipher.

The remarkable speed with which plaint was filed in this case renders it extremely doubtful that the accused had the opportunity of consulting or retaining a lawyer to appear for him at an inquiry held the morning after his arrest, and following on a continuous period of police custody. In an uncontroverted affidavit before this court the accused-petitioner has stated that the proctor who eventually arrived at the scene of inquiry that morning had been retained by his relative and I see no reason to think that in the circumstances of this case the accused himself had had any opportunity of consulting, instructing or retaining a lawyer himself. It is also significant that the proctor when he first appeared brought it to the Magistrate's notice that he had not obtained necessary instructions from his client.

The scope of the privilege of representation by counsel as examined in somewhat greater detail by the Indian and American courts may here be briefly noticed. Section 340 of the Indian Code of Criminal Procedure which contains a provision corresponding to that we are now considering has been construed to mean that full opportunity should be afforded to the accused to get proper legal advice and assistance before he is called upon to cross-examine the prosecution witnesses, (*In re Rangasamy Padayachi* (1916) 16 Cr. L. J. 786).

Thus where an accused person has been arrested and placed in custody and is then suddenly called upon to conduct his case without an opportunity having been given to him of obtaining legal assistance, there is in effect a denial of the right to counsel, (*Rajbansi* v. *The Emperor* (1921) 22

* 68 C.L.W. 53

Criminal Law Journal, 228). In the case referred to the accused had been kept in detention for a period of ten days with the result that he had had no opportunity of obtaining legal assistance.

I see no distinction between such a case and the present, where there has been an equal denial of opportunity inasmuch as from the time of his arrest till the time of his production before the Magistrate the accused was in police custody. As was observed in *Agarawal* v. *Emperor*, (1947) A.I.R. Allahabad 436, a Magistrate is bound to give an accused person sufficient facility to be represented by a lawyer especially when he is in custody from the time he was arrested and accused of an offence.

The Indian Courts have taken the principle of representation so far as to hold it to be essential at the stage of examination in chief no less than in cross-examination, for the reason that the skill and knowledge of a lawyer confer real advantages on an accused person at the stage of examination in chief, through objection being taken to inadmissible and irrelevant evidence and to leading questions (*Re Manargan* (1925) 27 Criminal Law Journal, 33).

Likewise, in recent years the American Supreme Court has handed down some outstandingly important decisions relating to the scope of the right to the assistance of Counsel, as provided in the Sixth Amendment to the American Constitution. This Amendment provides that "In all criminal prosecutions the accused shall have the right ..... to have the assistance of Counsel for his defence."

The right has been given a progressively extended interpretation taking it back to the stage of arraignment (i.e. formal framing of charges) *Hamilton* v. *Alabama* (1961) 368 U.S. 52, the stage of preliminary examination prior to arraignment, *White* v. *Maryland* (1963) 373 U.S. 59, and to the stage of police investigation itself, *Escobedo* v. *Illinois* (1964) 378 U.S. 478, at which, after attention has begun to focus on a particular suspect, even interrogation is not permissible in the absence of a defence attorney, *Miranda* v. *Arizona* (1966) 384 U.S. 436.

So also in America the introduction of evidence given at a previous hearing not held at a time and under circumstances affording the petitioner through Counsel an adequate opportunity to cross-examine the witness has been held to be a denial of the fundamental right essential to a fair trial, *Pointer* v. *Texas*, 380 U.S. 400.

It will thus be seen that a liberal attitude underlies the modern approach to the right of representation. This is in conformity with an appreciation that the Rule of Law lies at the basis of this right, a principle which as already observed, has been recognised by this court, *Premaratne* v. *Gunasekera*, (supra). It would be in accordance with this view of the scope and basis of section 287 that the lack of effective opportunity for the exercise of the right which it assures should be viewed as a denial of the right itself.

It is true that an accused person cannot neglect to assert his right to retain Counsel and thereafter complain at a later stage that he has not had the opportunity of representation by Counsel. It is said that in the present case the accused has not merely not exercised his right to retain counsel but has also made use of the opportunity afforded to him under section 189 of questioning the witness concerned. It is submitted therefore that the accused having already enjoyed the right of questioning the witness cannot as of right demand a further opportunity for cross-examination.

It cannot be said in the present case that the accused has delayed in availing himself of his right to retain a lawyer, for circumstances did not permit him on his own to retain one prior to the proceedings before the Magistrate on the 10th. The failure to have a pleader appearing for him at the time the first witness made his deposition and was questioned is not therefore a circumstance that can result in the view that the right to be represented at that stage of the proceedings has been forfeited by default.

In regard to the exercise by the appellant himself of the right to question the witness it would not be correct to hold such questioning to be in any way a substitute for cross-examination by a lawyer.

The advantages of representation by a trained lawyer need no elaboration here. No layman however well informed and self-possessed can in the matter of presenting his defence and safe-guarding his interests bring to his benefit such resources of knowledge, training and skill as are peculiarly the attributes of the legal profession. Far less may a person defend himself adequately when he is himself subject to the mental turmoil and emotional stress resulting from the pendency against him of a charge of grave crime, and

suddenly learns that he may put questions to a witness. I should here advert to the petitioner's averment in his affidavit that, being 66 years of age and having spent the previous night in a police cell, he was not in a fit condition physically or mentally to cross-examine Kandasamy effectively on the morning of 10th April.

In the circumstances I do not think that the questions asked by the accused result in a loss of the statutory right to be defended by a pleader.

Learned Counsel for the Crown has submitted that the question of recall of a witness for cross-examination is entirely one of discretion on the part of the learned Magistrate inasmuch as the witness has already been tendered to the accused for questioning.

The question of recall of a witness as opposed to the tendering of a witness for cross-examination for the first time is always, he points out, a matter of discretion for a trial Judge, (Wigmore on Evidence, vol. 6, section 1898). Learned Crown Counsel submits that this being a matter of the exercise of a discretion vested in the Judge, this Court would not ordinarily interfere in the exercise of that discretion unless that discretion has been exercised on some wrong principle of law and should have been exercised in a contrary way and in fact a miscarriage of justice has resulted. The discretion should in his submission be presumed to be rightly exercised. In support of these principles he cites the case of *Ratnam* v. *Cumarasamy*, (1965) 1 W.L.R. 8.

It would appear, however, that even upon the basis of this submission, there is still the need for interference by this Court inasmuch as all the requisites so specified are here present.

An examination of the reasons adduced by the Magistrate in support of the refusal to permit cross-examination shows that they are clearly not sustainable, and all the more so because, to judge from his order, he would ordinarily have exercised his discretion, in favour of granting the application.

One reason adduced by the learned Judge, as already observed, carries the implication that the witness had been suborned and might therefore go back on his evidence.

I do not think that the fact that one witness is thought by the learned Magistrate to have been suborned is a reason for presuming that all the other witnesses or at any rate the other crucial witnesses have also been suborned.

Furthermore, it seems quite apparent that the duty of a Judge is to decide the case upon the evidence before him. If a witness should go back upon his evidence in cross-examination, a fact which the Magistrate will have to take into account in determining the issue before him will be that, whatever his reason for so doing, the witness has now given an altered version. Witnesses may go back upon their evidence in consequence of subornation or weak-mindedness or plain untruthfulness, among other reasons, but there is no warrant for assuming in advance the falsity of an altered version which may emerge in cross-examination or the truth of the original version elicited in examination in chief. It seems unthinkable therefore that the right to cross examine should be denied lest the resulting evidence will not accord with the initial version given by the witness. Evidence both in chief and in cross-examination must be viewed in its totality if the Judge is to ascertain the truth. Indeed for this purpose, as has so often been said, cross-examination is the most powerful weapon in the armoury of our legal procedure. The placing of a shield between this weapon and a witness is certainly not conducive to the ascertainment of truth and may well result in entrenching falsehood.

If the Magistrate takes the view that a witness has been dishonest or has perjured himself he will no doubt deal with him for such conduct but upon the issue before him he must decide only upon the evidence before him.

It is also questionable whether the learned Magistrate had before him sufficient material on which to arrive at a finding that the witness had been subjected to some illicit form of pressure. It may well be that it was in consequence of skilful cross-examination at the hands of learned Queen's Counsel that the witness decided to go back upon his testimony and unless he has very strong reasons for arriving at the conclusion of subornation the Magistrate would generally incline in favour of the view that it is the process of cross-examination rather than the use of illicit pressure which has resulted in a witness' change of front.

Cross-examination will of course be curbed by Court if it transcends the limits allowed by law but within these limits the right to cross-examination cannot be denied or curtailed. It therefore seems

scarcely a tenable reason for denying cross-examination that it is expected to be effective, for this is the very end and purpose of the cross examiner's skill.

Learned Crown Counsel submits that in considering whether there has been the opportunity to cross examine, we can derive guidance from cases decided under section 33 of the Evidence Ordinance relating to the admissibility of evidence given in a prior judicial proceeding. One of the requisites to the admissibility of such evidence is that in the former proceedings the adverse party should have had the right and the opportunity to cross examine. In applying this section the question whether the right or opportunity has been effectively used is immaterial so long as the right and opportunity did exist. Indeed even if the right and opportunity have not been used the requisites of section 33 would still have been satisfied. On this basis it is submitted that when we consider section 157(3) of the Criminal Procedure Code we should consider whether the opportunity was afforded to the accused rather than the question whether the opportunity was effectively used.

I do not think the analogy of section 33 holds good when testing whether section 157(3) has been satisfied. When applying section 33 of the Court's concern is only with the technical requisite that there should have been opportunity, for more than this can scarcely be stipulated to meet the situation which has unavoidably arisen, of a witness being unable to depose again. In regard however to section 157(3) read in relation to section 287, it is not a technical requisite that must be satisfied but the fundamental question whether the right of representation conferred by section 287 has been truly and substantially enjoyed.

Another reason given by the learned Magistrate namely that no grave prejudice will result in view of the opportunity to cross examine in the higher Court does not again bear examination.

It is the right of every accused person in non-summary proceedings to hope and expect with confidence that if the evidence against him proves insufficient to justify a committal the Magistrate will discharge him without putting him through the unnecessary ordeal of trial in the higher Court on a charge of grave crime. Where such an opportunity of discharge by a Magistrate does exist it would be a serious violation of the right of the accused to deny him that which is his right merely because the superior Court will undoubtedly go through the normal process of trial. Magistrates would do well to bear in mind the long period of incarceration and the expense and pain of mind resulting from unnecessary commitments.

For these reasons I consider that in the circumstances of this case the refusal by the learned Magistrate to permit cross-examination of the witness Kandasamy by Counsel was wrong. Acting in revision I accordingly reverse the order of the learned Magistrate and direct that the witness Kandasamy be tendered for cross-examination by Counsel for the accused.

Application allowed.

Present: **Siva Supramaniam, J. and Tennekoon, J.**

G. L. A. PERERA & ANOTHER *vs.* THE MUNICIPAL COUNCIL OF NEGOMBO

S.C. No. 145(*F*)/1965 — *D.C. Negombo* 534/*L*

Argued on: 8th May, 1968
Decided on: 15th June, 1968

Municipal Councils Ordinance, (*Cap.* 252), *section* 47—*Housing and Town Improvement Ordinance* (*Cap.* 199) *section* 5— *Where statute expressly creates a right or provides specific remedy for breach—Is a person entitled to insist on other remedies?*

Municipal Council — Resolution to open new road adopted — No steps taken to acquire land and demarcate street lines for several years — Owner of land over which proposed road would run applying for permission to build on such land — Permission not granted pending demarcation of street lines — Owner laying foundation in view of delay in approving plans—Prosecution of owner and conviction under Housing and Town Improvement Ordinance—Subsequent civil action for declaration that council entitled to construct road, that owner not entitled to construct building without permission from Chairman and for injunction to stop building operations—Is the Council entitled to the reliefs prayed for?

In July 1959, a Municipal Council adopted a resolution of its Works Committee that a new road be opened and that street lines be demarcated for the purpose. The proposed road ran over a part of the land owned by the defendants. the Council however, did not take any steps to acquire the land from the owners even at the date of the institution of this action which was in January, 1963.

On 3/4/62 the defendants forwarded to the Chairman of the Council for his approval under section 5 of the Housing and Town Improvement Ordinance plans and specifications to erect a building on their land. The approval was not granted pending the laying down of street lines and in view of this delay, the defendants laid the foundation for a building which took in a strip of land within the proposed street lines. The defendant was prosecuted under section 13 of the said Ordinance and was convicted.

The Council then instituted this action praying —

(*a*) for a declaration that the plaintiff is entitled to construct the proposed road after paying compensation to the defendants;

(*b*) for a declaration that the defendants are not entitled to construct the building without a permit from the plaintiff under section 5 of the said Ordinance;

(*c*) for a declaration that the unauthorised building be removed;

(*d*) for an interim injunction against defendants to stop building operations on the said land, and

(*e*) for a permanent injunction to stop all building operations on the said land.

The learned District Judge gave judgment in terms of the prayer and the defendants appealed.

Held: (1) That the plaintiff is not entitled to the declaration in (a) above in view of section 47 of the Municipal Councils Ordinance which expressly empowers the Council *inter alia* to lay out and construct new roads.

(2) That the plaintiff is not entitled to the declaration in (b) as a specific remedy has been provided by the statute where in contravention of the obligation created by section 5 of the Housing and Town Improvement Ordinance any person erects a building within the limits administered by a local authority except in accordance with plans, drawings and specifications approved by the Chairman.

(3) That the plaintiff is not entited to the prayers in (c), (d) and (e) for the same reason as these reliefs are claimed on the basis that the defendants erected a building in contravention of the obligation imposed on them by the said section 5.

Per **Siva Supramaniam, J.** "Where an obligation does not arise under the common law but is created by Statute, one must look to the Statute to see if there is a specific remedy contained in it for a breach of that obligation. If a specific remedy has been provided, no other remedy is available."

Cases referred to: *Pasmore* v. *Oswald-twistle Urban District Council,* (1898) A.C. 387; 78 L.T 569; 14 T.L.R. 368

H. W. Jayawardena, Q.C,. with *E. A. G. de Silva* and *L. C. Seneviratne,* for the defendants-appellants.

C. Chellappah, for the plaintiff-respondent.

Siva Supramaniam, J.

This was a declaratory action combined with a prayer for an injunction instituted by the Municipal Council of Negombo (hereinafter referred to as the Council) against the defendants, who are the proprietors of a piece of land over which the Council proposed to construct a road, in which the Council prayed as follows:—

"(a) for a declaration that the plaintiff is entitled to construct the proposed road connecting Sea Street with Alles Road after making due compensation to the defendants for the said strip of land."

"(b) for a declaration that the defendants are not entitled to construct the building without a permit from the plaintiff under S. 5 of the Housing and Town Improvement Ordinance (Cap. 199)."

"(c) for a declaration that the unauthorised building be removed by the defendants."

"(d) for an interim injunction ordering the defendants to stop all building operations on the land described in the schedule hereto." and

"(e) for a permanent injunction on the defendants to stop all building operations on the land described in the schedule hereto."

The learned District Judge gave judgment in terms of the Council's prayer and the defendants have appealed.

The facts relative to the action are as follows:— On 31st July 1959 the Council had adopted a resolution of its Works Committee that a road 20 feet wide be opened connecting two roads named Sea Street and Alles Road and that street lines be demarcated for that purpose. The proposed road ran over private land, a part of which was owned by the defendants. No steps had, however, been taken by the Council even at the date of the institution of this action (12th January 1963) to acquire from the owners the land necessary for the construction of the said road. On 3rd April 1962 the defendants forwarded to the Chairman of the Council for his approval under section 5 of the Housing and Town Improvement Ordinance (hereinafter referred to as the Ordinance) plans and specifications to erect a building on their land. The approval was not granted pending the laying down of street lines. In view of the delay, the defendants, without awaiting the approval of the Chairman, laid the foundation for a building on the said land and the foundation took in a strip of land which would have fallen between the proposed street lines. The 1st defendant was thereupon prosecuted in the Magistrate's Court for committing an offence under section 13 of the Ordinance and was convicted and fined. Thereafter the Council instituted the instant action.

The first question that arises for determination on this appeal is whether the Council is entitled to the declarations prayed for in this action. As regards the declaration prayed for in paragraph (a) (*supra*), section 47 of the Municipal Councils Ordinance (Cap. 252) empowers a Municipal Council, *inter alia*, to lay out and construct new streets, making due compensation to the owners or occupiers of any property required for that purpose. Where a Statute expressly confers a right, a declaration from a Court is not required to establish the existence of that right and a declaratory action does not lie for that purpose. The same observation applies to the declaration prayed for in paragraph (b). Section 5 of the Ordinance expressly creates an obligation on every person who erects a building within the limits administered by a local authority to do so only in accordance with plans, drawings and specifications approved by the Chairman.

The prayer in paragraph (c), though framed as a prayer for a declaration is in fact a prayer for a directory judgment. That prayer as well as the prayer contained in paragraphs (d) and (e) for an interim and a permanent injunction respectively are reliefs claimed on the basis of the allegation that the defendants commenced to erect a building in contravention of the obligation imposed on them by section 5 of the Ordinance. Where an obligation does not arise under the common law but is created by Statute, one must look to the Statute to see if there is a specific remedy contained in it for a breach of that obligation. If a specific remedy has been provided, no other remedy is available. This principle of law was set out as follows by Lord Halsbury in the course of his speech in the House of Lords in *Pasmore* v. *Oswald-twistle Urban Council*, (1898) A.C. 387, 39.:—

> "The principle that where a specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges*, (1831) 1 B & Ad. 847, 859. He says: "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

The principle referred to in the said passage is applicable to the facts of the instant case. Sections 12 and 13 of the Ordinance specifically set out the remedies available to the Council if a person commences any building operation contrary to the provisions of the Statute. It is not open to the Council to seek a remedy outside the remedies specified in the Ordinance. The Council had consequently no cause of action to institute the present action against the defendants.

I set aside the judgement and decree of the learned District Judge and dismiss the plaintiff's action with costs in both Courts.

Tennekoon, J.

I agree.

Set aside.

Present: **Pandita-Gunawardene, J.**

YAGAGURU *vs.* KANDIAH, INSPECTOR OF POLICE

S.C. 685/68 — *M. C. Point Pedro* 2028

Argued on: 17th August, 1968
Decided on: 4th September, 1968

Charge—Duplicity — Immigration and Emigration Act—Charge under sections 9 *and* 20 *or alternatively under section* 15(*e*) *of the Act as amended by Act No.* 68 *of* 1961, *punishable under section* 45 *A*(1)(*b*) *— Is said charge bad for duplicity?*

The accused appellant was convicted on a charge of concealing or harbouring ten persons, all of South India, knowing that such persons had entered Ceylon in contravention of sections 9 and 10 of the Immigration and Emigration Act, or has remained in Ceylon in contravention of section 15(e) of the said Act as amended by Act No. 68 of 1961 punishable under section 45A(1) of the Act as so amended.

The evidence established that the appellant was the chief occupant of the premises where the ten persons were living at the time they were arrested.

In appeal it was contended on behalf of the appellant that the words "conceals" or "harbours" in section 45A(1)(b) create two distinct offences and therefore the charge was bad for duplicity.

Held: That the words 'conceals' or 'harbours' in the aforesaid section 45A(1)(b) allege one activity, namely "of keeping away." Therefore, the submission that the charge is bad for duplicity fails.

Per **Pandita-Gunawardena, J.** " The gravamen of the charge under this section can be rightly said to one of 'keeping away'. It would appear to me that the words 'conceal' and 'harbour' are used adjectively to describe more fully the one act complained of."

Case referred: *Thomson* vs. *Knights,* (1947) K.B. 336; (1947) 1 A.E.R. 112; 176 L.T. 367

S. C. Crossette-Thambiah with *A. M. Coomarasamy* for the accused-appellant.

Ranjith Gunatilleke, Crown Counsel for the Attorney-General.

Pandita Gunawardene, J.

This is an appeal by the accused-appellant from his conviction of concealing or harbouring ten persons to wit : Vaithianathan Renganathan, Sellappa Bapu, Muthusamy Kasyappan, Vengadasamy Sethuraman, Mariappan Ramasamy, Ramasamy Muthiah, Rajagopal Govindasamy, Renganathan, Ramu Muthusamy Ramasamy and Ramasamy Viswanathan all of South India knowing that such persons had entered Ceylon in contravention of Sections 9 and 10 of the Immigration and Emigration Act Chapter 351 of L.E.C. or has remained in Ceylon in contravention of Section 15(e) of the said Act as amended by Act No. 68 of 1961 punishable under section 45A(1) of the Act as so amended.

The facts are these:— on 9.4.68 upon receipt of certain information police sergeant Ratnasabapathy of Point Pedro Police proceeded to No. 415 Imbiliddy, Alvai North. These premises had a cadjan fence enclosing it. There was one gate leading to the premises which had been secured with a coir rope. In these premises there were two buildings about 18 to 25 feet apart, their entrances facing each other. One of the buildings was a house consisting of a room and a hall. The other was an open hut. The accused and his wife were in the open hut whilst the 10 persons named in the charge were found in the house which has also been described as an enclosed hut. Ratnasabapathy had to force open the gate to enter the premises. The ten persons who were found in the house in these premises are clearly

immigrants. There is ample evidence to establish the fact that the accused was the chief occupant of these premises and was living there at this time. The learned Magistrate has examined the evidence very closely and exhaustively and I am satisfied that his findings of fact are correct and beyond challenge. Learned Counsel for the appellant has however strongly urged that the charge is bad for duplicity, in that there are two offences in one charge and the conviction cannot therefore stand. Section 45A(1)(b) of the Immigration and Emigration Amendment Act No. 68 of 1961 provides that "any person who conceals or harbours any other person in any place whatsoever, or transports any other person or causes any other person to be transported by any means whatsoever, knowing that such other person has entered Ceylon or is remaining in Ceylon in contravention of any provision of this Act or of any order or regulation made thereunder shall be guilty of an offence under this act and shall on conviction be liable to rigorous imprisonment for a term of not less than two years and of not more than five years."

It has been argued that the words 'conceals' or 'harbours' create in this section two distinct offences. If these be two distinct offences then the law requires that in respect of each distinct offence there should be a separate charge and every such charge must be tried separately except in the cases mentioned in section 179, 180, 181 and 184 of the Criminal Procedure Code.

The fundamental question therefore is, "Do the words 'conceals' or 'harbours' in this section involve one act or do they constitute two distinct and separate acts?" For a consideration of this question it would primarily be obligatory to understand what the words 'conceal' and 'harbour' mean. It would seem necessary in the first instance to seek the definition of these words. In the Oxford English Dictionary 'conceal' means 'to keep out of sight, to hide"; 'Harbour' means "to lodge, take shelter, (and shelter "to screen from punishment").

It is apparent that these words conceals or harbours allege one activity namely, 'of keeping away.' In this connection it is useful to mention the case of *Thomson* vs. *Knights* (1947) 1 K.B., 336 which would seem to be of assistance. In that case the charge was one of being in charge of a motor vehicle whilst under the influence of drink or a drug in contravention of section 15(1) of the Road Traffic Act 1930, (1). It was contended that there were two offences: (i) being in charge of a motor vehicle whilst under the influence of drink. (ii) being in charge of a motor vehicle whilst under the influence of drugs. Lord Goddard, C.J., said (ibid at page 338):

> "I do not think parliament here meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drinks, what parliament intended to provide was that a man in charge of a motor car in a self induced state of incapacity, whether that incapacity was due to drink or drugs, the man commits an offence in each of those cases. In my opinion the conviction is not for an alternative offence nor can it be said to be in respect of two offences. The offence was being in charge of the car when in this particular state of incapacity."

Similarly I do not think parliament here intended to create two offences: one of concealing any other person ..... knowing that such other person has entered Ceylon or is remaining in Ceylon in contravention of any provision of this Act and the other of harbouring any other person in any place whatsoever ..... knowing that such other person has entered Ceylon or is remaining in Ceylon in contravention of any provision of this Act.

The gravamen of the charge under this section can be rightly said to be one of 'keeping away.' It would appear to me that the words 'conceal' and 'harbour' are used adjectively to describe more fully the one act complained of.

For these reasons it is abundantly clear that what was being considered in this section was a single act. Therefore the submission that the charge is bad for duplicity must fail.

The appeal is dismissed.

Appeal dismissed.

Present: **Tennekoon, J.**

CEYLON TRANSPORT BOARD *vs.* CEYLON TRANSPORT WORKERS' UNION

S.C. No. 134/67 — *L.T. Case No.* 7/28632

Argued on: 17th May, 1968
Decided on: 13th July, 1968.

Labour Tribunals — Duties of such Tribunals in regard to admission and rejection of evidence — Not bound by provisions of Evidence Ordinance — Discretion given to admit evidence that cannot be regarded as judicial evidence — Discretion to be exercised reasonably — Industrial Disputes Act (Cap. 131) as amended, section 36(4).

Industrial Disputes Act, section 31C(1) —Duty of Tribunal to act judicially in its approach to the evidence — Questions of fact to be decided apart from extraneous considerations — "Just and equitable" order must be in regard to facts so found.

Section 36(4) of the Industrial Disputes Act provides that a Labour Tribunal "shall not be bound by any of the provisions of the Evidence Ordinance."

In the present case the President of the Labour Tribunal had not acted on a statement signed by the workmen and produced by the employer at the inquiry before him, in which the workman had admitted complicity in the offence he had been accused of. The workman gave evidence in the Tribunal denying complicity in any offence and also stated that he had been forced to put his signature on a blank paper. For the employer, evidence was led of the circumstances in which the workman came to make the confession and also of his complicity in the offence of theft.

After summing up the evidence the President of the Tribunal had said that this statement "would probably not have been admissible in a criminal case" and that although the Tribunal was not bound by the rules of evidence "such a statement must be received with caution."

Held: (1) That the two questions that arose for determination by the Tribunal in regard to the alleged admission were whether the statement had in fact been made by that particular workman and, if so, whether it could safely be relied on as containing the truth. In the present case the Tribunal had failed to deal with either question.

(2) That on a full evaluation of the evidence the answer to both questions should have been in favour of the employer.

(3) That sections 36(4) was only intended to give the Tribunal a discretion which had to be exercised reasonably, to admit as evidence matter which the Tribunal considers material even though a Court of law would not regard it as judicial evidence. The section must not be regarded as a provision which enabled a Tribunal to apply exclusionary rules of evidence more rigorous than those contained in the Evidence Ordinance.

Section 31C(1) of the Industrial Disputes Act reads as follows:

"Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as may appear to the tribunal to be just and equitable."

Held: (1) That this section must not be read as giving the Labour Tribunal a power to ignore the weight of evidence or the effects of cross-examination on the vague and insubstantial ground that it would be inequitable to the other party to so consider it. The President of the Tribunal must decide all questions of fact "solely on the facts of the particular case, solely on the evidence before him and apart from any extraneous considerations."

(2) That the Tribunal must act judicially in its approach to the evidence. It is only after the facts have been so ascertained that the next stage, which is to make an order that is just and equitable upon the facts so found, is entered upon.

Per **Tennekoon, J.** "The reference in many texts and judgments to the powers of industrial courts and similar tribunals as 'arbitral' as opposed to 'judicial' must not be understood to mean that these tribunals are licensed to act arbitrarily."

Case referred: *R* v. *Manchester Legal Aid Committee, ex parte Brand (R.A.) and Co., Ltd.*, (1952) 1 A.E.R. 480; (1952) Q.B. 413; (1952) 1 T.L.R. 476.

N. Satyendra, for the employer-appellant.

No appearance for the applicant-respondent.

Tennekoon, J.

This is an appeal to this Court under section 31D(2) of the Industrial Disputes Act taken by the Ceylon Transport Board — the Employer — from an Order made by a Labour Tribunal under section 31C(1).

The respondent — the Ceylon Transport Workers' Union applied for relief or redress under section 31B(1) of the Act on behalf of a workman, one R. D. Premadasa, whose services had, it was alleged unjustifiably, been terminated by the Employer. The Employer-Appellant's position was, substantially, that the workman Premadasa collaborated with another or others in the dishonest removal of a timing chain from the Stores section of the Ceylon Transport Board's installations at Werahera. The appellant had no direct evidence of the theft but produced a document (R1), admittedly signed by the applicant, in which he admitted complicity in the theft. Evidence was also produced of the circumstances in which the workman came to make that confession. The Security Officer Mapitigama was the main witness for the appellant. He stated that he received certain information which led him, together with Watcher Wilman and another, to keep watch on the movements of the workman Premadasa and in particular to see whether Premadasa or anyone else would try to remove an item of Ceylon Transport Board property that had been secreted in a tea kiosk standing near the main gate at Werahera; he stated further that he and Wilman apprehended the workman and one Siriwardene as they were leaving the tea kiosk; a timing chain was found in a parcel which Siriwardene was carrying and the applicant when questioned admitted his complicity. Mapitigama recorded the statement of the applicant and this was signed by him. The lawyer appearing for the applicant cross-examined the Security Officer and in the course of cross-examination put the following question which, it is legitimate to assume, was on instructions from his client:—

"*Q.* I am instructed that you forced him to sign on a blank paper?"

which was answered with a denial.

Wilman a watcher of the Ceylon Transport Board stated that he went out with the Security Officer about 4.30 p.m. on that day and followed Premadasa when he was leaving after work; Premadasa entered the tea kiosk and he followed him, keeping out of his view. Here he saw the workman take a parcel from the kitchen section of the kiosk and hand it over to Siriwardene, a boy of about 18 employed at the kiosk; the workman left the boutique by a side door and Siriwardene left shortly thereafter; he and the Security Officer, who had been hiding outside the kiosk apprehended both Siriwardene and the workman. The parcel in Siriwardena's hand contained the timing chain. Except for noting a very minor and inconsequential contradiction in the evidence of Mapitigama and Wilman the President of the Labour Tribunal does not say that he disbelieves these two witnesses.

The applicant himself gave evidence; while not denying his presence in and near the tea kiosk at the time when Siriwardene and he were apprehended, he stated as follows in evidence-in-chief:—

> "Before I went to the halt I went to the boutique, had a cup of tea and then lit a cigarette and walked to the bus stand. Many workers went to have tea at that time on that day. I stayed in the boutique for about 5 minutes. When I was at the bus halt Mr. Mapitigama and the Watcher came and called me to a side saying that they had to tell me something. When I went near them Mr. Mapitigama the Security Inspector held me by my hand took me inside the office of Security Inspector. That office was inside the work place. Mr. Mapitigama showed me a parcel and asked me whether I had given it to a boy. He also showed me the boy. The boy was inside the office of the Security Inspector. I did not know what was inside the parcel. It was wrapped up in paper. I did not take it into my hand. They opened the parcel and showed me a Timing Chain and they asked me whether it was handed over by me. I said that I did not know anything about it. I know that the boy was an employee of the tea boutique. I did not make a written statement. Mr. Mapitigama took the photo pass from me and showed me the signature and asked me whether I could sign it on a piece of paper and threatened that if I did not put it down that I would be assaulted. I put my signature at the very bottom of the paper as it was indicated to me."

The suggestion here (as in the question put in cross-examination to Mr. Mapitigama) was that

he was forced by fear of threats of assault to put down his signature *at the bottom of a single blank sheet of paper*. In cross-examination he was shown the original of his statement; it consisted of two pages; the applicant's signature appears at the bottom of the first page and at the end of the statement on the 2nd page; on the 2nd page the statement ends close to the middle of the page and the signature is at that point and nowhere near the bottom of that page; both pages were shown to the applicant and he admitted that both signatures were his. The cross-examination continued as follows:—

"*Q.* I put it to you that Mr. Mapitigama reduced to writing what you stated to him?

A. I deny that.

Q. After reducing it to writing it was read and explained to you?

A. I deny that.

Q. You also read it before you signed it?

A. I was asked to sign **on a blank paper.**"

The cross-examination ended at this stage and it is obvious that the applicant's story of his having been forced to place his signature on a blank sheet of paper which was later filled up by Mapitigama was unworthy of credit. The President of the Labour Tribunal himself stepped in at this stage with some questions. The record reads as follows:—

"*Tribunal:* On one blank sheet or on more than one blank paper?

A. Two blank papers.

Q. You said you were given a blank form; where did you sign?

A. I signed where it was pointed out to me. He asked me to sign right at the bottom.

Q. Then in the next page he asked you to sign in the middle of the page?

A. Yes."

After this there was naturally no re-examination when the President had put into the mouth of the witness the answers which he should give if he was to be believed.

I now reproduce extracts from Premadasa's statement to the Security Officer (R1), the original of which is in Sinhala in the handwriting of Mapitigama and signed by Premadasa on both pages:

"I work in the Civil Engineer's Division. I work there as an engineering-labourer. Today (22.3.66) I came for work at 7.30 a.m. At about 2.30 p.m. when I went for tea to canteen number 1, I met there Mr. Norman who works in the Stores Section. He asked me to come into the Supplies Division (canteen) where tea is served. He said that there was an article for removal. He said, "you come in. There is an article. Take it for me to the road." At about 2.40 p.m. after I have had my tea, and as requested by him I entered through the "D" door, went through the middle of the workshop, came out from the door of the engineering section, entered through the door of the Supplies Division and went to the tea-drinking place. At this time Norman came up to me from "E" and "F" stores. Thereafter he gave me a chain which he had rolled in the shape of a ball and which he had secreted in his waist. When this chain was handed over to me it was not wrapped in anything. It had been shaped to the shape of a ball. I then took it and hid it in my waist.....

.....Taking the chain with me I returned to the tea-drinking place in the supplies section along the same route I took and got out from the main gate and went to the planked tea boutique (which is situated to the South when one proceeds towards the road) which is close to the main gate. Norman came to the spot (tea-boutique) as mentioned when handing over the article. All this took place at the tea time. At that time Norman told me to hide the chain in the rear of the boutique to be removed when leaving after work.

As requested by him I hid the chain at a certain place behind the boutique. Thereafter Norman went in the direction of the road, I went to my place of work. I worked till 4.30 p.m., and after my work was over, I went once again to the boutique where the article was kept. I met U. D. Ratnapala Siriwardena inside the boutique. Then I showed him the chain which I hid, asked him to bring it to the road and told him that Mr. Norman and I will be at the bus halt. I asked him to give back the article at the bus halt."

The President made his order on 13.9.67 and concluded as follows:

"The evidence in this case does give rise to a suspicion that the workman concerned himself with the theft of this chain but the case against the applicant in my opinion was not proved with such degree of probability as would justify the conclusion that the workman was guilty of the charges preferred against him by the Board. At the same time I am of the view that the workman should not have put himself into that position of suspicion that is apparent in this case. I order that the workman be reinstated. He will not, however, be entitled to any wages for the period of non-employment."

It seems to me that the Tribunal has completely failed to evaluate the evidence before him. After summing up the evidence on both sides the President says:—

"The statement R1 would probably not have been admissible in a criminal case; although

the Tribunal is not bound by the rules of evidence such a statement must be received with caution."

Section 36(4) of the Act provides that in the conduct of proceedings a Labour Tribunal shall not be bound by any of the provisions of the Evidence Ordinance. This is only intended to permit a Labour Tribunal in its discretion — which of course must be exercised reasonably — to admit as evidence all matter which he considers material even though a court of law would not regard it as judicial evidence. Section 36(4) must not be regarded as a provision which enables a Tribunal to apply exclusionary rules of evidence more rigorous than those contained in the Evidence Ordinance. A proceeding before a Labour Tribunal is not a criminal case and even if the President was inclined to guide himself by the rules of relevancy contained in the Evidence Ordinance, section 24 thereof (which is obviously the only section he could have had in view) could not have been availed of, since that applies only to criminal cases. Two questions arose for the Tribunal in regard to the alleged admission R1. The first was whether the statement was in fact made by Premadasa; the second, if so whether it could safely be relied on as containing the truth. The Tribunal has failed to deal with either question. If it had, it seems to me on a full evaluation of the evidence that the answer to both questions should have been in favour of the Employer-Appellant.

Immediately after the sentence quoted above appears the following:—

"The main evidence against the applicant before this Tribunal is this confession and the statement of the watcher that he saw the applicant hand over a parcel to Siriwardena. I do not think that it would be equitable to hold either on the document R1 or on the rest of the evidence in this case that the respondent Board has proved that the applicant committed theft or attempted to commit theft of the Timing Chain."

The Tribunal is here perhaps echoing the words of section 31C(1) which reads as follows:—

"Where an application under section 31B is made to a labour tribunal, it shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as may appear to the tribunal to be just and equitable."

This section must not be read as giving a labour tribunal a power to ignore the weight of evidence or the effects of cross-examination on the vague and insubstantial ground that it would be inequitable to one party so to do. There is no equity about a fact. The tribunal must decide all questions of fact "solely on the facts of the particular case solely on the evidence before him and apart from any extraneous considerations." (see *R.* v. *Manchester Legal Aid Committee, Ex parte Brand and Co., Ltd.*, (1952) 1 A.E.R. 480.) In short in his approach to the evidence he must act judicially. It is only after he has so ascertained the facts that he enters upon the next stage of his functions which is to make an order that is fair and equitable, having regard to the facts so found. To say of one party's case that it would not be equitable to reach a conclusion against the other on the evidence produced by the former is to apply an undisclosed and unascertainable standard of proof to that party's case and indeed to act arbitrarily and not judicially. The reference in many texts and judgments to the powers of industrial courts and similar tribunals as 'arbitral' as opposed to 'judicial' must not be understood to mean that these tribunals are licensed to act arbitrarily. I find it difficult in the circumstances to regard the decision of the Tribunal in this case as a decision within the meaning of the Act.

The appeal is accordingly allowed and the order of the Tribunal set aside.

Appeal allowed.

Present: **Sinnetamby, J.**

L. V. R. FERNANDO, Food and Price Control Inspector

vs.

SAMEENA, Son of A. M. Mohammed

S.C. 412/*M.C. Tangalla Case No.* 19236

Argued and decided on: 19th March, 1960

Control of Prices Act—Charge of selling beef above controlled price— Evidence of decoy that he asked for beef and accused handed over quantity of flesh which decoy said was beef — Is this evidence sufficient to sustain conviction? — Admission by conduct.

Where on a charge of selling beef above the controlled price the prosecution evidence is that the decoy went to the accused's stall and asked him for a pound of beef and the accused gave him a quantity of flesh which the decoy said in evidence was beef—

Held: That in the absence of proof to the contrary, the fact that the accused offered the flesh as beef is an admission by his conduct that the article he handed was beef and it was not open to him to come to court and say "prove the article that I gave you as beef is beef."

V. S. A. Pullenayagam, Crown Counsel, for the complainant-appellant.

No appearance for the accused-respondent.

Sinnetamby, J.

In this case, the learned Magistrate has accepted the evidence for the prosecution in its entirety. The charge was one of selling beef above the controlled price. The Magistrate has said that in spite of his accepting the prosecution evidence, there is nothing to show that the article sold was beef and in the absence of the Goverment Analyst's report, he thought that he was unable to so hold.

In this case, there is conduct which established an admission by the accused that the article he sold was beef. The prosecution evidence is that the decoy went to the accused's stall and asked him for a pound of beef and the accused gave him a quantity of flesh which the decoy said in evidence was beef. There is also some further evidence to show that it was beef although it is not of a conclusive nature. The mere fact that the accused offered the flesh as beef is an admission by him that the article he handed was beef and it is not open to him now to come to Court and say "prove the article that I gave you as beef is beef."

I think the best evidence with regard to the identity is the admission by the accused, admission by conduct, which in this case, certainly does establish that the article handed over is beef. It was open to the accused, if he could, to convince the Magistrate that what he gave as beef was not beef but cats' flesh or something else. Of course, that matter has to be decided by the Magistrate if evidence of that kind is placed before him.

The question now arises as to whether the case should be sent back for re-hearing *de novo* or whether it should proceed from the stage at which it was last stopped. Having regard to the possibility of the defence being called and having regard to the lapse of time since the evidence was given, I think, the best course would be for me to send the case back for re-hearing. I set aside the order of acquittal made by the Magistrate and send the case back for re-trial *de novo*.

Set aside and sent back.

Present: **Siva Supramaniam, J. and Tennekoon, J.**

THE BOARD OF DIRECTORS OF THE CEYLON SAVINGS BANK
vs.
RUBEN NAGODAVITANE

S.C. No. 19/66(*F*) — *D.C. Colombo* 9255/*M.B.*

Argued on: 7th. and 23rd. May 1968
Decided on: 26th June, 1968

Hypothecary Action — Default by defendant on date of filing answer — Case fixed for ex parte trial — On the day of ex parte trial defendant filing affidavit and praying for time to pay balance due — No application for purge of default — Court granting defendant's application — Has the Court power to grant such relief before ex parte hearing and entering of decree absolute — Mortgage Act (Cap. 89) sections 48(1) and 59 — Civil Procedure Code, sections 85 and 87(1).

On the day allowed for filing the answer in a hypothecary action, the defendant and his proctor were absent and the Court fixed the case for *ex parte* trial on 5/8/65. The defendant appeared on this day and tendered an affidavit admitting the claim subject to certain payments after institution of action, praying for six months' time to pay the arrears of the instalments and to pay the balance in annual instalments as agreed at the execution of the bond. He set out no grounds for his default.

The plaintiff objected to the defendant being heard until he had purged his default, but the learned District Judge held that he was entitled to consider the application before the *ex parte* trial and granted the relief prayed for. The plaintiff appealed.

Held: (1) That the learned District Judge was wrong in considering the affidavit tendered by the defendant before he heard the case *ex parte* and passing a decree absolute as required by section 85 of the Civil Procedure Code.

(2) That the Court had no power to grant relief except under section 48(1) of the Mortgage Act, which requires an application to be made in that behalf by the defendant.

(3) That the words "shall proceed to hear the case *ex parte*" in section 85 of the Civil Procedure (made applicable to hypothecary actions by section 59 of the Mortgage Act) mean that *the next step the Court shall take is to hear the case ex parte*, which need not necessarily be on the same day, but is an imperative direction.

(4) That after decree absolute is entered in terms of section 85 of the Civil Procedure Code, no application for relief under section 48(1) is permissible until the decree is vacated by making an application under section 87(1) of the Code and succeeding thereon.

Cases referred: *Perera* v. *Alwis* (1957) 60 N.L.R. 260.
Sally v. *Noor Mohammed* (1964) 66 N.L.R. 175.

H. W. Jayewardene, Q.C., with *D. S. Wijewardene*, for the plaintiff-appellant.

N. Kasirajah, for the defendant-respondent.

Siva Supramaniam, J.

The question that arises for decision in this appeal is whether a defendant in a hypothecary action who had absented himself on the date on which he was due to file answer is entitled thereafter, without purging his default, to obtain relief under the proviso to section 48(1) of the Mortgage Act (Cap. 89).

The Board of Directors of the Ceylon Savings Bank instituted this action for the enforcement of a mortgage bond granted by the defendant in its favour. In terms of the bond the principal along with the accrued interest was payable on demand. But the defendant was permitted by the plaintiff to pay the principal amount in fifteen equal annual instalments, provided each instalment was paid on the specified date. The defendant, however, made default in the payment of the instalments and the plaintiff claimed the full outstanding balance in terms of the bond.

In answer to the summons served on him by substituted service, as the Fiscal was unable to effect personal service, the defendant appeared by a Proctor and moved for time to file answer. He was allowed time till 20th May 1965. He failed to file answer on that date and was allowed further time till 24th June 1965. On that date too the answer was not filed and the defendant as well as his Proctor were absent. The Court, thereupon, fixed the case for *ex parte* trial on 5th August 1965.

The defendant appeared in court on 5th August 1965 and tendered an affidavit in which he admitted the claim subject to certain payments made by him to the plaintiff after the institution of the action. He set out no grounds whatsoever for his default on the earlier date, but prayed that he be granted six months' time to pay the arrears of the instalments and also be allowed to pay the balance in annual instalments as agreed upon between him and the plaintiff at the time of the execution of the bond. The prayer for relief was presumably under the proviso to section 48(1) of the Mortgage Act. The plaintiff objected to the defendant being heard until he had purged his default but the learned trial judge found that the court was entitled to consider his application before the *ex parte* trial was held and granted the defendant the relief he had prayed for. He erroneously stated, however, that the instalments ordered were "according to the terms of the bond." The plaintiff appeals against that order.

In regard to the question whether, after a case has been fixed for trial *ex parte* by reason of the default of appearance of the defendant, the defendant is entitled to appear and purge his default before the *ex parte* trial is held, conflicting views have been expressed by this court. In *Perera* v. *Alwis*, 60 N.L.R. 260, H. N. G. Fernando, J. (as he then was) and Sinnetamby, J. decided that the reasons for the default of appearance may be considered by the court before the *ex parte* trial is held. But in the later case of *Sally* v. *Noor Mohammed*, 66 N.L.R. 175, Basnayake, C.J. and G. P. A. Silva, J. disagreed with that view and declined to follow that decision. That question, however, does not arise for consideration in the instant case as the defendant at no stage made any application to purge his default.

It was argued by counsel for the defendant that, despite the default of the defendant on the date fixed for the filing of his answer, the court is entitled to grant him relief under the proviso to section 48(1) of the Mortgage Act, so long as no decree has been entered. Section 48(1) provides as follows:

> "Where in a hypothecary action the court finds that the mortgage ought to be enforced, the decree shall, in relation to the mortgaged land, order that the land shall be sold in default of payment, within a period of two months of the date of the decree, of the moneys due under the mortgage;
>
> Provided, however, that the court may, in its discretion and subject to such conditions including the making of specified payments on specified dates as it thinks fit, on application made in that behalf before the entry of the decree and after consideration of the circumstances of both the mortgagor and mortgagee, fix, in lieu of the aforesaid period of two months, such longer period as the court may consider reasonable."

It should be noted that, under the above proviso, the court is empowered to grant the relief, not *ex mero motu*, but on application made in that behalf by the defendant.

Section 59 of the Mortgage Act makes it clear that section 85 of the Civil Procedure Code is applicable to hypothecary actions. Section 85 (omitting parts not relevant for the point under consideration) reads as follows:—

> "If the defendant fails to appear on the day fixed for his appearance and answer, or if he fails to appear on the day fixed for the subsequent filing of his answer .... or if the defendant shall fail to file his answer on the day fixed therefor, and if on the occasion of such default of the defendant the plaintiff appears, then the court shall proceed to hear the case *ex parte* and to pass ..... in the case of a hypothecary action, a decree absolute...."

This section does not require that the court shall proceed *immediately* to hear the case *ex parte*. One of the Dictionary meanings of the word "proceed" is "make it one's next step." The words "shall proceed to hear the case *ex parte*" therefore mean that *the next step the court shall take is to hear the case ex parte*. The hearing need not necessarily be on the same day.

The direction, however, in regard to the next step is imperative and the court is not empowered to entertain any application for relief from the defendant until the *ex parte* trial has been held and decree has been entered in terms of section 85 of the Civil Procedure Code. I agree, with great respect, with the observation of Basnayake, C.J. in *Sally* v. *Noor Mohammed* (supra) that "the court has no power to take a course of action other than that prescribed in section 85 of the Civil Procedure Code when the defendant fails to appear on the day fixed for the subsequent filing of his answer."

The learned judge was wrong in considering the affidavit tendered by the defendant on 5th, August 1965 before he heard the case *ex parte* and passed a decree absolute as required by section 85 of the Civil Procedure Code. Had a decree absolute been entered in terms of that section, the defendant could not have made an application for relief under section 48(1) of the Mortgage Act until he had that decree vacated by making an application under section 87(1) of the Civil Procedure Code and satisfying the court that there were reasonable grounds for the default upon which the decree absolute was passed. As stated earlier, the defendant in this case made no attempt whatsoever to purge his default and the court had therefore no power to grant him relief under section 48(1) of the Mortgage Act.

I allow the appeal and set aside the judgment and decree of the lower court and direct that a fresh decree absolute be entered in the form No. 22A in the First Schedule to the Civil Procedure Code or to the like effect as required by section 85 of the Code.

The appellant will be entitled to its costs in both courts.

Tennekoon, J.

I agree.

Appeal allowed.

Present: **Alles, J.**

KANAKKAHEWAGE SISIRA PANDITARATNE

vs.

THE ASSISTANT SUPERINTENDENT OF POLICE, KEGALLE & ANOTHER

In the matter of an Application for the issue of a mandate in the nature of a Writ of Mandamus
S.C. Application No. 343/67

Argued on: 13th November, 1967
Decided on: 7th December, 1967
Final Order: 20th December, 1967

Writ of Mandamus — Order sought against Police to furnish certified copies of Information Book and statements recorded under sections 121(1) *and* 122(1) *of the Criminal Procedure Code — Proceedings instituted in cases under section* 148(1)(b) *of the Criminal Procedure Code against petitioner for offences against Police Officers and another — All except one cognisable offences — Denial by respondent by way of affidavit that any information under* 121(1) *was given to Police or that any such statements recorded under* 122*A — Reasonable to assume the contrary.*

In this application for a Writ of Mandamus, the petitioner prayed for an order of Court directing the above respondents to furnish him or his Proctor wth certified copies of information given and statements made in terms of section 121(1) and 122(1) respectively of the Criminal Procedure Code in respect of three cases, viz. 68125, 68267 and 68269, instituted under section 148(1)(b) of the Criminal Procedure Code by the Inspector of Crimes, Kegalle in the Magistrate's Court of Kegalle against the Petitioner, charging him with offences (under sections 484, 344, 220A, 314 of the Penal Code) committed against police officers and another. Except the charge under section 484 the rest were cognisable offences.

The 2nd respondent stated in his affidavit that no information under section 121(1) of the Criminal Procedure Code was given to any Police officer, nor were statements recorded by any police officer in respect of the offences with which the petitioner was charged. It was therefore argued that provisions of section 122A of the Criminal Procedure Code, which entitled an accused person or his proctor to obtain a certified copy of the information given under section 121(1) or any statement under 122(1) did not apply.

It was also admitted in the affidavit that the petitioner applied for the certified copies referred to above, but that his application was not granted.

Held: (1) That having regard to the matter of the charges preferred against the petitioner in the 148(1)(b) reports, one can reasonably assume that statements must have been made by the persons against whom or in respect of whom the petitioner is alleged to have committed the cognisable offences contained in the reports.

* For Sinhala translation, see Sinhala section, Vol. 17, part 3, p. 11

(2) That section 121 of the Criminal Procedure Code does not make exceptions in the case of Police officers.

(3) That the amendment to the Criminal Procedure Code by section 122A has expressly provided that the accused is entitled in law to obtain the information given under section 121(1) of the Code and the statements made under section 122(1) by persons against whom or in respect of whom the accused is alleged to have committed the offence.

His Lordship observed in the course of his order that "*Justice requires that the Courts should be vigilant that the legal rights of an accused person are not circumvented by any mistaken view of the law by over zealous officials*" and proceeded to direct the respondents to forward to the Registrar of the Supreme Court the Information Book of the Kegalle Police Station containing all investigations relating to the said cases and reports made by the police officers thereon for perusal by His Lordship before making a final order, which order was subsequently made granting the application of the petitioner.

Nimal Senanayake, with *Dharmasiri Senanayake* and *Gemunu Seneviratne*, for the petitioner.

V. S. A. Pullenayagam, Crown Counsel, with *Ranjit Abeysuriya*, Crown Counsel, for the Attorney-General.

Alles, J.

This is an application for a mandate in the nature of a writ of mandamus by the petitioner against whom proceedings have been instituted under section 148(1)(b) of the Criminal Procedure Code in the Magistrate's Court of Kegalle. The 1st respondent to the application is the Assistant Superintendent of Police, Kegalle and the 2nd respondent the Officer in Charge of the Kegalle Police Station. In his application, the petitioner prays for the intervention of this Court and seeks an order directing the respondents to furnish him or his proctor with certified copies of information given and statements made in terms of section 121(1) and 122(1) respectively of the Criminal Procedure Code in respect of cases Nos. 68125, 68267 and 68269 filed by the Inspector of Crimes, Kegalle, against the petitioner. In M.C. Kegalle 68125, the Police report under section 148(1)(b) of the Code alleges that the Petitioner intentionally insulted M. P. W. Munasinghe, Inspector of Police, Kegalle, an offence punishable under section 484 of the Penal Code; that he used criminal force on the said Munasinghe (section 344 of the code); and that he offered resistance to the apprehension of himself by Munasinghe (section 220A). In M.C. Kegalle 68267 the report alleges that the petitioner caused annoyance to N. B. Cyril Gunadasa, while being in a state of intoxication (section 488 of the code); insulted the said Gunadasa (section 484) and committed criminal intimidation on Gunadasa (section 488). In M.C. Kegalle 68269 the report alleges the commission of offence under section 314 of the Penal Code by the petitioner in respect of hurt caused to P. S. Pietersz and P.C. Karunadasa of the Kegalle Police. Except for the offence of insult under section 484, the other offences are cognisable offences.

In order to appreciate the question of law that has been argued in this application it is necessary to briefly recount the circumstances that led to the institution of criminal proceedings against the petitioner.

According to the affidavit of the 2nd respondent between 8 and 8.30 p.m. on 15.6.67, several abusive telephone calls were received at the Kegalle Police Station from the petitioner. It is not known how the police officers were aware that the calls originated from the petitioner, but according to the 2nd respondent the calls were traced to the Kegalle Rest House. A Police party, among whom were Inspector Munasinghe and P.S. Pietersz, was sent to the Rest House to make investigations. When the Police party arrived at the Rest House, the petitioner, who was the worse for liquor, abused the Police officers in obscene language and used criminal force on them. He also caused annoyance to Gunadasa, who was apparently a visitor to the Rest House and insulted him. The petitioner was thereupon arrested and taken to the Kegalle Police Station and subsequently criminal proceedings were instituted against him.

In his affidavit, the 2nd respondent maintains that no information under section 121(1) of the Criminal Procedure Code was given to any Police Officer nor recorded by any Police Officer in respect of the offences which the petitioner is alleged to have committed and that no proceedings have been instituted in the Magistrate's Court in pursuance of any such information. Consequently it has been submitted by Crown Counsel that this is not a case to which the provisions of section 122A of the Criminal Procedure Code applied. This section, which was introduced as an amendment to the code by Act No. 42 of 1961, enabled the

accused or his proctor to obtain from the proper authority a certified copy of any information given under section 121(1) of the Code consequent on which proceedings are instituted against any person and also any statement under section 122(1) by the person against whom or in respect of whom the accused is alleged to have committed an offence.

Section 121(1) contemplates the first information given orally or in writing to an officer in charge of a Police Station and is usually the basis for the commencement of proceedings under Chapter XII of the Code.

I am not prepared to accept the bare statement of the 2nd respondent that "no information under section 121(1) of the Criminal Procedure Code was given to any police officer nor recorded by any police officer at the Kegalle Police Station in respect of the offences with which the peititioner had been charged and that no proceedings have been instituted in the Magistrate's Court in pursuance of any such information." The 2nd respondent in his affidavit has admitted that the petitioner did make an application for certified extracts of the information under section 121(1) and the statements recorded under section 122(1) and that the certified copies applied for cannot be issued to the petitioner as he was not entitled to obtain them. One can only assume from the averment in the affidavits of the petitioner and the 2nd respondent that the position taken up by the 2nd respondent is that certain statements were recorded by the Police in the course of the investigation but that the petitioner was not entitled in law to obtain them in spite of the provisions of section 122A of the Criminal Procedure Code. Indeed having regard to the nature of the charges preferred against the petitioner in the 148(1)(b) reports one can reasonably assume that statements must have been made by the persons against whom or in respect of whom the petitioner is alleged to have committed the cognisable offences contained in the reports. It is idle to suggest that Inspector Munasinghe did not take a record of the manner in which the petitioner used criminal force on him and intentionally offered resistance or illegal obstruction to his lawful apprehension or that P.S. Pietersz and P.C. Karunadasa did not give an account of the commission of the cognisable offence of causing hurt of which they were the victims or that Gunadasa's statement of the manner in which the petitioner conducted himself to his annoyance while being in a state of intoxication was not a matter of record. Their statements may indeed be the first information of the commission of cognisable offence under section 121(1). If they were not, then one must assume that they were statements recorded under section 122(1) of the Code and under section 122A the petitioner would be legally entitled to obtain these statements, quite independent of whether information was given under section 121(1) or not.

Unfortunately, this Court has been left completely in the dark as to what transpired at the Police Station after the petitioner was brought to the Station and one is left in the realm of speculative inquiry as to the steps taken by the Police before they filed the reports under section 148(1)(b) of the Code. These reports are made entirely on the responsibility of the police officers and after due inquiry and investigation. The information under section 121(1) may be obtained in several ways. It may be made orally and reduced to writing or it may be made in writing in the first instance, or the information may be communicated over the telephone. A Police Officer who is present at the time of the commission of a cognisable offence has no doubt the right to arrest the offender under section 65 of the Police Ordinance, but when he takes the offender to the Station and informs the authorities of the offender's lapse, he would be giving information under section 121(1) of the Code. Section 121(1) does not make an exception in the case of Police officers. I cannot envisage any situtation in which a report made under section 148(1)(b) of the Code is not preceded by some information given in terms of section 121(1) and after statements are recorded under section 122(1) of the Criminal Procedure Code.

I am not prepared to act on the averment of the 2nd respondent in his affidavit that the petitioner is not entitled to the certified extracts called for by his letter of 4th August 1967 (marked 'C'). Whether he is entitled to them or not is a question of law which must be left for the determination of this Court.

The extracts called for by the petitioner have not been furnished to this Court in order that I may be satisfied that the assertion in the 2nd respondent's affidavit that the petitioner is not entitled to the extracts called for in his letter is a claim that can be justified. The amendment to the Criminal Procedure Code by Section 122A has expressly provided that the accused is entitled in law to obtain the information given under section 121(1) of the Code and the statements made under section 122(1) by the persons against whom or in respect of whom the accused is alleged to have

committed an offence. Justice requires that the Courts should be vigilant that the legal rights of an accused person are not circumvented by any mistaken view of the law by over zealous officials. I therefore direct the respondents to forward to the Registrar of this Court on or before 15th December the Information Book of the Kegalle Police Station containing all investigations made by the Police in regard to the reports made by them under section 148(1)(b) of the Criminal Procedure Code in cases Nos. 68125, 68267 and 68269 of the Magistrate's Court of Kegalle together with certified copies of all statements recorded by them in the course of their investigations.

After perusal of the relevant documents, I will make a final order whether the application of the petitioner is one that is entitled to succeed or not.

Final Order

Alles, J.

When I delivered my order on 7th December, 1967, I stated that I would make my final order on this application after a perusal of the relevant documents.

I have now perused the notes of the police investigation in relation to this application. According to these notes the Police party consisting of S.I. Munasinghe, P.S. Pietersz and P.C. Karunadasa went to the Kegalle Rest House at 9.40 p.m. to enquire into the non-cognisable offence of insult alleged against the petitioner. On arrival at the Rest House the petitioner again commenced to abuse the Police Officers and offered resistance to his arrest. He was then forcibly taken into the police Land Rover and while the vehicle was being driven to the police station he kicked Police Officers Pietersz and Karunadasa causing hurt to them. S.I. Munasinghe, when he returned to the station at 10.15 p.m. made his observations as to how the petitioner resisted arrest and kicked the police officers. These observations form the subject matter of the 148(1)(b) report in Case No. 68125 and make mention of the cognisable offences under S. 244 and 220A of the Penal Code. These observations would constitute the information relating to the commission of the cognisable offences referred to in the report and recorded under S. 121(1) of the Criminal Procedure Code. The petitioner would be entitled to this information.

At 10.55 p.m. after having the petitioner examined by the Doctor and brought back to the Station, S.I. Munasinghe sent P.S. Pietersz to the rest house to conduct enquiries. On Pietersz's arrival at 11.10 p.m. he recorded the statement of Cyril Gunadasa. In his statement Gunadasa described the manner in which the petitioner caused annoyance to him while being in a state of intoxication (S. 488 of the Penal Code) and how he was criminally intimidated (S. 486). These offences form the subject of the 148(1)(b) report in M.C. Kegalle 68267. The offence under S. 488 is a cognisable offence alleged to have been committed before the Police party arrived at the Rest House and would constitute the first information made under S. 121(1). The petitioner would be entitled to a certified copy of Gunadasa's statement.

P.S. Pietersz and P.C. Karunadasa, the victims of the kicking have made statements as to the manner in which the petitioner is alleged to have caused hurt to them which form the subject matter of the 148(1)(b) report to Court in M.C. Kegalle 68269. The petitioner would be entitled to the statements of these two police officers in relation to the offences under S. 314 alleged against the petitioner.

I am therefore of the view that the petitioner is entitled to succeed in his application for the issue to him or his proctor certified copies of the following documents in the undermentioned cases:—

(*a*) The recorded observations of S.I. Munasinghe made at 10.05 on 15.6.67 commencing with the words "At the Rest House with the Police party" and ending with the words "Inside the Land Rover he violently struggled and started kicking the Police Sergeant and the party who were in the Land Rover".

(*b*) The statement of Narangala Vidanelage Cyril Gunadasa made to P.S. Pietersz at 11.10 p.m. at the Rest House commencing with the words "He dialled on three or four occasions" and ending with the words "His conduct in the Rest House was such that it caused annoyance to me as well as to others and visitors to the Rest House."

(M.C. Kegalle 68267)

(*c*) The statement of P.C. 2042 Karunadasa recorded by P.S. Pietersz on 16.6.67 commencing with the words "on 15.6.67 I accompanied I.P. Munasinghe and P.S. Pietersz to the Rest House" and ending with the words "I received several kicks all over my body".

(M.C. Kegalle 68269)

(*d*) The statement of P.S. Pietersz recorded by S.I. Munasinghe commencing with the words "At about 9.55 p.m. I accompanied I.P. Munasinghe and P.C. 2042 and arrived at the Rest House at 10 p.m." and ending with the words "I received several kicks on my body."

(M.C. Kegalle 68269).

The application of the petitioner is allowed with costs which I fix at Rs. 105/-.

Application allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **Sirimane, J. (President), Alles, J. and Samerawickrema, J.**

THE QUEEN *vs.* P. K. D. JAYASENA & OTHERS

Appeal Nos. 34, 35, 36 of 1968 — *S.C. No.* 336/65
Application Nos. 51-54 *of* 1968 — *M.C. Panadura* 89481

Argued on: 16th and 17th August, 1968.
Reasons delivered on: 31st August, 1968

Court of Criminal Appeal — Conspiracy to commit robbery — Attempted robbery — Attempted theft — Misdirections of Fact — Good character put in issue by accused — Non-direction amounting to misdirection — Recalling of witness by trial Judge — When exercisable —Direction to Jury re-conflicting versions of witness so recalled—Non-direction regarding gaps and defeats in prosecution case—Circumstantial evidence — Criminal Procedure Code, section 429 *— Penal Code, sections* 113*A and sections* 366, 379, 490.

Five persons were indicted on charges of conspiracy to commit robbery of cash Rs. 69,674/91 and attempted robbery of the said sum. One accused (4th accused) applied for a separate trial. The four appellants were tried and found guilty on count 1 and of attempted theft on count 2.

The Court of Criminal Appeal dismissed the appeals of the 1st, 2nd and 3rd accused on the first count.

(*A*) On count 1:

(1) With reference to the conviction of the 5th accused (the driver of the taxi in which the accused had travelled) on the first count, the 5th accused had given evidence and stated that after the incident he drove away and when he saw a Police jeep halted on a road, he halted his car voluntarily. The defence suggested to the Police Constable who had halted the car that though he ordered the car to halt, there was the possibility that the car was in fact halted by the driver of his own accord. The answer was that it was possible.

The trial Judge in his summing up referred to the suggestion and told the Jury that they had heard the evidence of the Police Constable, who had specifically denied that, and asked them whether there was any reason to disbelieve the Police Constable.

Held: That this was a misdirection of fact which would undoubtedly have affected the credibility of the 5th accused.

(2) The 5th accused also put his character in issue. No reference was made in the summing-up to the good character of the accused.

Held: (i) That a man's good character must accrue to his credit and it is the duty of the trial Judge to draw the attention of the Jury to this fact, and that the possession of a good character by an accused person is primarily a matter which affects his credibility.

Followed: *The Queen* vs. *Somapala*, 69 N.L.R. 465.
Referred to: *R.* vs. *Ballis* (1966) 1 A.E.R. 552.

(ii) That in the circumstances of this case the omission to refer to the good character of the 5th accused was a non-direction which would have seriously affected the credibility of the accused in the eyes of the Jury.

(3) **Held:** That it was impossible to say that had the Jury been properly directed on the above matters, they would have convicted the 5th accused on the evidence led, and his conviction on count 1 should be set aside.

(*B*) On Count 2:

(1) **Held:** That although a trial Judge has an undoubted right (under section 429 of the Criminal Procedure Code) to recall any witness at any time, once a witness has given categorical and unambiguous evidence which favours the accused, this right should not be exercised in order to afford the prosecution an opportunity to whittle down the effect of that evidence.

(2) That where such a witness, on being recalled gives evidence which results in whittling down the effect of his earlier evidence, it is the duty of the trial Judge to place the two versions before the Jury and leave it to the Jury to decide which version they were disposed to accept. It is wrong not to make any reference at all to that evidence or to give any direction concerning it.

(3) That there was also a failure on the part of the prosecution to call two witnesses to fill a gap in the prosecution case, there was certain evidence of a witness which contradicted the Police evidence on certain links in the circumstantial evidence and that there was non-direction on these points, and misdirection regarding the effect of the Police Inspector's evidence.

(4) **Held:** That as the prosecution evidence on count 2 depended entirely on an inference from an impression created in the minds of two Police Officers, and there was misdirection on the evidence relating to that count, the convictions of all the accused-appellants on that count could not stand.

G. C. Wanigasekera, for the 1st, 2nd and 3rd accused-appellants.

E. R. S. R. Coomaraswamy, with *G. C. Wanigasekera*, *T. Wickremasinghe*, *C. Chakradaran* and *S. K. H. Wijetillake*, for the 5th accused-appellant.

M. Nehru, (assigned) for all the accused-appellants.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Sirimane, J.

Five persons were indicted on charges of conspiracy to commit robbery of cash Rs. 69,674.91 and attempted robbery of the said sum. Of those, the 4th accused applied for a separate trial, and his application was granted. The appellants are the 1st, 2nd, 3rd and 5th accused who have been found guilty on the first count, and of attempted theft on the second count. They were sentenced to terms of 2 1/2 and 1 1/2 years' R.I. respectively the sentences to run consecutively.

The case for the prosecution was that the 1st accused had spoken to one Dixon Perera, the cleaner of a lorry, and sought his assistance to rob a box containing the cash which the lorry was expected to carry. The lorry transported manure and also estate pay, and according to the evidence, the box containing the cash was placed in the middle of the lorry and surrounded by the bags of manure. Dixon Perera stated that the 1st accused said that he would be coming armed with four or five others, and mentioned the name of one Sammy (who was not an accused) and the name of Wilson, which is the name of the 3rd accused. Dixon Perera further stated that he was promised a percentage of the cash to be robbed for his assistance in the matter. Dixon Perera conveyed what the 1st accused told him to Danoris Perera, the "Watcher" of the lorry who in turn conveyed the information to one Ranjith Fernando, the Manager of the Company which owned the lorry, and on his instructions Dixon Perera informed the Police.

On the night of 9.12.64, the lorry which was on its way to Haputale was halted at Bandaragama with the bags of manure and a box containing cash Rs. 69,674/91. In consequence of the information given by Dixon Perera a Police party lay in ambush.

The Inspector said that he noticed that the rear doors of the lorry were closed by strands of rope being tied across them, and a hook being passed through the hasp and staple on the doors.

According to the evidence of the police officers, who had concealed themselves near the lorry, at about 1 a.m. a taxi went up and down and finally halted behind the lorry. Some people got down from the taxi and the police officers had heard a metallic sound from behind the lorry. They then moved in, but as a result of the Inspector accidentally making some noise which made their presence known to the thieves, they (the alleged thieves) got back into the taxi, fired a shot and drove away. The Police party then fired at the taxi and two other constables placed further down the road to prevent an escape had only succeeded in flinging a stone at the taxi as it got away. The taxi was, however, stopped by certain police officers who were on patrol in a jeep, and the 2nd, 3rd, 4th and 5th accused were found inside it, the 5th accused being the driver. According to the evidence, the 1st accused had got off the taxi shortly before it was halted, and was arrested later that night near the place where he is alleged to have got off, on being pointed out by the 5th accused.

The learned trial Judge's directions to the jury in regard to the manner in which they should approach the evidence of Dixon Perera are impeccable; and since they have accepted that evidence and also the other evidence which led to the irresistible conclusion that the 1st, 2nd and 3rd

accused were the persons who got down from scared off by the halted lorry before they were the taxi just near the presence of the police, we did not interfere with the convictions of those three accused on the charge of conspiracy.

But the case against the 5th accused on that charge is on a different footing. He is a taxi driver, and gave evidence. He said that his taxi was hired by the 4th accused, and that he knew nothing of the plan to rob the cash box. He also stated, in the course of his evidence, that though he drove off as he was scared, yet on seeing the police jeep further on, he halted the car in order to escape from the predicament in which he was placed. On this point the defence suggested to the police constable (Peiris) that though he ordered the car to halt, yet from his observation there was the possibility that the car was, in fact, halted by the driver of his own accord. The answer was that it was possible — the car having stopped about five yards away from where he stood. On this point the learned Judge in his charge to the jury said.

> "The suggestion is made that it was not a case of Peiris stopping the car but that the car stopped on seeing Peiris. You heard the evidence of Peiris and he specifically denies that. Now, is there any reason for you to disbelieve Peiris".

This is a misdirection on the evidence which would undoubtedly have adversely affected the credibility of the 5th accused.

The 5th accused also put his character in issue. There was no evidence that he was known to any of the other accused. A man's good character must accrue to his credit and it is the duty of the trial judge to draw the attention of the jury to this fact (see *The Queen* vs. *Somapala*, 69 N.L.R. 465). In the circumstances of this case the good character of the 5th accused was of importance in deciding whether his version — which was in no way improbable— was true. The possession of a good character by an accused is primarily a matter which goes to credibility (see *Reg* vs. *Bellis*, (1966) 1 A.E.R. 552). In his charge to the Jury, the learned judge made no reference at all to the good character of the accused — an omission which in the circumstances of this case is a non-direction which would have seriously affected the credibility of the 5th accused in the eyes of the jury. In our opinion, it is impossible to say that had the jury been properly directed on the matters set out above that they would have convicted the 5th accused on the evidence led. We accordingly set aside the conviction of the 5th accused on the first count.

In regard to the 2nd count on the indictment the police officers had not observed any attempt at robbery or theft or any person approaching the rear of the lorry. To prove that there had been an attempt the prosecution relied mainly on the evidence, that on *the next morning*, at 7.30 or 8 a.m. the Inspector who examined the lorry found "the strands of rope hanging and the hook-like nail missing." They also relied on the evidence of the Inspector and a constable (who could not see the rear of the lorry from where they were hiding that night) that they had heard some metallic sound. Their evidence on this point amounted to nothing more than this — that an *impression* was created in their minds that the sound that they had heard as something to do with a person meddling with the rear portion of the lorry. It was no more than an impression. The essence of the Inspector's evidence on the point appears in the following questions and answers:

"*Q.* In other words, your position is, when you heard the sound of metal you thought that someone was meddling with the rear of the lorry?

A. Yes.

Q. Now, you cannot tell us definitely that the sound of that metal came from the lorry?

A. My impression or understanding was that I saw people getting down from the car; I heard a noise from the rear (metal) of the lorry and immediately I felt that someone was meddling with the lorry."

And, the constable's evidence on the point is as follows:

"*Court Q.* Whether you were right or wrong the impression you had is that the noise came from the back of the lorry?

A. Yes."

When they noticed the hook missing next morning, they attributed the noise they had heard to the removal of the hook. Giving these officers all credit for fairness and impartiality, they may well have been mistaken in regard to their inference. An examination of the evidence of the prosecution witness Danoris who had given evidence before these police officers makes this clear. He was in a position where he could observe the rear of the

lorry. He said in answer to court that the lights of the car were on — that those lights lit up the lower part of the lorry at the rear and that he did not notice or at most did not remember to have noticed any person who got down from the car going near the lorry. The questions put by the Court and the answers given are as follows:

"*Q.* You said that the car was stopped about two fathoms behind the lorry?

A. Yes.

Q. And the headlights were burning?

A. Yes.

Q. Do you mean to say that it was not possible to see the whole of the back of the lorry?

A. It could be seen.

Q. Which means, if anybody walked up to the back of the lorry getting down from the car, you should see such a person?

A. Although someone alighted from the car he did not go near the lorry.

Q. Why don't you answer the question. I am asking you, if somebody went near the back of the lorry you could have seen?

A. Yes.

Q. And you saw nobody going?

A. I cannot remember."

So that on this evidence the persons who got down from the car could not be held responsible for the cutting or loosening of the strands of rope or the removal of the hook.

There was another item of evidence which related to this question. The cash box, which was concealed inside the lorry behind the bags of manure, had been taken inside the police station. This could not have been done without cutting or loosening the ropes and removing the hook. Danoris' evidence on this point was that as soon as the thieves got away in their car (which was around 1.00 a.m.) the lorry was driven to the police station and the cash box was taken out of the lorry at that time. His evidence in examination-in-chief on the point is as follows:

"*Q.* Soon after you went to the police station they did that?

A. At that very instance the cash box was taken into the police station.

Court Q. Who took the cash box into the police station?

A. Some police officers.

Q. As the jeep went off with the police officers, some other police officers took the cash box in?

A. Yes.

Q. At the same time?

A. Yes."

This evidence that the cash box was taken into the station that night received some support from the evidence of Ranjith Fernando who said that he got to the police station at about 10 or 10.15 a.m. next morning and the cash box had already been taken out of the lorry. He did not say that the cash box was taken out of the lorry in his presence as the Inspector implied. So that there was certainly a possibility of the ropes being loosened and the hook removed at the time the cash box was taken in. A police officer and the driver of the lorry, who are alleged to have guarded it from the time it was taken to the police station that night until next morning, were not called as witnesses and the failure to call them certainly left a gap in the prosecution case as to the point of time at which the ropes have been cut or the hook removed.

Up to that point in the case, there was no evidence to support the inference of the police officers that those who got down from the car caused a metallic sound by removing the hook. The Inspector had stated that the cash box was taken out on the next day about 11 a.m.

Witness Danoris had given his evidence before the police officers. After the police officers' evidence, Crown Counsel moved to recall Danoris. When the defence objected, the learned Judge himself decided to recall the witness.

A trial judge has an undoubted right to recall any witness at any time, but once a witness has given categorical and unambiguous evidence which favours the accused, this right should not be exercised in order to afford the prosecution an opportunity to whittle down the effect of that evidence. This was undoubtedly the purpose for which the application to recall Danoris was made, for when questioned by the learned trial Judge why he wanted Danoris recalled, the Crown Counsel said

that in the lower court Danoris had stated that the lights of the car had been put off. Danoris, on being questioned when recalled, said as follows:

"*Court:* *Q.* You told us when you gave evidence that when this car came for the final time, it came and stopped behind the lorry and the lights were on?

A. Yes.

Q. Now I am putting to you a passage from the evidence you gave in the Magistrate's Court — (The passage was then put to him) that is what you told the Magistrate?

A. Yes.

Q. Do you realise the importance of what you told the Magistrate — you have said that the lights were out. Here you said the lights remained. What is it that you want to say?

A. My father-in-law had expired a few days before I came to give evidence and my mind was unsettled. It happened about a week before the commencement of this trial. Therefore I forgot to speak the truth here. When I got down from the witness box I remembered, but through fear I did not turn back."

and later, under cross examination,

"*Q.* Inspector Samarasinghe has told this Court that the lorry was opened on the following morning at 11 o'clock and the cash box was taken out?

A. Yes.

Court: *Q.* You said that the cash box was taken out of the lorry on the previous night?

A. I think I said so by mistake.

Q. That is another matter you had forgotten?

A. Yes."

The learned Judge has made no reference at all to the evidence of Danoris or given any direction concerning it. He should have placed the versions given by Danoris before the jury and left it to them to decide which version they were disposed to accept. He made no reference at all to the evidence relating to the cash box being taken out of the lorry, and the failure of the prosecution to call the police officer and the driver who guarded the lorry. Having told the jury that the Inspector was an officer trained to observe details, and that his evidence was more acceptable than that of any other witness, the learned judge has stated as follows:—

"The Inspector says that he observed those two matters the next morning, because the first thing that he did, once the lorry was taken into the police station, was to tell the driver to keep an eye on it, and also to tell the reserve to keep an eye on it, and he went to arrest the people who tried to escape. He said the next morning he saw the hook had been removed and the rope cut. The question is, gentlemen, would you accept his evidence, because he says that there was no other course in which it could have happened. The lorry was brought immediately to the police station."

This passage would undoubtedly have led the jury to think that on the Inspector's evidence no person other than the appellants could have tampered with the ropes or the hook. A little later, the learned judge said:

"As I told you, if you accept the facts as spoken to it would be a case of attempted theft of the money"

In the light of the evidence dealt with above there was, in our opinion, a misdirection which vitiated the conviction on the second charge.

We accordingly acquitted all the appellants on the charge.

Fifth accused appellant acquitted. First, second and third accused appellants acquitted on count 2 only.

Present: **H. N. G. Fernando, C.J. and Abeyesundere, J.**

LADAMUTTU PILLAI KATHIRKAMAN PILLAI

vs.

KATHIRKAMAN KAMALEE & FIVE OTHERS

S.C. 147/67 (*Inty*) — *D.C. Colombo* 14879/*T*

Argued and decided on: December 14, 1967

Reasons delivered on: January 19, 1968

Civil Procedure Code section 377(*a*) *and* (*b*) — *Requirement that Order nisi or Interlocutory order be entered — Can such requirement be waived?*

Held: That the right to have notice of a petition under section 377 of the Civil Procedure Code by means of an order nisi or of an interlocutory order is capable of waiver just as much as a defendant in an action may by appearance in Court waive service of summons.

J. D. Aseervathan, with *Nalin Abeysekera*, and *Vernon Seneviratne*, for the appellant.

3rd respondent in person.

M. Sivananthan, for the 4th respondent.

J. W. Subasinghe, for the official Administrator.

H. N. G. Fernando, C.J.

In these testamentary proceedings Letters of Administration to the estate of the deceased had been issued on 9th March 1953 to the present appellant. Upon an application subsequently made to the District Court, the appellant was held to have been "negligent, inefficient and incapable of carrying on the functions of his Office" and the Letters granted to him were then revoked. On an appeal to this Court against the order of the District Court, the order revoking the Letters was by consent set aside and certain orders were made by this Court regarding the further administration of the estate by the appellant. Subsequently the appellant was found by this Court to have been guilty of contempt of its orders, and was sentenced to rigorous imprisonment for a period of one year. While he was serving that sentence, the widow of the deceased made application to the District Court for the revocation of the Letters of Administration issued to the appellant on various grounds, including the grounds stated in the former order of the District Court for revocation and the matter of the sentence for contempt. That application was made by petition and affidavit dated 6th May 1966.

The petition came up for consideration on 6th February, 1967 on which date the appellant was absent, being then in prison, but he was represented by his Proctor. The Court thereupon made order "that an Interlocutory order be entered and issued for the determination of the said matters in the petition" and the Judge intimated "that the respondents will be heard in regard to this petition." The minute made by the leaned Judge states as follows:— "Proctor for the 1st Respondent who is the present administrator and the other respondents present today waive service of this application to them." The Judge further ordered "Objections on 21.2.67."

On 7th March 1967 the appellant filed a statement of objections by way of reply to the petition for the revocation of the Letters. Inquiry into the objections of the appellant was fixed for 22nd April 1967. Thereafter further proceedings took place in Court on 22nd April 1967 when the appellant was represented by Counsel, and the Judge then made order fixing 4th May 1967 as the date for inquiry as to whether the present administrator (the appellant) should be removed.

On 4th May 1967 the appellant was again represented by Counsel who first made certain submissions on the merits of the application for revocation. He thereafter took the objection that no formal Interlocutory order in terms of section 377 has yet been entered and that no inquiry could be held until such an order is made. This objection was amplified at a further hearing on 16th June 1967. The Judge having reserved his order, made order on 16th July 1967 recalling the grant of administration to the appellant and appointing the Secretary of the District Court as official administrator.

The present appeal is against this order and the ground urged before us was that the order of 16th July 1967 was illegal because no formal Interlocutory Order in terms of section 377 of the Code had previously been made. We dismissed the appeal after hearing argument and I now set out my reasons.

Section 377, which is undoubtedly applicable in the case of an application to revoke Letters of Administration, pre-supposes that such an application is, in the first instance, considered *ex parte* by the Court. The provision in the section for the making of an order nisi or an Interlocutory order is designed to afford to the opposite party an opportunity to show cause against the grant of the relief prayed for in the petition. In the instant case however the purpose underlying section 377 was in fact satisfied, because the appellant was represented by Counsel in Court on 6th February 1967 when the petition for revocation was first taken up for consideration. Moreover, the Proctor for the appellant, according to the minute of the learned Judge, waived service of the application. In these circumstances it can fairly be presumed that the appellant through his Proctor became aware of the petition and of the intention of Court to take it into consideration. Indeed this becomes obvious from the fact that the appellant filed objections on 7th March 1967.

When the objections were filed inquiry into them was fixed for 22nd April 1967, on which date the appellant was represented by Counsel, and further inquiry was then fixed for 4th May. No objection was taken on the ground that a formal Interlocutory order had not been entered.

It seems to me that by filing objection in March 1967 and by acquiescing on 22nd April 1967 to the fixing of a date for inquiry, and by failing to take any objection to the omission of the Court to enter a formal Interlocutory order, the appellant waived his right that an Interlocutory order should first be made before the Court inquired into the petition for revocation. I have already pointed out that the making of an Interlocutory order is only a means by which an opportunity to show cause is afforded to the opposing party, and that in the present case such an opportunity was actually afforded and indeed utilized when the appellant filed his objections. As my brother pointed out during the course of the argument the right to have notice of a petition by means of an Interlocutory order is capable of waiver just as much as a defendant in an action may be appearance in Court waive service of summons. The appellant having by his conduct waived his right to the Interlocutory Order, I would hold that it was not open to him at a subsequent stage to rely upon the ommission to enter a formal order.

T he learned District Judge was of opinion that he was entitled to act *ex mero motu* under section 67 of the Courts Ordinance, and that a formal application under s. 377 of the Code is not necessary if the Court so acts. I am not called upon to consider the correctness of this oponion, but I must note that in fact the appellant had ample knowledge and notice that the Court would inquire into the matter of the revocation of the Letters of Administration.

For these reasons I affirmed the order of the learned District Judge and dismissed the appeal with costs.

Abeyesundere, J.

I agree.

Appeal dismissed.

Present: **Samarawickrama, J. and Weeramantry, J.**

L. C. N. FERNANDO *vs.* L. A. G. FERNANDO

S.C. No. 151/68 *(F) — D.C. Negombo No.* 2392/C

Argued on: 25th July, 1968
Decided on: 11th August, 1968.

Courts Ordinance section 69(1)*—Application to appoint Curator made to District Court of Negombo where minor resides — Prayer for permission to sell minor's immovable property situated at Puttalam — Court's refusal to grant permission on the ground that property situated outside its territorial jurisdiction —Is the refusal valid—Roman Dutch Law — Desirability that same Court should exercise all supervisory functions — Civil Procedure Code, section* 584 *— Effect.*

Civil Procedure Code, sections 6 *and* 9*—Whether such application is an "action" as defined therein—Jurisdiction of Court under section* 9.

The petitioner-appellant made application to the District Court of Negombo praying (a) that he be appointed curator of the property of the 1st respondent, a minor resident within the Jurisdiction of that Court;

(b) for permission to sell an item of immovable property belonging to the minor situated in the Puttalam District.

The learned District Judge dismissed the prayer for permission to sell on the ground that the land was situated outside the territorial limits of his jurisdiction.

Held: (1) That the learned District Judge was wrong in his view that he had no jurisdiction to grant permission.

(2) That the words "within its district" in the paragraph in section 69 of the Courts Ordinance providing for the care of the persons of minors and wards and the charge of their property, have been on more than one occasion held by the Supreme Court to qualify the words "minors" and "wards" rather than the word "property". It is well settled law that under section 69 of the Courts Ordinance the jurisdiction of a District Court to appoint guardians and curators of minors and their estates depends on the residence of the minor within the territorial limits of the jurisdiction of such Court.

(3) That even under the Roman Dutch Law, the appointment of a curator over the property of a minor would ordinarily give that curator control over all the property of the minor even though some items of property be situate outside the territorial limits of the court making the appointment.

(4) That as a practical reason it is desirable that the supervisory function of the Court, over 'minors' as their upper guardian, should not be split as between different Courts, but the court should be able to have that overall view of the minor's affairs and of the conduct and activities of the guardian or curator which would be neccessary for a proper assessment of the necessity for sale or other disposition of property.

(5) That the said application constitutes an action as defined in section 6 of the Civil Procedure Code. The minor respondent would be in the position of a defendant and the Court of the minor's residence would have jurisdiction in terms of section 9(a) of the Civil Procedure Code to hear and determine the application.

(6) That the mere existence of section 584 of the Civil Procedure Code is not sufficient of itself to justify a departure from the above view that the intention of section 69 (1) of the Courts Ordinance was to vest jurisdiction in the Court of residence.

Cases referred to: *In the matter of May Fernando, a minor,* (1896) 2 N.L.R. 249.
Muthiah v. *Baur,* (1906) 9 N.L.R. 190 (F.B.)
Keppitipola Kumarihamy v. *Rambukpotha* (1928) 30 N.L.R. 273.
Mudiyanse v. *Pemawathie* (1962) 64 N.L.R. 542
Cassaly vs. *Buhari* (1956) 58 N.L.R. 78
Pelis vs. *Silva* (1958) 60 N.L.R. 289.

Distinguished: *Cassaly* v. *Buhari* (1956) 58 N.L.R. 78.

S. J. P. Fernando, with *N. T. S. Kularatne*, for the petitioner-appellant.

Ananda de Silva, Crown Counsel as *amicus curiae*.

Weeramantry, J.

The petitioner appellant filed an application in the District Court of Negombo praying that he be appointed curator of the property of the first respondent, a minor resident within the jurisdiction of that court. The guardian ad-litem of the minor for the purpose of this application was the second respondent.

In the same application the petitioner appellant sought permission to sell an item of immovable property belonging to the minor situated in the Puttalam district. The learned District Judge dismissed that part of the application relating to the sale of the land holding that he had no jurisdiction to order such a sale inasmuch as the land was situate outside the territorial limits of his jurisdiction.

This appeal therefore raises the interesting question whether an application for permission to sell land belonging to a minor should be made to the District Court within whose jusridiction the minor resides or to the court within whose jurisdiction the land is situate.

Section 69 of the Courts Ordinance provides that every District Court shall have the care and custody of the persons and estates of all idiots and persons of unsound mind and others of insane and non-sane mind resident within its district with full power to appoint guardians and curators of all such persons and their estates. The section goes on to provide that in the like manner and with the same powers, the care of the persons of minors and wards and the care of their property within its district shall be subject to the jurisdiction of the District Court.

Although the words "within its district" appear immediately after the word "property" in this provision it has been held on more than one occasion by this court that the former expression qualifies the words "minors" and "wards" rather than the word "property" (*In the matter of May Fernando a minor*, (1896) 2 N.L.R. 249; *Muthiah* vs. *Baur* (1906) 9 N.L.R. 190, F.B.) This interpretation would seem to flolow from the fact that the words "also and in like manner" suggest that the jurisdiction of District Courts as regards minors and wards should be of the same nature as the jurisdiction in respect of lunatics and insane persons conferred on them by the earlier part of the section. This view also received approval in *Keppetipola Kumarihamy* vs. *Rambukpotha*, (1928) 30 N.L.R. 273. It seems settled then that the jurisdiction of a District Court to appoint guardians and curators of minors and their estates depends on the residence of the minor within the territorial limits of the jurisdiction of such court.

It is true that a somewhat different view has more recently been expressed by this court in *Cassaly* v. *Buhari*, (1956) 58 N.L.R 78. Gratiaen J. there observed in regard to section 69(1) of the Courts Ordinance that it gives statutory recognition to the powers and responsibilities of a court as the traditional upper guardian of minors under the Roman-Dutch law and that this provision entrusted every District Court with the care and management of a minor's estate situate within its jurisdiction.

Gratiaen, J. was in that case considering the question of a sale of a minor's property by his curator without the proper sanction of the court and was not giving his attention specifically to the question whether the court of residence had jurisdiction in preference to the court where property was situate. The dictum to which I have referred must not therefore be taken to be one to the effect that the court where property is situate has jurisdiction in preference to the court of residence, but rather as one emphasising that the powers of District Courts over minors though conferred by statute hark back to the traditional notion of upper guardianship so well known to and recognised by the Roman-Dutch law.

It would not appear, therefore, that this Court has at any stage departed specificially from the view expressed in its earlier decisions to which I have already referred, and these decisions having as they do the support of a full Bench of this Court must be taken to state auhtoritatively the law on this subject.

In the Roman-Dutch law likewise there would appear to have been a principle that for an order of court to be made relating to the property of a ward, the ward should have this domicile within the district of the Judge or Magistrate making such order, a rule which obtained even though the

things of which the alienation was in question were situate in places not subject to the power of such Magistrate (Voet 27.9.5)

As Voet observes(Voet 27.9.5) this principle is similar to that by virtue of which the praetor permitted the property of a ward to be sold not only in Italy but even in the provinces, provided the guardianship was being conducted at Rome and the guardian had undertaken at Rome the administration of the property in the provinces. (D.27.9. 5.12)

There is indeed a statement in the Digest (27.1.21.2) to the effect that if a patrimony over which a tutor is appointed is situate in very different parts, a tutor might apply to have other tutors appointed to act in those parts. This passage does not however derogate from the general principle that the tutor appointed has control over all property wherever situate for, as is observed in the Institutes (1.25.17) and in the Digest (27.1.21.2), a tutor who is appointed is considered as appointed for the whole patrimony.

Applying this principle then, the appointment of a curator over the property of a minor would ordinarily give that curator control over all the property of the minor even though some items of property be situate outside the territorial limits of the court making the appointment.

The South African Courts have in reliance on this Roman Dutch principle held that it would be proper to apply in the first instance to the Court of the minor's domicile even though in certain cases it might be necessary to obtain a further order from the Court where the property was situate. (*Ex parte* Uys 1929 T.P.D. 443 at 44; *ex parte* Ford 1940 W.L.D. 155 at 157. See also *ex parte* Estate Hiddingh 1935 O.P.D. 92 at 95.) They have also observed,that there can be no doubt that as a general rule the most convenient place for investigating whether the alienation is in the interests of the minor or not is the Court of the minor's domicile (*Ex parte* Uys 1929 T.P.D. 403.).

In Ceylon we do not have a multiplicity of divisions and jurisdictions such as may make it necessary in certain cases in South Africa to obtain the consent of the Court where the property is situate. I do not think therefore that under our procedure it becomes necessary as a matter of law to obtain the dual consent which may sometimes be rendered necessary in South Africa.

It may also be observed that it is not possible to derive guidance on this matter from either English or Indian procedure. In the former case, guardians are appointed by the Chancery Division of the High Court in the exercise of its traditional function of superintendence of the care and custody of infants, and any analogy with the territorial jurisdiction of District Courts becomes inappropriate; and in the latter case the matter is dependent on the special provisions of the Guardians and Wards Act, No. 8 of 1890, section 9(2) of which expressly provides that an application may be made either in the court where the minor resides or in the court where the property is situate. Likewise, little guidance can be obtained from decisions on the New York Code of Civil Procedure, from which many of our provisions of Civil Procedure are taken, for the reason that in that jurisdiction as well application for appointment of a guardian of the property may be made to the Supreme Court, (section 2349 of the New York Code of Civil Procedure, 1876).

We must next consider the effect on the present application of section 584 of the Civil Procedure Code which provides that if the property is situate in more than one district, an application for appoint ment of a person to take charge of the property and person of a minor should be made to the District Court of the district in which the minor at the time of application, resides.

It is not clear what precisely was the necessity for the enactment of such a section having regard to section 69 of the Courts Ordinance which had already provided that the Court of the minor's residence should be vested with such jurisdiction. A section expressly giving such jurisdiction to

the Court of residence where property is situate in more than one jurisdiction seems to be superfluous in the light of section 69(1) of the Courts Ordinance but I do not think that the mere existence of this provision is sufficient of itself to justify a departure from the view that the intention of section 69(1) of the Courts Ordinance was to vest jurisdiction in the Court of residence. Compelling reasons deriving both from the context of that section itself and from the underlying principles of common law must necessarilly outweigh such inference to the contrary as may be suggested by section 584.

There are other practical reasons which point also to the necessity for the principle that the Court of residence should have jurisdiction.

It will readily be appreciated that the Court, discharging as it does the role of upper guardian, expected to perform the same functions as these which an individual would have to perform had been placed in a position of supervisory authority over a guardian or curator. This function cannot be split as between different Courts for one Court alone must take this responsibility and discharge this function.

In particular, where property is situate in more jurisdictions than one, it would be undesirable to have this supervisory function exercised piecemeal by the different Courts in which such property happens to be situate. One Court would not then be able to have that overall view of the minor's affairs and of the conduct and activities of the guardian or curator, which would be necessary to a proper assessment of the necessity for sale or other disposition of property. Sales or other dispositions, or, for that matter, the very conduct of a guardian or curator, may well, when viewed in their totality, put the Court upon inquiry in cases where an individual application to deal with property may not arouse suspicion. It is desirable therefore that when a Court discharges the supervisory responsibility lying upon it, it would not be denied the benefit of seeing the minor's affairs in this wider way.

An alternative basis is also available in law on which to rest the jurisdiction of the Court of the minor's residence.

An application for the appointment of a curator and the sale of property has been held by this Court to be an action as defined in section 6 of the Civil Procedure Code (*Mudiyanse* v. *Pemawathie* (1962) 64 N.L.R. 542 at 543). To such an application the minor is required by law to be made a party and he must in such application be represented by a guardian-ad-litem (*Cassaly* v. *Buhary* (1956) 58 N.L.R. 78 at 81). Since the application constitutes an action, the minor respondent would be in the position of a defendant and in terms of section 9(a) of the Civil Procedure Code, the Court of the minor's residence would be a Court having jurisdiction to hear and determine such application.

It is also pertinent to observe, though it is not necessary to rest this decision upon that principle, that the mere fact that an application concerns lands does not necessarily make it an action in respect of land within the meaning of section 9(b) of the Civil Procedure Code, for this Court had held that an action for specific performance of an agreement to sell land is not an action in respect of land within the meaning of that provision (*Pelis* v. *Silva*) (1958) 60 N.L.R. 289). On the basis of this decision an application for permission to sell land may well fall outside the ambit of actions in respect of land, in which case the Courts where the property is situate may not in any event be a Court vested with jurisdiction to entertain an application.

Having regard to all these considerations it would appear that statute law, common law and considerations of practical advantage all combine in indicating the Court of the minor's residence as the appropriate Court to which application should be made for sale of property.

The order of the learned District Judge refusing permission on the ground that the Court of residence had no jurisdiction is therefore wrong in

our view and we remit this case to the learned District Judge in order that he may consider the application for sale made to him.

We have in this case called for the record in an earlier Curatorship case concerning these minors to which reference has been made in the course of these proceedings. This case, No. 2327 Curatorship of the District Court of Negombo, has been instituted on 9th October 1962 and the maternal aunt of the minors has been appointed therein as curatrix over the property of the minors. Order *nisi* was entered on 9th October 1962 and was made absolute on 7th March, 1963. Thereafter, on 4th September 1963 the present petitioner appears to have been substituted as curator, the earlier order appointing the curatrix having been cancelled. Certificate of curatorship was accordingly issued on 8th January, 1964. Various steps have been taken on the basis of this order and there does not appear to be any entry in the record of that case showing that that order has at any time been vacated.

As long as that order stands, it would appear that there was no need for a fresh appointment of the petitioner as curator over the same minors. We accordingly formally set aside the order appointing a curator, leaving it to the learned District Judge to consider whether the present application for sale should have been made upon the basis of the earlier appointment and within the framework of the earlier case or whether the circumstances call for a fresh application and a fresh appointment, after cancellation of the earlier appointment.

After determining upon the manner in which the curator should be appointed and making the appointment accordingly, the learned District Judge will proceed to consider the application for permission to sell on the footing that his Court has jurisdiction to decide this matter.

Samerawickrame, J.

I agree.

Appeal allowed.

Present: **Weeramantry, J.**

V. M. BOTEJU *vs* K. JAYEWARDANE & OTHERS*

Habeas Corpus Application No. 453 *of* 1967

Argued on: 27th June, 1968.
Decided on: 1st September, 1968.

Habeas Corpus—Custody of child of tender years— Paramount consideration interests of child — Preferent right of father may be overlooked, if unfitness of mother not established.

Where the mother of a child, about one year and a half old, sought its custody from her husband on the ground that the child is being wrongfully kept away from her by him.

Held: That in matters of custody of children, the paramount consideration is the interests of the child. In the persent case therefore the custody of a child of tender years ought to be awarded to the mother despite the preferent right of the father, if there is no convincing evidence of unfitness on the part of the mother to be entrusted with the child.

T. B. Dillimuni, for the petitioner.

Ranjan Gooneratne, with *Hemachandra Perera*, for the 1st respondent.

* For Sinhala translation, see Sinhala section, Vol. 17, Part 4 p. 15

Weeramantry, J.

In this case the mother of a child, about 1 1/2 years old at the date of her application, sought a Writ of Habeas Corpus in respect of this child on the ground that the child was being wrongfully kept away from her by her husband, the 1st respondent, and his parents. The petitioner alleged that on her visits to the house where the child was kept she was assaulted by the 1st respondent. The learned Magistrate after inquiry has recommended that the child be handed over to the mother with due rights of access to the 1st respondent.

This recommendation of the learned Magistrate is canvassed by the respondent on the ground that he as the father has a preferent right to the custody of the child.

Although no doubt the father has ordinarily a preferent right over the mother in respect of the custody of children of the marriage, it is well established that where the child is of tender years and therefore needs the comfort and society of its mother, custody ought to be awarded to the mother despite the preferent right of the father. This follows from the principle that in matters of custody the paramount consideration is the interest of the child. In the case of a child of such tender years the interests of the child would demand that it be restored to the mother unless of course there be some evidence of unfitness on the part of the mother to be entrusted with the child's care and custody.

In the present case there is no evidence of such unfitness and the learned Magistrate was in my view perfectly right in his recommendation that the custody of the child should be granted to the mother in the absence of evidence of unfitness on her part.

It has been suggested that the petitioner is a person who was attempted to commit suicide in the past and that she is a person of bad behaviour. These suggestions are made on the basis of a letter which has been marked in evidence, which letter the petitioner states she was forced to write by the respondent. The terms of the letter by their very nature lend support to the view that this is a letter she was forced to write as it contains too complete a catalogue of items of misbehaviour to have been voluntarily made by her as alleged by the respondent.

The point is made that at the proceedings before the Magistrate, the version of the wife that she was forced to write the letter was not put to the respondent husband. It would no doubt have been desirable for this position to be put specifically to the respondent husband, but I do not think, having regard to the totality of the evidence, that any prejudice has been caused to the respondent by reason of the failure of the petitioner to put this position to him.

Apart from the material contained in this letter there is no other basis on which it can be suggested that the petitioner is unfit to have the custody of the child. For these reasons, I uphold the recommendation of the learned Magistrate and order that the Corpus be handed over to the petitioner, subject to a reasonable right of access in favour of the 1st respondent on such terms and conditions as the learned Magistrate may in his discretion determine.

The petitioner will have the costs of these proceedings, both here and in the Court below, which I fix at Rs. 315/-.

Application allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J. (President), T. S. Fernando, J. and Abeyesundere, J.**

SEENI RATHINAM *v.* THE QUEEN

C.C.A. Appeal No. 121 *of* 1967 (*with Application No.* 161 *of* 1967) — *S.C. No.* 25 *of* 1966/*M.C. Jaffna* 31328

Argued and decided on: January 16, 18, 19 and 20, 1968
Reasons delivered on: February 14, 1968

Criminal Procedure Code, section 238 — *Conditions under which a demonstration at the scene is permissible — Procedure to be followed upon the return of the jurors to Court.*

Summing-up — Proper direction regarding an acceptable verdict.

Held: (1) That a demonstration during a view of the scene must be held in comparable conditions.

(2) That if during a view of the scene, certain places are pointed out by witnesses, they should, on the return of the jurors to Court, be recalled and examined on oath as to what they did, and thereafter permitted to be cross-examined.

(3) At the end of his charge to the jury, the trial judge addressed them thus:

"Try to be unanimous in your decision; but if you cannot be unanimous, at least bring in a five to two verdict. Any other verdict is not acceptable in law. You may retire and consider your verdict."

That the above direction was inadequate.

Per **T. S. Fernando, J.** "What is an acceptable verdict cannot be said to be a matter of common knowledge on the part of jurors. It is a question on which jurors may well be instructed by a trial judge, and where such instruction is attempted it should be fuller than in the instant direction. They should be informed that the returning of a legal verdict is not obligatory, and that, if they are finally divided 4 to 3, their duty is to say to the judge on their return that they are unable to reach a verdict by reason of the nature of their division."

Cases cited: *Karamat* v. *The Queen* (1956) A.C. 256
Tameshwar v. *The Queen* (1957) 3 W.L.R. 162

G. E. Chitty, Q.C., with *E. R. S. R. Coomaraswamy, Eardley Perera, M. Devasagayam* and *A. M. Coomaraswamy* (assigned) for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

T. S. Fernando, J.

The appellant (as the 1st accused) and two others (as the 2nd and 3rd accused) stood their trial at the Jaffna Assizes on a charge of murder of one Subramaniam Devendram. The jury by a unanimous verdict found the 2nd and 3rd accused not guilty, but by a divided verdict of five to two found the appellant guilty. The trial judge accordingly sentenced him to death.

Two main questions were raised before us on appeal, one of law and the other of fact. The question of fact was that the verdict was unreasonable; but, having regard to the view we have formed on the question of law and the order we decided to make on this appeal that a new trial be held, it becomes unnecessary to examine the evidence in this judgment as our order implies that we are of opinion that there was evidence upon which the appellant might reasonably have been convicted. The question of law was that, at a view of the scene ordered at the instance of the presiding judge, a demonstration took place before the judge and jury other than the kind of demonstration that was permissible resulting in grave prejudice to the appellant on the issue of the credibility of the alleged eye-witnesses.

Two other points raised, both of law, may also be mentioned. The first of these related to a direction given by the learned trial judge as to what is an acceptable verdict. At the very end of his charge to the jury, he addressed them thus:—

"Try to be unanimous in your decision; but if you cannot be unanimous, at least bring in a 5 to 2 verdict. Any other verdict is not acceptable in law. You may now retire and consider your verdict."

It was contended on behalf of the appellant that there was misdirection here capable of leading the jury to conclude that if they cannot be unanimous they had to return at least a 5 to 2 verdict. In respect of the appellant that was indeed the kind of verdict returned. We are free to say that the direction, such as it was, above reproduced was inadequate. What is an acceptable verdict cannot be said to be a matter of common knowledge on the part of jurors. It is a question on which jurors may well be instructed by a trial judge, and where such instruction is attempted, it should be fuller than in the instant direction. They should be informed that the returning of a legal verdict is not obligatory, and that, if they are finally divided 4 to 3, their duty is to say to the judge on their return that they are unable to reach a verdict by reason of the nature of their division.

The other point of law related also to something that took place at the view of the scene. Certain places were pointed out at the scene by the witnesses, but the witnesses were not recalled and examined on oath as to what they did nor, of course, were they permitted to be cross-examined on that matter. On the return of the jurors to the court and on the resumption of the recording of evidence, the Clerk of Assize alone was examined as a witness to ascertain what took place at the trial. We think that the two witnesses who showed certain spots material to the issue of their credibility should themselves have been recalled and, of course, permitted to be cross-examined. The observations made by Lord Denning in giving the reasons of the Privy Council in the case of *Tameshwar* v. *The Queen* (1957) 3 W.L.R. at 162 are in point and are reproduced below:—

"By giving a demonstration (a witness) gives evidence just as much as when in the witness-box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid, as the witness points to the very place where he stood. It is more dramatic, as he re-enacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible, he will say at least "I stood here" or "I did this" and, unless held in check, he will start to give his evidence all over again as he remembers with advantages what things he did that day. But however much or however little the witness repeats his evidence or improves upon it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence....."

Had there been no other and more material question of law urged on behalf of the appellant, in spite of the technical merit in this point of law, we would have had no hesitation in dismissing this appeal because we were in no doubt that no substantial miscarriage of justice had actually occurred by reason of the failure to examine in court the witnesses who showed the material spots.

We can now turn to the main question of law relied on by the appellant. The case for the Crown was that the deceased Devendram was shot by the appellant who was seated in a car that moved along the road abutting which the deceased was seated on the step of a boutique. Two witnesses, Kulasingham and Sharma, claimed to have identified the appellant as the person who fired the shot. Kulasingham was himself seated on a step of the boutique very close to the deceased. Sharma was seated on a chair behind a table placed towards the rear of the boutique. One of the material questions at the trial naturally was whether each of these two witnesses could have identified the appellant from their respective positions.

It was not disputed that at the view of the scene, which could only have been ordered by the learned

trial judge under section 238 of the Criminal Procedure Code, the judge either ordered or permitted a car to be driven along the road while the judge and jury remained inside the boutique in the belief, one must assume, that the jurors would thereby be assisted in their task of determining the credibility of the witnesses Kulasingham and Sharma when they said that they did identify the appellant as the person who actually fired. (It should be mentioned that the Crown case was that the 2nd accused drove the car, and that the appellant and the 3rd accused were in the rear seat.) There is no record in the evidence as to the nature of this demonstration nor indeed even of the fact that any demonstration did take place. Apart from what counsel has been able to tell us of the nature of the demonstration, the only reference to a demonstration of this kind is to be found in the learned trial judge's summing-up to the jury. In that summing-up much stress was laid on what could have been gathered by the visit to the scene and all that the jury saw there, including the demonstration with the aid of a car being driven along the road, and at various stages thereof, he observed:—

(*a*) "You have in your mind a picture of that";

(*b*) "Ask yourselves whether you could have seen what he purports to have seen from that position";

(*c*) "You had the useful assistance of an inspection of the scene and I think you ought to have no difficulty in reaching a conclusion in regard to this matter".

It is unnecessary, in our opinion, to examine on this appeal the nature of and the extent to which demonstrations are permissible at views of a place where the offence is alleged to have been committed. That all demonstrations are not ruled out is apparent from decisions on corresponding provisions of law; see *Karamat* v. *The Queen* (1956) A.C. 256 and *Tameshwar* v. *The Queen* (*supra*). We do, however, think that the actual demonstration which was accepted before us as having taken place was impermissible and, far from assisting the jury to decide upon the credibility of the two witnesses concerned, was liable to mislead them on that important issue. While the shooting was alleged to have taken place about 6 o'clock in the evening, the demonstration took place about noon. The boutique had changed hands between the date of the offence and the date of the visit by the jury to the scene. While this circumstance may not have affected the question whether Kulasingham who said he was sitting on the step of the boutique could have identified the man who shot, it could have affected the question whether the other witness Sharma who sat in the rear of the boutique could also have identified because the contents of the showcases in the boutique had undergone changes by reason of the conversion of what was a motor-spares boutique to a lending library. While the car used on the date of the offence is said to have been an Austin Ten, there is no evidence as to whether the car used at the demonstration was similar; any difference between the two could affect the question as to what part or how much of the body of the person who shot was visible to persons in the boutique. We do not know who drove the car on the occasion of the demonstration. He was not called as a witness even on the return of the jury to court after the view of the scene. We have no evidence as to how fast or how slow the car was driven at the demonstration. It was suggested that it was driven slowly. Whatever its speed at the demonstration may have been, there is all the difference one can imagine between the question of what a person or persons might have seen of another who somewhat unexpectedly passes in a car and shoots and what persons who (like the jurors) waited expectantly in the boutique for the car to appear on the road could have seen of its occupant or occupants. To say the least, a demonstration which was not held in comparable conditions should not, in our opinion, have been permitted and was capable of misleading the jury on the question of the credibility of the alleged eye-witnesses.

We have set out above the reason why we quashed the conviction of and the sentence, passed on the appellant and ordered his retrial on the charge contained in the indictment.

Retrial ordered.

Present: **Abeyesundere, J., Manicavasagar, J. and Alles, J.**

CANAKERATNE *v.* CANAKERATNE

S.C. No. 103/63 (*F*) — *D.C. Colombo* 3732/*D*

Argued on: January 19 and 20, 1967, March 15, 16, 19, 20 and 21, 1967, and May 10, 1967
Decided on: May 20, 1967

Divorce— Action by wife on ground of malicious desertion—Counter-claim by husband on same ground—Legal advice leading to consensual arrangement to live in temporary separation— This thought to be conducive to resumption of cohabitation — Disagreement regarding one of the conditions — Defendant's insistence that it should not be omitted—Negotiations coming to a standstill—Unreasonableness of defendant's conduct — Does it amount to malicious desertion by defendant?

The plaintiff wife sued her husband the defendant for a divorce on the ground of malicious desertion. He made a counter-claim for divorce on similar grounds. The husband had assaulted his wife on two occasions causing injury to her face and head. On legal advice leading to a written consensual arrangement, the wife continued to live in the matrimonial home with their younger daughter while the husband with the elder daughter took up residence with his parents in the home which was next door. The consensual separation was to be temporary and was thought by the legal advisers of both parties to be conducive to a consideration of the conditions on which there could be a resumption of married life. The document prepared by the legal advisers contained six conditions for the resumption of cohabitation and was signed by the wife but not by the husband. There was disagreement between the parties regarding one of the conditions marked (d), viz. that the plaintiff and the defendant should not communicate any views to their children concerning their grandparents. The disagreement arose as a result of the plaintiff's insistence that, if she were questioned by the children she would tell them the truth about the defendant's parents, viz. their ill-treatment of her. The defendant refused to agree on the plea that the plaintiff, under cover of telling the truth, would convey her own derogatory opinions to the children. Thereupon the negotiations of the legal advisers came to a standstill and the separation of the plaintiff and the defendant continued. During the temporary separation, the defendant acquiesced in or connived at the conduct of his parents when they used physical violence on the plaintiff on certain occasions. The trial judge accepted the evidence led by the plaintiff and found that the defendant had maliciously deserted her. His counter-claim was dismissed.

Held: That the condition (d) was unreasonable as it had the effect of preventing the plaintiff from telling the truth, even when questioned by the children, about the conduct of the defendant's parents towards her. The defendant's insistence on the observance by the plaintiff of an unreasonable condition for the resumption of cohabitation indicated his firm intention not to resume married life with the plaintiff. The defendant therefore was guilty of malicious desertion. His counter-claim was dismissed.

Per **Alles, J.** "All the offers of a reconciliation came from the wife. The trial judge rightly held that the defendant was to blame for the failure of the attempts to bring about a reconciliation since the consensual separation. I therefore agree with the order of the trial judge."

(Editorial Note : There is no other Ceylon case on the points raised and decided in the judgments though there are similar cases in the English reports cited at the trial and in appeal.)

C. Thiagalingam, Q.C., with *M. L. de Silva* and *T. Parathalingam*, for the defendant-appellant.

Maureen Seneviratne, with *Suriya Wickremasinghe* and *W. M. O. Perera*, for the plaintiff-respondent.

Abeyesundere, J.

In this action the plaintiff sued her husband the defendant, for a divorce on the ground that he had maliciously deserted her. The defendant in his answer counter-claimed a divorce on the ground that the plaintiff had maliciously deserted him. The learned District Judge entered judgment and decree granting a divorce to the plaintiff, giving the plaintiff the custody of the two children, and ordering the defendant to pay the plaintiff Rs. 600 a month as permanent alimony and Rs. 300 a month for the maintenance of the children. The defendant has appealed from the judgment and decree.

The plaintiff is Welsh and the defendant is a Sinhalese. They married in Wales on December

20, 1950 and arrived in Ceylon in September, 1951. For five months they resided in the home of the defendant's parents. Thereafter they lived in an annexe near by and later went into residence in a flat in close proximity to the home of the defendant's parents. Their first child, a daughter called Moena was born on September 14, 1951, and their second child, a daughter called Ayoma, was born on November 6, 1953.

In 1954 altercations between the plaintiff and the defendant occurred culminating in the assault of the plaintiff by the defendant on two occasions. On legal advice they commenced on December 18, 1954 to live separately by agreement. The plaintiff and Ayoma continued to reside in the flat and the defendant and Moena took up residence in the home of the defendant's parents. According to the plaintiff's evidence, her legal adviser, had without her consent, agreed to allow the defendant to have custody of Moena during the consensual separation of the plaintiff and the defendant. Their legal advisers thought that a temporary consensual separation would be conducive to a calm consideration of the conditions on which marital life could be resumed by the plaintiff and the defendant. The document marked P18(a) was prepared by the legal advisers. It contains six conditions for the resumption of cohabitation by the plaintiff and the defendant, and it was signed by the plaintiff and not by the defendant.

There was agreement between the plaintiff and the defendant in regard to five of the aforesaid conditions and there was disagreement in respect of one condition which is condition (d). That condition requires the plaintiff and the defendant not to communicate any views to the children concerning the children's grandparents. The disagreement regarding that condition arose from the plaintiff's insistence that, if she was questioned by the children, she would tell them the truth about the defendant's parents. The defendant was adamant that the plaintiff should strictly abide by condition (d). The negotiations of the legal advisers came to a standstill and the separation of the plaintiff and the defendant continued.

The defendant's evidence in regard to condition (d) is intended to indicate that his stipulation that the plaintiff must abide by that condition was not because he was opposed to the plaintiff's speaking the truth about his parents to the children but because he apprehended that the plaintiff would, in expressing to the children what she called the truth, make insulting remarks about his parents. His testimony in regard to this matter is as follows:

"*Question:* Was there any objection to her telling the truth?

Answer: There was no objection as far as she spoke the truth as truth is generally understood by us but when she tried to cloak under the truth those filthy suggestion of hers, I objected strongly. I strongly objected to the truth that mother is a filthy bitch."

After the consensual separation, the plaintiff had, in the course of an argument with the defendant about his mother's attitude towards her, referred to his mother as a filthy bitch. The defendant in his evidence stated that on one occasion the plaintiff from the balcony of the flat told Moena not to go to "those dirty people and filthy people", the reference being to his parents, and that on a later occasion when the defendant brought Moena to see the plaintiff in the flat, the plaintiff told Moena that the defendant's mother was "a filthy bitch." The plaintiff was not cross-examined whether she uttered to Moena insulting remarks regarding the defendant's parents. There is no evidence that, even on the occasions when force was used on the plaintiff by the defendant's parents, the plaintiff reviled them in offensive language. Therefore we do not give credence to the defendant's uncorroborated testimony that the plaintiff uttered to Moena insulting remarks about the defendant's parents.

We are of the view that the defendant's anxiety was that the plaintiff would express to the children a derogatory opinion of their paternal grandparents. The evidence discloses that the plaintiff has a derogatory opinion of the defendant's parents. The cause of such opinion is the ill-treatment of the plaintiff by the defendant's parents. The plaintiff's evidence with regard to such ill-treatment is that the defendant's mother interfered with the plaintiff's upbringing of Moena, that the defendant's parents were associated with him in taking away Moena from the plaintiff, and that the defendant's parents used force on the plaintiff on certain occasions as a result of which complaints were made by the plaintiff to the police. That evidence of the plaintiff has been believed by the learned District Judge and we see no reason to disagree with him. The defendant has acquiesced in or connived at the aforesaid conduct of his parents. In our view the truth about the defendant's parents which the plaintiff stated that, if questioned by the children, she would

tell them is the ill-treatment of the plaintiff by the defendant's parents and not, as alleged by the defendant, vile abuse of his parents by her. Counsel for the defendant submitted that, even if the plaintiff's opinion of the defendant's parents was true, its communication to the children would make it impossible for the defendant to live with the plaintiff. We do not agree with that submission. The defendant's testimony in regard to what a parent should do if a child put a question to the parent is that the question must be answered truthfully to the best of the parent's ability. Having regard to this view of the defendant, we are unable to hold that the defendant will find it impossible to live with the plaintiff if she, when questioned by the children, tells them the truth about the conduct of their paternal grandparents towards her.

Condition (3) was the means by which the defendant endeavoured to prevent information of the ill-treatment of the plaintiff by his parents from reaching the children. He tried to secure the plaintiff's agreement to withold such information from the children by impelling her to abide by condition (d) by his stipulation that, unless she accepted that condition without any qualification, he would not sign the document marked P18(a). We hold that condition (d) is unreasonable as it has the effect of preventing the plaintiff from telling the truth, even when questioned by the children, about the conduct of the defendant's parents towards her. The defendant's insistence on the observance by the plaintiff of an unreasonable condition of the resumption of cohabitation indicates his firm intention not to revert to cohabitation with the plaintiff. There is therefore malicious desertion of the plaintiff by the defendant.

For the aforesaid reasons we affirm the judgment and decree of the learned District Judge and dismiss the defendant's appeal with costs.

Manicavasagar, J.

I had the benefit of reading the opinion of my brother, Abeyesundere, J. and I agree that this appeal should be dismissed with costs for the reasons given by him.

I desire however to express another point of view which I consider leads to the same result.

On a consideration of the entirety of the evidence, I have no doubt whatsoever that the wife genuinely desired to resume life with her husband. He fears that she would in the future tell their children her opinion of his parents, expressed in abusive and insulting words, though he had no objection to her telling them the truth, if asked, as to the manner in which she was treated by them. Condition (d) of document P18 a was the outcome of his fears: the wife signed the agreement and her interpretation of condition (d) is that it meant no more than telling their children, if questioned by them, the true facts of the treatment she received from his parents: despite this the husband does not believe her assurance.

To my mind the imposition of condition (d) whether it means telling the truth to the children or expressing views derogatory of their paternal grand-parents is unreasonable. There is no evidence, acceptable to us, that her conduct in the past was such that he had reason for his fears, and therefore required this assurance before they got together again. The condition itself visualises a contingency which may or may not arise. Bearing in mind that where there are difficulties with the members of the family of a spouse, the first duty of the spouse is towards the other spouse, my view is that even whilst the spouses are living together, the circumstance that one of them tells their children the true facts of the ill-treatment by the members of the family of the other, is not a reason to break up the marital home: not even if on occasion he or she gave vent to his or her feelings and expressed to the children views of them couched in insulting terms, unless it was persisted in with such frequency that it may be regarded, having regard to the circumstances of the particular case, as a sufficiently grave and weighty cause which makes it impossible for them to live together. The present is not such a case. I have no doubt that the husband has acted unreasonably in not resuming life with his wife.

Alles, J.

I am in agreement with the order proposed by my brother, Abeyesundere, J. but would like to state my own views.

This appeal is from the judgment of the District Judge after a re-hearing. At the first trial, the learned District Judge gave judgment in favour of the plaintiff. From this judgment the defendant appealed to the Supreme Court and the appeal came up for hearing before Sansoni and Tambiah, JJ., who by their judgment set the case down for re-hearing before another Judge because in their view the trial Judge had failed to give careful consideration to the question as to which party

was responsible for the failure to bring about a reconciliation. It was the view of the Supreme Court that the learned trial Judge had not adequately dealt with some of the correspondence which passed between the lawyers to the parties after a consensual separation had been entered into between them on 18th December 1954. The rehearing of the case came up before another Judge who, by his order of 20th October, 1962 again gave judgment in favour of the plaintiff for a divorce on the ground of malicious desertion and also granted her the custody of the two children of the marriage. The defendant appealed to the Supreme Court from this order and in view of a difference of opinion between T. S. Fernando and Sri Skanda Rajah, JJ., before whom the appeal was argued, the case has been now set down for argument before a Divisional Bench consisting of three Judges.

The parties were married at Cardiff in Wales on 20th December, 1950. They are both graduates of the University College, Cardiff where the plaintiff obtained her Arts degree in French and Mathematics and the defendant his degree in Education and Philosophy. The defendant was a son of a former Judge of the Supreme Court of Ceylon and hailed from a well-known and wealthy family residing in Colombo. The plaintiff's parents were school-teachers. Her father was a graduate of the University of Wales. The couple came to Ceylon in September 1951 and four days later, the first child, Moena was born. A second girl, Ayoma, was born on 6th November, 1953. On their arrival in Ceylon the couple stayed for about five months with the plaintiff's parents in law, Mr. and Mrs. A. R. H. Canekeratne at No. 9 Horton Place. It was the plaintiff's complaint that during the five months in which she remained with the defendant's parents, she had trouble with her mother-in-law, about the upbringing of Moena; while she advocated more modern method with regard to the upbringing of the child, Mrs. Canekeratne was a firm believer in the old fashioned methods. The plaintiff's difficulties were aggravated by the fact that she did not know the Sinhalese language and consequently could keep no check on the orders given by her mother-in-law with regard to the upbringing of Moena. In February, 1952, the couple moved to the annexe attached to the main house where they continued to live until May, 1953. According to the plaintiff, the unhealthy influence of her mother-in-law continued even after she moved to the annexe. The elder Mrs. Canekeratne would insist on Moena being sent to spend the greater part of the day with her and the plaintiff resented the interference of her mother-in-law in her domestic affairs. These were not her only difficulties. She was also finding it difficult to run her home without adequate funds from her husband and consequently was compelled to seek temporary employment to earn some money for her essential needs. The learned trial Judge has held that there was justification in the assertion of the plaintiff that her husband was completely dominated by his mother and that she had a strong influence over him.

The plaintiff and the defendant both gave evidence at the trial and have been cross-examined in great detail. The trial Judge, who had ample opportunity of assessing the respective versions of the parties, on questions of fact has preferred to accept the evidence of the plaintiff in preference to that of the defendant. The evidence of the plaintiff which the trial Judge has accepted established that the wife was the aggrieved party. The couple left the annexe and shifted to a flat belonging to the defendant in close proximity to No. 9 Horton Place. This was in May 1953 before the birth of Ayoma. Trouble again dogged the plaintiff's footsteps. A few months prior to the birth of Ayoma, the plaintiff had occasion to complain about the defendant's undue familiarity with one Dorothy Seneviratne who was a frequent visitor to the flat. The defendant's friendship with Dorothy Seneviratne continued till October, 1954 and during this period there were several quarrels between the husband and wife. Soon after October, 1954, in the course of a quarrel, the husband struck the wife on the head. This was the first time that he used physical violence on her. Earlier in September, 1954, the plaintiff's mother, Mrs. Davis, came on a visit to Ceylon. She stayed with the plaintiff and the defendant in the flat for two and half weeks after which she was asked to leave the flat by the defendant and she took up residence at the Y.W.C.A. It has been alleged by the defendant that after the arrival of the plaintiff's mother in Ceylon, the plaintiff, egged on by her mother made life unbearable for him at the flat. The plaintiff admitted in evidence in answer to defendant's Counsel that Mrs. Davis stated that the marriage was a "sham". Mrs. Davis had an opportunity of seeing for herself how the marriage was progressing and it is not strange having regard to what she must have witnessed that she characterised the marriage as a "sham." According to the plaintiff, her mother suggested that her daughter should return to England with the children requesting the defendant to follow so that a

fresh start may be made in another country without the interference of the parents in law. The defendant has seized on this suggestion to maintain that the marriage was broken by the conduct of Mrs. Davis. This is an unfair suggestion which the learned trial Judge has not accepted, particularly as trouble between the parties had commenced long before Mrs. Davis' arrival in Ceylon. However, Mrs. Wickremasinghe, whose evidence has been accepted by the Judge, and to whom the plaintiff had complained and sought assistance for the purpose of ironing out the differences between the husband and wife received the impression that the mother's presence in the flat might create trouble between the husband and wife and advised the plaintiff's mother to leave the flat and seek accommodation elsewhere. There were other troubles which beset the plaintiff during her stay in the flat and threatened to shatter the peace of her home — there was the interference by the defendant's mother, the difficulty with regard to money matters — the wife complaining that the husband did not prove her with sufficient means — and the language problem. The plaintiff did not know Sinhalese and did not favour the children being spoken to in Sinhalese in her presence. Her reaction was quite natural as she wanted to know what was spoken to her children in her presence and did not want to be left out of the conversation. There were further assaults by the husband on the wife spoken to by the plaintiff which have been adequately dealt with by the trial Judge.

The learned trial Judge has dealt at length with the assault on the plaintiff which immediately preceded the separation of the parties on 17th December, 1954. On 14th December, the husband in a fit of temper took Moena wrapped in a towel to the parents' house and did not bring her back till the evening. The defendant took Moena again the next day. The plaintiff went to the house of her parents in law and demanded the return of Moena. Mrs. Davis also came to the house. Both the plaintiff and Mrs. Davis were man-handled by Mr. and Mrs. Canekeratne and she was not allowed to remove Moena by the Canekaratnes. When she protested to her husband that same night, her husband assaulted her causing injuries to her face and head. The plaintiff complained to the Police in two separate complaints on the 15th December about the treatment she received at the hands of the Canekeratnes and her husband (P2 and P3). As a result of the assault by her husband, she had to take treatment at the Hospital. Her version of these incidents has been accepted by the Judge. On 17th December, the defendant left the flat taking Moena with him and went to live with his parents while the plaintiff continued to remain in the flat with Ayoma. This was the final break up of the marriage.

Thereafter, the lawyers — Mr. Hale for the plaintiff and Mr. Pullenayagam for the defendant endeavoured to bring about a reconciliation but their efforts failed. Several letters passed between the parties, all of which have been produced in evidence and considered by the trial Judge. At the same time, Mrs. Wickremasinghe also tried to effect a reconciliation but her efforts too failed.

Besides the incident of 15th December in which the elder Mr. and Mrs. Canekeratne figured, mention has to be made to two other incidents in which the plaintiff suffered physical violence. On 9th February 1955, the plaintiff went to the main house to speak to Moena when Mrs. Canekeratne and the defendant's sister used violence on her and prevented her from having access to her daughter. The defendant was present at the time. The other incident took place on Moena's birthday on 14th September, 1957. Moena was staying with the defendant and his parents. Ayoma was invited to the party and the plaintiff took Ayoma for the party which was held at the defendant's sister's house. While she was seated in the garden, the defendant came and asked her to leave the house. Mr. and Mrs. Canekeratne were present and Mr. Canekeratne threatened to assault her and forcibly turned her out of the house with the aid of the Police who had been summoned. She made a complaint of this incident to the Police (P48).

Since Moena was removed by the defendant on 17th December, 1954, she was not allowed to see the plaintiff except on two occasions one of which was the occasion of the birthday party referred to earlier. The plaintiff compalined bitterly that the parents in law with the connivance of the defendant were deliberately preventing her from having access to her elder daughter and alienating the affections of Moena against the mother.

After the parties separated on 17th December, 1954 and while negotiations continued between the lawyers, Mr. Hale on behalf of the plaintiff, after a joint discussion between the parties and their lawyers, forwarded document P18(a) dated 29th March, 1955 signed by the plaintiff to Mr. Pullenayagam for the defendant's agreement and signature. This was the first serious attempt at a reconciliation. Counsel at the hearing of this appeal

have agreed that this document contains the main points of difference between the husband and wife and that both parties agreed to abide by the conditions contained therein except for Clause (d). That clause reads as follows:

> (*d*) The parties undertake not to communicate any views to the children concerning the grand-parents.

The plaintiff, not unnaturally, held strong views about her parents in law, particularly her mother-in-law. She said she was untruthful, deceitful and immoral and proceeded to give examples of these qualities. She said that when she gave orders to the ayahs, instead of giving her orders, Mrs. Canekeratne gave her own orders; she said that Mrs. Canekeratne would complain to the defendant that she (the plaintiff) would put too much food into Moena's mouth and choke her and thereby instruct the ayah to feed Moena without allowing her to eat by herself. (The plaintiff wanted to train the child to eat by herself.) She explained what she meant by immorality when she maintained that her mother-in-law deprived her of the company of her elder daughter for almost six years. There is no doubt that she was very bitter against her parents in law, which according to her was due to the conduct of her parents in law who had used physical violence on her, interfered in her married life and deprived her of the company of her elder daughter. There is also no doubt that the defendant acquiesced and connived at the conduct of his parents. In this state of affairs, it is not surprising that she must have used strong language about her parents in law, in particular her mother in law. She does not deny that she may have asked her mother-in-law whether she wanted her face slapped; that in quarrels with her husband she may have referred to Mr. Canekeratne as a 'filthy bitch', 'dirty swine' and 'old hag.' The plaintiff was compelled to admit that she may have used such words in describing her mother-in-law. With regard to Clause (d) her position was that she would not volunteer her views of the grand parents to the children, but if the children were to ask her for her views she would not hesitate to tell them the truth. Her views would of course be her assessment of the type of people they were deceitful, untruthful and immoral. She said she would not use of words of common abuse in describing her mother-in-law which she used when she quarrelled with her husband. The defendant in evidence agreed that the children must be told the truth and agreed with passages from Bertrand Russel's book on Child Education, but he appears to have been sceptical about the attitude of the plaintiff, who he was sure, would not hesitate to use the same expressions about his parents which she had used in the course of the quarrels with him. One can understand his attitude in the matter; he has been a dutiful son and wished to ensure that the honour of his parents' reputation will always remain unsullied. The question however arises whether in imposing a condition that under no circumstances should his wife in her conversations with his children refer in disparaging terms to his parents, he was entitled to maintain, that unless she agreed to such a condition, he was justified in leaving the matrimonial home. Unfortunately, in spite of an otherwise excellent judgment, the trial Judge has not dealt with this problem although he says that the plaintiff can hardly be blamed for her attitude towards her parents in law. If the defendant's offer was genuine, and the condition imposed is reasonable, the failure of the plaintiff to abide by such a condition would amount to constructive malicious desertion and the defendant would be entitled to succeed. I do not think the condition imposed by the wife — that she would speak the truth if questioned by the children about the parents in law, is unreasonable. Therefore the only outstanding question is whether the defendant's condition is unreasonable in the circumstances, a non-compliance of which entitled him to refuse co-habitation. Before dealing with this question, I think it is necessary to consider whether the defendant's offer is one that is genuine. I am inclined to think it is not. If this was a genuine fear, it is strange that no reference had been made about this point specifically in the pleadings. Again, how would the defendant achieve his object of keeping the honour of his parents untarnished, if the plaintiff refused to abide by this condition? All the offers for a reconciliation came from the wife and the husband appears to have been only too ready to criticise such efforts on the part of the wife without suggesting any concrete proposals himself. According to Mrs. Wickremasinghe, the defendant (agreed to the written terms of reconciliation) suggested by him, but subsequently, to her surprise, resiled from his undertaking. I agree with the learned trial Judge that the attempts on the part of the wife to effect a reconciliation subsequent to the first trial was not actuated by any ulterior motives on her part. On the other hand, it seems to me that no genuine offers for reconciliation have ever been made by the defendant. Assuming however that the present offer is one that is genuine, the question still arises whether the offer is one that is reasonable in the circumstances. The defendant's fears that the

plaintiff will use disparaging terms in describing the conduct of his parents to his children, if and when she is questioned by them is one that is extremely remote, particularly as she never used such language to them even when she suffered physical violence at their hands. The question is one that is purely hypothetical and the situation one that might never arise. Again, it seems hardly likely that in the distant future, if the children did ask uncomfortable questions about their grandparents from their mother that she would again use the unsavoury language which she had used in her quarrels with her husband particularly, as with the passage of time her wrath against her parents in law is bound to have cooled. The plaintiff is a lady of education and it is most unlikely that she would risk the contempt of her children by speaking in the same disparaging terms of their grandparents, one of them being now dead and other advanced in years. The plaintiff herself admitted that she had now resolved her differences with her mother-in-law. Nor does it seem to me likely that the growing children would be unaware from extraneous sources of the views their mother held about her parents in law and perhaps as sensible and intelligent children will refrain from questioning their mother on matters that are bound to cause both parties embarrassment. I therefore think the condition sought to be imposed on the plaintiff to muzzle her in the future in a particular manner is one that is unreasonable in the circumstances. The only inference to be drawn from the imposition of such an unreasonable condition on the wife is that the defendant entertained the animus desertendi and never intended to be reconciled to his wife.

In my view, the trial Judge rightly held in the circumstances of this case that the defendant was to blame for the failure of the attempts to bring about a reconciliation since the consensual separation of 18.12.54. I therefore agree with the order of the trial Judge and would dismiss the appeal with costs.

Appeal dismissed.

Present: **Weeramantry, J.**

T. D. VICTOR *v.* INSPECTOR OF CRIMES, HARBOUR POLICE

S.C. No. 65/68 — *J.M.C. Colombo No.* 37754

Argued on: 19th March, 1968
Decided on: 29th March, 1968

Customs Ordinance, section 166(1)—*Charge of theft thereunder—Ingredients of the offence.*

Held: (1) That Section 166(1) of the Customs Ordinance postulates two requirements as being necessary to the conviction of a person in possession of an article suspected to have been stolen. *Firstly* — that such person does not give an account to the satisfaction of the Magistrate as to how he came by such article; *Secondly* — that the Magistrate should be satisfied that having regard to all the requirements of the case there are reasonable grounds for suspecting such article to be stolen.

(2) That the mere acceptance of the prosecution version and the rejection of the defence does not amount to a finding by the Magistrate that he is satisfied that there were reasonable grounds for suspecting the article to have been stolen. The latter involves an independent inquiry on which independent findings are required. An answer adverse to the accused on the question how he came to be in possession does not necessarily lead to an answer against him on the question whether the property is reasonably suspected to have been stolen.

Per **Weeramantry, J.** "When special offences of this nature are created by the Legislature and in particular in the case of offences involving a reversal of the usual rules of proof, it is of the utmost importance that there should be the strictest and most scrupulous insistence on those factors which the Legislature itself has postulated as pre-requisites to a conviction."

Cases cited: *Sammie* v. *Nagoda Police* (1951) 53 N.L.R. 255
Hutchinson v. Wijesinghe (1953) 55 N.L.R. 431

E. A. G. de Silva, for the accused-appellant.

S. W. B. Wadugodapitiya, Crown Counsel, for the Attorney-General.

Weeramantry, J.

The accused appellant in this case, a labourer employed under the Port Cargo Corporation, was charged with the theft of an empty polythene bag reasonably suspected to have been stolen from warehouse No. 3, Delft Quay, in the Port of Colombo, an offence punishable under section 166(1) of the Customs Ordinance, Chapter 235. The accused was found guilty of this offence and sentenced to pay a fine of Rs. 10/-, and to undergo one week's rigorous imprisonment in default.

The case for the prosecution was that around 9 p.m. on the day in question the accused and some other employees of the Port Cargo Corporation, when coming out of warehouse No. 3, were observed to have in their possession certain polythene bags in which ammonia was usually packed. These bags were being carried at the time under their arm pits and contained the clothes of these labourers. The prosecution contended that the polythene bags were property belonging to warehouse No. 3 and that the accused entertained a theftuous intention in regard to the polythene bag he carried.

It would appear that it was not an unusual occurrence for labourers engaged in unloading ammonia, to protect themselves by wearing discarded polythene bags round their waists, as was spoken to by a storekeeper of the Port Cargo Corporation who was called as a prosecution witness. This storekeeper stated further that he had seen labourers with these polythene bags wrapped round their waists going out of the warehouse and coming in after dinner. Their dinner time would appear to be between 9.00 and 10.00 p.m.

The officials of the Harbour Police who saw the labourers on that occasion stated that they were proceeding in the direction of the water tap presumably to wash their hands before or after their meal. Furthermore although there is no direct evidence on the matter, the water tap is itself clearly situated within the premises of the Port for the charge is one of being found in possession of a suspected article within the limits of the Port. It cannot therefore be concluded that merely because the labourers in question were going out of the warehouse they were attempting to take these bags out of the premises of the Port.

Another circumstance spoken to by the prosecution witnesses was that the polythene bags were not concealed but were being openly carried.

There was no evidence on the part of the prosecution proving that the bag which was found on the accused came from stocks in the warehouse and the only attempt at identifying the bag as being one from the stores was evidence of similarity between a specimen bag taken from the stores and the bag in question. There was no identifying mark on the bag nor was the storekeeper able without his books to speak to the stock position. This deficiency in the prosecution evidence assumes particular importance in view of the evidence of the storekeeper himself that discarded bags were used for protective purposes by labourers as referred to earlier.

The accused himself gave evidence and stated that polythene bags are used by the labourers to wrap around their waists and that at dinner time which is between 9.00 and 10.00 p.m. the labourers go out of the warehouse for their dinner and after dinner wash their hands at the water tap. When they go for dinner as well as when they wash their hands they do not remove the bags which are round their waists. He admitted having the bag in question with him and denied that he entertained any theftuous intention in regard to it. The accused further stated that the supervisor had seen them use polythene bags for this purpose but had never asked them not to do so. He also denied having ever taken polythene bags out of the harbour. The learned Magistrate rejected the evidence of the accused to the effect that he had no intention of committing theft and observed that the accused could not have been wearing discarded polythene bags round his waist as according to the evidence he had his clothes wrapped in the polythene bag. In view of his rejection of the defence version and his acceptance of the prosecution evidence the Magistrate found the accused guilty of the charge.

The approach of the learned Magistrate to the case necessitates an examination of the section under which the charge is laid. It will be observed that section 166(1) postulates two requirements as being necessary to the conviction of a person in possession of an article suspected to have been stolen. These are firstly that such person does not give an account to the satisfaction of the Magistrate as to how he came by such article and secondly that the Magistrate should be satisfied

that having regard to all the circumstances of the case there are reasonable grounds for suspecting such article to be stolen.

The Magistrate has in the present case not been impressed by the account given by the accused as to how he came by such article. The defence submits that the Magistrate has overlooked the circumstance that the explanation is a reasonable one having regard to the prosecution evidence that there were abondoned bags which were used by the labourers without objection by the authorities, that the bag was being openly carried, that there was no material placed by the prosecution before the court to eliminate the possibility of the bag in question being an abondoned bag and that there was no evidence of any shortage of stocks in the warehouse. Be that as it may, there is a finding by the learned Magistrate on this matter which it would not be necessary to disturb having regard to the second requirements imposed by the section.

The section is in somewhat unusual terms in that it expressly requires the Magistrate to be satisfied that having regard to all the circumstances of the case there are reasonable grounds for suspecting such article to have been stolen. Hence the Magistrate should in fact be satisfied of the existence of these reasonable grounds. Nowhere in the order of the learned Magistrate does he give his attention to the question whether this is a bag which there are reasonable grounds for suspecting to have been stolen. Such a finding by the learned Magistrate becomes all the more important when one has regard to the circumstances stressed by the defence, which have been outlined in the preceding paragraph.

In support of his argument that the Magistrate should expressly give his mind to this question, learned Counsel for the appellant has cited the case of *Sammie* v. *Nagoda Police* (1951) 53 N.L.R. 255, where Nagalingam, J. had occasion to consider a similar point under the Rubber Thefts Ordinance. This Ordinance which appeared as Chap. 29 in Volume 1 of the 1938 edition of the Legislative Enactments, contained a section framed in phraseology identical with that of section 166(1) of the Customs Ordinance. Section 16(1) of the Rubber Thefts Ordinance provided that any person found in possession of rubber suspected to have been stolen may be convicted under an offence under the Ordinance if such person does not give an account to the satisfaction of the Magistrate as to how he came by that rubber and the Magistrate is satisfied that, having regard to all the circumstances of the case, there are reasonable grounds for suspecting such rubber to have been stolen.

With reference to this latter provision, Nagalingam, J. in the case cited has observed that the effect of this provision is that where the accused person can give an innocent explanation of his possession he is entitled to an acquittal although the rubber may in fact be stolen property. He further observed that it is only where the accused has failed to satisfy the Magistrate that his possession of the rubber was in circumstances which exclude any *mens rea* attaching to him, that the Magistrate is called upon to proceed further to satisfy himself that there are reasonable grounds to suspect such rubber to have been stolen. Moreover in that case the accused had in fact pleaded guilty, but despite this plea it was held that the Magistrate should be satisfied that there are reasonable grounds for suspecting the rubber to have been stolen.

We do not in the present case have any expression by the Magistrate of a view that having regard to all the circumstances of the case there are reasonable grounds for suspecting the polythene bag in question to have been stolen. Just as in *Sammie* v. *Nagoda Police* a plea of guilt was held to leave unaffected the requirement that the Magistrate should be so satisfied, so also in the present case the mere acceptance of the prosecution version and the rejection of the defence does not amount to a finding by the learned Magistrate that he is satisfied that there were reasonable grounds for suspecting the bag to have been stolen. Indeed the latter involves an independent inquiry on which independent findings are required. An answer adverse to the accused on the question how he came to be in possession does not necessarily lead to an answer against him on the question whether the property is reasonably suspected to have been stolen. If a finding on the former question concludes the matter there is no reason why the legislature should expressly stipulate as an additional requirement that the Magistrate should be satisfied on this latter matter as well.

When special offences of this nature are created by the Legislature and in particular in the case of offences involving a reversal of the usual rules of proof, it is of the utmost importance that there should be the strictest and most scrupulous insistence on those factors which the Legislature itself has postulated as pre-requisites to a conviction.

There is also a decision on similar lines in *Hutchinson* v. *Wijesinghe* (1953) 55 N.L.R. 431, where the Ordinance in question was as in the present case the Customs Ordinance. In that case Swan, J. following Nagalingam, J. in *Sammie* v. *Nagoda Police* held that the Magistrate should have been satisfied that having regard to all the circumstances of the case there were reasonable grounds for suspecting the article to have been stolen from any ship, boat, quay, or warehouse within the Port of Colombo. Swan, J. has there expressed the view that it was only after the learned Magistrate was so satisfied, that it would have become incumbent on the accused to give an account to the satisfaction of the Magistrate as to how he came by this article.

In reliance on the principle enunciated by Nagalingam, J. in *Sammie* v. *Nagoda Police*, I hold that the order cannot be sustained. In the absence of a finding as required by the section and in the circumstances of the accused having offered an innocent explanation not inconsistent with the prosecution evidence itself, I take the view that the prosecution has failed to prove the charge which it has laid against the accused.

I accordingly quash the conviction and acquit the accused.

Accused acquitted.

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

UNANTENNE *v.* W. L. A. FERNANDO, (EXECUTOR OF THE ESTATE OF THE LATE MRS. A. M. FERNANDO)

S.C. No. 1/1967 — *Land Acquisition Board of Review Appeal No. ML* 28

Argued and decided on: 15th February, 1968.

Land Acquisition Act — Award made by acquiring officer under Section 17 *after inquiry under Section* 9 *— Appeal against award to Board of Review — Sections* 23A (*introduced by Amendment Act of* 1964) *and* 24(4) *— Is the making of an award a Judicial decision*?

Regulations made by Minister under Section 63(2) *of the Act regarding evidence required in proceedings before Board — Regulations* 2, 6 *and* 7 *— Evidence before Board restricted to one expert on either side — Appellant in addition permitted to rely on documentary evidence of comparable transactions and evidence led at inquiry — Do these regulations affect only the right of the appellant — Can acquiring officer call evidence of non-expert to speak to facts at the hearing of appeal.*

The appellant as acquiring officer under the Land Acquisition Act, after due inquiry under section 9, made an award under section 17 of the Act in respect of a land called Ambalantundu situated at Ukuwela in the Matale District. The respondent as executor of the estate of the deceased owner of the land appealed to the Board of Review constituted under the Act. At the hearing of the appeal before the Board, after the appellant's case was closed, an application was made on behalf of the respondent (acquiring officer who was vested with wide powers to summon any witness whose evidence is likely to be material, to call the Chairman of the Village Committee of the area to speak to certain facts. This being objected to by the counsel for the respondent on the ground that there is no legal provision enabling the respondent to call evidence at the hearing of the appeal other than the evidence of an expert, the matter was fixed for inquiry on 25/6/1965.

After hearing counsel for both sides the Board held that the respondent was not entitled under the existing regulations to call a witness other than an expert at the hearing of the appeal.

The Board also pointed out in their Order —

(1) that it might be said that the effect of this ruling is to place the respondent acquiring officer at a disadvantage compared to the appellant, who, in addition to being entitled to call an expert, is also given the right under Regulation 7 to adduce documentary evidence of comparable transactions in appeal, and that if this be the effect, the remedy is in the Minister's hands.

(2) that in giving their ruling the Board refrained from making any pronouncement on the right of a respondent to adduce documentary evidence of comparable transactions before the Board.

(3) that the award of the acquiring officer is a judicial decision arrived at after he has held an inquiry under section 9 of the Act.

The Acquiring Officer appealed to the Supreme Court.

H. Deheragoda, Senior Crown Counsel, for the appellant.

H. W. Jayawardene, Q.C., with *H. Rodrigo* and *D. S. Wijewardane*, for the respondent.

The Supreme Court, after hearing counsel dismissed the appeal with costs.

The following is the Order of the Board of Review against with the acquiring officer appealed:

Appeal No. ML—28 (Acqn. of lots 1 & 3 in Plan PPA. 2923)

Mr. N. Nadarasa, Advocate, Instructed by *Mr. M. U. M. Saleem*, Proctor, appears for the appellant (W. L. A. Fernando).

Mr. F. C. Perera, Crown Counsel, appears for the respondent (Acquiring Officer).

In the course of the hearing of this appeal, and after the appellant had closed his case, Mr. Senathirajah for the respondent made an application to call the Chairman of the Ukuwela V.C. to speak to certain facts. The appellant then objected to this witness being called. As the objection, which is based on the ground that there is no legal provision enabling the respondent to call evidence at the hearing of the appeal other than the evidence of an expert, involved the consideration of an important question of law relating to procedure, the matter was put off for the 25th June, 1965 to enable the respondent to consult the Attorney General.

On the 25th June, 1965, the question of law was argued before us by Mr. Nadarasa for the appellant and Crown Counsel representing the respondent.

The Land Acquisition Act provides in Section 9 for the holding of an inquiry by the acquiring officer as a preliminary step before making an award under section 17. The matters in regard to which the inquiry is required to be made are, *inter alia*, the market value of the land which is to be acquired, such claims for compensation as may have been notified to the acquiring officer within time, and any other matter needs investigation for the purpose of making the award. The acquiring officer is given wide powers under the act for summoning as a witness anyperson whose evidence is likely to be material to the subject matter of the inquiry.

Part III of the Land Acquisition Act deals with appeals to the Board of Review from an award of compensation under section 17. There is no specific provision in Part III as to the evidence that may be led at the hearing of an appeal, but section 63(2) in Part VII enables the Minister to make regulations for or in respect of certain specified matters, including the evidence which may be required or admitted in any proceedings before the Board.

Regulation 2 of the Land Acquisition Regulations, 1950, made by the Minister provides, *inter alia*, that every appeal to the Board of Review shall contain the names and addresses of witnesses whom the appellant proposes to call. Regulation 6 provides that in proceedings before the Board not more than one expert witness shall be heard on either side, unless the Board for special reasons, directs otherwise. Under regulation 7 the appellant is precluded from relying on any documentary or oral evidence at the hearing before the Board other than evidence adduced before the inquiry officer, but this restriction is not to apply to evidence of an expert or to documentary evidence of comparable transactions. Section 23A of the Land Acquisition Act, introduced by the Land Acquisition (Amendment) Act No. 28 of 1964, which came into operation on the 12th November, 1964, requires an appellant to furnish to the Board within a specified time lists of the witnesses he intends to call and of the documents he intends to produce at the hearing of the appeal. Section 24(4) deals with the powers of the Chairman at a meeting of the Board to summon witnesses etc.

The above appear to be all the provisions relating to the adducing of evidence at the hearing of an appeal before the Board of Review. Crown Counsel submitted that in asmuch as these provisions, with the exception of Regulation 6 relating to the number of expert witnesses who may be called, affect only the right of the appellant to adduce evidence, the respondent is entitled (subject to Regulation 6) to adduce at the hearing of the appeal any evidence he chooses, provided it is relevant. In considering this submission, it is to be noted that under the Land Acquisition Act such proceedings as take place before the Board of Review are by way of an appeal from an award of the acquiring officer relating to compensation. The award of the acquiring officer is a judicial decision arrived at after he has held the inquiry under Section 9. The powers of the Board in appeal are limited to an examination of the correctness of the award of compensation made by the acquiring officer. The Board may either affirm the award, or increase or decrease it (section 25).

In dealing with an appeal the Board would necessarily have to consider the material, including oral and documentary evidence, which the acquiring officer had before him and on which the award is based. That the parties to the appeal can rely on such material in presenting their respective cases before the Board admits of no doubt. But the power of the Board to receive fresh evidence *ex mero motu* or at the instance of the parties cannot be placed on the same footing. No authority was cited by Crown Counsel that an appellate body has an inherent general power to do so. In the case of the Supreme Court, express power is given to receive fresh evidence at the hearing of any appeal before it — vide section 37 of the Courts Ordinance and Section 773 of the Civil Procedure Code. But even where an appellate Court is given such power the conditions under which it will be exercised are now well defined. One of the conditions is that, if fresh evidence is sought to be introduced at the instance of a party, it must appear that such evidence was not available to him at the original hearing even though he had shown reasonable diligence in attempting to obtain it. In the present case no explanation has been given as to why the respondent, who is no other than the acquiring officer himself, did not summon to give evidence

at the inquiry before him the witness now sought to be called.

In the absence of any provision in the Land Acquisition Act, the respondent would appear to have no right to call fresh evidence at the hearing of the appeal except to the extent that specific power in that behalf is given under the Land Acquistion Regulation, 1950. The only regulation dealing with the right of the respondent to call fresh evidence is regulation 6 which, as stated earlier, provides that not more than one expert witness may be called on either side unless the Board, for special reasons directs otherwise. The respondent is, therefore, not entitled under the existing regulations to call a witness other than an expert witness at the hearing of the appeal. We disallow the application of Mr. Senathirajah that the Chairman, V.C. Ukuwela be called as a witness for the respondent.

It might be said that the effect of our ruling is to place the respondent in a position of disadvantage compared to the appellant, who, in addition to being entitled to call an expert witness, is also given the right under Regulation 7 to adduce documentary evidence of comparable transactions. If such be the effect of our ruling the remedy would appear to be in the hands of the Minister who has the power to make appropriate regulations under section 63(2) of the Land Acquisition Act which will place the respondent on an equal footing with the appellant in regard to adducing at the hearing of the appeal. We wish to point out, however, that in giving our ruling we have refrained from making any pronouncement on the right of a respondent to adduce documentary evidence of comparable transactions.

H. W. R. Weerasooriya
Chairman
Land Acqn. Board of Review

Members of the Board:

Mr. T. P. P. Goonetilleke
Mr. R. S. W. Soysa
Mr. N. B. de S. Wijesekera

Decision of the Board of Review upheld.

Present: **Weeramantry, J.**

K. S. A. RAMAN *vs.* MRS. D. DHARMADASA

S.C. No. 129/67 (*RE*) — *C.R. Colombo No.* 88768

Argued on: 27th June, 1968
Decided on: 24th September, 1968

Rent Restriction Act (*Cap.* 274) *as amended by Act No.* 12 *of* 1966, *section* 12*A*(2) — *Power of Court to grant relief to tenant in arrears of rent — Tenancy deemed to continue on payment of arrears if such relief granted — Has the Court power to make order that writ of ejectment issue against tenant after certain period even if arrears paid.*

Section 12A(2) of the Rent Restriction Act (which was brought in by amending Act No. 12 of 1966 and which applies to premises of which the standard rent is under Rs. 100/-) enables the Court to give relief to a tenant where it is satisfied that the tenant has been in arrears of rent "on account of the tenant's illness or unemployment or other sufficient cause". The section goes on to provide that if the tenant pays to the Court the arrears of rent on such dates his tenancy of the premises shall, notwithstanding its termination by the landlord, be deemed not to have been terminated.

In the present case the defendant (tenant) was held to be in arrears of rent for more than a period of 3 months but had pleaded the benefit of section 12A(2). The learned trial Judge was satisfied that the defendant was entitled to relief under that section. However, while granting relief under that section the learned Judge made order *inter alia* "that in any event writ of ejectment would issue after 21st October, 1968."

Held: That where a Court decided to grant relief under section 12A(2) of the Rent Restriction Act as amended by Act No. 12 of 1966, it must necessarily follow that, if its order regarding payment of the arrears is complied with, the tenancy is deemed to continue in force. The Court therefore had no power to order writ to issue against the tenant after a certain date "in any event". If the tenant complied with the conditions laid down by the trial Judge, his tenancy must be deemed not to have been terminated.

A. A. M. Marleen, with *M. S. A. Aziz*, for the defendant-appellant.

S. Gunasekera, for the plaintiff-respondent.

Weeramantry, J.

This appeal involves the interpretation of Section 12(a)(2) of the Rent Restriction Act as amended by Act No. 12 of 1966.

This provision enables the Court on being satisfied that rent has been in arrears on account of the tenant's illness or unemployment or other sufficient cause, to make order that a writ for the ejectment of the tenant shall not issue if the tenant pays to the Court the arrears of rent either in a lump sum on such date, or in instalments on such dates as may be specified in the order. The section goes on to provide that if the tenant pays to the Court the arrears of rent on such date or dates his tenancy of those premises shall notwithstanding its termination by the landlord, be deemed not to have been terminated.

In the present case the defendant was held to be in arrears of rent for a period of more than three months, thereby ordinarily entitling the landlord to a decree in ejectment. The defendant however pleaded the benefit of the section already referred to on the ground of unemployment and ill-health, and the learned Judge was satisfied that the defendant was entitled to the relief he claimed as it was clear on his uncontradicted evidence that he had been unemployed and had been ill.

In view of this finding, the learned Judge decided to grant relief to the defendant under section 12(A)(2) and in seeking to grant such relief, made order requiring the defendant to pay a specified sum every month along with a further sum as current damages and ordered further that writs should not issue till 31st October 1968. The order went on to state that in the event of any two consecutive defaults in these payments both writs would issue and that in any event writ of ejectment would issue after 31st October, 1968.

The point is taken in appeal that upon a reading of section 12(A)(2) a Judge deciding to grant the relief provided for by the section has no jurisdiction to order writ of ejectment to issue in any event. The section states that if the tenant pays the arrears of rent as stipulated by the Judge his tenancy *shall*, notwithstanding its termination by the landlord, be deemed not to have been terminated. If therefore a Judge decided to grant relief under this section, it will necessarily follow that if his order regarding payment is complied with, the tenancy is deemed to continue in force.

In the present case, it is quite clear that the learned Judge, having satisfied himself that circumstances existed justifying the grant of relief under this section, has decided to grant relief under this section.

I therefore hold that that portion of the order which requires writ to issue in any event after 31st October, 1968, is not in conformity with this section and should therefore be deleted. Subject to this alteration, the order of the learned Judge will stand.

It follows from this order that if the tenant complies with the conditions laid down by the learned Judge, the tenancy shall, notwithstanding its termination by the landlord, be deemed not to have been terminated.

Counsel for the appellant has also urged that there has been no adequate proof in this case of the notice to quit. However, there is the evidence that notice to quit was sent by registered post and the registered postal article receipt has been produced. There is, moreover, on the question of the receipt of the notice, a finding of fact by the learned Judge with which I see no reason to interfere. The judgment proceeds therefore on the basis that notice to quit has been duly served on the defendant.

The appeal will be allowed to the extent indicated in the earlier part of this judgment. The appellant will be entitled to half costs of this appeal.

Appeal allowed.

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

S. RAMALINGAM KANDIAH *v.* P. KANDASAMY*

S.C. 462 (*Final*) *of* 1964 — *D.C. Jaffna No.* 374/*M*

Argued on: June 13 and 24, 1967
Decided on: July 19, 1967

Partnership — Action to recover share of capital after termination of partnership in 1949 *— Action instituted after seven years against partner who managed entire business — Two earlier actions by plaintiff against the same partner earlier to recover profits for two half years respectively in terms of partnership agreement—Defence pleas that plaintiff's claim is prescribed and also barred by section* 34 *of Civil Procedure Code — Partner — Does one partner stand towards another partner in relation of trustee or fiduciary?*

The plaintiff instituted this action on 1.6.1956 against the 1st defendant for the recovery of a sum of Rs. 13423/60 together with legal interest thereon from 1.10.1949 alleging that this sum was due to him as his contribution to the capital of a partnership entered into by deed P1 of 1948 by the 1st defendant, 5th defendant, a person named P and the plaintiff to carry on the business of buying and selling Government arrack as renters for the year October, 1948 to September, 1949.

P died and 3 and 4 defendants are his heirs. 2nd defendant is the husband of the 3rd defendant. No relief was claimed against the 2, 3, 4 and 5 defendants. P1 provided for all monies of the partnership should be in the custody of the 1st defendant and the trial Judge also held that the 1st defendant managed the entire business.

The plaintiff had successfully sued the 1st defendant earlier in case No. 5896 D.C. Jaffna for his half-share of the profits for 1st half year of the partnership and filed case 8646 D.C. Jaffna for profits for the 2nd half-year. The latter case had been laid by pending the determination of the present action.

It was contended *inter alia* by the 1st defendant:

(*a*) that the plaintiff's claim was prescribed;
(*b*) that the plaintiff could not maintain this action as it was barred by section 34 of the Civil Procedure Code.

The learned trial Judge held against the 1st defendant on both these pleas. On the question of prescription he referred to Sections 90 and 111 of the Trust Ordinance and took the view that the defendant being the sole Manager of the partnership funds was in the position of a constructive trustee in respect thereof or in a fiduciary position. The 1st defendant appealed.

Held: (1) That the learned District Judge misdirected himself in reaching the conclusion that the 1st defendant (appellant) was in the position of a constructive trustee or in that of a fiduciary towards the plaintiff.

(2) That section 90 of the Trusts Ordinance is of no avail to the appellant as this section deals with what are in the nature of secret gains made by persons who are bound to others in a fiduciary position which position has to be decided according to English Law which is the law governing partnership.

(3) That section 111 of the Trusts Ordinance does not assist the plaintiff because sub-section 5 thereof excludes the application to constructive trusts except in so far as such trusts are treated as express trusts by the law of England. Text-books and decided cases are all against the view that one partner stands towards another partner in the relation of an express trustee.

(4) That the ordinary Statutes of Limitation apply to actions of account after dissolution of partnership or the exclusion of a partner.

(5) That therefore, this action having been filed after the expiry of six years from the date of termination of the partnership, section 6 of the Prescription Ordinance rendered it unmaintainable.

On the 2nd contention of the appellant aforesaid—

Held: (6) That section 34 of the Civil Procedure Code provides no bar to the claim in the present action as it is founded on a cause of action entirely different from the two earlier actions wherein the plaintiff sought to recover profits for the two half years respectively of the partnership in terms of the agreement P1.

* For Sinhala translation, see Sinhala section, Vol. 17, Part 5 p. 17

Cases referred to: *Pittapur Raja* v. *Suriya Row*, I.L.R. 8 Mad. 520
Palaniappa v. *Saminathan*, (1913) 17 N.L.R. 56 (P.C.)
Somasunderam v. *Sinnatamby*, (1913) 3 C.A.C. (Cey.) 94
Saibo v. *Abuthahir*, (1935) 37 N.L.R. 319; IV C.L.W. 110
Hugh Stevenson and Sons v. *Aktiengesellschaft Fur Cartonnagen-Industrie*(1918) A.C. 239; 118 L.T. 126
Soar v. *Ashwell*, (1893) 2 Q.B.D. 390; 69 L.T. 585
Knox v. *Gye*, (1871) L.R. 5 H.L. 656; 42 L.J.Ch. 234
Gordon v. *Gonda*, (1955) 2 A.E.R. 762
Gopala Chetty v. *Vijayaraghavachariar*, (1922) 1 A.C. 488; 127 L.T. 192 (P.C.)

C. Thiagalingam, Q.C., with *P. Somatillekam*, *C. Ganesh* and *K. Kanag-Iswaran*, for the 1st defendant-appellant

S. Sharvananda, with *P. Thuraiappah*, for the plaintiff-respondent.

T. S. Fernando, J.

By a partnership agreement No. 521 of the 20th October 1948 (P1), the plaintiff, the 1st defendant (the appellant), the 5th defendant and another person of the name of Perambalam agreed to undertake the business of buying and selling Government arrack (arrack renters) for the period 1st October 1948 to 30th September 1949. In pursuance of this agreement the plaintiff contributed a sum of Rs. 13,423/60 as his share of the capital of the partnership. In this action instituted on 1st June 1956 he seeks to recover this sum from the appellant together with legal interest thereon from 1st October 1949. Perambalam is dead, and the 3rd and 4th defendants are his heirs. The 2nd defendant is the husband of the 3rd defendant. No relief is claimed by the plaintiff from the 2nd to the 5th defendants, probably because it was his case that all the monies of the partnership business were throughout in the hands of the appellant. The trial judge has held (and the finding was not canvassed on appeal) that the appellant managed the entire business of the partnership. The agreement P1, it may be mentioned, provided for all monies of the partnership being in the custody of the appellant.

There has been much, perhaps too much, litigation between the parties to this appeal in respect of the monies forming part of the partnership business to which P1 relates. This is in truth the third action filed by the plaintiff.

Under clause 5 of P1 all the partners were to meet monthly and ascertain the correctness of the accounts and they were to "receive or bear the profits or loss proportionately once in every six months". Even before the term of the partnership ended, the plaintiff on 12th September 1949 sued the appellant in D.C. Jaffna case No. 5896 to recover his share of the profits for the first half-year of the partnership which he estimated as a sum of Rs. 9,000/-. He was successful (after two appeals to this Court) in obtaining judgment against the appellant in a sum of Rs. 3,766/-. In that case it was also determined that the sum contributed by the plaintiff towards the capital of the partnership was Rs. 13,423/69.

The plaintiff next filed a second case, D.C. Jaffna No. 8646, also against the appellant, in which he seeks to recover his share of the profits for the second half-year of the partnership, viz. 1st April to 30th September 1949. That case appears to have been laid by pending the determination of the present action (No. 374/M) which was instituted on 1st June 1956 and ended with the District Judge granting judgment for the plaintiff as prayed for, holding against the appellant, *inter alia*, on two issues raised by him, viz. that the plaintiff was barred from maintaining the action (1) by the Prescription Ordinance and (2) by the provisions of section 34 of the Civil Procedure Code. Argument on the appeal before us was confined to these two questions of law.

The argument for the appellant on the second of these questions could be dealt with concisely in the following way. The whole of the claim which section 34 requires the plaintiff to include in his action is limited to the claim in respect of the cause of action for which the suit of proceeding is instituted. That was indeed the view of the Privy Council in referring to a similar provision in the Indian Civil Procedure Code — see *Pittapur Raja* v. *Suriya Row*, I.L.R. 8 Mad. 520. In dealing with this very section the same judicial body stated in the local case of *Palaniappa* v. *Saminathan*, (1913) 17 N.L.R. at 60 that it "is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the

inclusion in one and the same action of different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies."

The case of *Somasunderam* v. *Sinnatamby*, (1913) 3 C.A.C. (Cey.) 94 on which the appellant relied is distinguishable as the cause of action in both cases there concerned was one and the same, viz. refusal or failure of the defendant to account to the deceased partner's estate for the share of the profits due to it by the partnership. The present case bears some resemblance on this point to the case of *Saibo* v. *Abuthahir* (1935) 37 N.L.R. 319. There it was stipulated by bond that the principal sum shall be payable on demand, and that the interest shall be payable for a period of four years once in six months and thereafter monthly. The Court ruled that the covenants regarding the payment of principal and interest were separate and independent, and that an action to recover the interest was no bar to a subsequent action to recover the principal. First when case No. 5896 was instituted, and later when case No. 8646 was filed, the cause of action relied on was the refusal or failure to pay the profits for the two half-years respectively of the partnership term as had been agreed upon in P1. The present case was founded on an entirely different cause of action, viz. the refusal or failure to pay back to the plaintiff the share of the capital contributed by him, and section 34 provides no bar to that claim. The trial judge was right in answering the relevant issue as he did and the argument for the appellant on the second question fails.

To turn now to a consideration of the first question of law, there can be no dispute that section 6 of the Prescription Ordinance ordinarily bars the maintenance of any action on the agreement P1 after the expiry of six years from the date of termination of the partnership. The trial judge, however, held against the appellant on this issue by reaching the conclusion that as sole manager of the partnership funds he became a constructive trustee in respect of the funds of the partnership. He referred to sections 90 and 111 of the Trusts Ordinance and, on the strength of certain observations of Lord Atkinson in *Hugh Stevenson and Sons.* v. *Aktiengesellschaft Für Cartonnagen-Industrie*, (1918) A.C. 239 at 250 and of Bowen, L.J. in *Soar* v. *Ashwell* (1893) 2 Q.B.D. at 396 and 397, held that the appellant was in a fiduciary position towards the plaintiff. With respect, the learned trial judge has misdirected himself in reaching this conclusion. Section 90 of the Trusts Ordinance deals with what are in the nature of secret gains made by persons who are bound to others in a fiduciary position, but the existence of the fiduciary relationship has itself to be decided according to the law applicable, and in the present case according to the law governing partnership which is the English Law. Nor does section 111 assist the plaintiff because sub-section (5) thereof excludes its application to constructive trusts except in so far as such trusts are treated as express trusts by the law of England. Text-books and decided cases are all against the maintenance of an argument that one partner stands towards another partner in the relation of an express trustee.

The observations of Lord Atkinson in the case referred to above are in the nature of an *obiter dictum* and the citation he relies on is from the dissenting judgment of Lord Hatherley in *Knox* v. *Gye* (1871) L.R. 5 H.L. 656. The majority opinion of the House of Lords in this last mentioned case was against the view expressed by Lord Hatherley. The Court there held that a surviving partner, not being a trustee for the executors of his deceased partner, the payment of a sum of money received from a debtor of the partnership within six years from the institution of the case did not take the case out of the Statute of Limitations. The *ratio decidendi* there really favours the argument for the appellant. Said Lord Westbury, one of the judges who formed the majority, "There is no fiduciary relation between a surviving partner and the representatives of his deceased partner: there are legal obligations between them equally binding on both." And again — vide p. 676 — "There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in Equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal obligation which is thereby created". Lord Colonsay who agreed with Lord Westbury stated — at p. 677 — "I hold that the Statute of Limitations does apply to a suit brought by the executor of a deceased partner against the surviving partner demanding an account of the partnership concerns; and I hold that such is the relative positions of the parties, and that such is the demand made in this suit. I further hold that. in the general case, the *punctum temporis* from which the statutory period of six years begins to run is the date at which the partnership estate

came to be vested in the surviving partner. At any time during the currency of that period the executor of the deceased partner may bring a suit demanding from the surviving partner an account of the partnership concerns, but after the statutory period has elapsed no such suit can be maintained."

The case of *Knox* v. *Gye* (supra) which Evershed M.R. in *Gordon* v. *Gonda* (1955) 2 A.E.R. 762 referred to as a case of great complication was explained in the judgment of the Privy Council in the Indian case of *Gopala Chetty* v. *Vijayaraghavachariar* (1922) 1 A.C. 488 where Lord Phillimore went on to say "If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share."

The text-writers are explicit on the question that the appellant has raised in this case.

(1) In Pollock's Law of Partnership (14th ed.) — p. 119 — the position is stated thus:—

> "A surviving partner has sometimes been said to be a trustee for the deceased partner's representative in respect of his interest in the partnership; but this is a metaphorical and inaccurate expression. The claim of the representatives against the surviving partner is in the nature of a simple contract debt, and is subject to the Statute of Limitations."

(2) In Underhill's Law of Partnership (8th ed.) — p. 128 — dealing with the question of the date when an outgoing partner's share is due:—

> "It may be mentioned here, that under arrangements for paying out the share of a deceased or out-going partner the amount is a debt accruing at the date of the dissolution or death, and for the purposes of the Limitation Act, 1939, time begins to run from that date"

(3) In Lindley on Partnership — (12th ed.) — p. 344 — dealing with the general duty of partners to observe good faith:—

> "It may, however, be observed that this obligation to good faith does not impose a fiduciary character upon the agency which exists between partners; for instance, ... the ordinary Statutes of Limitations apply to actions of account after a dissolution of partnership or the exclusion of a partner."

and, again — at p. 537 — (dealing with the effect of the Statute of Limitations on Actions between Partners):—

> "So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the Limitation Act has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the Statute begins to run. This has been decided by the House of Lords in *Knox* v. *Gye*, in which a surviving partner relied on the Statute as a defence to a suit for an account instituted by the executor of a deceased partner."

The case of *Soar* v. *Ashwell* (supra) upon which some reliance was placed by the trial judge has no application to a case like the present which is an action between former partners. That was a case of a solicitor, a person in a special position, receiving money on behalf of certain trustees but retaining in it his own hands.

The misdirections referred to earlier led the learned trial judge to hold against the appellant on the issue of prescription. This action having been filed after the expiry of six years from the date of termination of the partnership, section 6 of the Prescription Ordinance rendered it unmaintainable. It should therefore have been dismissed.

I would allow the appeal and direct that the plaintiff's action be dismissed. The appellant is entitled to his costs in both Courts.

Alles, J.

I agree.

Appeal allowed.

Present: **Wijayatilake, J.**

ARUMUGAM SOMALINGAM *v.* FOOD AND PRICE CONTROL INSPECTOR, PANADURA

S.C. 564/68 — *M.C. Panadura Case* 5227

Argued on: 2nd and 15th September, 1968
Decided on: 1st October, 1968

Control of Price Act (*Cap.* 173) *as amended—Imperative provision in the price order requiring a receipt to be given to the customer—Accused charged with selling for a price in excess of the controlled price — Failure of the prosecution to produce the receipt — Evidence Ordinance, section* 114(*g*).

The accused was convicted of having sold two incandescent mantles for Re 1/-, a price in excess of the maximum controlled price of -/82.

In appeal, it was submitted on behalf of the accused that the evidence led for the prosecution fell short of proving a sale; that the alleged cashier who accepted the money should have been joined as a co-accused if a completed act of sale was to be proved; and that the prosecution had failed to prove beyond reasonable doubt the price alleged to have been charged. The price order required the accused to give the customer a receipt in which were to be set out the particulars of the sale, including the price charged. The accused was not charged with having failed to issue a receipt, nor did the prosecution produce the receipt at the trial. It was submitted that, in the circumstances, the accused was entitled to the benefit of the presumption under section 114(g) of the Evidence Ordinance.

Held: (1) That on the evidence the elements of a sale were present. The alleged cashier who accepted the money need not have been joined as a co-accused as he was merely a collecting agent on behalf of the seller.

(2) That, however a reasonable doubt arose as to the price charged, and the accused was therefore entitled to be acquitted.

Cases referred to: *Milner* v. *Staffordshire Congregational Union* (1956) 1 A.E.R. 495.
Rex v. *Edwards* (1947) 1 A.E.R. 314
Rex v. *Woodgreen Profiteering Committee* (1920) Law Journal K.B. 55
Pakiam Pillai v. *Merry*, 44 N.L.R. 142

Nihal Jayawickreme, for the appellant.

V. S. A. Pullenayagam, Senior Crown Counsel, with *Priyantha Perera, Crown Counsel*, for the respondent.

Wijayatilake, J.

In this case the accused was charged with selling two Incandescent mantles (Globe Brand) for Re. 1/- a price in excess of the maximum control retail price of -/82 cts. an offence punishable under Section 8(6) of the Control of Prices Act (Chapter 173) as amended by the Control of Prices (Amendment Acts No. 44 of 1957 and No. 16 of 1966) read with order No. 2 of 1965 made under Section 4 of the said Act in respect of Incandescent mantles appearing in Ceylon Government Gazette (Extraordinary) No. 14538 of 21.10.65.

Mr. Jayawickrema, Counsel for the appellant did not seek to canvass the finding of the learned Magistrate as to what transpired in this boutique except that the prosecution has failed to prove the price alleged to have been charged beyond reasonable doubt. He has submitted that on the evidence led in this case the Crown has failed to prove a sale as contemplated in the charge laid against the accused. He has also submitted that under the order appearing in Government Gazette 14538 of 21.10.1965 it is imperative that every person who sells any incandescent mantle by wholesale or retail shall give the purchaser a receipt in which there shall be set out the particulars of the sale. As in the instant case the prosecution has failed to charge the accused for a contravention of this order, in the absence of a receipt the accused is entitled to the benefit of the presumption under Section 114(g) of the Evidence Ordinance.

According to the evidence D. Abeysinghe, Food and Price Control Inspector had handed over a Rs. 2/- note to the Price Control Inspector, Abeywickrama and he had instructed him to go to any boutique at the Panadura bazaar and buy any price controlled commodity and he had also

instructed him to give a signal to P.C. Patabendige if there is any act of profiteering. These two had accordingly entered premises No. 372, Main Street, Panadura and Abeysinghe had taken up a position on the other side of the road to watch the transaction. He had seen Abeywickrama going up to the accused and asking for something, and he had seen the accused handing over two mantles (Globe Brand) to him. Obviously his reference to the 'brand' is an exaggeration as he could not possibly have seen the brand mark from where he was. Abeywickrama had tendered the Rs. 2/- note to the accused but the accused had said something in Tamil and pointed out to the cashier. The cashier had taken the money from Abeywickrama and put it inside the table drawer and given some balance to him. At this stage on a signal from P.C. Patabendige Abeysinghe had entered the boutique with Patabendige. Thereupon Abeywickrama had handed two Globe Brand mantles and a Re. 1/- coin being the balance said to have been given to him by the cashier. He had complained that it was the accused who had quoted 50 cts. for each mantle. Both Abeywickrama and P.C. Patabendige did not possess any money when they were searched. Thereupon on a request made by Abeysinghe the cashier had opened the drawer and given him the Rs. 2/- note, the number of which he had noted. Inspectors Abeysinghe and Abeywickrama gave evidence for the prosecution. The accused did not give evidence nor was any evidence called on his behalf.

Mr. Jayawickrame submits that the onus is entirely on the prosecution and the evidence falls short of proving a sale as the accused had merely handed over the mantles to a prospective customer. He submits that the prosecution having omitted to join the alleged cashier as a co-accused, the prosecution has failed to prove a completed act of sale. If at all on the evidence there has been only an attempt to sell. He relies on the case of *Milner* v. *Staffordshire Congregational Union* (1956) 1 A.E.R. 495, *Rex* v. *Edwards* (1947) 1 A.E.R. 314, *Rex* v. *Woodgreen Profiteering Committee* (1920) Law Journal K.B. 55 and also the judgment of Abeyesundere, J. in S.C. 665/666 of 1967 M.C. Colombo 411402 A (S.C.M. 5.12.67). In my view the facts of all the above cases can be clearly distinguished from the facts before me in the instant case. Mr. Pullenayagam Senior Crown Counsel has drawn my attention to the judgment of Wijeyewardene, J. in *Pakiam Pillai* v. *Merry* reported in 44 N.L.R. 142 where it was held that where there is a sale of specific goods for cash the property passes by the contract but the seller may (unless otherwise agreed) retain the goods till the price is paid. Wijeyewardene, J. further observed that he did not think it necessary for the purpose of a prosecution under the Control of Prices Ordinance No. 39 of 1939 to prove a contract of sale (enforceable by action) within the meaning of Section 4 of the Sale of Goods Ordinance. I do not think it is necessary in this case to go outside the Sale of Goods Ordinance as on the facts, it is quite clear that there has been an offer by the accused and an acceptance by the decoy and there has been consensus ad idem with regard to the articles offered and accepted and consideration as Abeywickrema in his evidence has stated that the accused quoted the price for the mantles. As for the payment the person at the counter would be merely a collecting agent on behalf of the seller. Mr. Jayawickrame submits that the fact of agency has not been proved and the person accepting the cash should have been therefore added as a co-accused. I do not think there is any merit in this submission as it is quite clear that the person accepting the cash did so after the sale had taken place.

Mr. Jayawickrame in support of his second ground has referred me *inter alia* to the Control of Prices Order appearing in Government Gazette 14251 of 7.12.1964. which provides in respect of certain subsidiary food stuffs such as onions and coriander that every person who sells any such articles by retail shall *on demand* give the purchaser a receipt. He stresses the fact that in the case of incandescent mantles it is imperative that the seller should give the purchaser a receipt whether a demand is made or not. He accordingly submits that in the transaction in question if the seller failed to give a receipt he would have contravened the Order and it would have been open to the Price Control Inspector to charge him on that account. Mr. Pullenayagam has submitted that it is not necessary for the prosecution to charge an accused in respect of every particular Order he has contravened. However, in my view unlike an Order requiring the seller to display a list of prices which would be independent of the sale itself; the order relied on by Mr. Jayawickrama refers particularly to the act of sale which is the subject of the charge and the prosecution having failed to produce a receipt or charge the accused for not issuing a receipt, the question arises whether in-fact a receipt was issued or not. There is no burden on the accused and his omission or failure to cross-examine the prosecution witnesses is of no avail to the prosecution. I might state that one

can safely presume that the Price Control Inspectors were not ignorant of this Order pertaining to the issue of a receipt.

It would not be open to this Court to speculate as to whether these Price Control Inspectors were so generous as to waive this particular charge out of sympathy for the accused or the cashier. This being a case where the evidence is solely of decoys it is all the more reason why a Court has to pay due heed to any omission or failure such as the one in question in assessing the evidence. Perhaps if this point had been raised in the original Court before the learned Magistrate arrived at his verdict he might have hesitated to convict the accused.

In the circumstances in my opinion a reasonable doubt arises as to the price charged and I would give the benefit of this doubt to the accused and acquit him.

Accused acquitted.

Present: **de Kretser, J.**

INSPECTOR OF POLICE, FORT *v.* MOHAMMED CASIM *

S.C. 1000—*M.M.C.* 45491 *Colombo*

Argued on: 12th July, 1968
Decided on: 15th July, 1968

Control of Prices Act (*Cap.* 173) — *Charge under* 8(2)(b)(i) *for refusing to sell a box of matches though having them in possession — Price of match box set out in Gazette varying from five cents to one cent according to number of sticks contained—Failure to prove number of matches in the boxes.*

The accused was charged under section 8(2)(b)(i) of the Control of Prices Act for having refused to sell a box of matches although he had in his possession 120 Safety Match boxes. According to the Gazette dated 23/7/65 P3 produced, the price of a box of matches varied from five cents to one cent depending on whether the box contained 50 or 10 sticks.

There was no evidence that any of the boxes of matches contained the required number of sticks, nor evidence that in the market there were no match boxes which contain less than 10 or more than 50 matches.

Held: That the prosecution has failed to prove the charge.

Bala Nadaraja, for the appellant

Ranjith Gunatilleke, for the Attorney-General.

de Kretser, J.

P3, G.G. 14459 of 23.7.65 sets out the prices above which match boxes containing match sticks cannot be sold. According to it the price of a box of matches varied from five cents to one cent according as the box contained fifty sticks or ten sticks.

The charge against the accused is that he refused to sell a box of matches although he had 120 Safety Match Boxes in his possession and thereby committed an offence under Section 8(2)(b)(i) of Cap; 173 of Volume 6 of the Legislative Enactments.

There is no evidence that these boxes of matches contained sticks in number 10 to 50 as the case may be which constitute the boxes which are price controlled. So far as we know they may have been empty boxes. But assume they did contain sticks, did they contain sticks to the number which makes them price controlled match boxes. If not the accused committed no offence in refusing to sell them. There is no evidence that in the market there are no match boxes which contain less than 10 matches or more than 50 matches.

The gap in the prosecution case has gone unnoticed. It results in the prosecution failing to prove the charge. The appeal is allowed and the accused is acquitted.

Accused acquitted.

* For Sinhala translation, see Sinhala section, Vol. 17, part 6, p. 22

Present: **Sirimane, J. and Alles, J.**

A. M. MUTHUMENIKA vs. T. DANIAL PEIRIS & ANOTHER

S.C. 31/67 (*Inty*) — *D.C. Badulla Case No.* 1234/*P*

Argued and decided on: 15th September, 1968

Partition action— Action filed under the Partition Act No. 16 *of* 1951*—Can it be converted into a vindicatory action.*

The plaint in a partition action disclosed five co-owners, namely the plaintiff and the 1st to 4th defendants. The plaintiff and the second to fourth defendants were said to own 1/6th of the corpus each, and the first defendant to 2/6 share thereof. Answer was filed only by the 1st Defendant who claimed the entirety of the corpus. At the trial a "settlement" was effected by converting the partition action to a *rei vindicatio* action and allotting the entire corpus to the plaintiff and the 1st defendant in specific shares, without any evidence having been led.

Held: That there is no provision in law to convert a partition action filed under the Partition Act No. 16 of 1957 into a vindicatory action, and the plaintiff should proceed with the partition action.

A. H. Moomin, for the 2nd defendant-appellant.

L. A. T. Williams, for the plaintiff-respondent.

Sirimane, J.

This was a partition action filed by the plaintiff-respondent. In his plaint he has stated that there were five co-owners namely the plaintiff and the first to fourth defendants, 1st defendant being entitled to a 2/6th share and the others to 1/6th share each.

The 1st defendant filed answer claiming the entire land. The others did not file answer.

The case was then fixed for trial and on the trial date a peculiar procedure was adopted. No evidence was led and the lawyers appearing in the case stated that the case was settled and further that the action was converted into a vindicatory action. Thereafter by agreement the plaintiff was declared entitled to an extent of 30 perches and the 1st defendant to the balance and it was further agreed between the two that the Commissioner should demarcate the land into *two* lots.

There is no provision in law to convert a partition action filed under the Partition Act No. 16 of 1951 into a vindicatory action.

The order of the learned District Judge made on 27.1.65 is set aside. The plaintiff should proceed with the partition action after giving notice of trial under section 24 of the Partition Act. The appellant is entitled to his costs of appeal.

Alles, J.

I agree.

Appeal allowed.

Privy Council Appeal No. 9 of 1966

Present: **Viscount Dilhorne, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Pearson**

M. T. K. S. S. A. N. MOHAMED SAHIB

v.

THE COMMISSIONER FOR THE REGISTRATION OF INDIAN & PAKISTANI RESIDENTS COLOMBO

From

THE SUPREME COURT OF CEYLON

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

Delivered on: 2nd October, 1968.

Indian and Pakistani Residents (Citizenship) Act of 1949 (*Cap.* 350), *sections* 5, 7, 10 *and* 15 — *Application for registration as citizen of Ceylon made after expiry of period prescribed in Section* 5— *Refusal to register by Commissioner on grounds other than that application out of time — Appeal to Supreme Court —Point that application out of time taken for first time in appeal and upheld—Appeal to Privy Council— Correctness of Supreme Court view affirmed — Imperative nature of words in section* 5— *Duty of Court to take notice of limitation of jurisdiction.*

The Indian and Pakistani Residents (Citizenship) Act of Ceylon was enacted on 5/8/1949 making provision for granting of the status of a citizen of Ceylon by registration to Indians and Pakistanis who had the qualification of past residence in Ceylon for a certain minimum period.

Section 5 of the Act provided as follows: "The privilege or extended privilege conferred by this Act shall be exercised in every case before the expiry of a period of two years reckoned from the appointed date (defined in Section 24 as 5th August, 1949): and no application made after the expiry of that period shall be accepted or entertained, whatsoever the cause of the delay."

The appellant made an application on 4/12/1956 for registration under the Act, more than 5 years after the expiry of the period referred to in Section 5 above.

The Deputy Commissioner served the appellant a notice dated 5/8/1957 stating that he had decided to refuse the application on four grounds (other than the ground that the application was out of time.) unless the appellant showed cause to the contrary within a specified period.

After inquiry at which a substantial amount of evidence was led the Commissioner refused the application as he was not satisfied as to the alleged extent of past residence in Ceylon and consequently that the appellant was permanently resident in Ceylon.

On an appeal to the Supreme Court against this refusal the Counsel for the respondent, after notice given to the appellant's counsel shortly before hearing, took the objection for the first time that the application was out of time. The Supreme Court, per Tambiah, J. rejecting a contention on behalf of the appellant that the appellant had made an earlier application through his brother, held that the application should not have been entertained by the Deputy Commissioner, nor should it be entertained by the Supreme Court and dismissed the appeal.

Before the Privy Council it was contended (*a*) that the Supreme Court ought not to have considered the application out of time (i) as the necessary evidence was not available to the appellant as the point was raised for the first time at the hearing of the appeal (ii) as the scope of the inquiry and the resulting appeal was limited to the four grounds set out in the Commissioner's notice

(*b*) that the maxim *omnia praesumuntur rite esse acta* should be applied in support of the appellant's argument and accordingly it should be inferred that the Commissioner entertained the application because he had special facts before him such as an earlier application of or to which this application was a mere amplication, which justified him in doing so.

Held: (1) That there is nothing to suggest that the appellant's application is an amplification of or supplement to a previous application or that there was any previous application.

(2) That the provisions of section 5 of the Act are clear and emphatic and their effect is unmistakable. They are imperative provisions and they restrict the jurisdiction of the Commissioner and consequently that of the Supreme Court. The Court must take notice of a limitation of its jurisdiction.

(3) That the maxim "*omina praesumuntur rite esse acta*" can be turned against the appellant, because it must be assumed *prima facie* that the complete file on complete set of relevant records was produced from the Commissioner's office and there was no trace of any earlier application.

Cases referred to: *Marianthony v. Commissioner for Registration of Indian and Pakistani Residents* (1957) 58 N.L.R. 431
Caruppiah v. Commissioner for Registration of Indian and Pakistani Residents (1960) 62 N.L.R. 17.
S. S. Seyed Ali Idroos v. The Commissioner for the Registration of Indian and Pakistani Residents (1960) 62 N.L.R. 109.
Davies v. Warwick (1943) K.B. 329 C.A.
Snell v. Unity Finance Company Limited (1964) 2 Q.B. 203 C.A.

E. F. N. Gratiaen, Q.C., with *T. O. Kellock, Q.C., and Miss D. Phillips*, for the appellants.

M. P. Solomon, for the respondents.

Lord Pearson:

This is an appeal by special leave from an order of the Supreme Court of Ceylon dismissing the appellant's appeal from the Deputy Commissioner's refusal to register the appellant as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act of Ceylon. Their Lordships have been informed by counsel that the appellant is a brother of Seyed Mohamed Shareef, who made a successful appeal to their Lordships' Board in a partly similar case (reported in 1966 Appeal cases at page 47); and that on a further inquiry before a different Commissioner Seyed Mohamed Shareef's application for registration was granted; and that the appellant's other brother Mohamed Hussain Abdul Cader, who is mentioned in the record, succeeded eventually in his application for registration under the Act.

But the applications of those two brothers for registration under the Act were made within the proper time. In the present case the Supreme Court has decided that the appellant's application cannot be entertained and must be rejected because it was made out of time. The issue in the present appeal is whether that decision was correct.

The Act was enacted on 5th August 1949, and it was, as appears from its long title, an Act to make provision for granting the status of a citizen of Ceylon by registration to Indians and Pakistanis who had the qualification of past residence in Ceylon for a certain minimum period. Section 4(1) provided that any Indian or Pakistani resident to whom the Act applied might, irrespective of age or sex, exercise the privilege of procuring registration as a citizen of Ceylon for himself or herself and should be entitled to make application therefor in the manner prescribed. That was the general provision, but it was subject to special provisions for a wife not livng apart from her husband and for a minor dependent on his father or his widowed or unmarried mother. Such persons could not make separate applications: the husband or father or mother could procure registration for himself or herself and additionally for the wife or the minor. There was also provision for an "extended privilege", whereby on the death of a person qualified for registration his widow or his or her dependent child could, if certain conditions were fulfilled, apply for registration. These special provisions of section 4 do not assist the appellant. It is not claimed on his behalf that he was at any relevant time dependent on his father or mother. He may have been dependent on one of his brothers, but there was no provision in the Act enabling a person to acquire registration for himself and in addition for a dependent brother.

Section 5 of the Act provided as follows:

> "The privilege or extended privilege by this Act shall be exercised in every case before the expiry of a period of two years reckoned from the appointed date; and no application made after the expiry of that period shall be accepted or entertained, whatsoever the cause of the delay."

The "appointed date" was defined by section 24 as meaning 5th August 1949. Accordingly the period within which the privilege was exercisable under section 5 expired on 5th August 1951,

Section 7 provided for the making of applications for registration, and section 8 provided for the verification of applications by investigating officers.

Section 10 (which was at one time section 9) provided, so far as is relevant to this case, as follows:

> "(1) Where, upon the consideration of any application, the Commissioner is of opinion that a *; prima facie* case has not been established, he shall cause to be served on the applicant a notice setting out the grounds on which the application will be refused and giving the applicant an opportunity to show cause to the contrary within a period of three months from the date of the notice.
>
> .....
>
> (3) Where cause is shown by the applicant within the aforesaid period the Commissioner may ....
>
> (*a*) make an order appointing the time and the place for an inquiry and cause a copy of that order to be served on the applicant;
>
> ....."

Section 15 contained provisions as to inquiries, and subsection (4) was as follows:

> "The proceedings at an inquiry shall as far as possible be free from the formalities and technicalities of the rules of procedure and evidence applicable to a court of law, and may be conducted by the Commissioner in any manner, not inconsistent with the principles of natural justice, which to him may seem best adapted to elicit proof concerning the matters that are investigated."

Section 16 provided, so far as is relevant to this case, as follows:

> "(1) An appeal against an order refusing .... an application for registration may be preferred to the Supreme Court in the prescribed manner by the applicant....
>
> (2) Each appeal under this section shall be preferred within three months of the date of the order by means of a petition setting out the facts and the grounds of the appeal.
>
> ....."

The appellant made an application for registration under the Act. His application was dated 4th December 1956, more than five years after the expiry of the period referred to in section 5 of the Act.

The Deputy Commissioner served on the appellant a notice dated 5th August 1957 stating "I have decided to refuse your application under that Act dated 4th December 1956 on the grounds specified in the Schedule hereto unless you show cause to the contrary within a period of three months from the date hereof by letter addressed to me". The Schedule was as follows:

> "You have failed to prove
>
> 1. That you are an Indian or Pakistani Resident. No evidence has been offered that your origin or the origin of an ancestor of yours was in Prepartition British India or an Indian State.
>
> 2. That you were resident in Ceylon from 1.1.36 to 8.6.51 without absence exceeding 12 months on any single occasion.
>
> 3. That you were on the date of your application possessed of an assured income of a reasonable amount or had some suitable business or employment or other lawful means of livelihood to support yourself.
>
> 4. That you had permanently settled in Ceylon."

Thus there was in these grounds of refusal set out in the Schedule to the notice no mention of the application being out of time.

At the inquiry a substantial amount of evidence was adduced in relation to the four issues arising under the four grounds of refusal set out in the Schedule to the notice. On 15th September 1958 the Commissioner gave his judgment. He was satisfied under the first issue as to the Indian origin, and under the third issue as to the appellant's means of livelihood. He was not satisfied under second issue as to the alleged extent of the past residence in Ceylon and consequently was not satisfied under the fourth issue that the applicant was permanently settled in Ceylon. Accordingly he made an order refusing the appellant's application to be registered as a citizen of Ceylon under the Act.

The appellant appealed to the Supreme Court of Ceylon against the Commissioner's refusal of his application. On the hearing of the appeal to the Supreme Court the respondent's counsel took the objection that the application was out of time. Their Lordships have been informed that some notice was given, perhaps only very shortly before the hearing, by the respondent's counsel to the appellant's counsel of the intention to take this objection. At any rate it was taken at the hearing and the Supreme Court considered it and held that it must prevail. Tambiah, J. in his judgment after referring to the appellant's application, which was in Form 1A, and to its date, which was 4th December 1956, and to sections 5 and 24 of the Act, said "Therefore, if the appellant's application is

regarded as the application in Form 1A, signed by him on 4th December 1956, then his application should not have been entertained by the Deputy Commissioner nor should it be entertained by this Court,". At the end of his judgment Tambiah, J. said "It is with regret that I dismiss the appellant's appeal, since his application should not have been entertained by the Deputy Commissioner nor could it be entertained by this Court. On the facts, no doubt, a good deal could be said on behalf of the appellant. The Commissioner has misdirected himself on a number of matters, but it is unnecessary for me to go into the facts in view of my finding that the appellant had not made an application within the prescribed time".

One of the contentions put forward on behalf of the appellant in the Supreme Court was that the appellant had made an earlier application through his brother Mohamed Hussain Abdul Cader, because that brother had made his own application for registration on 4th August 1951 (just within the prescribed period) and in it he had under the heading in the prescribed form "Names, addresses and relationship to the applicant of all dependants" entered the name of the appellant. But this was part of the information which the brother had to give in his own application made on his own behalf, and Tambiah, J., speaking of this application, said "I find nothing in it to suggest that the appellant's brother had made any application on behalf of the appellant". In the present appeal the application of the appellant's brother was not produced and was apparently not relied upon. In any case there is no reason to doubt the correctness of Tambiah, J.'s conclusion.

It was contended in the present appeal that the Supreme Court ought not to have considered it to be an established fact that the appellant's application was out of time. It was said that the necessary evidence was not available, as the point was raised for the first time on the hearing of the appeal in the Supreme Court and, if the point had been raised in the course of the inquiry before the Commissioner, it might have appeared that the appellant had made some earlier application within the prescribed period and that the application dated 4th December, 1956 was merely an amplification of or supplement to the earlier application. It was also said that the maxim "*Omnia presumuntur rite esse acta*" should be applied in support of the appellant's argument, and accordingly that, when the Commissioner entertained an application which on the face it appeared to be out of time, it should be inferred that there were special facts (*e.g.*, an earlier application of or to which this application was a mere amplification or supplement) which justified him in doing so.

Reference was made to certain notes found in the Commissioner's Office and evidently relating to interviews in connection with the application of the appellant's brother Mohamed Hussain Abdul Cader. There was one note "Write Mr. Bernard Aluwihare. Reference your interview with the Commissioner on 28.11.56, please see me with your client on 3.12.56 at 10 a.m. at this office". After this there is another note "Get dependant brother to fill in Form 1A."

Their Lordships are unable to accept the appellant's contention in relation to these matters. The plain fact is that the appellant's application is dated 4th December 1956 and there is nothing in it to suggest that it is an amplification of or supplement to a previous application or that there was any previous application. The maxim "*Omnia praesumuntur rite esse acta*" can be turned against the appellant, because it must be assumed *prima facie* that the complete file or complete set of relevant records was produced from the Commissioner's Office and there was no trace of any earlier application. Moreover it is fairly clear that the notes give the clue to what happened. It was observed in November or December 1956, when Mohamed Hussain Abdul Cader's application was under consideration, that no application had been made by or on behalf of the appellant, and it was suggested he should then make one. That is the meaning of the words "Get dependant brother to fill in Form 1A." The date of the interview at which apparently this suggestion was made was 3rd December, 1956. On the following day, 4th December, 1956, the appellant made his application by filling in Form 1A. The inference is that this was his first application. It may well be said that the appellant was misled by this suggestion, evidently emanating from the Commissioner's office, into making an application which was more than five years out of time. This is a matter which affects the question whether any order for costs should be made against the appellant, but it does not bear upon the issues in the appeal.

It was also contended on behalf of the appellant that the Supreme Court should not have considered the respondent's objection that application was out of time, because the scope of the inquiry and of the resulting appeal was limited to the four grounds for refusal set out in the Schedule to the

Commissioner's notice, and because the objection was a new point raised for the first time on appeal. Three Ceylon cases were cited:

M. K. Marianthony v. *Commissioner for Registration of Indian and Pakistani Residents* (1957) 58 N.L.R. 431.

Caruppiah v. *Commissioner for Registration of Indian and Pakistani Residents* (1960) 62 N.L.R. 17.

S. S. Seyed Ali Idroos v. *The Commissioner for the Registration of Indian and Pakistani Residents* (1960) 62 N.L.R. 109.

In their Lordships' opinion the principles sought to be relied on are sound and well-established, but they are not applicable to the present case. The provisions of section 5 of the Act are clear and emphatic, and their effect is unmistakable. They are not merely directory provisions. They are imperative provisions and they restrict the jurisdiction of the Commissioner, and consequently that of the Supreme Court hearing an appeal from the Commissioner. It is provided that "no application made after the expiry of that period shall be accepted or entertained, whatsoever the cause of the delay". A Court must take notice of a limitation of its jurisdiction.

In *Davies* v. *Warwick* (1943) K.B. 329 C.A. which was a case under the Rent Restriction Acts, Goddard L.J. said at p. 336 "The cases cited show that the effect of section 3 of the Act of 1933, which restricts the power of the court to grant orders for possession, is not to afford a statutory defence to a party, but to limit the jurisdiction of the court. If the court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession, it is the duty of the court to refuse it, even though the statute is not raised by the defendant, because there is no jurisdiction to grant it".

In *Snell* v. *Unity Finance Company Limited* (1964) 2 Q.B. 203 C.A. Diplock L.J. referred to the case of *Smith* v. *Baker and Sons*, said.

> "That case was not concerned with points of law which went to either of those matters which it is the duty of the court itself to take even if neither party does, that is, points of law which go (1) to the jurisdiction of the Court or (2) to the illegality of the contract sued upon. It is a clear rule of public policy that such points should be taken by the court irrespective of the wishes of the parties; and, if not taken by the judge at trial, should be taken of its own initiative by an appellate court."

Their Lordships are of opinion that the Supreme Court reached the right conclusion, and accordingly they will humbly advise Her Majesty that this appeal should be dismissed. There will be no order as to costs.

Appeal dismissed.

Present: **Pandita-Gunawardena, J.**

RAMASAMY & OTHERS *vs.* GUNARATNE

S.C. 521-526/'68 — *M.C. Gampola* 8978

Argued on: 30th November, 1968
Reasons delivered on: 16th December, 1968

Criminal Procedure Code, sections 152(3), 180(1) *and* 425— *Accused charged in Magistrate's Court with several offences, committed in course of same transaction—One of the offences not triable by Magistrate — Failure to assume jurisdiction under section* 152(3) *owing to erroneous view — Conviction of all offences after trial — Effect — Illegality — Is it curable under section* 425 *— Is it permissible to separate illegal trial from trial of other offences?*

The appellants were charged with six offences, one of which was an offence, under section 145 of the Penal Code in respect of which the Magistrate had no jurisdiction to try as it was triable by the District Court. The Magistrate proceeded to trial in the erroneous belief that it was not necessary to assume Jurisdiction under Section 152(3) of the Criminal Procedure Code and convicted them of all the offences:—

Held: (1) That the failure on the part of the Magistrate to act under the terms of Section 152(3) of the Criminal Procedure Code is an illegality not curable under Section 425 of the Criminal Procedure Code, as the Magistrate's Court is not a Court of competent jurisdiction in respect of the offence under Section 145 of the Penal Code.

(3) That there is no law which makes it permissible to separate an illegal trial of the offence under Section 145 from the trial of the remaining counts as the trial by the Magistrate must be treated as one trial and not as separate trials in respect of separate offences joined together under Section 180(1) as forming part of the same transaction.

(3) That the case *Madar Lebbe* v. *Kiri Banda*, 18 N.L.R. 376 (Full Bench) lays down the procedure to be adopted in such cases viz. to adopt the procedure laid down in Section 152(3) of the Criminal Procedure Code, provided the Magistrate inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose.

Cases referred to: *Madar Lebbe* v. *Kiri Banda et al.* 18 N.L.R. 376.

N. Satyendra, for the accused-appellants.

Tyronne Fernando, Crown Counsel, for the Attorney-General.

Pandita-Gunawardena, J.

The appellants were charged and convicted in the Magistrate's Court of Gampola on the following counts:—

(1) that they on 10.11.67 at Black Forest Estate, Pussellawa were members of an unlawful assembly, the common object of which was to voluntarily cause hurt to Murhu Vellayan of South Delta Group and thereby committed an offence punishable under Section 140 of the Penal Code, Cap. 19 R.L.E.C.

(2) at the time and place aforesaid and in the course of the same transaction as set out in Count 1 above, the accused were all armed with deadly weapons, to wit, knives and clubs while being members of the said unlawful assembly and thereby committed an offence punishable under Sections 141 of the Penal Code, Cap. 19 R.L.E.C.

(3) that all the accused being members of the said unlawful assembly while being armed with deadly weapons, did use violence in the prosecution of the said common object of the said unlawful assembly as set out in Count 1 and thereby committed an offence punishable under Section 145 of the Penal Code, Cap. 19 R.L.E.C.

(4) at the same transaction as set out in Count 1 to 3 above, the abovenamed 1 to 3 accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group with a sharp cutting instrument, to wit, a pruning knife and thereby committed an offence punishable under Section 315 of the Penal Code, read with Section 32 of Cap. 19 R.L.E.C.

(5) at the time and place aforesaid and in the course of the same transaction as set out in Count 1 and 3 above, the 4th and 5th accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group, Pussellawa, with clubs and thereby committed an offence punishable under Section 314 read with Section 32 of Cap. 19 R.L.E.C.

(6) at the time and place aforesaid and in the course of the same transaction as set out in Count 1 to 3 above, the 6th accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group, Pussellawa by kicking at the abdomen and thereby committing an offence punishable under Section 314 of the Penal Code, Cap. 19 R.L.E.C.

The third count sets out an offence under Section 145 of the Penal Code. It is an offence triable by the District Court and not one in respect of which the Magistrate's Court had jurisdiction to try. Learned counsel for the appellants contends that the entire proceedings are tainted with illegality and therefore the convictions and sentences must be quashed.

The facts upon which the charges were brought are as follows:— On 10.11.67, Vellayan, the Supervisor in Black Forest Estate, accompanied by one Nagalingam, was walking along a road in the Estate; they were met by the appellants who obstructed them; the appellant attacked Vellayan; the first appellant is said to have cut Vellayan with a knife whilst the others struck him with clubs; one of the appellants kicked him; as a result of this assault, Vellayan sustained injuries. They were however not of a serious or grievous nature as would appear from the medico-legal report, P1. The two knife injuries were skin deep, one on the back of the left wrist and the other on the inner aspect of the left knee. The other injuries were minor contusions and abrasions and they were on the right and left arms.

The charges against the appellants are based on facts relating to one incident. The joinder of the charges has been by virtue of Section 180(1) of the Criminal Procedure Code which provides "If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment". It has been

urged that as Count 3 discloses an offence not summarily triable by the Magistrate, the trial was bad in law and the proceedings are ab initio vitiated. It is manifest that Count 3 — the offence of rioting — is an offence which the Magistrate had no jurisdiction to try and the trial upon that charge is illegal and is a nullity.

The question to which I have to address myself is whether it is permissible for me to quash the conviction and sentence on Count 3 and proceed to consider the remaining Counts which are properly triable by the Magistrate. Learned counsel for the appellants argues that that is a course not open to me. It is submitted that the facts in this case relate to one transaction; that charges inclusive of Count 3 are based on one incident of assault upon Vellayan; that the joinder of the charges has been for the reason that the offences were committed in the course of one and the same transaction; and that it has been one trial on all the charges. It has been said, and with much force, that the Magistrate could not commence trial in this case in view of Count 3, a count which he was not competent to try.

The learned Magistrate has apparently proceeded to try the appellants in the erroneous belief that all the offences were triable by him as Magistrate. In the proceedings of 11.1.1968, after the evidence of Vellayan had been led, the learned Magistrate has said, "In view of this witness's evidence, it is not necessary to act under Section 152(3) of the Criminal Procedure Code. I proceed to charge the accused and try them on the powers vested in me as Magistrate without assumption of jurisdiction". Had the learned Magistrate taken the trouble to refer to the first schedule to the Criminal Procedure Code, he would have seen that Count 3 — an offence under Section 145 of the Penal Code — is clearly one which is not triable by him as Magistrate. What the learned Magistrate should have done was to have adopted the procedure laid down in Section 152(3) of the Criminal Procedure Code. Section 153(3) states:

> "Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction to try the offence is of opinion that such offence may properly be tried summarily, he may try the same summarily following the procedure laid down in Chapter XVIII and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose."

In the case of *Madar Lebbe* v. *Kiri Banda et al* 18 N.L.R. 376 (Full Bench), it has been held — I am quoting from the headnote —

> "There is no objection to a Police Magistrate applying Section 152(3) of the Criminal Procedure Code to a case where an accused charged with several offences, some of which are triable by the Police Court and others are not, provided he inflicts no higher punishment than he has ordinary jurisdiction to impose."

The facts of that case as reported are as follows:— the charges against the accused were for offences under Sections 140, 144, 146 and 439 of the Penal Code. The Magistrate proceeded to try the accused summarily in his capacity as District Judge, invoking the provisions of Section 152(3) of the Criminal Procedure Code. Section 140 discloses an offence which the Magistrate had jurisdiction to try as Magistrate and the sentence imposed on that count was one of six months' rigorous imprisonment, which was within the powers of the Magistrate to impose. The sentence passed for the offence under Section 144 was two years' rigorous imprisonment, plus a fine of Rs. 2,500/- which clearly exceeded the punitive jurisdiction of a District Court, (vide Section 14 of the C.P.C.) where the maximum fine is Rs. 1,000/-. The sentence on that count was therefore varied by reducing the fine to Rs. 1,000/-. De Sampayo, J. (agreeing with Wood Renton, C.J. and Ennis, J.) in the course of his judgment *ibid* at page 379 said:

> "If the offence is one which is triable by the Police Court, the Police Magistrate has jurisdiction without any reference to Section 152(3) of the Criminal Procedure Code, and if he arrogates to himself higher punitive powers by purporting to act under that provision, the infliction of any punishment beyond the Police Court limit does not by itself vitiate a conviction, but is in my opinion an irregularity which may be cured as regards the sentence by the interference of the Supreme Court in appeal or in revision. Mr. Bawa, for the appellants, does not seriously contest this point, but he strenuously argues that where an accused is charged in the same proceedings with several offences, some of which are triable summarily by the Police Court and others are not Section 152(3) is not applicable at all, and that if for the purpose of trying the latter offences summarily the Police Magistrate gives himself jurisdiction under that Section, a conviction for all or any of the offences is wholly bad". ..... "I do not think that this reasoning is sound" .... "In my opinion there is no objection to a Police Magistrate applying Section 152(3) to a case where several offences of two descriptions of gravity are concerned, provided of course he inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose."

The position in this case is that although among the offences was one which the Magistrate

was not empowered to try summarily as Magistrate, the Magistrate in the mistaken belief that they were all offences which he could have tried as Magistrate, proceeded to trial. It is, in my opinion, not a case of an irregularity which is curable by Section 425 of the Criminal Procedure Code. Section 425 enacts that "Subject to the provisions herein before contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account —

(*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial in any inquiry or other proceedings under this Code, or

(*b*) .....

(*c*) .....

unless such error, omission, irregularity, or want has occasioned a failure of justice".

The Magistrate's Court was certainly not a Court of competent jurisdiction in respect of Count 3, an offence under Section 145 of the Penal Code. The failure on the part of the Magistrate to act under the terms of Section 152(3) of the Criminal Procedure Code is therefore an illegality which is incurable.

Neither the researches of Counsel nor my own into this aspect of the matter has resulted in the discovery of any authority for the proposition that in circumstances such as are present here, it is permissible to separate the illegal trial of the offence under Count 3 from the trial of the remaining counts; to quash the proceedings in respect of Count 3; and consider the remaining summarily triable counts. It would appear that the basic principle which militates against such a course is that the trial by the Magistrate must be treated as one trial and not as separate trials in respect of separate offences which have been joined together under Section 180(1) as forming part of the same transaction. It would seem to me that the case of *Madar Lebbe* v. *Kiri Banda*, 18 N.L.R. 376, (Full Bench) lays down the procedure to be adopted by Magistrates in cases where some of the offences are triable summarily by a Magistrate and others are not. In such cases, the Magistrate is required to adopt the procedure laid down in Section 152(3) of the Criminal Procedure Code, "provided of course he inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose".

The trial in this case has not been in accordance with the law and is therefore illegal. The convictions and sentences are hereby quashed.

Sentences quashed.

Present: **Sirimane, J.**

M. H. AGNES FONSEKA *v.* W. E. H. PERERA, I.P., KANDANA*

S.C. 656/68 — *M.C. Kanuwana Case No.* 10954/*K*

Argued and decided on: 18th September, 1968

Excise Ordinance — Possession of excisable article — First offender— Sufficiency of fine in ordinary cases.

Held: That in excise offences an option of a fine should ordinarily be given to a first offender.

D. W. Abeyakoon, for the accused-appellant.

Lalith Rodrigo, Crown Counsel, for the Attorney-General.

Sirimane, J.

The accused has been convicted of being in possession of an excisable article described in the charge as "Goda" which, according to the Government Analyst is a formented liquor. I see no reason to interfere with the conviction.

The accused is a woman, and a first offender. She has been sentenced to 6 months' rigorous

* For Sinhala translation, see Sinhala section, Vol. 17, part 7, p. 25

imprisonment. In excise offences an option of a fine should ordinarily be given to a first offender. The learned Magistrate has imposed the maximum sentence in this case because the quantity of liquor found was large and according to him, these offences are "very rampant in this part of the country." But one must not lose sight of the fact that as a far as the accused is concerned this was her first offence.

I alter the sentence to a fine of Rs. 350/- in default 6 weeks' rigorous imprisonment. Subject to this variation in the sentence the appeal is dismissed.

Sentence varied.

Present: **Siva Supramaniam J. and Tennekoon, J.**

A. F. JONES & CO. LTD. *v.* S. C. S. DE SILVA

Application No. 262/66

In the matter of an application for the issue of a Mandate in the nature of a Writ of Certiorari and Prohibition on S. C. S. de Silva and four others.

Argued and decided on: 8th May, 1968.

Industrial Disputes Act (*Cap.* 131) *section* 31 *H —Reference for settlement of dispute arising out of intended retrenchment — Suspension for two months of employer's right to retrench — Necessity for award to be made within such two month period.*

Held: (1) That where an industrial dispute arising out of an intended retrenchment is referred for settlement under section 31 H of the Industrial Disputes Act, the award must itself be made before the expiry of the two month period specified in this section.

Followed: *The Shell Co. of Ceylon Ltd.* v. *H. D. Perera & Others* 70 N.L.R. 108.

H. W. Jayawardene, Q.C., with *Lakshman Kadirgamar* and *R. L. Jayasuriya*, for the petitioner.

G. D. C. Weerasinghe, with *Miss Adela P. Abeyratne*, for the 4th respondent.

H. L. de Silva, Crown Counsel, as *amicus curiae*.

Siva Supramaniam, J.

It is common ground that the termination of the employment of the workers took effect on 31st May 1966 in terms of the notice "E" given by the employer. Under section 31.H of the Industrial Disputes Act (Cap. 131) the right of the employer to effect the retrenchment is suspended only for a period of two months from the date of the reference of the dispute to an Industrial Court for settlement. This period expired on 23rd May, 1966. The view was expressed in the case of the *Shell Company of Ceylon Limited* v. *H. D. Perera and five others*, 70 N.L.R. p. 108, that "where a reference of an industrial dispute for settlement as contemplated in section 31.H of the Act has been made, the award must itself be made before the expiry of the two months specified in the said section". We are in agreement with that view. Since the period of two months expired on 23rd May 1966, the Industrial Court had no jurisdiction on 4.6.66 to go into the question referred to it by the Minister by his reference dated 23rd March 1966. We therefore quash the proceedings of that date.

We grant the petitioner's prayer contained in paragraphs a(i) and (ii). The 4th respondent will pay the costs of the petition.

Tennekoon, J,

I agree,

Application allowed.

Present: **Wijayatilake, J.**

P. A. HAMZA NAINA *v.* INSPECTOR OF POLICE, GAMPAHA

S.C. 668/68 — *M.C. Gampaha* 18233/*A*

Argued and decided on: 30th October, 1968

Control of Prices Act, No. 29 *of* 1950 *and* 31 *of* 1952 — *Price order published in Gazette (Extraordinary) No.* 14199 *of* 15.10.1964 — *Charge of sale of beef above controlled price at Yakkala, a place within the Colombo District but outside Colombo Municipality— Absence of proof that place where alleged sale took place was within Colombo District — Presumption— Judicial notice, Evidence Ordinance, Section* 57—*Adminstrative Districts Act* (*Cap.* 392).

The accused was charged with and convicted of selling beef at No. 3 Yakkala, in the Gampaha-Kirindiwela Road above the controlled price fixed by Price Order of 15.10.64 made by the Assistant Food Controller of Prices, Colombo District under Section 4 read with section 3(2) of the Control of Prices Act No. 29 of 1950 and No. 31 of 1952 published in Ceylon Government Gazette (Extra-Ordinary) No. 14199 of 15.10.64.

In appeal it was contended on his behalf (*a*) that according to the Schedule, the Price Order applied to the Colombo District outside the Municipal limits of Colombo.

(*b*) that the prosecution has failed to prove that the place where the beef was alleged to have been sold is within the Colombo District.

The only evidence on this point was that of the Sub-Inspector of Police who confessed that he could not say what the limits of the Colombo District were. The prosecution failed to produce in evidence a map of the Colombo District showing the Administrative Divisions or the evidence of anyone who could authoritatively speak to the limits of the Colombo District though the Administrative Districts Act sets out the limits of each administrative district. The learned Magistrate in his reasons observed as follows:- "There cannot be any doubt that No. 3 Yakkala where the accused's beef stall is situated is not a place within the limits of the Colombo Municipality" and administratively Gampaha comes within the jurisdiction of the Government Agent Colombo District."

Held: That in the circumstances, the Magistrate was not justified in presuming that this stall is within the Colombo District, as the Judicial Districts of Ceylon, with which the magistrate may be familiar do not correspond to the Administrative Districts of Ceylon as set out in the Administrative Districts Act No. 22 of 1955.

Cases referred to: *Bogstra* v. *Custodian of Enemy Property* XXVI C.L.W. 5.
Galahitiyawa v. *Inspector Joseph* 69 N.L.R. 152.
Menon v. *Lantine*, 43 N.L.R. 34
Mendis v. *Jayawardene*, S.C. 543/68 M.C. Avissawella 80838 S.C. Minutes of 23.10.68

E. H. C. Jayatilake, for the accused-appellant.

Priyantha Perera, Crown Counsel, for the Attorney-General.

Wijayatilake, J.

In this case the accused is charged with selling beef above the maximum price in contravention of the Food Price Order No. FC/B SF 7(6) of 15.10.64 made by the Assistant Food Controller of Prices (Food) Colombo District under Section 4 read with Section 3(2) of the Control of Prices Act No. 29 of 1950 and 31 of 1952 and published in Ceylon Government Gazette (Extraordinary) No. 14199 of 15th October, 1964.

The learned Magistrate has found the accused guilty and sentenced him to a term of 4 weeks' rigorous imprisonment and to pay a fine of Rs. 500/- in default 6 weeks' rigorous imprisonment. Mr. Jayatileke, learned counsel for the appellant has referred me to the Government Gazette mentioned in the charge and he submits that according to the schedule this Price Order applies to the Colombo District excluding the Municipal limits of Colombo and therefore the prosecution had to establish that this offence was

* For Sinhala translation, see Sinhala section, Vol. 17, Part 6 p. 23

committed within the Colombo District and outside the Municipal limits of Colombo the beef stall in question being at No. 3 Yakkala on the Gampaha-Kirindiwela Road. He submits that the prosecution has failed to prove that the place where the beef was alleged to have been sold is *within* the Colombo District. When the sub-inspector of police gave evidence he was cross-examined particularly in regard to this point and in answer to the question as to the limits of the Colombo District he stated that the Colombo Municipality area extends up to the Peliyagoda bridge, and Colombo Municipality ends at the Peliyagoda bridge. Then when he was questioned again as to the limits of the Colombo District he confessed that he could not say what they were and he confirmed that he could not give the areas which are incorporated in the Colombo District. The learned Magistrate in his reasons has considered this objection taken by the defence that the prosecution has failed to prove that the place of offence was within the Colombo District and he has commented that in regard to this submission he has to observe that "there cannot be any doubt that No. 3 Yakkala where the accused's beef stall is situated is not a place within the limits of the Colombo Municipality". In regard to this particular observation there is the evidence of the Inspector of Police. The Magistrate, however, observes that the detection had been made by the Gampaha police in an area within the jurisdiction of that police station and he thinks that he is entitled to presume "that administratively Gampaha comes within the jurisdiction of the Government Agent, Colombo District". It may be mentioned that the prosecution has failed to produce in evidence a map of the Colombo District showing the Administrative divisions or the evidence of anyone who could authoritatively speak to the limits of the Colombo District. The Administrative District Act, Chapter 392 sets out the limits of the Administrative Districts. Section 2(2) sets out that the limits of each Administrative District specified in column I of the first schedule to this Act shall, subject to any alterations made therein, under Section 3, be those specified in the corresponding entry in column II of that schedule. It is not at all clear how the learned Magistrate presumed that this particular place No. 3 Yakkala came within the jurisdiction of the Colombo District without a precise scrutiny of the divisions as set out in these two columns. My attention has been drawn by Crown Counsel to Section 57 of the Evidence Ordinance and he submits that Courts can take judicial notice of facts other than those mentioned in that Section. He relies on the principle set out in the case of *Bogstra* v. *Custodian of Enemy Property* reported in 26 C.L.W. page 5. He has also drawn my attention to the cases of *Galahitiyawa* v. *Inspector Joseph* (69 N.L.R. 152) and *Menon* v. *Lantine* (43 N.L.R. 34) and he submits that the Magistrate is entitled to make use of his personal observations and arrive at certain conclusions. Therefore in the instant case he was entitled to presume that this particular place fell within the Colombo District as he was the Magistrate functioning at Gampaha. However, it may be noted that the Judicial Districts of Ceylon with which a Magistrate may be familiar do not correspond to the Administrative Districts of Ceylon. In this case the Police Inspector who should have been more familiar with the area, has himself confessed that he was not aware of the limits of the Colombo District.

Mr. Jayatilaka has referred me to a recent judgment of de Krester, J. in *Mendis* v. *Jayawardene* S.C. 543/68 M.C. Avissawella 80838 S.C. minutes of 23.10.68 which has dealt with a similar question. With great respect I am in agreement with the judgment of my brother de Kretser, J. and the principle set out by him would be applicable to the facts before me the only evidence being that the beef stall is at No. 3 Yakkala on the Gampaha-Kirindiwela Road and I would uphold the objection raised by counsel for the accused that the Magistrate was not justified in presuming that this stall is within the Colombo District, on the facts proved in this case. Perhaps, if the evidence was that the stall in question is situated within close proximity to the Municipal limits of Colombo or within well defined and well known physical boundaries the presumption might have been justified but in the instant case it would be quite unsafe to base a conviction on a rather tenuous presumption of the Magistrate.

I would accordingly quash the conviction and acquit the accused.

Accused acquitted.

Present: de Kretser, J.

INSPECTOR OF POLICE, MORATUWA *v.* U. WANNIARATCHI

S.C. 498 — *M.C. Panadura* 7742

Argued on: 19th July, 1968
Decided on: 22nd July, 1968

Control of Prices — Charge of selling box of matches at 8 cents when controlled price was 5 cents — Controlled price varies from 5 cents to 1 cent according as the box contained 50 to 10 sticks— Absence of evidence of number of sticks in box — Conviction not sustainable.

The accused was charged with and convicted of selling a box of match sticks (P1) for 8 cents, a price in excess of the controlled price by 3 cents.

Held: (1) That the conviction could not be sustained in the absence of evidence of the number of matches the box P1 contained as the controlled price varied from five cents to one cent according as the box contained 50 to 10 sticks. (Vide Government Gazette No. 14459 of 23.7.65.

(2) That the imprint on the box P1 stating the maximum price of five cents at which it could be sold does not establish the charge in the absence of evidence as to who fixed the imprint and the maximum price thereon and that it was placed on boxes which contained 50 matches or more only.

Dr. Colvin R. de Silva, with *M. L. de Silva*, for the accused-appellant.

Lalith Rodrigo, Crown Counsel, for the Attorney-General.

de Kretser, J.

The charge against this accused is that he sold to P.C. Abeyratne a box of match sticks for 8 cents which was a price 3 cents in excess of the controlled price.

It is not all match boxes containing matches which are price controlled. For example, if a match box contained less than ten sticks there is no controlled price set out above which it is an offence to sell it. So that there should be evidence that no such boxes of matches are manufactured before the prosecution can hope to establish that the box P1 was a box to which the order applied. There is no such evidence in this case. There should have been evidence of the number of matches the box contained for that would clearly establish whether or not the box was one which was price controlled. There is no such evidence in this case. It was the easiest thing possible for the box P1 to have been opened and the number of sticks in it counted if necessary in Court but for some reason this has not been done. The Magistrate (Mr. J. J. F. A. Dias) says because on the box P1 there is fixed an imprint which states the maximum price at which it could be sold is five cents, that it follows that the box was one which contained 50 sticks.

In the absence of evidence as to who fixed the imprint and the maximum price referred to in it and that it was so placed on boxes which contained 50 matches or more only I find it impossible to agree with the Magistrate. The imprint on the label as it stands is *prima facie* evidence of nothing.

The appeal is allowed and the accused acquitted.

Accused acquitted.

* For Sinhala translation, see Sinhala section Vol. 17 Part 7, p. 26

Present: **Wijayatilake, J.**

D. G. SENEVIRATNE I.P. AND OTHERS *vs.* K. A. R. SALAMAN FERNANDO

S.C. 292-293/68

Application under Section 37 *of the Courts Ordinance in M.C. Panadura case No.* 6487

Argued and Decided on: 29th October, 1968

Criminal Procedure Code, Sections 191, 194 — *Acquittal or discharge — Acquittal of accused under Section* 194, *Criminal Procedure Code — Cancellation of order of acquittal.*

Held: That a genuine mistake on the part of a complainant about the date of the trial was a good ground for cancelling an order of acquittal made under the proviso to section 194 and that such a mistake was a "cause over which he had no control" within the meaning of the proviso.

Followed: *Seevaratnam* v. *Gopalasamy* 56 N.L.R. 66.

Referred to: *Abdul Majeed* v. *Cassim* 41 N.L.R. 273
Dahanayake v. *Ratnayake* 58 N.L.R. 406

W. D. Gunasekera, with *Harischandra Mendis* and *N. R. M. Daluwatte*, for the petitioners.

Nimal Senanayake, with *Miss A. P. Abeyratne*, for the respondent.

Wijayatilake, J.

This is an Application by the accused-petitioners to quash the order of the learned Magistrate re-opening this case. Mr. Gunasekera, learned counsel for the petitioner submits that the accused have been discharged under Section 191 of the Criminal Procedure Code and therefore the Magistrate had no jurisdiction thereafter to re-open the case. He has referred me to the case of *Abdul Majeed* v. *Cassim* (41 N.L.R. 273), in which Nihill, J. held that a Magistrate has no power to re-open proceedings in a case where the accused have been discharged under Section 191 of the Criminal Procedure Code or by an order which in its legal effect is an order under that Section.

Mr. Nimal Senanayake, learned counsel for the respondent, concedes that if the order was in fact made under Section 191 the Magistrate would not have had the jurisdiction to re-open the case. However, he submits that it is quite clear from the proceedings in this case that the learned Magistrate had, though he had used the word 'discharge', in effect 'acquitted' the accused under Section 194 of the Criminal Procedure Code. He has referred me to the proviso to this Section which permits the Magistrates to cancel any order made under this Section if the conditions therein are satisfied. It would appear that the Magistrate had made the order discharging the accused on 20th April, 1968 and the complainant had submitted an affidavit explaining his absence dated the same day and this has been journalised on the 21st April. The learned Magistrate had thereupon noticed the accused to show cause why the application to re-open should not be allowed. It would appear from the affidavit that the complainant had misheard the trial date. It is also noteworthy that when this case came up for trial on the 20th of April a Proctor had appeared for the complainant and informed Court that he had no instructions. In my opinion, this fact alone shows the genuineness of the statement made in the affidavit. It is also significant that the affidavit had been prepared on the same day and the Court had issued notice on the following day; so that this application to re-open the case has been made within reasonable time as contemplated in the proviso to Section 194.

Mr. Gunasekera strenuously submits that it does not come within the proviso as the affidavit does not speak of any sickness, accident or some other cause over which the complainant had no control. In an analogous situation this question has been considered by Gratiaen, J. in the case of *Seevaratnam* v. *Gopalasamy* (56 N.L.R. 66) where it was held that an order of acquittal entered under Section 194 of the Criminal Procedure Code may be cancelled if the complainant subsequently satisfies the Magistrate that his absence was due to a genuine misunderstanding as to the date fixed for his appearance. Mr. Gunasekera submits that Gratiean, J. has not considered

precisely the terms of the proviso and that he had failed to take into account that a genuine misunderstanding has not been provided for. In reading the proviso myself it is my view that the words "some other cause over which he had no control" could include the misunderstanding of the date which has been set out in the affidavit. With respect, I entirely agree with the judgment of Gratiaen, J. As for the use of the word 'discharge' instead of 'acquit' see the case of *Dahanayake* v. *Ratnayake* (58 N.L.R. 406).

Furthermore, it is surprising why the accused in this case who are police officers have thought it fit to make this application to the Supreme Court when they had on 29.5.68 before the learned Magistrate expressed categorically the fact that they had no objection to the case being re-opened under the provisions of Section 194 of the Criminal Procedure Code. In my opinion there are no merits whatever in this application and I would therefore dismiss it.

Application dismissed.

Present: **H. N. G. Fernando, C.J.**

J. SAMSUDEEN (*alias*) RAJAH *vs.* A. NALLIAH, I.P. UPPUWELY

S.C. 774/'68 — *M.C. Trincomalee* 2204

Argued and decided on: 30th September, 1968

Charge of using criminal force with intent to outrage the modesty of a woman — Unsafe to act on the uncorroborated testimony of woman.

Held: That when a person is charged with using criminal force with intent to outrage the modesty of a woman, it is usually unsafe to act on the uncorroborated testimony of the woman.

Siva Rajaratnam, for the accused-appellant

Lalith Rodrigo, Crown Counsel for the Attorney-General

H. N. G. Fernando, C.J.

In this case, where the accused was charged with using criminal force with intent to outrage the modesty of a woman, the only evidence as to the alleged offence was that of the woman herself. The learned Magistrate failed to take into account the principle that in a case of this type, it is usually unsafe to act upon uncorroborated testimony. (51 N.L.R. page 447.)

According to the woman, the alleged offence took place on the afternoon of the 29th of November, 1967, during the absence of her husband from home. No complaint was made to the Police until the morning of the next day. The complaint was then made by the husband of the woman and the version which he gave them substantially differs from the version which the woman gave in Court. According to the evidence in Court, the accused had first come to the woman's house in the company of two other persons and left the house, but returned again and committed the alleged offence on the second occasion. The version is quite different from the version given to the Police by the woman's husband, for his statement was to the effect that there had been only one visit to the house and by two persons. According to this version, the accused committed the alleged offence in the presence of another party. Having regard to this contradiction, the Magistrate could not have with safety acted upon the uncorroborated evidence of the woman.

The conviction and the sentence imposed on the accused are set aside.

Conviction and sentence set aside.

Present: **Pandita-Gunawardene, J.**

G. S. SIRISENA *vs.* O. K. HEMACHANDRA, S.I. POLICE, PELIYAGODA

S.C. 546/68 — *M.C. Colombo Case No.* 43700

Argued and decided on: 2nd September, 1968

Ceylon Penal Code, 367—*Theft—Confession to security officer—Admissibility—Evidence Ordinance section* 25(1)—*Whether sufficient reasons given by Magistrate for his decision—Criminal Procedure Code, section* 306(1).

The accused, a mechanic, working at a depot of the Ceylon Transport Board, was apprehended by security officers after he had committed theft of a radiator belonging to the C.T.B. It was in evidence that the security officers had seen the accused remove the radiator from the bus in which it had been conveyed out of the depot, and attempt to hide it by the way side. It was also in evidence that the security officers had questioned the accused in answer to whom he had said "that he brought the radiator by himself." It was argued that the latter statement was a confession and inadmissible under section 25(1) of Evidence Ordinance.

Held: That as there was other evidence besides the alleged "confession" sufficient to establish guilt, and as the learned magistrate had not referred to the alleged "confession" at all in coming to a finding, it could not be said that the material evidence in the case had been affected by the admission of the accused's statement.

Held further: That where the magistrate stated in his Judgment that as the facts of the case were simple, and fell within a narrow compass beside the fact that the prosecution case consisted of only two witnesses that for the defence only the accused gave evidence and proceeded to give reasons based on the demeanour of the witnesses it was a sufficient compliance with the provisions of section 306(1) of the Criminal Procedure Code.

Case referred to: *Vidane Arachchi of Kalupe* vs. *Appu Sinno* (1921) 22 N.L.R. 412.

K. Shanmugalingam, for the accused-appellant.

Lalith Rodrigo, Crown Counsel, for the Attorney-General.

Pandita-Gunawardene, J.

In this case the accused-appellant was charged and convicted in the Magistrate's Court of Colombo with theft of a radiator belonging to the Ceylon Transport Board, an offence punishable under section 367 of the Ceylon Penal Code. He was sentenced to a term of 6 months' rigorous imprisonment. He has appealed from his conviction and sentence.

It would appear that in the early hours of 7th April, 1967 Raja Karunaratne, Chief Security Officer of the Ceylon Transport Board on receipt of certain information followed a bus. Raja Karunaratne was accompanied by a fellow security officer Ranjith Jayawardene. They travelled in a car and followed that bus — when Karunaratne found that the bus came to a halt at a place which he describes as an unusual place where the bus is not normally expected to stop. Naturally this would have been a suspicious circumstance and in view of this sudden stopping of the bus at an unwarranted place, Raja Karunaratne over-took the bus and took the car to a by-road. Having got down from the car he came towards the bus to find it's engine running and while going closer to the bus he saw the accused-appellant pulling a radiator from underneath the chassis. He was pushing the radiator on to the side of the road. The accused-appellant was then seized by Raja Karunaratne. The radiator has been indentified as one belonging to the Ceylon Transport Board, and it is in evidence that the accused -appellant had no authority or permission to remove this radiator from the Ceylon Transport Board.

Learned counsel for the appellant has sought to have this conviction and sentence set aside on two grounds. He submits that there has been inadmissible evidence in the case, and an alleged confession made by the accused-appellant has been considered as evidence against him. Learned counsel has referred me to a statement of Raja Karunaratne where he has said under cross-examination "We questioned the accused from where he got it. He said, that he was working at the C.T.B. Depot at Peliyagoda as a mechanic and that he brought P1 (Radiator) by himself". Counsel for the appellant submits that this statement in his evidence amounts to a confession and therefore is inadmissible. Section 25(1) of the Evidence Ordinance lays down that "no confession made to a police officer shall be proved as against a person accused of any offence." In support of this contention learned counsel cites the case of *Vidane Arachchi of Kalupe* vs. *Appu Sinno*, 22 N.L.R. 412. The headnote reads as follows:

> "A confession to a Mudaliyar of a District who arrested the accused was held to be inadmissible."

The facts as they appear from the judgment are that the accused in that case and another were convicted of having removed coral in contravention of the provisions of the Seashore Protection Ordinance, 1911. It was the Mudaliyar of the district who arrested the accused in the act of removing the coral from a prohibited area. The Mudaliyar had questioned the accused who admitted the offence. Reading the judgment it would appear to me that the conviction of the accused in that case was solely based on the confession to the Mudaliyar which was inadmissible. But here the position is different, because it cannot be by any stretch of imagination that the conviction has been based on this alleged statement made by him to the Security Officer. Before the accused-appellant was being questioned by Karunaratne, Karunaratne detailed the circumstances in which he found the accused handling this radiator. It is obvious that this bus which carried the radiator was stopped at an unwarranted spot for the purpose of stealthily removing the radiator which had been kept underneath the chassis. Karunaratne had observed the accused-appellant removing the radiator from underneath and pushing along the road. These facts are sufficient if accepted to base a finding of guilt. Therefore even if it could be said that there has been inadmissible evidence in that the statement which I have already referred to is a confession, I do not think that it could in any way affect the material evidence in the case which tell against the accused. Certainly the conviction of the accused appellant had not been based on this statement said to have been made by him to Karunaratne. On the contrary in his judgment the learned Magistrate has made no reference to it at all. The other ground submitted by learned counsel was that the Magistrate has not adduced any reasons. Admittedly Section 306(1) of the Criminal Procedure Code requires that "A Magistrate shall in his judgment mention the points for determination and give reasons for his decision". This is a case where the facts are simple and straightforward and fall within a narrow compass, and the prosecution case consists of only two witnesses, Karunaratne being the only material witness to testify to the facts in support of the charge, and for the defence only the accused gave evidence. In the course of his judgment, the learned Magistrate has stated that "no reason has been alleged as to why Raja Karunaratne should falsely testify against this accused. Raja Karunaratne and witness de Silva gave their evidence in a very frank manner which left no doubt in my mind, that they were speaking the truth. On a consideration of the evidence led, in having seen the witnesses giving their evidence, I am unable to accept the version given by the accused. I reject his defence".

Having regard to the simple facts in this case, I think these reasons are sufficient to meet the requirements of section 306 of the Criminal Procedure Code, for there was nothing very extensive for the learned Magistrate to consider. I therefore hold that both these grounds submitted by learned counsel for the accused-appellant should fail. I see no reason to interfere with the conviction and sentence.

The appeal is dismissed.

Appeal dismissed.

Privy Council Appeal No. 24 *of* 1967

Present: **Lord Hodson, Lord Guest, Lord Upjohn, Lord Donovan, and Sir Thaddeus McCarthy**

TIKIRI BANDA DULLEWE *v.* PADMA RUKMANI DULLEWE & ANOTHER

From
THE SUPREME COURT OF CEYLON

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

Delivered on: 4th December, 1968

Kandyan Law Declaration and Amendment Ordinance of 1939 (*Cap.* 59), *sections* 4 *and* 5 — *Kandyan Gift, described as gift irrevocable and subject to fideicommissum — Is the word irrevocable sufficient to constitute an express renunciation of the right to revoke within the meaning of Section* 5(1)(*d*) *of the Ordinance*?

A Kandyan deed of Gift in respect of certain lands in favour of R made in 1941, contained the following material words in its recital:— "the donor ..... doth hereby grant convey assign, transfer set over and assure into the said donee as a gift irrevocable" and further provided that it was subject to a fideicommissum in favour of R's legal issue failing whom the premises were to devolve absolutely on T.

R having died in May, 1943, the donor purported to revoke the said gift by a deed in October, 1943 and on the same date conveyed these lands to the appellant.

In 1959 R's only child (the respondent), appearing by her next friend sued the appellant for a declaration of title to the said lands basing her claim on the said gift of 1941. The appellant relied on the said purported revocation and the conveyance on the same day.

The determination of the rights of the parties depended on (*a*) the construction of the said deed of gift of 1941.

(*b*) the construction of section 5(1)(d) of the Kandyan Law Declaration and Amendment Ordinance of 1939.

The material words of the said Section 5(1)(d) are as follows:— ....."it shall not be lawful for a donor to cancel or revoke any of the following gifts when any such gift is made after the commencement of this Ordinance;

(*a*) .....

(*b*) .....

(*c*) .....

(*d*) any gift the right to cancel or revoke which shall have been expressly renounced by the Donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning....."

The District Court held that the use of word "irrevocable" in the deed of gift was sufficient to constitute an express renunciation of the right to revoke the gift within the meaning of section 5(1) (d) of the said Ordinance of 1939. The Supreme Court on appeal confirmed the decision of the District Court following a previous decision of its own in *Punchi Banda* v. *Nagasena*, (1963) 64 N.L.R. 548.

On an appeal to the Privy Council,

Held: (Lord Donovan *dissentiente*)

(1) That prior to the passing of the Kandyan Law Declaration and Amendment Ordinance of 1939, gifts being treated as contracts, the courts looked at the intention of the parties as expressed in deeds by which the gifts were effected. Judicial decisions appear to have been influenced in some cases by the English doctrine of consideration.

(2) That since the passing of the said Ordinance of 1939, the position has changed, and in construing the Ordinance it is necessary to consider whether its requirements have been complied with irrespective of the intention which can be found on a reading of the original document. The intention may have been to give up the right to revoke, but this is not the same as the express revocation of a right. The renunciation is to be expressed not implied.

(3) That, therefore the word "irrevocable" used in the deed is not a sufficient compliance with the requirement of the said Ordinance of 1939.

Overruled: *Punchi Banda* v. *Nagasena*, (1963) 64 N.L.R. 548; LXIII C.L.W. 10
Kuruppu v. *Dingiri Menika* (S.C. 161/62 (F) — D.C. Kandy 6442 — S.C. Minutes of 5.12.1963)

Cases referred to: *Eastman Photographic Materials Company* v. *Comptroller-General of Patents, Designs, and Trade-Marks* (1898) A.C. 571;79 L.T. 195; 14 T.L.R. 527.
W. R. W. M. Tikiri Bandara and Another v. *P. Gunawardena*, (1967) 70 N.L.R. 203.
Ukku Banda v. *Paulis Singho et al.* (1926) 27 N.L.R. 449.
United Marketing Co. v. *Kara* (1963) 1 W.L.R. 523.
North Staffordshire Railway Co. v. *Edge* (1920) A.C. 254; 122 L.T. 385; 36 T.L.R. 115
Kirihenaya v. *Jotiya* (1922) 24 N.L.R. 149.
Bogahalande v. *Kumarihamy*, (1926) 8 C.L.Rec. 91.

Appeal from a judgment of the Supreme Court reported in LXX C.L.W. 55

E. F. N. Gratiaen, Q.C., with *D. C. Amerasinghe*, for the appellant.

S. Nadesan, Q.C., with *John Baker*, for the respondents.

Lord Hodson

This is an appeal from a judgment of the Supreme Court of Ceylon dismissing the appeal of the appellant from the District Court of Kandy.

The case concerns a Deed of Gift (No. 183) dated 26th May 1941, whereby the Donor Tikiri Banda Dullewe made a gift of certain lands to his son Richard.

The material words following the recitals are:

> "Now know ye and these presents witness that the said Donor in consideration of the love and affection which he has unto the said .... Richard Dullewe (hereinafter sometimes called the said Donee) and for diverse other good causes and considerations him hereunto specially moving doth hereby grant, convey, assign, transfer, set over and assure unto the said Donee as a gift irrevocable but subject to the condition hereinafter contained.
>
> All those premises in the Schedule hereto of the value Rupees ten thousand (Rs. 10,000/-) only.
> .....
>
> To have and to hold the said lands and premises hereby conveyed unto the said Donee subject to the condition that the said Donee shall not sell, gift mortgage or otherwise alienate or encumber the said premises (but may lease the said premises for a period not over five years) and after his death the same shall devolve absolutely on his legal issue and in the event of his dying without legal issue the premises shall devolve absolutely on .... Tikiri Banda Dullewe."

It is to be noticed the gift of the lands effected by this deed was expressed to be irrevocable although subject to a condition as expressed. The gift was perfected by acceptance and was properly described as a "Kandyan" gift. No question arises as to its validity.

The Donor however by Deed No. 9048 dated 26th October 1943 did purport to revoke the deed of gift in respect of the lands and on the same date purported to convey them to the appellant.

The action was instituted by the first respondent appearing by her next friend the second respondent on 18th May 1959 praying for a declaration of title to the lands. Her claim rested upon the deed of gift of 26th May 1941. The first respondent is the only child of Richard (the Donee) who died in May 1943 and having come of age is the effective respondent to the appeal.

The appellant's claim rests on the deed of purported revocation executed by the Donor on 26th October 1943 and the conveyance to him by the Donor on the same date.

The Supreme Court, confirming the District Court, followed a previous decision of its own in *Punchi Banda* v. *Nagasena* 64 N.L.R. 548. The effect of the latter decision was that the use of the word "irrevocable" in a deed of gift was sufficient to constitute an express renunciation of the right to revoke the gift.

The determination of the question under appeal depends mainly upon the true construction of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59 of 1939) which so far as material reads as follows:

"4. (1) Subject to the provisions and exceptions hereinafter contained, a donor may, during his lifetime and without the consent of the Donee or of any other person, cancel or revoke in whole or in part any gift, whether made before or after the commencement of this Ordinance, and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation:

Provided that the right, title, or interest of any person in any immovable property shall not, if such right, title, or interest has accrued before the commencement of this Ordinance, be affected or prejudiced by reason of the cancellation or revocation of the gift to any greater extent than it might have been if this Ordinance had not been enacted.

(2) No such cancellation or revocation of a gift effected after the commencement of this Ordinance shall be of force or avail in law unless it shall be effected by an instrument in writing declaring that such gift is cancelled or revoked and signed and executed by the Donor or by some person lawfully authorised by him in accordance with the provisions of the Prevention of Frauds Ordinance or of the Deeds and Documents (Execution before Public Officers) Ordinance.

5. (1) Notwithstanding the provisions of section 4(1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance:

(*a*) any gift by virtue of which the property .... shall vest in the trustee .... of a temple ....

(*b*) any gift in consideration of .... marriage ....

(*c*) any gift creating or effecting a charitable trust ....

(*d*) any gift, the right to cancel or revoke which shall have been expressly renounced by the Donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words 'I renounce the right to revoke' or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument:

Provided that a declaration so made in any such subsequent instrument shall be of no force or effect unless such instrument bears stamps to the value of five rupees and is executed in accordance with the provisions of the Prevention of Frauds Ordinance or of the Deeds and Documents (Execution before Public Officers) Ordinance.

(2) Nothing in this section shall affect or be deemed to affect the revocability of any gift made before the commencement of this Ordinance."

In order to construe the language of 5(1) which relates to gifts made after the commencement of the Ordinance it is necessary to appreciate what the legal position of gifts was in Kandy before the passing of the Ordinance.

Their Lordships have been referred to the authoritative Treatise on the Laws and Customs of the Sinhalese including the portion still surviving under the name Kandyan Law by the late Dr. Hayley.

From this it appears, and the contrary was not argued, that Sinhalese conveyances of land had the curious characteristic of revocability. This characteristic of revocability is not peculiar to the Sinhalese law: for example in the laws of Babylonia the right to reclaim property alienated was well established.

Although exceptions to the general rule have been recognised in decisions of the courts the opinion of Dr. Hayley was that it would seem that Sinhalese law proper, unaffected by European ideas or judicial decisions knew nothing of renunciation but permitted revocation in every case with the exceptions perhaps of dedications to religious establishments.

The Convention of 1815, by which the Kingdom of Kandy was joined to the rest of Ceylon, did not contemplate any departure from the strict enforcement of the Kandyan customs and usages otherwise than under legislative sanction.

A proclamation of 14th July 1821 recognised the existence of the right to repurchase in some of the Kandyan provinces and declared that all sales of land should be final and conclusive, and neither the seller nor his heirs should have any right to repurchase unless an express stipulation to that effect were contained in the deed.

By abolishing the right of revocation in the case of sale alone the right in other cases was impliedly preserved.

Prior to 1815 a clause of renunciation appears to have been rare or non-existent. An examination of the actual grants contained in the Central Province Gazeteer between 1620 and 1830 shows no example of a clause of renunciation as such. The existence of any rule of law at that time based upon such a clause is therefore highly improbable.

The limitation of the exception to a gift in favour of religious establishments to which Dr. Hayley referred was not universally accepted. According to Armour, one of the institutional writers, other deeds came within the exception and were irrevocable.

It was in dealing with exceptions that uncertainty was created by various decisions of the courts and in 1927 the Kandyan Law Commission was appointed to deal with the matter in view of the doubts which had arisen.

This Commission in 1935 issued the report which their Lordships have looked at in order to see what the position was leading up to the passing of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59 of 1939).

Paragraph 44 which dealt with the revocability of deeds of gift reads:

> "Although the general rule was that all deeds of gift were revocable by the grantor in his lifetime, this rule seems to have had certain exceptions and it is in laying down what the exceptions were that great difficulty, not to say some confusion, has arisen owing to the very indefinite state into which the law drifted as a result of the construction of deeds of gift, the language of which lent itself to different interpretations."

It was in the light of the findings in this paragraph that the recommendations which led to the passing of the Ordinance were made.

It should be noted that this report is looked at not to ascertain the intention of the words used in the subsequent act but because, to quote and adopt the words of Lord Halsbury L. C. in *Eastman Photographic Materials Company* v. *Comptroller-General of Patents, Designs, and Trade-Marks* (1898) A.C. 571, 575, "no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission."

An authoritative review of many of these early authorities is contained in the recent case, decided in 1967, of *W. R. W. M. Tikiri Bandara and another* v. *P. Gunawaradena* Vol. LXX, Part 9, N.L.R. page 203. This judgment of the Supreme Court given on appeal from a judgment of the District Court, Ratnapura concerned a Kandyan deed of gift dated 1915 and accordingly not governed by the Kandyan Law Declaration and Amendment Act of 1939. The gift was in terms declared to be "absolute and irrevocable, which shall not be revoked at any time in any manner whatsoever."

Tambiah J. with whom Sirimane, J. agreed concluded his judgment by the words following:

> ".....the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows: If in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing irrevocability is not dependent on any condition, then such a deed cannot be revoked. This salutary principle, which has been laid down by the Full Bench, had been followed in a long line of decisions and should not be departed from in the interests of ensuring the validity of title based on Kandyan deeds of gift. It is settled principle that a long established rule affecting title to property should not be interfered with by this Court. In the instant case the deed of donation comes within this rule. The deed clearly states that it will not be revoked at any time and for any reason."

If the deed in the instant case fell to be construed in accordance with the pre-1939 law it would no doubt properly be construed, notwithstanding the condition to which the description of the gift as irrevocable is subject, as equivalent to a renunciation of the right to revoke.

Similarly if there were a long line of decisions to the same effect in relation to deeds subject to the Kandyan Law Declaration and Amendment Ordinance of 1939, it would not be desirable to depart therefrom for obvious reasons since many titles to property may be affected.

Since the passing of the Ordinance of 1939, however, it cannot be said that there is a consistent current of authority in relation to such deeds.

In the instant case *Punchi Banda* v. *Nagasena* (*supra*) was followed by the Supreme Court and in another case decided by the Supreme Court, *Kuruppu* v. *Dingiri Menika* (S.C. 161/62 (F)—D.C. Kandy 6442—S.C. Minutes of 5.12.1963) the same interpretation was given. On the other hand in the District Court Kurunegala Case No. 10580 and in District Court Ratnapura Case No. 1317 the respective courts have held that the expression "as a gift absolute and irrevocable" does not constitute a sufficient compliance with the requirements of the section. Both of these cases were taken on appeal to the Supreme Court and the appeals were dismissed without reasons given, the former on 11th October 1956 and the latter on 16th September 1960.

The maxim "*contemporanea expositio est optima et fortissima in lege*" gives no assistance in this state of the authorities and it is necessary to examine the language of the Ordinance of 1939 with care for it is upon the language of the Ordinance that the answer to the question whether the purported revocation of the deed of gift of 26th May 1941 is bad and ineffectual in law depends. The Ordinance permits revocation of any gift when the right to cancel or revoke shall have been expressly renounced by the Donor. These words recognise a pre-existing right to revoke and require an express renunciation either in the instrument effecting the gift or in any subsequent instrument. There is a further requirement that the revocation must be effected in a particular way *videlicet* by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning. The inverted commas draw attention to the words to be used. The exact words need not be used but if they are not used, words of substantially the same meaning are required. This alternative leaves no room for departure from the essential requirement of a declaration containing a transitive verb as opposed to an adjectival description of the gift as irrevocable which is apt to describe what has been done already. Their Lordships cannot wholly agree with the analysis of Sansoni, J. with which L. B. de Silva, J. agreed appearing in *Punchi Banda's* case (*supra*) at page 550. He set out the requirements of the Ordinance as follows:

(1) A renunciation of the right to revoke
(2) which is express
(3) made by the Donor in a declaration
(4) containing the words "I renounce the right to revoke" or words of substantially the same meaning.

He added however these words "The fourth requirement seems to be merely illustrative of the other three."

This would appear to be to place too little significance upon the fourth requirement having regard to the long legal history of Kandyan deeds of gift and the doubts which had arisen as to their revocability prior to the appointment of the Kandyan Law Commission.

An indication that the distinction between an express clause of renunciation and an unambiguous adjective such as "irrevocable" was recognised as a real one in the courts is to be found in an authority much relied upon by the respondent namely *Ukku Banda* v. *Paulis Singho et al* 27 N.L.R. 449. In this case, decided some years before the Kandyan Law Commission reported, the Supreme Court held that a Kandyan deed of gift was irrevocable since it contained the words "absolute and irrevocable" attaching to the gift and a declaration that the Donee should have the property "absolutely and forever".

It was argued successfully by counsel in support of the irrevocability of the deed that there was no need for a special clause of renunciation.

Now, however, the words of the Ordinance do require that which may fairly be described as a special clause of renunciation. The renunciation is to be expressed and not to be implied and a description of a gift as irrevocable does no more than imply the renouncing of an existing right to renounce. The requirement of an express renunciation stands in the way of the acceptance of an interpretation of the words used in this case, to all intents and purposes the same words as those used in the *Ukku Banda* case (*supra*), so as to produce the result that the Donor has already effectively renounced his right to revoke.

Prior to the passing of the Ordinance, gifts being treated as contracts, the courts looked at the intention of the parties as expressed in deeds by which the gifts were effected. Judicial decisions appear to have been influenced in some cases by the English doctrine of consideration.

Now the position has changed.

In construing the Ordinance it is necessary to consider whether its requirements have been complied with irrespective of the intention which can be found on a reading of the original document. The intention may have been to give up the right to revoke but this is not the same as express revocation of an existing right. The requirements of the Ordinance have not, in the opinion of their Lordships, been complied with.

An alternative submission, not made in the courts below, was raised in the appellant's case and can be stated shortly. It was that the renunciation of the right of revocation was made by the Donor and accepted by the original Donee alone. The first respondent was accordingly not intended to be benefited by the revoked gift and the gift to her as fidei commissary stands.

This argument depends on a severance of the gift so as to separate the gift to the Donee as fiduciary from that to the fidei commissary.

This separation of gifts is not self-evident on the construction of the deed of 1941.

Their Lordships express no concluded opinion on this alternative submission since the appellant did not pursue the point in argument having regard to the judgment of the Board in *United Marketing Co.* v. *Kara* (1963) 1 W.L.R. 523. Their Lordships there expressed their adherence to the guidance given by Lord Birkenhead L.C. in *North Staffordshire Railway Co.* v. *Edge* (1920) A.C. 254, 263.

Even where a bare question of law only is involved their Lordships are seldom ready to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below. In this case as in *Kara's* case (*supra*) the alternative submission cannot be said to be so clearly right that the contrary view is unarguable.

Upon the ground of appeal to which their Lordships have previously referred namely failure to comply with the Ordinance of 1939 they will humbly advise Her Majesty that the appeal be allowed, the Decrees of the Supreme Court of 3rd December 1965 and of the District Court of 9th September 1963 set aside and the respondents' action dismissed. The respondent must pay the appellant's costs of this appeal and of the proceedings in the courts below.

Dissenting Judgment by **Lord Donovan:**

This appeal raises a short point of construction first of section 5(1)(*d*) of the Kandyan Law Declaration and Amendment Ordinance of 1939, and secondly of the deed of gift of 26th May 1941.

Section 5(1)(*d*) was enacted following a report of the Kandyan Law Commission in 1935 which referred to uncertainty in the existing law as to how a donor's right to revoke a gift could be effectively renounced. Omitting immaterial words it reads:

> "....it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance.
>
> (*a*) .....
>
> (*b*) .....
>
> (*c*) .....
>
> (*d*) any gift the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift, or in any subsequent instrument, by a declaration containing the words 'I renounce the right to revoke' or words of substantially the same meaning...."

The alternative thus indicated clearly connotes some words which are not a repetition of the formula but the meaning of which is in no material sense different. Nor need they begin with the words "I declare" in order to be a "Declaration" — a term which includes a statement or an assertion.

The Deed itself is a gift of certain lands; and the Donor avers that he "doth hereby grant, convey, assign, transfer, set over, and assure unto the said Donee as a gift irrevocable" the said lands.

The question is whether the words "as a gift irrevocable" satisfy the condition for irrevocability prescribed by section 5(1)(*d*) of the Ordinance. The Supreme Court of Ceylon, affirming the decision of the District Court of Kandy, has held that they do.

Various arguments were adduced against this view. The word "irrevocable" it was said was simply a statement of intention and no more. In fact it is a statement of the kind of gift the Donor is presently making, and he is proclaiming that it is of the kind that is to be irrevocable. Next it was argued that the formula prescribed by section 5(1)(*d*) contains a transitive verb ("renounce") and an object of that verb ("the right to revoke") and that other words cannot have susbtantially the same meaning unless they also possess these features. I find this argument of no weight when the Ordinance itself sanctions the use of other words provided they are of substantially the same meaning. It was further contended that if the Ordinance had intended to make effective a simple statement in the deed of gift that it was irrevocable, it would surely have done so. The implication to be drawn is that the legislature intended some more different and more formal declaration. This argument is double-edged. One of the reasons for the Ordinance was the previously existing confusion as to what words would amount to irrevocability and which would not. So that if a donor did not use some expression containing

the actual word "irrevocable", arguments would still be open that the words he *had* used meant the same thing: and a provision such as is suggested might have raised as many problems as it solved. I can well understand the legislature in these circumstances taking the alternative course of prescribing a set formula, and adduced that words of substantially the same meaning would do. Furthermore, since there were decisions prior to the Ordinance in which a simple declaration of irrevocability was held by the Supreme Court to be sufficient, the expectation is that had the legislature wished to provide otherwise it would have said so.

The Donor here has expressly indicated that the lands were to be "a gift irrevocable". The word "irrevocable" means "not capable of revocation"; and the capacity to revoke obviously depends upon the existence of a right to do so. One may therefore ask, "Who could revoke the gift in the ordinary way" or "In whom would such right ordinarily exist"? The answer of course is the Donor himself. When therefore he uses a word which indicates that the gift is not to be capable of revocation, he is saying that he shall not enjoy the right to revoke which he would otherwise possess. In other words he is renouncing that right. He is not using words which "substantially" mean the same thing as the prescribed formula, but exactly the same thing. True, the Ordinance requires that whatever words are used the right shall be "expressly" renounced. The words "as a gift irrevocable" *are* express.

It follows that in my opinion the judgment appealed from is correct. But even if I had some doubt upon the matter I should be averse from disturbing it, having regard to the legal history behind the controversy.

In *Kirihenaya* v. *Jotiya* (24 Ceylon New Law Reports p. 149) a Kandyan deed of gift dated in 1908 contained a declaration by the Donor that "I shall not revoke this deed of gift at any time...." In 1920, however, she purported to do so. It was held by the Supreme Court of Ceylon in 1922 that by the words quoted she had renounced her right to revoke.

In *Ukku Banda* v. *Paulis Singho et al.* (27 Ceylon Law Reports p. 449) a Kandyan deed of gift dated 1905 contained a declaration by the Donor that he granted shares of certain premises unto the Donee "as a gift absolute and irrevocable". In 1923 the Donor purported to revoke the deed. It was again held by the Supreme Court of Ceylon in 1926 that the words quoted were an express renunciation of the power to revoke.

Later in 1926 the two foregoing decisions were challenged in the Supreme Court in the case of *Bogahalande* v. *Kumarihamy* (8 Ceylon Law Recorder 91) but were affirmed by the Supreme Court.

In 1939 the Ordinance here in question was enacted without any express disavowal of these decisions.

Thereafter in 1963 in *Punchi Banda* v. *Nagasena* (64 Ceylon New Law Reports p. 549) it was held (again by the Supreme Court) that by the use of the single word "irrevocable" in a Kandyan deed of gift the Donor expressly renounced his right to revoke it. Continuity was thus given after the Ordinance to the above quoted decisions to a similar effect which were pronounced before the Ordinanee was enacted.

In *Tikiri Bandara* v. *Gunawardena* (1967) 70 New Law Reports 203 Tambiah J. concluded his judgment in these words:

> "The customary laws of the Kandyans, on which Hayley was relying, have been developed and modified by case law which adapted the archaic system to suit modern conditions. They are of little significance on this point although on obscure points on which case law could throw little light, they could become an important source of Kandyan law.
>
> As stated earlier, the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows: If in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing irrevocability is not dependent on any condition, then such a deed cannot be revoked. This salutary principle, which has been laid down by the Full Bench, had been followed in a long line of decisions and should not be departed from in the interests of ensuring the validity of title based on Kandyan deeds of gift. It is settled principle that a long-established rule affecting title to property should not be interfered with by this court. In the instant case the deed of donation comes within this rule. The deed clearly states that it will not be revoked at any time and for any reason. For these reasons the judgment of the learned District Judge is affirmed and the appeal is dismissed with costs."

The reasonable expectation is that on the basis of the decisions above cited, some given before the Ordinance and some after it, there have been transfers of land which have been declared irrevocable in the manner held by the Supreme Court to be a renunciation of the right to revoke. This expectation is not diminished by any paucity of decisions since the Ordinance: on the contrary it is enhanced. In my view therefore the decision of the Supreme Court in the present case ought not in any event to be disturbed unless it were plainly wrong. I think however that it is plainly right.

I differ from your Lordships with regret: but would humbly advise Her Majesty that the appeal should be dismissed.

Appeal allowed.

Present: **G. P. A. Silva, A.C.J. and Siva Supramaniam, J.**

DISSANAYAKE MUDIYANSELAGE PUNCHI MAHATMAYO

v.

D. WIJEDORU, ASST. COMMISSIONER OF AGRARIAN SERVICES, KANDY & ANOTHER

S.C. No. 257/1968

An application for a Mandate in the nature of a Writ of Certiorari

Argued on: 9th October, 1968
Decided on: 29th January, 1969.

Paddy Lands Act— Complaint by tenant cultivator of eviction by petitioner in 1963 *— Inquiry by Commissioner of Agrarian Services — Finding that person evicted was joint cultivator with Petitioner's husband—Order restoring him to possession — Unsuccessful appeal by petitioner to Board of Review.*

Certiorari, application by way of, for quashing said proceedings and orders on ground that at time of complaint, Act recognised no joint cultivators—Amending Act of 1964*—Applicability— Purpose of Amendment in Section* (1A) *— Jurisdiction — Retrospective operation.*

On an application made in 1963 by the 2nd respondent (a tenant cultivator) to the 1st respondent, (the Commissioner of Agrarian Services) for restoration to possession of a field from which he alleged he was evicted by the petitioner, the 1st respondent after a prolonged inquiry, ending in August, 1965 held that the 2nd respondent was wrongly evicted as he was a joint tenant cultivator with the husband of the petitioner and ordered restoration to possession of the said field.

After an unsuccessful appeal to the Board of Review constituted under the Paddy Lands Act, the petitioner made this application to the Supreme Court praying for the quashing of the proceedings held and orders made by the 1st responden restoring the 2nd respondent to the possession of the field.

It was submitted on behalf of the petitioner (*a*) that at the time of the said application by the 2nd respondent, no provision existed in the Paddy Lands Act recognising the rights of a joint tenant cultivator, and therefore, the 2nd respondent would not come within the definition of a tenant cultivator in section 3(1) of the Act.

(*b*) that the Amending Act, No. 11 of 1964 was intended to fill this gap and bring in joint cultivators within its scope,

(*c*) that as the Amending Act was not retrospective in operation, the 1st respondent had no jurisdiction to entertain the application or to make orders in terms of the Amendment.

Held: (1) That submission (*a*) above could not be accepted in view (i) of the provisions of Section 2(ii) of the Interpretation Ordinance that words in the singular number shall include the plural and (ii) the necessity for joint participation in the various operations of ploughing, sowing and reaping inherent in the nature of paddy cultivation.

(2) That the purpose in introducing the new sub-section (1A) immediately after section 3(1) by the Amending Act of 1964 seems to be to define clearly the position of cultivators in rotation.

* For Sinhala translation, see Sinhala section, Vol. 17, Part 7 p. 27

(3) That as the original Act, which became law on 1/2/1958 was itself retrospective in its nature in that relief was given by it to persons whose grievances arose nearly two years before the passing of the Act, even if the Amending Act created a new class of tenants who were entitled to the reliefs set out in the original Act, in the absence of anything to the contrary as to the operative date from which such reliefs could be given, it is reasonable to assume that the date already specified in the original Act, which now embodies the amending Act, is the operative date.

(4) That therefore, the 1st respondent was acting within his jurisdiction when he entertained the application and made the orders under review.

Per **G. P. A. Silva, A.C.J.** "Although it is not necessary to deal with this matter in order to decide on the initial contention of the petitioner, in view of the submission made by counsel, the question arises as to what the purpose was in introducing the new sub section 1A immediately after section 3(1) of the original Act. To my mind, it may well have been intended to define clearly the position of cultivators in rotation."

Mark Fernando, for the petitioner.

N. Sinnatamby, Crown Counsel, for the 1st respondent.

M. Kanagasunderam, for the 2nd respondent.

G. P. A. Silva, A.C.J.

This is an application by the petitioner, who is the owner of a paddy field, for a Writ of Certiorari to quash the proceedings held and the orders made by the 1st respondent, an Assistant Commissioner of Agrarian Services on the application made by the 2nd respondent to be restored to possession of this paddy field on the ground that he had been wrongly evicted by the petitioner. On the 2nd September, 1963 the 2nd respondent, alleging that he was and had been a tenant cultivator of the said paddy field under the petitioner, made an application to the 1st respondent under the provisions of the Paddy Lands Act to have himself restored to the possession of the said paddy field on the ground that he had been wrongly evicted. The 1st respondent held certain inquiries on this application commencing on 29th July, 1964 and ending on 29th November, 1965 and, at the conclusion thereof, made order declaring that the 2nd respondent was a joint tenant cultivator with the husband of the petitioner and restoring him to possession of the said paddy field. The petitioner thereupon appealed to the Board of Review constituted under the Paddy Lands Act against the order of the 1st respondent but his appeal was dismissed by the said Board.

The main contention for the petitioner is that, at the time of the application made by the 2nd respondent for relief under the provisions of the Paddy Lands Act, no provision existed in this Act to recognise the rights of a joint tenant cultivator and that such a right was recognised only by the amendment to this Act made on the 24th August, 1964 and that the 1st respondent had therefore no jurisdiction to entertain the said application or to make an order in terms of a subsequent amendment to the Act which was not retrospective in its operation. The argument is therefore twofold, namely, that whatever rights the 2nd respondent is entitled to, have to be resolved in terms of the provisions of the original Act and that the 1st respondent was acting without jurisdiction when he exercised powers conferred on him by the Amending Act which came into operation only on 24th August, 1964.

In regard to the first limb of his argument the submission of counsel for the petitioner is that section 3 of the original Act No. 1 of 1958 did not recognise joint cultivators but only a single cultivator and that a person in the position of the 2nd respondent would not come within the definition of a tenant cultivator under that section. The Amending Act No. 11 of 1964 was in his submission intended to fill this gap and bring in joint cultivators within its scope. Section 3(1) provides:—

> Where any person is the cultivator of any extent of paddy land let to him under any oral or written agreement made before or after the coming into operation of this Act in the Administrative District in which that extent wholly or mainly lies, then, if he is a citizen of Ceylon, he shall, subject to the provisions of this Act, be the tenant cultivator of that extent.

In view of the provisions of section 2(ii) of the Interpretation Ordinance that words in the singular number shall include the plural, it is difficult to accept the submission that section 3 of the Paddy Lands Act contemplated only a single cultivator. Secondly, inherent in the nature of paddy cultivation and more pronounced than in other types of cultivation is the necessity for joint participation in the various operations of ploughing, sowing and reaping. It is idle to think that the framers of the original Act did not contemplate the numerous instances where more than one person, whether they were members of a family or otherwise, cultivated paddy fields jointly as tenants of absentee landlords. If the contention of the counsel for the petitioner is sound it will also necessarily lead to the conclusion that the original Act or even the Amending Act did not contemplate more than one landlord, of any paddy field let to a tenant cultivator; for, the word landlord is generally used in the singular in both the Acts except in the preamble to the original Act. Such an interpretation will lead to the absurd result that jointly owned paddy fields let out to tenant cultivators in Ceylon, which are more the rule than the exception, would fall outside the purview of the Paddy Lands Act. For all these reasons I do not find it possible to agree with the contention of the petitioner in regard to this point.

Although it is not necessary to deal with this matter in order to decide on the initial contention of the petitioner, in veiw of the submission made by counsel, the question arises as to what the purpose was in introducing the new sub-section 1A immediately after section 3(1) of the original Act. To my mind it may well have been intended to define clearly the position of cultivators in rotation. For, where there is an agreement between one or more landlords and one or more cultivators as contemplated by section 3(1) of the original Act, but the cultivation as between the tenant is carried on in rotation, one cultivator or a set of cultivators who work the paddy field in one season would not be cultivators during the next season. Had it not been for the new section 3 (1A) introduced by the Amendment the cultivator or cultivators, as the case may be, who did not do any cultivation during one of the seasons in rotation would commit a breach of the agreement with the landlord and forfeit his or their rights as tenant cultivator under the agreement. The new sub-section seems to have been intended therefore to afford protection to such a tenant as would, in the words of the sub-section, be a tenant cultivator of that extent (let to him under any oral or written agreement) for the season or seasons in which he is a cultivator of that extent. I am fortified in this view by the absence in the original Act, in the definition of a "tenant cultivator" of the words "season or seasons" which find a prominent place in the same definition in the Amending Act. The question of seasons would in the context in which it is used, only arise in the case of cultivation in rotation and would not have a place in the normal case where the tenant cultivator or cultivators would be cultivating the extent let to him or them during every season. The word 'jointly' in this section does not militate against this construction because the agreement with the landlord in such a case may be entered into jointly by several tenants undertaking to cultivate the land jointly, but at the same time one of the tenants (where there are only two joint tenants) or one group of tenants (where there are several) cultivating the land in such alternate seasons as may be agreed upon.

In the application before me no question of any cultivation in rotation arises. According to the affidavit filed by the 2nd respondent he has been tenant cultivator of the paddy field in question under the petitioner since 1947. The finding of the 1st respondent after inquiring into the complaints of eviction, which finding is hardly being canvassed, is that the 2nd respondent was at least a joint tenant cultivator with Cuda Banda, the husband of the petitioner, at the time of the eviction complained of. In view of the conclusion reached by me earlier, therefore, the 1st respondent acted with jurisdiction when he held the inquiry and gave his decision which was upheld by the Board of Review and in respect of which the present application for a Writ is being made.

Crown Counsel, who appears for the 1st respondent, while submitting that the original Act did contemplate joint cultivators, also contends that even if joint cultivators were brought with in the purview of the principal Act by the introduction of sub section 1A, on 24th August, 1964, the moment the Amending Act came into operation tenants, whether single or joint, were protected as from 12th April, 1956 from which date evictions of tenant cultivators were to be taken notice of in terms of section 4(6) of the original Act even though the Act became law only on 1st February, 1958. I think there is substance in this contention. The original Act itself was retrospective in its nature in that relief was given by it to persons whose grievances arose nearly two years before the passing of the Act

Even if the Amending Act created a new class of tenants who were entitled to the reliefs set out in the original Act, in the absence of any provision to the contrary as to the operative date from which such reliefs could be given, it is reasonable to assume that the date already specified in the original Act which now embodies the Amending Act is the operative date.

In supporting the contention of counsel for the 1st respondent counsel for the 2nd respondent submits that there is no indication either direct or indirect anywhere in the original Act that only sole tenant cultivators were to be protected by the Act. He further submits that if the question of the eviction of joint tenants had arisen prior to the passing of the Amendment of 1964, no court could have reasonably held that the original Act did not protect joint tenant cultivators. This is a submission with which I agree. In the circumstances both the contentions of counsel for the petitioner fail. The application is accordingly dismissed with costs.

Siva Supramaniam, J.

I agree.

Application dismissed.

Present: **Wijayatilake, J.**

M. H. JOHN SINGHO *v.* MARIAN BEEBIE

S.C. No. 26/1968 — *C.R. Teldeniya No.* 2300

Argued on: 9th November, 1968
Decided on: 22nd January, 1969

Landlord and Tenant — Sub-tenancy — Action for ejectment on ground of sub-letting — No notice terminating tenancy required — Proof of exclusive possession and occupation of separate portion necessary — Mere permissive user insufficient — Lease of business, not sub-letting of premises — Rent Restriction Act (Cap. 274) section 9.

The plaintiff sued the two defendants for ejectment from certain premises and also prayed for arrears of rent and damages from the 1st defendant. The plaintiff relied on an alleged sub-letting of the premises by the 1st defendant to the 2nd defendant.

Held: (1) That where a tenant sub-lets the leased premises in contravention of section 9 of the Rent Restriction Act No. 29 of 1948, the landlord is entitled to institute proceedings in ejectment without terminating the tenancy by notice.

(2) That in a case of sub-tenancy the essential test is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has by agreement placed the alleged sub-tenant in exclusive possession. Mere permissive user does not create the relationship of tenant and sub-tenant. There should be proof that the sub-tenant had the exclusive possession and occupation of a separate portion of the premises.

(3) That the lease of a business does not amount to sub-letting of the premises in which the business was carried on.

Followed: *Wimalasuriya* v. *Ponniah*, (1951) 52 N.L.R. 191.
Lilian Jayawardena v. *Kandiah*, (1968) LXXV C.L.W. 12.
Charles Appuhamy v. *Abeysekere*, (1954) 56 N.L.R. 243.

Cases referred to: *Suppiah Pillai* v. *Muthukaruppa Pillai*, (1953) 54 N.L.R. 572.
Fernando v. *Athimoolam*, (1959) LVII C.L.W. 16.
Devairakkam v. *Samarasinghe*, (1962) 65 N.L.R. 18.

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, and *M. S. Aziz*, for the 1st defendant-appellant.

Nihal Jayawickrema, for the plaintiff-respondent.

Wijayatilake, J.

The plaintiff sued the 1st defendant-appellant and one D. H. Ratnayake the 2nd defendant for ejectment from the premises No. 62/2 Urugala Road, Teldeniya. The plaintiff also prayed for arrears of rent and damages from the 1st defendant. The plaintiff avers that she let the premises to the 1st defendant on a monthly rental of Rs. 45/- and that the 1st defendant had on or about 17.7.65 sub-let the premises to the 2nd defendant.

The sole question which has arisen for decision is whether the 1st defendant had sub-let the premises to the 2nd defendant as alleged. Admittedly, no notice has been given to the defendant or either of them on this basis. It may be noted that where a tenant sub-lets the leased premises in contravention of Section 9 of the Rent Restriction Act No. 29 of 1948, the landlord is entitled to institute proceedings in ejectment without terminating the tenancy by notice — vide *Wimalasuriya* v. *Ponniah* 52 N.L.R. 191.

The learned Commissioner of Requests had held that there is sufficient evidence to show that the 1st defendant has sub-let the premises to the 2nd defendant. Mr. Coomaraswamy, learned Counsel for the appellant submits that the Commissioner has clearly misdirected himself in coming to this conclusion, the evidence being quite inadequate to support such a finding. It is significant that the plaint in this action is dated 23.7.65. and three weeks prior to this on 1.7.65, the plaintiff's Proctor had sent the notice 1D1 to the 1st defendant to vacate the premises on the ground that the plaintiff's son required the premises for his use and occupation and/or for the business of her son. There is no mention of any sub-tenancy in this notice: Having sent this notice on 1.7.65. the plaintiff files this action on 23.7.65. on the basis of a sub-tenancy. The plaintiff in her evidence has stated that the 1st defendant ran a tea kiosk in these premises till August 1965 and that she saw the 2nd defendant in the premises in August 1965 damaging the cement floor and putting up a counter, and he was occupying a portion of the premises, having taken it from the 1st defendant. She had thereafter instructed her Proctor to file action. The plaintiff concedes that she did not make any attempt to check whether the 2nd defendant had obtained a licence from the Town Council in respect of the business she states he had taken over from the 1st defendant. The plaintiff's witness Rambukwella, a former village Headman of the area was quite indefinite as to who was in these premises during the relevant period. The next witness Heen Banda stated that Ratnayake (the 2nd defendant) was in occupation of these premises and he was running a tea kiosk for a period of 3 or 4 months from May 1965. He had supplied plantains to the 2nd defendant during this period. In re-examination this witness admitted that he did not know the relationship between the 1st and 2nd defendant and that the 2nd defendant was there only for one or two months. The plaintiff's son Saheed had seen the 2nd defendant in occupation of the premises from 12th July. He had seen him removing the boiler used for boiling water. When questioned he had come to understand that the 2nd defendant had taken over the premises on rent from the 1st defendant; and that he was not causing any damages to the premises. He had thereupon obtained the writing P1 on 18.7.65. by which he undertakes to save the building from any damage. Thereafter on 23rd July, he had seen the 2nd defendant putting up a tank and when questioned he had given him the writing P2 undertaking to remove the tank which has been installed when leaving the premises. He says that the 2nd defendant was in occupation of these premises for about three months, from 12.7.65. and this action was filed in November. This is obviously wrong as the plaint had been filed in July. As it appears to me the evidence led on behalf of the plaintiff is most unsatisfactory. P1 and P2 have not been proved but the learned Commissioner has laid great stress on the documents.

The 1st defendant states that the 2nd defendant was only a cashier under him in his boutique on these premises for a period of 16 days in July 1965 and he had assaulted an employee in this boutique, taken Rs. 50/- from him and gone away promising to return but he had failed to turn up. As for the installation of a boiler and alterations to the building he (the 1st defendant) had got them done and at the stage of these alterations the 2nd defendant was not there and he had no authority to give the writings P1 and P2. The question does arise whether they were given by the 2nd defendant. Even if they were it may well be that he had given them after his quarrel with an employee of the 1st defendant. The learned Commissioner has in his assessment of the evidence failed to appreciate the trend of events. On a scrutiny of the evidence it would appear that the plaintiff having given notice to quit on 1.7.65 on the basis that his son required the premises she had on second thoughts sought to take a shorter cut to evict the 1st defendant by pleading a sub-tenancy.

As submitted by Counsel for the appellant the essential test is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has, by agreement, placed the alleged sub-tenant in exclusive possession. (Mere permissive user does not create the relationship of tenant and sub-tenant.

Vide *Suppiah Pillai* v. *Muttukaruppa Pillai* 54 N.L.R. 572

Fernando v. *Athimoolam* 57 C.L.W. 16.

Mr. Coomaraswamy also relies on the principle that the lease of a *business* does not amount to sub-letting of the premises on which the business was carried on, vide *Devairakkam* v. *Samarasinghe* 56 N.L.R. 18 and *Charles Appuhamy* v. *Abeysekera* 56 N.L.R. 243. As I have already observed the documents P1 and P2 are highly suspicious and even if they are genuine it is more likely that the plaintiff has sought the assistance of a disgruntled employee to bolster up her case.

Mr. Jayawickreme, learned Counsel for the respondent faced as he is with the incongruities in this case has made a valiant effort to support the judgment but it was quite obvious that the more he delved into the facts they showed the falsity of the averment made by the plaintiff in regard to a sub-tenancy.

There was no proof either that the 2nd defendant had the exclusive possession and occupation of a separate portion of the premises. See *Lilian Jayawardene* v. *Kandiah* 75 C.L.W. 12.

I would accordingly set aside the order of the learned Commissioner of Requests and dismiss the plaintiff's action with costs in favour of the 1st defendant in both Courts.

Appeal allowed.

Present: **H. N. G. Fernando, C.J. and Sirimane, J.**

SAWDOON UMMA d/o TAMBY RAJA *v.* FERNANDO

S.C. 328/65(*F*) — *D.C. Kandy* 3487/*MB*

Argued on: 24th September, 1968
Decided on: 11th October, 1968

Debt Conciliation Ordinance (*Cap.* 81) — *Settlement of mortgage debt recorded in terms of Section* 30 — *Payment by instalments — In case of single default creditor at liberty to seek legal remedy — Default after one payment — Application by creditor under Section* 43 *for hypothecary decree — Decree entered for sale of property mortgaged — Has District Court jurisdiction to enter such decree — Mortgage Act —* (*Cap* 89) *Its applicability.*

The defendent executed a Mortgage Bond in 1954 in favour of the plaintiff to secure a debt of Rs. 20,000/-. They were parties to a settlement under Section 30 of the Debt Conciliation Ordinance. According to the settlement *inter alia* the debtors had to pay jointly and severally a sum of Rs. 100/- on or before 4.5.54 and thereafter they should pay by quarterly instalments of Rs. 500/- each. The 1st of such instalments to be paid on or before 4.8.59, In the event of a single default the creditor is at liberty to seek legal remedy.

No payments were made by the debtors (defendants) and on an application by the creditor, (plaintiff) to the District Court for a decree to be entered under Section 43 of the Debt Conciliation Ordinance a decree *nisi* was entered on 14.9.61, in terms of the settlement and asking for a hypothecary decree for sale of the property mortgaged by said Bond. Accordingly decree *nisi* including a hypothecary decree for the sale of the land mortgaged was entered and later made absolute.

Held: (1) That the effect of Section 40 of the Debt Conciliation Ordinance in the facts of the present case is that not only the obligation of the debtors to pay the sum of Rs. 20,000/- with interest, but also the obligation arising from the hypothecation of the land became merged in the settlement.

(2) That the words in the proviso to Section 40(1) clearly establish that a settlement under the Debt Conciliation Ordinance, unless it expressly provides otherwise, does not extinguish the right of a creditor to obtain a hypothecary decree for the sale of the property mortgaged as security for the debt.

(3) That the absence of a provision in the settlement in this case authorising a court to enter a hypothecary decree itself is a sufficient ground to hold that Section 43 of the Ordinance did not vest the District Court with jurisdiction to enter a hypothecary decree.

Held further: (4) That a settlement under the Ordinance cannot confer jurisdiction on a Court, even by express provision to enter a hypothecary decree otherwise than in an action maintained in conformity with the special procedure laid down in Part II of the Mortgage Act (Cap. 89).

(5) That therefore, the decree appealed from should be amended by deleting all provisions relating to the mortgaged property and its sale thereunder.

Per **H. N. G. Fernando, C.J.** "I should add that since the original debt becomes merged in a settlement under the Debt Conciliation Ordinance, such a settlement should clearly set out the amount of the debt to be payable according to its terms."

At the request of Counsel His Lordship, the Chief Justice laid down in the concluding paragraphs of his judgment the procedure to be followed when debtors fail to carry out the terms of such settlement.

Cases referred to: *Shafeek* v. *Solomon de Silva & Others* (1967) 69 N.L.R. p. 481
Samarasinghe v. *Balasuriya* 69 N.L.R. 205

C. Ranganathan, Q.C., with *S. A. Marikar*, for the respondents-appellants

N. E. Weerasooria, Q.C., with *M. S. M. Nazeem*, for the petitioners-respondents.

H. N. G. Fernando, C.J.

The defendants in this case had executed a mortgage bond in 1954 in favour of a creditor as security for the payment of a debt of Rs. 20,000 and interest. On an application made to the Debt Conciliation Board, a settlement relating to the debt was recorded in terms of Section 30 of the Debt Conciliation Ordinance (Cap. 81). The settlement of 3rd February 1959 provided as follows:—

(1) "that interest should be calculated at the rate of 7% per annum and that a sum equivalent to 34 months interest was due up to the end of January this year.

(2) that the debtors should pay jointly and severally a sum of Rs. 1,000/- on or before 4th May, 1959 and thereafter they should pay by quarterly instalments of Rs. 500/- each. The first of such instalments will be paid on or before 4th August, 1959.

(3) that the full sum should be paid to the creditor within a period of 5 years — that is, on or before 4th February, 1964.

(4) that in the event of a single default the creditor is at liberty to seek legal remedy.

(5) that delivery of the bond discharged with the deeds and the payment of the balance full sum are concurrent conditions — that is, the creditor must deliver the bond discharged with the deeds when the debtor tender payments of the balance full sum."

It would appear that no payments were made by the defendants in accordance with paragraph (2) of the settlement. In October 1961, the creditor made an application to the District Court asking for a decree to be entered in terms of the settlement and asking also that a hypothecary decree be entered for the sale of the property mortgaged to the creditor by the bond of 1954. A decree *nisi* was accordingly entered on 14th November, 1961. The original creditor died thereafter, and the two respondents to this appeal were substituted in the place of the original creditor.

At the subsequent inquiry in the District Court, the only objection taken against the creditor's application was that the original creditor had not signed the proxy filed with the application. This objection was rejected by the District Judge and he ordered the Decree *Nisi* to be made absolute. The point of importance is that the Decree entered by the District Court is a hypothecary decree for the sale of the land mortgaged by the bond of 1954.

Counsel appearing for the debtors has argued in this appeal that a hypothecary decree can be entered by a Court only in a hypothecary action instituted and maintained in accordance with the procedure laid down in the Mortgage Act (Cap. 89), and that the District Judge had no jurisdiction to enter such a decree upon the application made by the creditor in this case. That Act, particularly in Part II, makes special provision for the procedure in a hypothecary action, which is defined in the Act as

> "an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the moneys due upon the mortgage and to enforce such payment by a judicial sale of the mortgaged property."

I need state no reasons for the opinion that a Court cannot enter a decree which includes an order in terms specified in that definition except in a regular action maintained in compliance with Part II of the Mortgage Act.

The Advisers of the creditor in this case, in seeking an appropriate remedy for the failure of the debtors to comply with the settlement of 1959, have obviously been influenced by certain provisions of the Debt Conciliation Ordinance which it is necessary to reproduce here:—

s.40(1) A settlement under section 30 or section 31 shall when the original and the duplicate thereof have been countersigned by the Chairman and subject to any order the Board may make in respect of that settlement under section 54, be final between the parties, and the contract in respect of any debt dealt with in the settlement shall become merged in the settlement:

Provided, however, that where any debt secured by any charge, lien or mortgage over any property, movable or immovable, is dealt with in any settlement, the rights of the creditor under such charge, lien or mortgage shall, unless otherwise expressly provided in the settlement, be deemed to subsist under the settlement to the extent of the amount payable there-under in respect of such debt, until such amount has been paid or the property over which the charge, lien or mortgage was created has been sold for the satisfaction of such debt.

s.43(1) Where the debtor fails to comply with the terms of any settlement under this Ordinance, any creditor may, except in a case where a deed or instrument has been executed in accordance with the provisions of section 34 for the purpose of giving effect to those terms of that settlement, apply to a court of competent jurisdiction, at any time after the expiry of three months from the date on which such settlement was countersigned by the Chairman of the Board, that a certified copy of such settlement be filed in court and that a decree be entered in his favour in terms of such settlement. The application shall be by petition in the way of summary procedure, and the parties to the settlement, other than the petitioner shall be named respondents, and the petitioner shall aver in the petition that the debtor has failed to comply with the terms of the settlement.

(2) If the court is satisfied, after such inquiry as it may been necessary, that the petitioner is *prima facie* entitled to the decree in his favour, the court shall enter a decree *nisi* of the settlement. The court shall also appoint a date, notice of which shall be served in the prescribed manner on the debtor, on or before which the debtor may show cause as hereinafter provided against the decree *nisi* being made absolute.

The effect of section 40 in the facts of the present case is that the obligation of the debtors to re-pay the sum of Rs. 20,000/- with interest became merged in the settlement of February, 1959. But the "contract in respect of the debt" included the further obligation that the re-payment was secured by the hypothecation of land, and that hypothecation also became merged in the settlement. Neither party to this appeal has contended for the proposition that the settlement had the effect of releasing the debtors from their contractual obligation that the land mortgaged by the bond of 1954 is liable to be declared bound and executable for the payment of the debt due from the debtors in ths case. This proposition is negatived in the Proviso to section 40(1) of Cap. 81. In terms of that Proviso, the rights of the creditor under the mortgage bond of 1954 are deemed to subsist under the settlement, *until the amount of the debt dealt with in the settlement has been paid or the property over which the mortgage was created has been sold for the satisfaction of such debt.*

The concluding words of the Proviso, which I have italicised above, clearly establish that a settlement under the Debt Conciliation Ordinance, unless it expressly provides otherwise, does not extinguish the right of a creditor to obtain a hypothecary decree for the sale of property mortgaged to him as security for a debt. But section 43 of the Debt Conciliation Ordinance appears to have led to some uncretainty as to the mode in which that right is to be enforced.

If a debtor fails to comply with the terms of a settlement, section 43 entitles him to obtain a decree *nisi* in terms of the settlement, and section 44 empowers the Court to make such a decree absolute. But the provisions of the settlement in this case do not in fact authorise a Court to enter a hypothecary decree; the settlement only provides for the rate of interest payable by the debtors and for capital payments to be made by them. On this ground alone, namely that the settlement contains no provision for the entry of a hypothecary decree, I must hold that section 43 of the Debt Conciliation Ordinance did not enable the District Court in this case to enter a hypothecary decree.

But I hold further that a settlement under the Debt Conciliation Ordinance cannot confer jurisdiction on a Court, even by express provision, to enter a hypothecary decree otherwise than in an action maintained in conformity with the special procedure laid down in Part II of the Mortgage Act. I have elsewhere referred to the objects and purposes of that Act (*Shafeek* v. *Solomon de Silva and Others* (1967) 69 N.L.R. p. 481); these will be defeated if parties to a mortgage of land, or the members of the Debt Conciliation Board, can in a settlement confer on a Court a jurisdiction to enter a hypothecary decree in defiance of the provisions of the special law contained in the

Mortgage Act, and previously contained in the Mortgage Ordinance of 1927.

The Proviso to section 40(1) of Chapter 81 provides that the right of a creditor under a mortgage subsists under the settlement, not by the force of the settlement, but by force of the law as enacted in that Proviso. By virtue of the Proviso, that right subsists until the amount (of the debt due under the settlement) is paid "or the property over which the ..... mortgage is created has been sold in satisfaction of the debt". There is thus a reference in the Proviso to the forced sale of mortgaged property, and such a sale can lawfully take place only in a hypothecary action, the procedure in which is governed by Part II of the Mortgage Act.

In the case of *Samarasinghe* v. *Balasuriya* (69 N.L.R. 205), this Court held that, where a debt due on a mortgage bond has become the subject of a settlement under the Debt Conciliation Ordinance, the obligation to repay the debt thereafter arises on the settlement, and not on the earlier mortgage bond. The judgment therefore rightly held that the action in that case must be dismissed because it was an action to recover the debt due on the bond and not on the settlement. But certain further observations, made *obiter* in that judgment, appear to express the opinion that the creditor's right of mortgage becomes merged in the settlement, *and is therefore extinguished or wiped out*. With much respect, it seems to me that the Court would not have reached that opinion, if the circumstances of that case had required full consideration of the terms of section 40(1) of Chapter 81. The language of the section, in particular of its Proviso, shows that the creditor's former right *under the mortgage*, i.e. the right of hypothec as distinct from the right to receive payment of the debt, continues to subsist under the settlement, even though the settlement may not expressly so provide. The creditor thus retains his right over the property mortgaged to him as security for payment of the debt due under the settlement. A secured creditor cannot lose the benefit of his security, merely because in proceedings before the Debt Conciliation Board he agrees out of sympathy for his debtor to a settlement which only reduces the amount of a debt or the rate of interest payable upon the debt.

Learned Counsel appearing for the creditors in this appeal has properly informed us that the advisers of creditors who have been parties to settlement under the Debt Conciliation Ordinance are uncertain as to the correct procedure which is to be followed when debtors fail to carry out the terms of such settlements. I venture therefore to state the following opinion:—

(*a*) Where the debt the payment of which is secured by a mortgage bond is the subject of a settlement, the right of the creditor to a hypothecary decree subsists under the settlement, unless the settlement expressly provides otherwise.

(*b*) Where the debtor fails to carry out the terms of the settlement, the creditor should apply to a competent Court under section 43 of Chapter 81 and he can thus obtain a decree absolute to compel the debtor to perform his obligations, principally the obligation to pay the debt and interest, imposed by the settlement.

(*c*) Where in addition the creditor desires to obtain a hypothecary decree over the property originally mortgaged to him, his right under the mortgage bond to such a decree is preserved by section 40(1); but he can obtain such a decree only in a hypothecary action, the procedure in which will be goverend by the Mortgage Act.

(*d*) The hypothecary decree entered in such an action will render the mortgaged property bound and executable, not for the amount of the original debt, but for the amount of the debt and interest payable in terms of the settlement.

I should add that since the original debt becomes merged in a settlement under the Debt Conciliation Ordinance, such a settlement should clearly set out the amount of the debt to be payable according to its terms.

The decree under appeal is amended by the deletion therefrom of all provisions relating to the mortgaged property, to the said property being bound and executable for the payment of the amount of the decree, and to the sale of the said property, and by the deletion also of the Schedule to the decree.

Sirimane, J.

I agree.

Decree Amended.

END OF VOLUME LXXV

සතිපතා ලංකා නීතිය

ඉංග්‍රීසි භාෂාවෙන් පළවන තෝරාගත් සමහර නඩු තීන්දුවල වාතීා සහ විශේෂ අවස්ථාවල දී
ශ්‍රේෂ්ඨාධිකරණය කැඳවන සභාවල පැවැත්වෙන කථාවන්හි
වාතීා ද අඩංගු වේ.

සංහිතාව

17 වෙනි කාණ්ඩය

රාජනීතිඥ හේම එච්. බස්නායක
(උපදෙශක කතෘ)

ජී. පී. ජේ. කුරුකුලසූරිය
ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥ
(කතෘ)

බී. පී. පිරිස් එල්.එල්.බී. (ලන්ඩන්)
වී. රත්නසභාපති බී.ඒ.(ලංකා),එල්.එල්.බී.(ලන්ඩන්)
යූ. ඒ. එස්. පෙරේරා එම්.ඒ.(ලන්ඩන්)
එන්. එම්. එස්. ජයවික්‍රම එල්.එල්.බී.(ලංකා)

එම්. එච්. එම්. නයිනමරික්කාර්
බී.ඒ.,එල්.එල්.බී, (කැන්ටැබ්)
එස්. එස්. බස්නායක බී.ඒ., බී.සී.එල්. (ඔක්ස්ෆර්ඩ්)
එන්. එස්. ඒ. ගුණතිලක එල්.එල්.බී.(ලංකා)
වරුන බස්නායක

ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥවරු
සහකාර කතෘවරු

1969

දයකමිල – කාණ්ඩයකට (ඉංග්‍රීසි වාතීාත් සමග) රු. 17/50 පසුගිය කාණ්ඩයක මිල රු. 17/50.
පිටපත් ලබාගත හැක්කේ නොා: 50/3, සිරිපා පාර, හැව්ලොක් ටවුම්—කොළඹ 5.

පාර්ශව කාරයින්ගේ නාම

අපරාධ නඩු සංවිධාන සංග්‍රහය

121(1) සහ 122(1) 122(ඒ) 148(1)(බී) ඡේද.

මැන්ඩාමුස් ආඥා පණත යටතේ බලනු ... 12

අර්ථකථන ආඥා පණත

2(ii) ඡේදය

කුඹුරු පණත 25

ඇප

ඇප උසාවි ආඥා පනතේ 31 වන ඡේදය — චිත්තිකරුවන්ට ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයකට මුහුණ දීමට නියම කිරීම — එසේ නියම කිරීමෙන් පසු පළමුවැනි අපරාධ සැසි වාරයේ දී නඩුව විභාග කිරීමට අසමත්වීම — 31 වන ඡේදයේ බල පැවැත්වීම — අධි චෝදනා පත්‍රය සකස්කොට ඉදිරිපත් නොකිරීම චිත්තිකරුවන් ඇප පිට නිදහස් කිරීමට ප්‍රමාණවත් හේතුවක් ද?

මෙය උසාවි ආඥා පනතේ 31 වැනි වගන්තිය යටතේ කරනු ලැබ පහත දැක්වෙන කරුණු මත ඇප පිට චිත්තිකරුවන් නිදහස් කර ගැනීම සඳහා කරන ලද ඉල්ලීමකි.

(අ) 23.2.66 දින මිනීමැරීමට කුමන්ත්‍රණය කිරීමේ චෝදනාවක් ඇපැල්කරුට සහ තවත් තිදෙනකුට විරුද්ධව නාගරික මහේස්ත්‍රාත් උසාවියේ දී ඉදිරිපත් කරන ලද බව.

(ආ) 23.6.66 වැනි දින ඉල්ලුම්කරු හා අනික් චිත්තිකරුවන් තිදෙනාට ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයකට මුහුණ දීමට නියෝග කරන ලද බව.

(ඇ) 10.7.66, 10.10.66, 10.1.67 යන දිනවල ඇරඹුණු අපරාධ සැසි වාරවල දී හෝ 20.3.67 වැනි දින ඇරඹී පැවැත්වෙමින් නිබුණු අපරාධ සැසිවාරයේ දී ද නඩුව විභාග නොවුන බව,

(ඈ) ඉල්ලුම්කරු වෙත චෝදනා පත්‍රයක් එතෙක් යවා නොනිබුනු අතර, ඔහුට විරුද්ධව පැවති සාක්ෂි ද ඉතා දුර්වල ඒවා බව.

මානික්කවාසගර් විනිශ්චයකාරතුමාගේ තීන්දුව කෙරෙහි විශ්වාසය තබමින් (මැන්ඩිස් එ. රැජිත 66 න.නී.වා. 502) රජයේ අධිනීතිඥවරයා නීතිමය තර්කයක් මත මේ ඉල්ලීමට විරෝධය දැක් වීය. එනම්: ඉල්ලුම්කරු වෙත චෝදනා පත්‍රයක් නොයවන ලද හෙයින් ඔහුගේ ඉල්ලුම් පත්‍රයේ සඳහන් වෙන එක ද සැසි වාරයක දී හෝ යථා පරිදි ඉල්ලුම්කරුට විරුද්ධව නඩුව විභාග කළ නොහැකි වූ හෙයින් ඇප පිට නිදහස් කරන ලෙස ඉල්ලීමට ඔහුට අයිතියක් නැති බවයි.

තීන්දුව: (1) උසාවි ආඥා පනතේ 31 වැනි ඡේදයේ ක්‍රියාකාරිත්වය වනුයේ ශ්‍රේෂ්ඨාධිකරණ ඉදිරියේ නඩු විභාගයකට ඉදිරිපත් කරන ලද සිරකරුවකු යථා පරිදි ඔහුගේ නඩුව විභාග කළ යුතුවූ සැසි වාරයේ දී එය ඉටු නොවූ කල ඔහු ඇප පිට නිදහස් කළ යුතු වීමයි.

(2) "සිරකරු යථා පරිදි නඩු විභාගයට පාත්‍ර කළ යුතු සැසි වාරය" යන වචනවලින් අදහස් කෙරෙනුයේ චෝදිතව සිටින අපරාධය සිදු කරන ලද පළාත ඇතුළත් වන අපරාධ අධිකරණ මණ්ඩලය සඳහා පැවැත්වෙන සැසි වාරයයි.

(3) අධි චෝදනා පත්‍රය සූදානම් කොට ඉදිරිපත් කිරීම හා සම්බන්ධ කිසියම් පියවරක් ගැනීමට අතපසු වීම නිසා ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ සැසි වාරයේ දී සිරකරුට විරුද්ධව නඩු විභාගය යථා පරිදි විභාග කිරීමට නීතියෙන් ඉඩක් නොවියයි පිළිගැනීමට සැහෙන හේතුවක් නොවේ.

(4) අධි චෝදනා පත්‍රය සූදානම් කිරීමට හෝ සාක්ෂි වාර්තා කිරීමට හෝ කාලය නොමැතිවීම කරණ කොටගෙන නඩුව ඉහළට තැබීමත් පළමු අපරාධ සැසි වාරයත් අතර ඇතැම් විට ප්‍රමාණවත් කාලයක් නොමැති හෙයින් සිරකරුවකුට විරුද්ධව නඩු විභාගය පැවැත්විය නොහැකි වීම චිත්තිකරු ඇප පිට නිදහස් නොකිරීමට ප්‍රමාණවත් හේතුවක් වන්නේ ය.

සමරවික්‍රම විනිශ්චයකාරතුමා: "ප්‍රමාදයනට හේතු, අදාළ පුද්ගලයන්ගේ නොසැලකිල්ලයයි ගණන් නොගත්තත්, ඇපයට ඉඩ ලැබීම පිළිබඳ සිරකරුවකු සතු අයිතිය ඔහුට අහිමි කිරීම සඳහා ඒවා ක්‍රියාවේ නොයෙදේ."

සි. ඇස්. පෙරේරා එ. ඇටෝර්නි-ජනරාල්වරයා 1

උසාවි ආඥා පණත

31 වෙනි ඡේදය

ඇප යටතේ බලනු 1

කුඹුරු පණත

කුඹුරු පනත — පෙත්සම්කරු විසින් 1963 දී බදු ගොවියා අස්කිරීමේ චෝදනාව — කෘෂිකර්ම ව්‍යාප්ති මණ්ඩලයේ කොමසාරිස්තුමා විභාගයක් පැවැත්වීම — අස්කරන්ට යෙදුන බදුකරු පෙත්සම්කාරියගේ පුරුෂයාත් සමග එකට ගොවිතැන් කළ ගොවියෙකැයි තීරණයවීම — ඔහුට එය පැවරීමට නියෝග කිරීම — එම නියෝගයට විරුද්ධව සම්ක්ෂණ මණ්ඩලයට අභියාචනයක් ඉදිරිපත් කිරීම — එය අසාර්ථකවීම — 'සර්ටියෝරේරායි' ආඥාවක් — එමගින් ඉහත සඳහන් විභාග වාර්තා

සහ නියෝගය අහෝසි කිරීමට ඉල්ලීම — පැමිණිල්ල ඉදිරිපත් කරන අවධියෙහි කුඹුරු පනතේ අඩංගු නීතිවලට ඒවා පටහැනිය කියා සිටීම — 1964 සංශෝධිත පනතේ 1ඒ ඡේදයේ පරමාර්ථය අතීතයට බලපානා පරිදි නීති සංශෝධනය කිරීම.

පෙත්සම්කාරිය විසින් තමා කුඹුරක භුක්තියෙන් පිටමං කරන ලදැයි කියමින් මෙහි 2වන වගඋත්තරකරු (බදු ගොවියකු) විසින් 1වන වගඋත්තරකරුට (ගොවිජන සේවා දෙපාර්තමේන්තුවේ උප කොමසාරිස්වරයා) කරන ලද ආයාචනයක හේතුවෙන් දිගු කාල සීමාවක් තුල ඔහු විසින් විභාගයක් පවත්වනු ලැබ, වර්ෂ 1965 අගෝස්තු මස නිම වූ එම විභාගයේ දී පෙත්සම්කාරියගේ ස්වාමිපුරුෂයා සමග හවුලේ වගා කළ තැනැත්තකු වූ එම 2වන වගඋත්තරකරු අයථා ලෙස ඒ කුඹුරින් බැහැර කරන ලදැයි නිගමනය කළ කොමසාරිස්වරයා එම වගාකරුට යළිත් කුඹුරේ භුක්තිය දියයුතු යයි ද නියෝග කළේය.

කුඹුරු පනතේ ප්‍රතිපාදනයන්ට අනුව සංවිධානය කළ සමීක්ෂණ (Board of Review) මණ්ඩලයට අසාර්ථක වූ අභියාචනයක් ඉදිරිපත් කිරීමෙන් පසු පෙත්සම්කාරිය එකී පරීක්ෂණයෙන් 1වන වගඋත්තරකරු විසින්, කළ කරුණු විභාගය අවලංගු කිරීමට සහ 2වන විත්තිකරුට යළිත් කුඹුරේ භුක්තිය පවරා දීමට යයි කළ නියෝගය ඉවත් කිරීමට යාඥා කරමින් ශ්‍රේෂ්ඨාධිකරණයට මෙම ආයාචනය ඉදිරිපත් කළාය.

පෙත්සම්කාරිය වෙනුවෙන් පහත සඳහන් පරිදි අධිකරණයට කරුණු සැල කරන ලදී.

(ඒ) දෙවන වගඋත්තරකරු විසින් එම ආයාචනය ඉදිරිපත් කරන ලද අවදියේ හවුලේ බදු ගෙන කුඹුරක් වගා කරන තැනැත්තකුගේ අයිනිවාසිකම් කුඹුරු පනතින් පිළිනොගැනී තිබීම නිසා එහි 3(1) වැනි ඡේදයේ සඳහන් වූ බදු ගෙන වගා කරන්නකු ගැන ඇති විග්‍රහයට 2වන වගඋත්තරකරු ඇතුළත් නොවේ.

(බී) වර්ෂ 1964 අංක 11 දරණ සංශෝධන පනතින් මෙම අඩුලුහුඬුව පිරවීමට අදහස් කරනු ලැබ ඒ නයින් හවුලේ බදු ගෙන වගා කරන්නන් ද එම විග්‍රහයේ සීමාවට ඇතුළත් කොට තිබේ.

(සී) සංශෝධන පනත අතීතයට බල පා ක්‍රියා නොකරන බැවින් එම ආයාචනය පිළිගෙන ඒ අනුව කටයුතු කිරීමට හෝ සංශෝධන පනතට අනුව නියෝග දීමට හෝ 1වන වගඋත්තරකරුට බලයක් නැත.

තීන්දුව: (1) ඉහත සඳහන් (ඒ) දරන කරුණ අඩංගු තර්කය පහතින් පෙනෙන කරුණු දෙක නිසා පිළිගත නොහේ.

(i) අර්ථකථන ආඥා පනතේ (Interpretation Ordinance) 2(ii) ඡේදයේ ප්‍රතිපාදනයන්ට අනුව සලකන විට ඒක වචනාර්ථ පදවල බහු වචනාර්ථ ද ඇතුලත් විය යුතුවීම.

(ii) වී ගොවිතැනෙහි විවිධ කාර්යාංශයන් ලෙස ගැනෙන සිසෑම, වැපිරීම සහ කැපීම පිණිස සාමාන්‍යයෙන් හවුලේ කෙරෙන සහභාගිවීම් අවශ්‍ය වීම.

(2) වර්ෂ 1964 සංශෝධන පනතින් 1ඒ දරණ අලුත් උප-ඡේදය 3(1) දරණ ඡේදයට පසුව ඊළඟින්ම ඇතුළත්කර තිබීමේ පරමාර්ථය, වාරයෙන් වාරයට වගා කරන්නන්ගේ තත්වය පැහැදිලි ලෙස විග්‍රහ කිරීම සේ පෙනියේ.

(3) මුල් පනත පැනවීමට අවුරුදු දෙකකට තරම පෙර මැයිවිලි කීමට සිදු වූ අයද එම පනතින් සහනයක් ලැබීම නිසා එය වර්ෂ 1958.2.1 වන දින නීතිගතවූ නමුදු එය ම අතීතයටද බලපාන ස්වභාවයක් උසුලන බැවින් සංශෝධන පනතින් බදු ගෙන වගා කරන අලුත් වගා කරන්නන් පංක්තියක් ඇති වුවත් එහි එම අයට සහනය දිය යුත්තේ කවදා සිටදැයි යන්න එහි සඳහන් වී නැති නිසා දැන් සංශෝධන පනත ද ඇතුළත් කොට සැලකෙන පනතෙහිම කලින් සිට සඳහන් වන දිනය මෙම සහනය දීම ක්‍රියාත්මක වන දිනය හැටියට සලකා ගැනීම යුක්තිසහගත වේ.

දිසානායක මුදියන්සේලාගේ පූර්විමහත්මයෝ එ. ඒ. ඩී. විජේදෝරු මහතුවර ගොවි ජන සේවා උප කොමසාරිස් සහ තවත් අයෙක් ... 27

තුරහ තරහ ඔට්ටු ඇල්ලීමේ ආඥා පණත

තුරහ තරහ සම්බන්ධයෙන් ඔට්ටු ඇල්ලීමේ ආඥා පනත 3(3) ඡේදය — 11(2) ඡේදය හා සමග කියැවුනු කල — තුරහ තරහයක් සම්බන්ධයෙන් අය බද්දට යටත් නොවූ ඔට්ටුවක් සඳහා මුදල් භාර ගැනීමේ චෝදනාවක් — විදේශයක පැවැත්වුනු තුරහ තරහයක් — චෝදනාව තහවුරු කිරීම සඳහා සූවත්පත් පිටපත් ඉදිරිපත් කිරීම — වැරැදිකරු බව තීන්දු වීම — පැමිණිල්ල විසින් ඔප්පු කළ යුතු දෙය — ඉදිරිපත් කළ සූවත්පත්වල සාක්ෂිමය අගය.

මේ නඩුවේ දී බද්දට යටත් වූවක් නොවන ඔට්ටුවක් විදේශීය රටක පැවැත්වුනු තුරහ තරහයක් සම්බන්ධයෙන් භාර ගැනීමේ චෝදනාව:—

තීන්දුව: (1) පැමිණිල්ල විසින් ඔට්ටු තුණ්ඩුවල තිබුනු නම් අශ්වයින්ගේ නම් බව ඔප්පු කිරීම ප්‍රමාණවත් නොවේ. ඒ අශ්වයින් තරහයට සහභාගි වූ බව ද පැමිණිල්ල විසින් ඔප්පු කළ යුතු ය.

(2) සාක්ෂි වශයෙන් ඉදිරිපත් කරන ලද පුවත් පත්වල අඩංගු දේ අසා දැනගත් සාක්ෂි වූ හෙයින්, පැමිණිල්ල විසින් ඔප්පු කළ යුතු වූ කරුණු ඔප්පු කිරීම සඳහා ඒවා යොදා ගත නොහැකි ය.

මයිකල් ලියනගේ ඇ. පොලිස් පරීක්ෂකතැන, බොරැල්ල 4

නොතාරිස් තැන

නොතාරිස් කෙනකුගේ බලවත් නොසැලකිල්ල නිසා ණය මුදලක් ලබා ගැනීම සඳහා උකස් තැබූ ඉඩම් අටෙන් හතකට සම්බන්ධවූ ද, උකස්කරුගේ අයිතියට බලපවත්වන්නා වූ ද ඔප්පු දෙකක් ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයේ ලිපි ලේඛන පරීක්ෂා කිරීමේදී අසු නොවී යාම — උකස් කළ ඉඩම් විකිණීමට ඉන් පසු දිනක ලැබූ නියෝගයක් — වෙන්දේසියේදී ඉල්ලුම්කරුවන්ට උකස්කරුගේ අයිතියේ අඩුලුහුඩුකම් පිළිබඳව දන්වමින් මිලදී ගත හැකුයි සැලකිය හැකි අය අතර ප්‍රචාරය වූ දැන්වීමක් — ඉඩම් හතක් පිළිබඳව සඳහන් කෙරුණු පිටුවල ඔප්පු දෙකක් සඳහන් නොවීම — වෙනත් පිටුවල ඒවා සඳහන් වීම — සඳහන් පිළිබඳ අන්‍යෝන්‍ය විස්තර සටහන් සැක සහිත බව — එහි ප්‍රතිඵලය.

සාක්ෂි ආඥා පණත — 35 වන සහ 114(ඩී) දරණ ඡේද — සමහර ඉඩම්වල නොබෙදූ කොටස් සහ වෙන ඉඩම්වල බෙදූ කොටස් අයිතිවාසිකම් සම්බන්ධ කරන ඔප්පු — මේවා ලියාපදිංචි කළ හැකි ලිපි ලේඛනද යන්න — ලියාපදිංචි කිරීමේ ආඥා පණත (117 වන අධිකාරය) 49 වන ඡේදය යටතේ සැලකුනු රීති — අංක 5, 6, 10(1), 13(3) සහ 14 යන රීති.

පැමිණිලිකාර වෙළඳ සමාගම අභාවප්‍රාප්ත 'ඒ' නමැති නොතාරිස් තැනගේ බූදලයේ පොල්මඃකාර යන්ට රු: 25,302/78ක අලාභ මුදලක් ඉල්ලා නඩු දැමීමෙය. මෙයට හේතුවූයේ එම සමාගමින් රු: 25,000ක ණය මුදලක් ලබා ගැනීම සඳහා 'පී' නමැත්තකු උකස් තැබූ උකස්කරයකට සම්බන්ධ ඉඩම්වල අයිතිය ගැන නිර්දේශ කිරීමට භාරගත් එම නොතාරිස්වරයා ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයේ කළ ලිපි ලේඛන පරීක්ෂණයේදී ඔහුට ඔප්පු දෙකක් තමාගේ බලවත් නොසැලකිලිකම නිසා අසු නොවී යාමය. පී18 සහ පී19 දමා ලකුණු කොට ඇති මෙම ඔප්පු දෙකින් 'පී' නමැත්තා මෙම ඉඩම් අතුරින් හතක අයිතිය තමාගේ පුතුන් දෙදෙනාට පවරා තිබේ. කලකට පසු 'පී' නමැත්තාට විරුද්ධව උකස් ඉඩම් විකිණීමේ තීන්දුවක් නිකුත් වූ විට ඒ අනුව ඇස්කීසි ගසා ඉඩම් විකිණීමට තැත් කිරීමේ දී මෙම ඉඩම් හත වෙන්දේසියෙන් ගැනීමට ඉල්ලුම්කරුවන් නොපැමිණීම නිසා මෙය අනාවරණය විය.

එසේ ඉල්ලුම්කරුවන් නොමැති වීමට හේතුව ඉල්ලුම්කරුවන් ලෙස පැමිණෙතැයි සිතිය හැකි පිරිස අතර 'පී' නමැත්තාට ඇත්තේ "විකිණීමට ඉදිරිපත්කොට ඇති ඉඩම්වල සීමාසහිත අයිතියක් පමණකැ" යි ඔවුනට දන්වමින් බෙදා හැර තිබුනු දැන්වීම් පත්‍රිකාවකි.

පී18 සහ පී 19 දමා ලකුණුකර ඇති එකී ඔප්පුවල ඇති ඉඩම් ගැන ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයෙහි සඳහන් වී ඇති කිසිම පිටුවක මේ ඔප්පු දෙක ලියා පදිංචි වී නොමැත. 'පී' නමැත්තාට සමහර ඉඩම්වල නොබෙදූ කොටස්වල අයිතිවාසිකම් සහ අනිකුත් බෙදූ ඉඩම්වල තිබූ අයිතිවාසිකම් ඒකාබද්ධකොට සැලැස්මක් සාදවා එය වෙනම ඉඩම් ලෙස සලකා එම ඉඩම්වලින් එක් කොටස බැගින් පුතුන් දෙදෙනා අතරේ බෙදා දී තිබේ.

කෙසේ වුවද මෙම ඔප්පු දෙක සම්පූර්ණයෙන් වෙනස් පිටක ලියා පදිංචිකර තිබේ. ඒ සටහන් නියම පිටුවේ සටහන් සමග අන්‍යෝන්‍ය සම්බන්ධ සටහන්වලින් එකට බැඳී තිබුනු නමුත් මේ අන්‍යෝන්‍ය විස්තර සටහන් බලය නොලත් යමකු විසින් පසුව ඇතුළු කරන ලද ඒවායයි කියන අභියෝගයකට පාත්‍රවිය.

ඉදිරිපත් කරන ලද ලිපි ලේඛන පරීක්ෂා කිරීමෙන් පහත සඳහන් කරුණු පැහැදිලි විය.

(ඒ) මෙසේ වෙන් වශයෙන් සැලකිය හැකි ඔප්පු හතේ ඇති එකම අන්‍යෝන්‍ය විස්තර සටහනක හෝ ඒවා සටහන් කළ දිනය යටතේ හෝ ලිපි ලේඛන ලියාපදිංචි කිරීමේ ආඥා පණතින් හා ඒ අනුව සැලකුනු රීතිවලින් එසේ අන්‍යෝන්‍ය විස්තර සටහනක් ඇතුළත් කිරීමට බලයලත් එකම පුද්ගලයා වන රෙජිස්ත්‍රාර්තැන විසින් අත්සන් තබා හෝ ඔහුගේ නමේ මුල් අකුරින් යුත් කෙටි අත්සන තබා හෝ නැත.

(බී) පී18 සහ පී19 දරණ ඔප්පු ලියාපදිංචි වී ඇති පිටේ සහතික කොපියක් ඉදිරිපත් කරන ලද නමුත් වර්ෂ 1963 සැප්තැම්බර් මාසයේ මෙම කොපිය නිකුත් කළ අවස්ථාවේ එහි විද්‍යමාන වන අන්‍යෝන්‍ය විස්තර සටහන කවරකු විසින් වත් කෙටි අත්සනක් තබා ඇති බවක් පෙනී යන අයුරින් කිසිම කරුණක් නැතත් නඩු විභාගයේදී ඉදිරිපත්කොට ඇති මූලික පිටපතේ කෙටි අත්සනක් තිබේ.

පැමිණිලිකාර සමාගමේ පාලක අධ්‍යක්ෂකවරයාගේ සාක්ෂියෙන් නොතාරිස්වරයා තෙමේම පරීක්ෂණය පැවැත් වූ බවත්, ඉඩම්වලින් එකක් ප්‍රාණ භුක්තියට යටත් බවත් ඔහුට දන්වා තිබුනු බව පෙනී ගියේය.

තීන්දුව: (1) මේ කරුණු අනුව සලකා බලන කල මේ සම්බන්ධයෙන් ලියැවී ඇති අන්‍යෝන්‍ය විස්තර සටහන් ඉතාම දැඩි ලෙස සැක සහිතය. මේ සටහන් ගැන විශ්වාසය තබා කරුණු දක්වන්නන් විසින් ඒ සටහන් නිර්ව්‍යාජ බව ඔප්පු කිරීමට සාක්ෂි කැඳවා නැති නිසා විධිමත් කාර්‍යාලීය කටයුතු කෙරෙන අනුසාරයෙන් ඒවා සටහන් වී ඇතැයි සාක්ෂි ආඥා පනතේ 114(ඩී) යටතේ මෙම අධිකරණයට කළ හැකි පූර්ව නිගමනය කිරීම මෙහි නොකළ යුතුය.

(2) මියගිය නොතාරිස් තැනගේ බලවත් නොසැලකිලිමත් බව ස්ථාපිත කිරීමට පැමිණිලිකරුට නොහැකි වී තිබේ.

(3) පී18 සහ පී19 දරණ ඔප්පුවල පරිශ්‍රමයක් දරා ඇති අයුරින් ඉඩමක නොබෙදූ කොටස් තවත් ඉඩම්වල බෙදා ඇති කොටස් සමග ඒකාබද්ධ කොට කඩදාසිවල සටහන් කිරීමෙන් පමණක් අලුත් ඉඩමක් තැනීම නීත්‍යානුකූලවත්, ක්‍රියානුසාරයෙනුත් කිරීමට නොහැකි දෙයකි.

(4) මේ හේතුව නිසා එම ඔප්පු දෙක ලියාපදිංචි කිරීමට රෙජිස්ත්‍රාර්වරයා අලුත් පිටක් විවෘත නොකළ යුතුව තිබුනි. ඔප්පුවල උප ලේඛනයන්හි මේ ඉඩම් හත ගැන මනා විස්තර ඇතුලත් නිසා, ලියාපදිංචි කරන වේලාවේම යථා විධියෙන් අන්‍යෝන්‍ය විස්තර සටහන් දමා ඒවාද නිවැරදි ලෙස ඒ ඒ පිටු හතේම ලියාපදිංචි කළ හැකිව තිබින.

(5) පී18 සහ පී19 දරණ ඔප්පු දෙක අබිබවා යථා පරිදි ලියාපදිංචි කිරීමේ බලහිමියෙන් මෙම උකස්කරය ප්‍රමුඛත්වය ලබන බැවින් ඇස්කිසි ගසා විකිණීමේදී මිලට ගත් කවරෙකුට හෝ මනා අයිතියක් ලැබෙන නිසා පැමිණිලිකරුට මෙයින් අලාභයක් සිදු වී නැත.

සිරිමාන්න විනිශ්චයකාරතුමා: "එබැවින් ඇස්කිසියේ විකිණීමකදී එය මිලට ගන්නා කවරකුට හෝ වෙවා නිමි කමක් ලැබේ. පැමිණිලිකරුගේ උගත් නීතිවේදියා අඩුලුහුඩු හිමිකමක් ඇති ඉඩම් මිලදී ගැනීමට මිනිසුන් සතුටු නැතැයි කියමින් තර්ක කළේය. එහෙත් මෙම අලුඩුහුඩුකම නීතිමය අඩුලුහුඩුකමක් මිස හිමිකමේ අඩුලුහුඩුකම ගැන සැකයක් නොවන බව පෙන්නා දීම අවශ්‍යය."

ගැටගහවල වතුයාය එ. මොහොමඩ් රfපික් සහ තවත් කෙනෙක් 6

පරිපාලන දිස්ත්‍රික් ආඥා පණත

මිල පාලන යටතේ බලනු 25

භාරකාර ආඥා පණත

90 සහ 111 වෙනි ඡේද

භවුල් ව්‍යාපාරය යටතේ බලනු 17

මනා සැලකිලි භාවය

නොතාරිස් තැන යටතේ බලනු... ... 6

මිල පාලන පණත

(i) මිල පාලන පනත (173 වන අධිකාරය)—තමා ළඟ ගිනිපෙට්ටි තිබියදී ගිනි පෙට්ටියක් විකිණීම ප්‍රතික්ෂේප කිරීමෙන් 8(2) (බී) (i) ඡේදයට අනුව ඉදිරිපත්වූ චෝදනාවක් — පෙට්ටියක ගිනිකුරු 50 සිට 10 දක්වා ඇති කල එහි මිල සත පහේ සිට සතය දක්වා ක්‍රමානුකූලව වෙනස් විය යුතු යයි ගැසට් පත්‍රයේ පළවී තිබීම — පෙට්ටිවල තිබූ ගිනිකුරු සංඛ්‍යාව ඔප්පු කිරීමට නොහැකිවීම.

තමා ළඟ ගිනි පෙට්ටි 120 ක් තිබියදීත්, ඉන් එක් පෙට්ටියක් විකිණීම ප්‍රතික්ෂේප කිරීමේ හේතුවෙන් මිල පාලන පනතේ 8(2) (බී) (i) ඡේදය යටතේ චෝදිතයාට විරුද්ධව චෝදනා ඉදිරිපත් කෙරිණි. පී3 දමා සලකුණු කොට ඉදිරිපත් කරන ලද ගැසට් පත්‍රයේ නිර්දේශයන් අනුව එක් ගිනි පෙට්ටියක මිල එහි කුරු 50 සිට 10 දක්වා ඇති කලක පිළිවෙලින් සත පහේ සිට සතය දක්වා වෙනස් විය යුතුවිය.

එක් ගිනි පෙට්ටියකවත් තිබිය යුතු ගිනි කුරු සංඛ්‍යාව අසුරා තිබුනු බවට සාක්ෂි නොමැති විය. කුරු 10 ට අඩු වූ හෝ කුරු 50 ට වැඩිවූ හෝ ගිනි පෙට්ටි වෙළඳ පොලේ නොතිබුනු බවටද සාක්ෂි නොවීය.

තීන්දුව: චෝදනාව ඔප්පු කිරීමට පැමිණිලි පක්ෂයට නොහැකි වී තිබේ.

පොලිස් පරීක්ෂක, (දූෂණ මර්දන අංශය) කොටුව, කොළඹ එ. මොහමඩ් කසිම් 22

(ii) මිල පාලනය—ගිනි පෙට්ටියක මිල සත පහක්ව තිබියදී එය සත අටකට විකුණන ලැදයි චෝදනාවක් — ගිනි පෙට්ටියක කුරු 50 සිට 10 දක්වා ඇති හෙයින් ඒ අනුව ගිනි පෙට්ටිවල පාලන මිල සත පහේ සිට සතය දක්වා වෙනස් වීම — එක් පෙට්ටියක තිබූ කුරු සංඛ්‍යාව කෙතෙක් දැයි සාක්ෂි නොමැතිවීම — චෝදනාව තහවුරු කළ නොහැකි වීම.

පී1 දමා ලකුණු කොට ඉදිරිපත් කරන ලද ගිනි පෙට්ටියක් පාලන මිලට වඩා සත තුනක් වැඩියෙන් — සත අටකට — විකුණන ලදැයි චෝදිතයාට විරුද්ධව චෝදනා ඉදිරිපත් කිරීමෙන් පසු ඔහු වරදකරු කරනු ලැබීය.

තීන්දුව: (1) ගිනි පෙට්ටියක කුරු 50 සිට 10 දක්වා අසුරා තිබීම අනුව එහි පාලන මිල සත 5 සිට සත 1 දක්වා වෙනස් වන බැවින් පී1 දරණ ගිනි

පෙට්ටියේ තිබූ කුරු සංඛ්‍යාව ගැන සාක්ෂි නොමැත්තෙන් මෙම චෝදනාව සනාථ කළ නොහැක. (3.7.65) දින දරණ සහ අංක 14459 දරණ ලංකාණ්ඩුවේ ගැසට් පත්‍රය බලන්න.)

(2) පී1 දරණ ගිනි පෙට්ටියේ ඇති එය විකිණිය හැකි වැඩිම මිල සත පහය යන්න කියැවෙන මුද්‍රිත සටහන සහ එය මත තිබෙන වැඩිම මිල කවරකු විසින් අලවන ලද්දක්ද යන්න සහ එය අලවා ඇත්තේ කුරු 50 ක් ඇති ගිනි පෙට්ටිවලය යන්න කියැවෙන සාක්ෂි නොමැතිවීම නිසා එයින් චෝදනාව සනාථ නොකෙරේ.

කේ. ඒ. වීරසිංහ සාජන්ට් 2169, මොරටුව එ. උපසේන චන්නිආරච්චි 26

(iii) අංක 29 සහ 1952 අංක 31 දරණ මිළ පාලන ආඥා පනත — 15.10.1964 වැනි දින අංක 14199 දරණ අති විශේෂ ගැසට් පත්‍රයේ පළ කරන ලද මිල පාලන නියෝගය — කොළඹ නගර සභාවෙන් පිටස්තර වූ එහෙත් කොළඹ දිස්ත්‍රික්කය ඇතුළත පිහිටි යක්කල දී පාලන මිලට වැඩියෙන් හරක් මස් විකිණීමේ චෝදනාවක් — චෝදිත වරද කළේ යැයි කියනු ලබන ස්ථානය කොළඹ දිස්ත්‍රික්කය ඇතුළත් වූ බවට සාක්ෂි නොමැතිකම — පූර්ව නිගමනය — අධිකරණ සැලකිල්ල — සාක්ෂි පනත — 57 වැනි ඡේදය — පරිපාලන දිස්ත්‍රික්ක ආඥා පනත, 392 වෙනි අධිකාරය.

1952 අංක 31 හා 1950 අංක 29 දරණ මිල පාලන ආඥා පනතේ 3(2) හා 4 යන ඡේදවලින් ලත් බලය යටතේ කොළඹ දිස්ත්‍රික්කයේ නියෝජ්‍ය ආහාර මිල පාලක විසින් සම්පාදිතව, 15.10.64 වැනි දින හා අංක 14199 දරණ ආණ්ඩුවේ (අතිවිශේෂ) ගැසට් පත්‍රයේ පළ වූ මිල නියෝගයේ සඳහන් පාලන මිලට ඉහළින්, යක්කල ගම්පහ — කිරිඳිවැල පාරේ අංක 3 දරණ ස්ථානයේ දී හරක් මස් විකුණන ලදැයි චෝදිතව විත්තිකරු චෝදනාවට වරදකරු බව තීන්දු කරන ලදී.

(අ) 15.10.1964 මිල පාලන නියෝගයේ උපලේඛනය අනුව එකී නියෝගය කොළඹ නගර සභා සීමාවෙන් පිට කොළඹ දිස්ත්‍රික්කයේ ඇතුළත පමණක් වලංගු වූ බවත්,

(ආ) හරක් මස් විකුණන ලදැයි කියනු ලබන යක්කල නම් ස්ථානය කොළඹ දිස්ත්‍රික්ක සීමාව තුළ පිහිටියේ යැයි ඔප්පු කිරීමට පැමිණිල්ල අසමර්ථ වී ඇති බවත් ඇපෑලේ දී විත්තිකරු වෙනුවෙන් තර්ක කරන ලදී.

මේ කාරණය සම්බන්ධයෙන් ඉදිරිපත් කරන ලද එකම සාක්ෂිය වූයේ තමා කොළඹ දිස්ත්‍රික්කයේ සීමාවන් නොදන්නේ යැයි පැවසූ උප-පොලිස් පරීක්ෂකගේ සාක්ෂියයි.

පරිපාලන දිස්ත්‍රික් ආඥා පනතේ පරිපාලන දිස්ත්‍රික් සීමාවන් සඳහන් වන්නේ වුව ද, මෙහිදී සාක්ෂි වශයෙන් කොළඹ දිස්ත්‍රික්කයේ පෙන්නුම් කරන සිතියමක් හෝ කොළඹ දිස්ත්‍රික් සීමාවන් ගැන පිළිගත හැකි පරිදි කරුණු කිව හැක්කකුගේ සාක්ෂියක් හෝ ඉදිරිපත් කිරීමට පැමිණිල්ල අපොහොසත් විය. උගත් මහේස්ත්‍රාත්තුමා තම තීන්දුවේ දී මෙසේ ද සඳහන් කළේය. ''විත්තිකරුගේ මස් කඩය තිබූ යක්කල නොව 3 දරණ ස්ථානය කොළඹ නගර සභා සීමාවෙන් පිට පිහිටි තැනක් බවට කිසිම සැකයක් නැත'', තවද ''කොළඹ ඒජන්තතුමාගේ බල සීමාව පවතින කොළඹ දිස්ත්‍රික්කයට ගම්පහ අයිතිය''.

තීන්දුව: මේ කරුණු උඩ මෙම හරක් මස් කඩය කොළඹ දිස්ත්‍රික් සීමාව ඇතුළත පිහිටියේ යැයි පූර්ව නිගමනයකට මහේස්ත්‍රාත්තුමා බැසීම යුක්ති සහගත නොවේ. මක්නිසාද යත්, උගත් මහේස්ත්‍රාත්වරයා හොඳින් දැන සිටියා විය හැකි අධිකරණ ප්‍රදේශ පරිපාලන ප්‍රදේශ සමග නියම ලෙස නොසැසඳෙන බැවින්ය.

පී. ඒ. හංසා නයිනා එ. ගම්පහ පොලිස් පරීක්ෂක 25

මැන්ඩාමුස් ආඥා

මැන්ඩාමුස් ආඥාවක් — අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) සහ 122(1) දරණ ඡේද යටතේ අපරාධ නොරතුරු සටහන් පොතේ සටහන් කළ ප්‍රකාශයන්හි සහතික පිටපත් සම්පාදනය කිරීමට යයි පොලිසියට විරුද්ධව නියෝගයක් ලබා ගැනීමේ පරිශ්‍රමයක් — පොලිස් නිලධාරීන්ට සහ තව තැනැත්තකුට පෙත්සමකරු විසින් තමාට දඬුවම් ලැබිය හැකි වරද කරන ලදැයි ඔහුට විරුද්ධව අපරාධ නඩු විධාන සංග්‍රහයේ 148(1)(බී) දරණ ඡේදය යටතේ නඩු දැමීම සඳහා පියවර ගැනීම — එකක් හැර අනිත් සියල්ලම සංඥේය (Cognisable) වරදවීම — 121(1) ඡේදය යටතේ පොලිසියට කිසිම නොරතුරක් දීම හෝ එවැනි ප්‍රකාශයක් 122(1) ඡේදය යටතේ සටහන්කර ගැනීමක් නොසිදුවීයයි දිවුරුම් පෙත්සමකින් සැලකර සිටීම — ඒ සැලකර සිටීම අනුව කරුණු සිදුවී යයි සලකා ගැනීම යුක්තියුක්ත ලෙස අපහසුවීම.

දණ්ඩ නීති සංග්‍රහයේ 484, 344, 220(ඒ), 314 දරණ ඡේද යටතේ සඳහන් දඬුවම් ලැබිය හැකි වරද පෙත්සමකරු විසින් පොලිස් නිලධාරීන්ට සහ තව තැනැත්තකුට කරන ලදැයි කැඟල්ලේ පොලිසියේ අපරාධ පරීක්ෂක තැන විසින් අපරාධ නඩු විධාන සංග්‍රහයේ 148(1)(බී) ඡේදයට අනුව පෙත්සමකරුට විරුද්ධව කැඟල්ලේ මහේස්ත්‍රාත් උසාවියේ දමන ලද අංක 68125, 68267 සහ 68269 දරණ නඩු සම්බන්ධයෙන් අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) සහ 122(1) දරණ ඡේද යටතේ සටහන් කරගන්නා ලද ප්‍රකාශයන්හි සහතික

පිටපත් ඉහත සඳහන් වගඋත්තරකරුවන් විසින් තමාට හෝ තමාගේ නීතිඥ තැනට නිකුත් කළ යුතුයයි අධිකරණ නියෝගයක් ලබා ගැනීමට පෙත්සම්කරු විසින් මැන්ඩාමුස් ආඥාවක් ලැබීමේ අදහසින් කරන ලද මෙම ඉල්ලීමෙහි යාඥාකොට තිබේ. දණ්ඩ නීති සංග්‍රහයේ 484 වැනි ඡේදය යටතේ ඇති චෝදනාව හැර සෙස්ස සංඥය වරද බව මෙහිලා සැලකිය යුතුය. අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) ඡේදය යටතේ කිසිම පොලිස් නිලධාරියකුට තොරතුරක් දීම හෝ පෙත්සම්කරුට එල්ලකර ඇති චෝදනාවන්ට සම්බන්ධ වරද පිළිබඳව කිසිම පොලිස් නිලධරයකු අපරාධ නඩු විධාන සංග්‍රහයේ 122(1) දරන ඡේදය යටතේ ප්‍රකාශයක් සටහන් කර ගැනීම හෝ සිදුවී නොමැති බව දෙවන වගඋත්තරකරු තම දිවුරුම් පෙත්සමෙහි සඳහන් කළේ ය.

මේ හේතුව නිසා අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) ඡේදය යටතේ දෙන ලද තොරතුරු සටහනක හෝ 122(1) දරණ ඡේදය යටතේ කරන ලද කිසියම් ප්‍රකාශයක හෝ සහතික පිටපත් ලැබීමට චෝදිතයකුට හෝ ඔහුගේ නීතිඥ තැනට අයිනිවාසිකමක් ලැබෙන අපරාධ නඩු විධාන සංග්‍රහයේ 122(ඒ) දරණ ඡේදය මෙහිදී අදාල නොවන බව කියමින් මේ ඉල්ලීමට විරුද්ධව තර්ක ඉදිරිපත් කරන ලදී.

තවදුරටත් එම දිවුරුම් පෙත්සමින් පෙත්සම්කරු ඉහත සඳහන් සහතික පිටපත් ඉල්ලූ බවත්, එහෙත් ඒවා ඔහුට නුදුන් බවත් පිළිගෙන තිබේ.

තීන්දුව: (1) පෙත්සම්කරු විසින් කළැයි කියන සංඥය වරදට ලක් වූ අය විසින් හෝ එය පිළිබඳව හෝ ප්‍රකාශයක් කර ඇති බව කෙනකුට 148(1)(බී) ඡේදය යටතේ ඉදිරිපත් කරන ලද රපෝර්තුවල පෙත්සම්කරුට විරුද්ධව ඇති චෝදනා පිළිබඳව ඇති සිද්ධිය ගැන සලකා බලන්නකුට යුක්තියුක්ත ලෙස සලකා ගත හැක.

(2) අපරාධ නඩු විධාන සංග්‍රහයේ 121 වන ඡේදය පොලිස් නිලධාරීන් සම්බන්ධයෙන් පමණක් ව්‍යතිරේකයක් (Exception) පණවා නැත.

(3) එහි 121(1) දරණ ඡේදය යටතේ දෙන ලද තොරතුරක් හෝ චෝදිතයා විසින් කරන ලද වරදට ලක් වූ අය විසින් හෝ එම වරදට නිමිත්ත වූ අය පිළිබඳව කරන ලද ප්‍රකාශයක් හෝ පිළිබඳ සහතික පිටපතක් ලබා ගැනීමට අපරාධ නඩු විධාන සංග්‍රහයේ 122(ඒ) දරණ ඡේදයෙන් චෝදිතයකුට අයිතියක් ඇති බව ප්‍රකාශනීය ලෙස පණවා තිබේ.

විනිශ්චයකාරතුමා තම නියෝගය දීමේදී පහත පෙනෙන සේ ප්‍රකාශ කළහ. "පමණට වඩා උද්‍යෝගය දක්වන නිලධරයන් විසින් නීතිය ගැන ඇති වැරැදි අවබෝධය නිසා චෝදිතයකුට ඇති අයිනිවාසිකම මගහරවන අයුරින් ප්‍රයත්නයක් නොකෙරෙන හැටියට අධිකරණය පරීක්ෂාකාරීව වග බලා ගත යුතු බව යුක්තියේ නාමයෙන් අවශ්‍යයෙන්ම සිදුවිය යුත්තකි."

මෙසේ කී විනිශ්චයකාරතුමා මේ පරීක්ෂණය පිළිබඳ සියළුම සටහන් සහ පොලිස් නිලධාරීන් විසින් කළ ප්‍රකාශ ඇතුළත් කැගල්ල පොලිසියේ අපරාධ තොරතුරු සටහන් පොත තමාගේ අවලෝකනයට භාජන කිරීම සඳහා ශ්‍රේෂ්ඨාධිකරණයේ රෙජිස්ත්‍රාර් තැන වෙන අවසාන නියෝගයට පෙර ඉදිරිපත් කරන සේ වගඋත්තරකරුවන්ට නියෝග කොට අනතුරුව පෙත්සම්කරුගේ ඉල්ලීමට ඉඩ දෙමින් අවසාන තීරණය දුන්නේ ය.

කනංකහේවගේ සිසිර පණ්ඩිතරත්න එ.
කැගල්ලේ උප-පොලිස් පරීක්ෂක ... 11

සාක්ෂි පණත

35 සහ 114 (ඩී) දරන ඡේද

නොතාරිස් තැන යටතේ බලනු 6

සිවිල් නඩු සංවිධාන සංග්‍රහය

34 වෙනි ඡේදය

හවුල් ව්‍යාපාරය යටතේ බලනු 17

හවුල් ව්‍යාපාරය

හවුල් ව්‍යාපාරයක් — වර්ෂ 1949 හවුල් ව්‍යාපාරය නිමාවට ගියාට පසු මූල ධනයේ කොටස ආපසු ලබා ගැනීමට පැවරූ නඩුවක් — හවුල් ව්‍යාපාර ගිවිසුමේ කොන්දේසිවලට අනුකූලව පැමිණිලිකරු විසින් තමාට පිළිවෙළින් අඩ වසර දෙකකට හිමි ලාභය ඉල්ලා හවුල්කරුට විරුඬව කලින් දමන ලද නඩු දෙකක් — පැමිණිලිකරුගේ මෙම නඩුව කාලාතික්‍රාන්ත වී ඇති බව සහ එය සිවිල් නඩු විධාන සංග්‍රහයේ 34 වන ඡේදයේ පැනවීම නිසා කිය නොහැකි බව සැලකරමින් විත්තිය තම නිදහසට කරුණු දැක්වීම.

හවුල්කරු — එක් හවුල්කරුවකු තවෙකකුට භාරකාරත්වයක් ඇතුව හෝ විශ්වාසනීය තත්ත්වයක් ඇතුව හෝ සිටීද?

වර්ෂ 1948 ඔක්තෝබර් මස සිට 1949 සැප්තැම්බර් මාසය තෙක් ඇති අවුරුද්දේ කාල සීමාව තුළ රේන්දකරුවන් වශයෙන් රජය මගින් පෙරන අරක්කු මිළට ගැනීමට හා විකිණීමට පී1 දමා සළකුණු කරන ලද වර්ෂ 1948 ඔප්පුවෙන් පළමු වන විත්තිකරු, පස්වන විත්තිකරු, 'පී' නමැති තව තැනැත්තකු සහ පැමිණිලිකරු අතර තම

සම්මුතිය අනුව කරගෙන යන හවුල් ව්‍යාපාරයක මූල ධනයට තමා විසින් ප්‍රදානය කළ කොටස බැව් කියන රු: 13,423/60 ක් සහ 1.10.1949 දින සිට ඊට අයත් නීත්‍යානුකූල පොලිය ආපසු ලබා ගැනීම සඳහා පැමිණිලිකරු 1.6.1956 දින පළමු වන විත්තිකරුට විරුද්ධව මෙම නඩුව පවරා තිබේ.

තුන්වන සහ හතරවන විත්තිකරුවෝ අභාවප්‍රාප්ත 'පී' නමැත්තාගේ උරුමක්කාරයන් වූ අතර දෙවන විත්තිකරු තුන්වැන්නාගේ ස්වාමිපුරුෂයා ය. දෙවන, තුන්වන, හතරවන සහ පස්වන විත්තිකරුවන්ට විරුද්ධව කිසිම සහනයක් මෙහි ඉල්ලා නැත. මෙම හවුල් ව්‍යාපාරයේ සියලුම මුදල් හදල් පළමුවන විත්තිකරුගේ ආරක්ෂාව යටතේ තිබිය යුතුයැයි ඉහත සඳහන් පී1 දරණ ඔප්පුවේ ඇති අතර, මෙම නඩුව විසඳූ උගත් විනිශ්චයකාරවරයා විසින් පිළිගන්නා ලද්දේ එකී සම්පූර්ණ හවුල් ව්‍යාපාරය පරිපාලනය කරන ලද්දේ පළමුවන විත්තිකරු වීසිත් බවය.

තමා සතු මූල ධනයෙන් හවුල් ව්‍යාපාරය කළ කාල සීමාවේ පළමුවන අඩ වසර තුළ ඉපැයුණු ලාභය ඉල්ලා පැමිණිලිකරු පළමුවන විත්තිකරුට විරුද්ධව මීට කලින් යාපනයේ දිස්ත්‍රික් උසාවියේ නො: 5856 දරණ නඩුව සාර්ථක ලෙස කියා තිබේ. එසේම යාපනයේ දිස්ත්‍රික් උසාවියේ නො. 8646 දරණ නඩුවද, දෙවන අඩ වසර තුළ තමාට හිමිවිය යුතු ලාභය ඉල්ලා ඔහු විසින් පවරා ඇති නමුත් දැනට අප ඉදිරියේ ඇති මේ නඩුව නිමවන තුරු එය කල් තබා ඇත.

තවත් කරුණු අතර පළමුවන විත්තිකරු විසින් පහත සඳහන් තර්ක ඉදිරිපත් කරන ලදී.

(ඒ) පැමිණිලිකරුගේ ඉල්ලීම කාලාතික්‍රාන්ත දෙයක් බව:

(බී) සිවිල් නඩු විධාන සංග්‍රහයේ 34 වන ඡේදයේ පැනවීම්වලින් වැළකී ඇති නිසා පැමිණිලිකරුට මේ නඩුව කියාගෙන යාමට නොහැකි බව.

මේ ආයාචනා දෙක ගැන උගත් විනිශ්චයකාරවරයා පළමුවන විත්තිකරුට විරුද්ධව නිගමනය කළේය. කාලාතික්‍රාන්තවීමේ ප්‍රශ්නය විසඳීමේදී භාරකාර ආඥා පනතේ 90 වන සහ 111 වන ඡේද ගැන සඳහන් කළ ඔහු මෙම හවුල් ව්‍යාපාර අරමුදලේ එකම පරිපාලකයා වූ විත්තිකරු ඒ පිළිබඳව අනුචිත භාරකාරයකුගේ (Constructive Trustee) තත්වය දරමින් හෝ විශ්වාසනීය (Fiduciary) තත්වයක් දරමින් හෝ සිටියේය යන මතයක එල්බ ගත්තේය. මේ නිසා පළමුවන විත්තිකරුගෙන් අභියාචනයක් ඉදිරිපත්ව ඇත.

තීන්දුව: (1) පළමුවන විත්තිකරු (ඇපැල්කරු) අනුචිත භාරකාරයකු ගේ තත්ත්වයෙන් හෝ විශ්වාසනීය තත්ත්වයකින් හෝ සිටියේය යන නිගමනයට බැසගත් උගත් විනිශ්චයකාරවරයා කරුණු වරදවා වටහා ගෙන තිබේ.

(2) අනික් අයවඵන්ට යම්කිසි විශ්වාසනීය තත්ත්වයක පිහිටා ඇති අය විසින් රහසිගතව ලබන ලද ප්‍රති-ලාභයක ස්වභාවය ඇති දේවලටම අදාළ වන නිසා භාරකාර ආඥා පනතේ 90 වන ඡේදය ඇපැල්කරුට මෙහිදී උපයෝගී කරගත නොහැක. මෙම විශ්වාසනීය තත්ත්වය ගැන නිගමනයකට බැසිය යුත්තේ ඉංග්‍රීසි නීතිය අනුව බවත්, එම නීතියම හවුල් ව්‍යාපාර පිළිබඳවද බලපවත්වන බවත් මෙහි ලා සැලකිය යුතුය.

(3) භාරකාර ආඥා පනතේ 111 වන ඡේදයද මෙහිදී පැමිණිලිකරුට සහාය පිණිස යොදවා ගත නොහැක. එම ආඥා පනතේ 5 වන ඡේදයෙන් එංගලන්තයේ පවතින නීතියට අනුව ප්‍රකාශිත භාරයක්යැයි යම්කිසි අනුචිත භාරයක් එහි කරුණු අනුව සලකා ගත හැකි නම් එපමණ දුරට පමණක් මිස එයට වඩා දුර අනුචිත භාරයක් යොදවා ගැනීම බැහැර කර තිබේ.

(4) එක් හවුල්කරුවකු තම හවුල්කරුවකු කෙරෙහි කිසියම් ප්‍රකාශිත භාරයක භාරකරුවකු ගේ තත්ත්වයෙන් සිටියයි කියන මතයට නීති ග්‍රන්ථ සහ විසඳී ඇති නඩු සියල්ලම පාහේ පටහැනිව තිබේ.

(5) සාමාන්‍යයෙන් පැනවී ඇති කාලය සීමා කිරීමේ ලිඛිත ආඥා අදාළ වන්නේ හවුල් ව්‍යාපාරයක් විසුරුවා හැරීමෙන් පසුව එහි ගණන් හිලවු සම්බන්ධයෙන් දමන නඩුවලට හෝ හවුල්කරුවකු ඉවත් කිරීමට දමන ලද නඩුවලටය.

(6) එම නිසා එකී හවුල් ව්‍යාපාරය විසුරුවා හැරීමෙන් සාවුරුද්දකට පසුව දමා ඇති මෙම නඩුව කාල සීමා ආඥා පනතේ 6 වන ඡේදයේ ප්‍රතිපාදනයන්ගේ හේතුවෙන් ගෙන යා නොහැකි නඩුවකි.

ඉහත සඳහන් ඇපැල්කරුගේ දෙවන තර්කය පදනම් කොට දෙන ලද තීන්දුව මෙසේය:

(7) පී1 දරන හවුල් ව්‍යාපාර ඔප්පුවේ ප්‍රඥප්තීන්ට අනුව පැමිණිලිකරු පිළිවෙළින් වසර දෙකක තමාට හිමි ලාභය ලබා ගැනීමේ අභිප්‍රායයෙන් කරන ලද වැයමක් නඩු නිමිත්ත හැටියට සලකා දමන ලද එම නඩුව හාත්පසින්ම වෙනස්වූ නඩු නිමිත්තක් මත ගොඩනැගී ඇති මෙම නඩුවට සිවිල් නඩු විධාන සංග්‍රහයේ 34 වන ඡේදයෙන් වැළකීමක් සිදුනොවේ.

හබෙයාස් කෝපස් ආඥාව

හබයාස් කෝර්පුස් ආඥාවක් — ලාබාල දරුවකුගේ භාරය — ඉහළින්ම සැලකෙන කරුණ දරුවාගේ සුභසිද්ධිය — මවගේ නුසුදුසුකම ඔප්පු නොවූ විට පියාගේ විශේෂ අයිතිය නොසලකා හැරිය හැකිය.

අවුරුදු එකහමාරක් පමණ වයසැති දරුවකුගේ මවක් සිය සැමියා වීසින් දරුවා තමාගෙන් අයුතු අන්දමින් වෙන් කර තබා ඇතැයි දක්වමින් එකී දරුවාගේ භාරය ඉල්ලා සිටියාය.

තීන්දුව: දරුවන්ගේ භාරය පිළිබඳ කාරණා වලදී ඉහළින්ම සලකා බැලෙන කරුණ වනුයේ දරුවාගේ සුභසිද්ධියයි. එම නිසා මේ නඩුවේදී පියාගේ විශේෂ අයිතිය තිබියේ වී නමුත් දරුවා ගේ භාරයට මවගේ නුසුදුසුකම ගැන සාක්ෂි නොමැති නිසා මෙහිදී මේ ලාබාල දරුවාගේ භාරය මවට ලැබිය යුතුය.

වී. එම්. බොතේජු එ. කේ. ජයවර්ධන සහ තවත් අය 15

ලියා පදිංචි කිරීමේ ආඥා පණත

49 වෙනි ඡේදය යටතේ සැදුනු රීති

නොතාරිස් තැන යටතේ බලනු 6

සමරවික්‍රම විනිශ්චයකාරතුමා ඉදිරිපිට

සී. ඇස්. පෙරේරා එ. ඇටෝර්නි-ජනරාල්වරයා*

ශ්‍රේෂ්ඨාධිකරණ අංක 290/66 — ම.ල. කොළඹ 36626

උසාවි ආඥා පනතේ 31 වන වගන්තිය යටතේ කරනු ලබන ඉල්ලීමක් පිළිබඳ කාරණයයි.

විවාද කළේ: 1967 අප්‍රෙල්, 3 වැනිදා
තීන්දුව දුන්නේ: 1967 ජූලි, 7 වැනිදා

ඇප — උසාවි ආඥා පනතේ 31 වන ඡේදය—චිත්තිකරුවන්ට ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයකට මුහුණ දීමට නියම කිරීම — එසේ නියම කිරීමෙන් පසු පළමුවැනි අපරාධ සැසි වාරයේ දී නඩුව විභාග කිරීමට අසමත් වීම—31 වන ඡේදයේ බලපැවැත්වීම—අධි චෝදනා පත්‍රය යකස්කොට ඉදිරිපත් නොකිරීම චිත්තිකරුවන් ඇප පිට නිදහස් කිරීමට විරුද්ධවීමට ප්‍රමාණවත් හේතුවක් ද?

මෙය උසාවි ආඥා පනතේ 31 වැනි වගන්තිය යටතේ කරනු ලැබ පහත දක්වෙන කරුණු මත ඇප පිට චිත්තිකරුවන් නිදහස් කර ගැනීම සඳහා කරන ලද ඉල්ලීමකි.

(අ) 23.2.66 දින මිනිමැරීමට කුමන්ත්‍රණය කිරීමේ චෝදනාවක් ඇපැල්කරුට සහ තවත් තිදෙනකුට විරුද්ධව නාගරික මහේස්ත්‍රාත් උසාවියේ දී ඉදිරිපත් කරන ලද බව.

(ආ) 23.6.66 වැනි දින ඉල්ලුම්කරු හා අනික් චිත්තිකරුවන් තිදෙනාට ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයකට මුහුණ දීමට නියෝග කරන ලද බව.

(ඇ) 10.7.66, 10.10.66, 10.1.67 යන දින වල ඇරඹුණු අපරාධ සැසි වාරවල දී හෝ 20.3.67 වැනි දින ඇරඹී පැවැත්වෙමින් තිබුණු අපරාධ සැසිවාරයේ දී ද නඩුව විභාග නොවුන බව.

(ඈ) ඉල්ලුම්කරු වෙත චෝදනා පත්‍රයක් එතෙක් යවා නොතිබුනු අතර, ඔහුට විරුද්ධව පැවති සාක්ෂි ද ඉතා දුර්වල ඒවා බව.

මානික්කවාසගර් විනිශ්චයකාරතුමාගේ තීන්දුව කෙරෙහි විශ්වාසය තබමින් (මැන්ඩිස් එ. රාජින 66 න.නී.වා. 502) රජයේ අධිනීතිඥවරයා නීතිමය තර්කයක් මත මේ ඉල්ලීමට විරෝධය දැක් වී ය. එනම්: ඉල්ලුම්කරු වෙත චෝදනා පත්‍රයක් නොයවන ලද හෙයින් ඔහුගේ ඉල්ලුම් පත්‍රයේ සඳහන් වෙන එක ද සැසි වාරයක දී හෝ යථා පරිදි ඉල්ලුම්කරුට විරුද්ධව නඩුව විභාග කළ නොහැකි වූ හෙයින් ඇප පිට නිදහස් කරන ලෙස ඉල්ලීමට ඔහුට අයිතියක් නැති බවයි.

තීන්දුව: (1) උසාවි ආඥා පනතේ 31 වැනි ඡේදයේ ක්‍රියාකාරිත්වය වනුයේ ශ්‍රේෂ්ඨාධිකරණ ඉදිරියේ නඩු විභාගයකට ඉදිරිපත් කරන ලද සිරකරුවකු යථා පරිදි ඔහුගේ නඩුව විභාග කළ යුතුවූ සැසි වාරයේ දී එය ඉටු නොවූ කල ඔහු ඇප පිට නිදහස් කළ යුතු වීමයි.

(2) "සිරකරු යථා පරිදි නඩු විභාගයට පාත්‍ර කළ යුතු සැසි වාරය" යන වචනවලින් අදහස් කෙරෙනුයේ සිරකරු චෝදිතව සිටින අපරාධය සිදු කරන ලද පළාත ඇතුළත් වන අපරාධ අධිකරණ මණ්ඩලය සඳහා පැවැත්වෙන සැසි වාරයයි.

(3) අධි චෝදනා පත්‍රය සූදානම් කොට ඉදිරිපත් කිරීම හා සම්බන්ධ කිසියම් පියවරක් ගැනීමට අතපසු වීම නිසා ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ සැසි වාරයේ දී සිරකරුට විරුද්ධව නඩු විභාගය යථා පරිදි විභාග කිරීමට නීතියෙන් ඉඩක් නොවියයි පිළිගැනීමට සැහෙන හේතුවක් නොවේ.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 9 වෙනි පිට බලනු.

(4) අධි චෝදනා පත්‍රය සූදානම් කිරීමට හෝ සාක්ෂි වාර්තා කිරීමට කාලය නොමැතිවීම කරණ කොටගෙන නඩුව ඉහළට තැබීමත් පළමු අපරාධ සැසි වාරයත් අතර ඇතැම් විට ප්‍රමාණවත් කාලයක් නොමැති හෙයින් සිරකරුවකුට විරුද්ධව නඩු විභාගය පැවැත්විය නොහැකි වීම විත්තිකරු ඇප පිට නිදහස් නොකිරීමට ප්‍රමාණවත් හේතුවක් වන්නේ ය.

සමරවික්‍රම විනිශ්චයකාරතුමා: ''ප්‍රමාදයනට හේතුව අදාළ පුද්ගලයන්ගේ නොසැලකිල්ලයයි ගණන් නොගත්තත්, ඇපයට ඉඩ ලැබීම පිළිබඳ සිරකරුවකු සතු අයිතිය ඔහුට අහිමි කිරීම සඳහා ඒවා ක්‍රියාවේ නොයෙදේ.''

අනුගමනය නොකළ නඩු : ඩබ්ලිව්. පී. මැන්ඩිස් එ. මහ රැජින, 66 න.නී.වා. පිටු 502.

සඳහන් කළ නඩු: මහ රැජින එ. ජිනදාස, 60 න.නී.වා. පිටු 125.

ද මැල් එ. ඇටෝර්නි-ජනරාල්වරයා, 47 න.නී.වා. පිටු 136.

ආචාර්‍ය කොල්වින් ආර්. ද සිල්වා, මැල්කම් පෙරේරා, පී. කේ. ලියනගේ, පී. ඕ. විමලනාග යන මහතුන් සමග, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

රජයේ අධිනීතිඥ වී. ඇස්. ඒ. පුල්ලෙනායගම් මහතා, රජයේ අධිනීතිඥ ඇල්. ඩී. ගුරුසාමි මහතා සමග, ඇටෝර්නි-ජනරාල්වරයා වෙනුවෙන්.

සමරවික්‍රම විනිශ්චයකාරතුමා:

මෙය වූ කලී ශ්‍රේෂ්‍යාධිකරණ අංක 290/66, කොළඹ මහේස්ත්‍රාත් උසාවියේ අංක 36626 දරණ නඩුවේ 1 වන විත්තිකරු විසින් උසාවි ආඥා පනතේ 31 වන වගන්තිය යටතේ කරනු ලබන ඉල්ලීමකි. දණ්ඩ නීති සංග්‍රහයේ 296 හා 108 යන වගන්ති සමග කියැවිය යුතු එම සංග්‍රහයේ 113 බී වගන්තිය යටතේ දඩුවම් ලැබිය හැකි මිනීමැරීම සඳහා කුමන්ත්‍රණය කිරීමේ වරද දෙකක් තමන් විසින් කරන ලදැයි චෝදනා කරමින් ඉල්ලුම්කරුට හා තවත් තිදෙනකුට විරුද්ධව 1966 පෙබරවාරි 23 වන දින දී කොළඹ නාගරික මහේස්ත්‍රාත් උසාවියට තොරතුරු හාර දුන් බැව් ඉල්ලීමෙන් කියැ වේ. මහේස්ත්‍රාත්වරයා විසින්, ඉල්ලුම්කරු හා අනෙක් විත්තිකරුවන් තිදෙනා මෙම උසාවියේ නඩු විභාගයකට 1966 ජූනි 23 වන දින දී යොමු කළ බැව් ද වැඩිදුරටත් එයින් කියැ වේ. 1966 ජූලි 19 වන දින, 1966 ඔක්තෝබර් 10 හා 1967 ජනවාරි 10 වන දින ඇරඹුණු මෙම උසාවියේ බටහිර සංචාරයෙහි අපරාධ සැසිවල දී මෙන් ම 1967 මාර්තු 20 වන දින ඇරඹුණු වර්තමාන සැසියේ දී ද ඉල්ලුම්කරු විභාගය සඳහා නොගෙනෙන ලදැයි ද තවදුරටත් එහි සඳහන් වේ.

තමාගේ සේවාදායක වෙත තවමත් අධිචෝදනා පත්‍රයක් හාර කොට නැති බවත්, ඔහුට විරුඬව ඇති සාක්ෂ්‍ය අපරාධ සහායකයෙකුගේ සාක්ෂ්‍ය බවත්, එකී සාක්ෂ්‍ය තහවුරු කිරීමේ සාක්ෂ්‍ය හැටියට යම් හෙයකින් සලකනොත් තහවුරු කිරීමේ සාක්ෂ්‍ය ඉතා අල්ප වශයෙන් පමණක් ඇති බවත් ඉල්ලුම්කරුගේ උගත් අධිනීතිඥ වරයා තවදුරටත් දක්වා සිටියේ ය.

ඌදෙක් නීති පදනමක පිහිටා උගත් රජයේ අධිනීතිඥ වරයා මෙම ඉල්ලීමට විරුද්ධ වූයේ ය. එය වූ කලී, අධිචෝදනා පත්‍රයක් ඉල්ලුම්කරු වෙත භාර කර නැති හෙයින් ම ඔහුගේ ඉල්ලීමේ සඳහන් කරන ලද කවර යැයියක දී හෝ ඔහු නියමිත අන්දමින් විභාගයට කැප කළ නොහැකිව තිබුණු බව ය. එහෙයින් ම, උසාවි ආඥා පනතේ 31 වන වගන්තිය යටතේ ඇප පිට මුදා හරිනු ලැබීමට ඔහුට අයිතියක් නැත. වෙනත් කරුණු අතර, සැසියේ කාලයේ දී නඩුව විභාග කිරීමට තරම් එය මෝරා තිබිය යුතු බැව් වගන්තියෙන් අවශ්‍ය කර ඇතැයි මානිකවාසගර් විනිශ්චයකාරතුමා විසින් දෙන ලද, ඩබ්ලිව්. පී. මැන්ඩිස් එ. රැජින, 66 නව නීති වාර්තා 502 පිට තීන්දුව උගත් රජයේ නීතිඥතැන විසින් පිහිට කොට ගන්නා ලද්දේ ය.

උසාවි ආඥා පනතේ 31 වන වගන්තියේ ප්‍රතිඵලය නම් නඩු විභාග උදෙසා මෙම උසාවිය ඉදිරිපිටට පවරනු ලැබූ සිරකරුවා, සුදුසු අන්දමින් විභාගයට කැප කළ හැකි වන්නා වූ පළමුවන සැසි වාරයේ දී විභාගයට නොගෙනෙන ලද්දේ නම් ඔහුට ඇපයට ඉඩ දිය යුතු ය. මට පෙනෙන හැටියට, අපේ අපරාධ නඩු සංවිධානය අනුව, මහේස්ත්‍රාත්වරයකු විසින් යොමු කරනු ලැබූ පුද්ගලයකු විභාගයකට කැප කිරීම වූ කලී අඩු ගණනේ පියවර තුනක්වත් ගත යුතු වූ ක්‍රියා කලාපයකි. ඒවා නම්:—

(1) අධි චෝදනා පත්‍රයක් සකස් කොට නඩු විභාගයට නියමිත දිනට අඩු ගණනේ දින දහහතරකට වත් ප්‍රථමයෙන් විත්තිකරුට භාර කිරීම,

(2) මෙම උසාවිය ඉදිරියේ දී නඩු විභාගය සඳහා නියම කරන ලද දිනය දක්වමින් දැන්වීමක් චිත්තිකරුට භාර කිරීම;

(3) තමා වෙත භාර කරන ලද අයි චෝදනාව උඩ මෙම චිත්තිකරු උසාවිය ඉදිරියේ විනිශ්චයට ඉදිරිපත් කිරීම.

උසාවි ආඥා පනතේ 31 වන වගන්තියේ අදාළ කොටස මෙසේ කියැවේ:—

"31. කිසියම් වරදක් සඳහා ශ්‍රේෂ්ඨාධිකරණය වෙත පවරනු ලබන කිසියම් සිරකරුවකු, ඔහු පවරන ලද දිනයෙන් පසුව සුදුසු අන්දමින් නඩු විභාගයට භාජන කළ හැකි වූ පළමුවන අපරාධ සැසි වාරයේ දී විභාගයට නොගෙනෙනොත් ....., එයට ප්‍රතිවිරුද්ධ හොඳ හේතූන් දැක්වුවහොත් මිස, නැත්නම් එකී උසාවිය හෝ එහි විනිශ්චයකාරවරයකු හෝ ඔහුට ඇපයට ඉඩ දිය යුතු ය."

මෙම විධිවිධානය යටතේ සිරකරුට ඇපයට ඉඩ දිය යුතු ද යන්න තීරණය කිරීමේ දී, උසාවියක් විසින් ප්‍රශ්න දෙකක් සලකා බැලිය යුතුව ඇත. (1) මහේස්ත්‍රාත්වරයා විසින් ඔහු පවරනු ලැබූ අවස්ථාවෙන් පසුව පැවැත්වුණු සැසියක දී සිරකරු විභාගය සඳහා නොගෙනෙනු ලැබුවේ ද, (2) එම සැසිය සුදුසු අන්දමින් ඔහු නඩු විභාගයකට පාත්‍ර කළ හැකිව තිබුණු සැසියක් ද යන්න ය. දෙවන ප්‍රශ්නය තීරණය කිරීමේ දී, ඔහු නඩු විභාගය සඳහා ගෙනෙන ලද්දේ නම් සුදුසු අන්දමින් ඔහු විභාගයට භාජන කළ හැකිව තිබුණේ ද, යන්න කෙනකු විසින් සලකා බැලිය යුතු බැව් මට හැඟේ. එහෙයින් ම, මා සිතන ඉන්දමට, සිරකරුවා විභාගයට පැමිණවීම හා ගැටී ඇති එක් පියවරක්, එනම් අධිචෝදනාව සකස් කොට භාර කිරීම පැහැර හැරීමක් නිසා සැසියක දී සිරකරුවකු සුදුසු අන්දමින් විභාගයකට කැප කළ නොහැකිවිණැයි යන්න පිළිගැනීම ප්‍රමාණවත් හේතුවක් වශයෙන් ඉදිරිපත් කිරීමට ඉඩ හැරිය නොහැකි ය.

එහෙයින් ම, 'සිරකරුවා සුදුසු අන්දමින් විභාගයට කැප කළ හැකි වූ අපරාධ සැසිය' යන වචනවලින් සිරකරුවා චෝදනා ලබා සිටින අපරාධය හෝ වරද සිදු කරනු ලැබූ සීමා තුළ සංචාරය වෙනුවෙන් පවත්නා සැසිය සඳහන් කෙරෙන බැව් මම අදහස් කරමි. රැජින එ. ජීනදාස, 60 නව නීති වාර්තා 125 පිටුව, නඩුවේ දී ගුණසේකර විනිශ්චයකාරතුමා, "වරදවල් දකුණු සංචාරයේ පිහිටියා වූ ගාල්ල අධිකරණ කොට්ඨාශය තුළ දී කරන ලදැයි කියනු ලැබේ" යයි කීවේ ය. එහෙයින් චිත්තිකරු 'සුදුසු අන්දමින්' විභාගයකට භාජන කළ' හැක්කේ එම සංචාරය සඳහා මෙම උසාවියෙන් පවත්වනු ලබන අපරාධ සැසියකදී ය. මවිසින් දරනු ලබන මතය නහිල් විනිශ්චයකාරතුමා විසින් ද මැල් එ. ඇටෝර්නි-ජනරාල්, 47 නව නීති වාර්තා 136 පිටුවේ දී ගන්නා ලද මතයට අනුකූල ය, ගෞරවාන්විතව මානික-වාසගර් විනිශ්චයකාරතුමා විසින් වගන්තිය කෙරෙහි තබන ලද අර්ථ කථනයට එකඟ වීමට මට නොහැක්කේය.

මවිසින් ගන්නා ලද මතය උඩ ද ඇතැම් නඩුවල දී නඩු විභාගයට කැප කිරීමත්, පළමුවන අපරාධ සැසියත් අතරතුර දී, අධි චෝදනාව සකස් කිරීම සඳහා වඩාත් කාලය අවශ්‍ය නිසා හෝ වෙවයි අපරාධ නඩු සංවිධාන සංග්‍රහයේ 389 වන වගන්තියට අනුකූලව තවදුර සාක්ෂ්‍ය ඉදිරිපත් කිරීම අවශ්‍ය නිසා වේවයි සිරකරුවා නඩු විභාගය සඳහා ගෙන ඒමට කාලය ප්‍රමාණවත් නොවිය හැකි ය. එබඳු අවස්ථා ඇතොත්, එම කාරණාවල දී චිත්තිකරුගේ ඇපයට ඉඩහැරිය යුතු නොවීම පිළිබඳව එය 'හොඳ හේතුව' වශයෙන් යෙදෙනු ඇත.

1966 ජුනි 23 වන දින දී චිත්තිකරුවන් විභාගයට කැප කළ නමුත්, නඩු කොපිය 1966 නොවැම්බර් 7 වන දින ඇටෝර්නි-ජනරාල් දෙපාර්තමේන්තුවට ලැබුණු බවත්, 1967 අප්‍රෙල් 21 වන දින දී තවදුර සාක්ෂ්‍ය සටහන් කර ගන්නා ලෙස මහේස්ත්‍රාත්වරයා වෙත ඇටෝර්නි-ජනරාල් වෙනුවෙන් උපදෙස් දෙන ලද බවත් උගත් රජයේ අධිනීතිඥවරයා සඳහන් කෙළේ ය. විභාගයට කැප කිරීමෙන් භාර මසකට පසුව මහේස්ත්‍රාත් උසාවිය විසින් ඇටෝර්නි-ජනරාල් වෙත නඩු කොපිය යවනු ලැබීම පැහැදිලි කිරීම සඳහා පාලන දුෂ්කරතා හෝ වෙනත් හේතු තිබිය හැකි ය. තවදුර සාක්ෂ්‍ය සටහන් කිරීම සඳහා විධානයන් නිකුත් කිරීමට පෙර පස් මසකටත් වඩා ප්‍රමාදයක් තිබීම පැහැදිලි කරන්නා වූ කාරණා ද තිබිය හැකි ය. මේ කරුණු පිළිබඳව මා විභාග කොට නැති නිසා ඒවා පිළිබඳව මතයක් මම ප්‍රකාශ නොකරමි. ප්‍රමාදයනට හේතුව අදාළ පුද්ගලයන්ගේ නොසැලකිල්ලයයි ගණන් නොගත්තත්, ඇපයට ඉඩ ලැබීම පිළිබඳ සිරකරුවකු යතු අයිතිය ඔහුට අහිමි කිරීම සඳහා ඒවා ක්‍රියාවේ නොයෙදේ. විභාගයට කැප කිරීමෙන් පසුව අඩුරුද්දක කාලයක් තිස්සේ අධිචෝදනාවක් සකස් කිරීමට නොහැකිවීමට තුඩු දුන් කාරණා උගත් රජයේ අධිනීතිඥවරයා සඳහන් කෙළේ ය. ඔහු ඒ කාරණා මෙම වගන්තිය යටතේ 'හොඳ හේතූන්' වශයෙන් යොදා නොගැනීම නුවණට හුරුය.

අදාළ සියලු කරුණු සුපරීක්ෂාකාරීව සලකා බැලීමෙන් පසුව මෙම අවස්ථාවේ දී ඇපයට ඉඩ ලැබීමට නඩුවේ 1 වන චිත්තිකරු වන ඉල්ලුම්කරුට අයිතියක් ඇති බවට මම සැහීමට පත්වෙමි. ඇපකාරයන් දෙදෙනකු සහිතව රු. 10,000/- ක ඇප පොරොන්දුවකට ඔහු බැඳීමෙන් පසුව ඔහු මුදා හරිනු ලැබිය යුතුයයි මම විධාන කරමි.

ඉල්ලීමට ඉඩ දෙන ලදී.

පරිවර්තනය: **ඇල්. ඇම්. ඒ. සිල්වා විසිනි.**

අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට.

මයිකල් ලියනගේ එ. පොලිස් පරීක්ෂකතැන, බොරැල්ල*

සු.උ. අංකය 990/67 — කොළඹ නගර සභා උසාවිය අංක 42849

විවාද කළ සහ තීන්දු කළ දිනය: 1968 පෙබරවාරි 20

තුරග තරග සම්බන්ධයෙන් ඔට්ටු ඇල්ලීමේ ආඥා පනත 3(3) ඡේදය — 11(2) ඡේදය හා සමග කියැවුනු කල — තුරග තරගයක් සම්බන්ධයෙන් අය බද්දට යටත් නොවූ ඔට්ටුවක් සඳහා මුදල් භාර ගැනීමේ චෝදනාවක්— විදේශයක පැවැත්වුනු තුරග තරගයක් — චෝදනාව තහවුරු කිරීම සඳහා පුවත්පත් පිටපත් ඉදිරිපත් කිරීම — වැරදිකරු බව තීන්දු වීම — පැමිණිල්ල විසින් ඔප්පු කළ යුතු දෙය — ඉදිරිපත් කළ පුවත්පත්වල සාක්ෂිමය අගය.

මේ නඩුවේ දී බද්දට යටත් වූවක් නොවන ඔට්ටුවක් විදේශීය රටක පැවැත්වුනු තුරග තරගයක් සම්බන්ධයෙන් භාර ගැනීමේ චෝදනාව:—

තීන්දුව: (1) පැමිණිල්ල විසින් ඔට්ටුතුණ්ඩුවල තිබුනු නම් අශ්වයින්ගේ නම් බව ඔප්පු කිරීම ප්‍රමාණවත් නොවේ. ඒ අශ්වයින් තරඟයට සහභාගි වූ බව ද පැමිණිල්ල විසින් ඔප්පු කළ යුතු ය.

(2) සාක්ෂි වශයෙන් ඉදිරිපත් කරන ලද පුවත්පත්වල අඩංගු දේ අසා දැනගත් සාක්ෂි වූ හෙයින්, පැමිණිල්ල විසින් ඔප්පු කළ යුතු වූ කරුණු ඔප්පු කිරීම සඳහා ඒවා යොදා ගත නොහැකි ය.

සී. ඊ. ද සිල්වා මහතා, වරදකරු වූ ඇපැල්කරුවෙනුවෙන්.

රජයේ අධිනීතිඥ රංජිත් ගුණතිලක මහතා, වගඋත්තරකරුවන් වෙනුවෙන්.

අබේසුන්දර විනිශ්චයකාර තුමා:

තුරග තරග ඔට්ටු ඇල්ලීමේ ආඥා පනතේ 3(2) ඡේදය සමග 11(2) ඡේදයත් එකට සම්බන්ධ කොට කියැවීමේ දී දඬුවම් ලැබිය යුතු වරදකට වරදකරු වූ මෙම නඩුවේ චිත්තිකරුට රුපියල් 1,000 ක දඩයක් හෝ එය නොගෙවුවහොත් බරපතල වැඩ ඇතිව හය මසක සිර දඬුවමක් ද නියම විය. චිත්තිකරු විසින් කරන ලදැයි කියන දඬුවම් ලැබිය යුතු වරද අශ්ව ධාවනය පිළිබඳව ගෙවිය යුතු බද්දට අසු නොවන ඔට්ටුවක් ඔහු විසින් ලබා ගැනීම ය. මෙම තුරග තරගය ඩොන්කැස්ටර් නගරයෙහි දුවන ලද්දක් යැයි සඳහන් වී තිබේ. ඩොන්කැස්ටර් නගරයෙහි දුවන ලද අශ්ව තරඟයකට සහභාගි වූ අශ්වයන්ගේ යැයි සැළකෙන නම් ඇති පුවත්පත් දෙකක පිටපත් දෙකක් ද, ඔට්ටු ඇල්ලීමට භාවිතා කරනු ලැබූ කඩදාසි තීරුවල එකී නම් සඳහන්ව තිබූ බව ද මෙහි ලා සැළකිය යුතු ය. මෙහි දී ඔට්ටු ඇල්ලීම සඳහා යොදාගත් කඩදාසි තීරුවල තිබූ නම් අශ්වයන්ගේ නම් බව පමණක් නොව එම නම් ඇති අශ්වයන් තුරග තරගයකට දුවන ලද බව ද ඔප්පු කිරීමේ භාරය පැමිණිලි පක්ෂය සතුව තිබිණි. සාක්ෂි සඳහා ඉදිරිපත් කරන ලද පුවත්පත් වල අඩංගු කරුණු ආරංචි මාත්‍ර සාක්ෂි නිසා, එයින් පැමිණිලි පක්ෂය විසින් ඔප්පු කළ යුතු දෙය ඔප්පු කිරීමට එය කෙරෙහි විශ්වාසය තැබීමට පැමිණිලි පක්ෂයට නො පිළිවන. ඇටෝර්නි-ජනරාල්වරයා වෙනුවෙන් රජයේ අධිනීතිඥවරයා චිත්තිකරු එම ඔට්ටු ඇල්ලීමට කඩදාසි තීරු භාරගෙන තිබීම ම සාක්ෂි ආඥා පනතේ 17 වන ඡේදයෙන් කියැවෙන පරිදි කරුණු ඔහු විසින් පිළිගැනීමක් යැයි සඳහන් කළේ ය. මේ නිසා එසේ ලබා ගත් ඔට්ටු තරගයක දී දුවන ලද අශ්වයන් පිළිබඳව බව ඔහු කියා සිටියේ ය. ඔට්ටු ඇල්ලීමේ කඩදාසි තීරුවල සඳහන් නම් අශ්වයන්ගේ නම් බවත්, එම නම් ඇති අශ්වයන් තුරග තරගයකට දිවූ බවත් චෝදිතයා විසින් විශ්වාස කිරීම එයට වුවමනා කරන තරමේ සාක්ෂියක් නොවේ.

ඉහත සඳහන් හේතූන් උඩ චිත්තිකරු වරදට පත් කරනු ලැබීම සහ ඔහුට දුන් දඬුවම් නිෂ්ප්‍රභා කරන මම චෝදිතයා නිදහස් කරමි.

චිත්තිකරු නිදහස් කරන ලදී.

*ඉංග්‍රිසි පිටපත ඉංග්‍රිසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 11 වෙනි පිට බලනු.

එව්. ඇන්. ජී. ප්‍රනාන්දු, අග්‍රවිනිශ්චයකාරතුමා සහ සිරිමාන්න, විනිශ්චයකාරතුමා ඉදිරිපිට

ගැටගහවල වතුයාය එ. මොහමඩ් රෆීක් සහ තව කෙනෙක්*

ශ්‍රේෂ්ඨාධිකරණ අංක 118/1964 — මහනුවර දිස්ත්‍රික් උසාවිය අංකය 9085

විවාද කළ දින: වර්ෂ 1967 ජූනි 8, 9, 10, 11, 12 සහ 20 වෙනි දිනයන්හි
තීන්දු කළ දින: වර්ෂ 1967, ජූලි 19 වැනිදා

නොතාරිස් කෙනකුගේ බලවත් නොසැලකිල්ල නිසා පැමිණිලිකරු ණය මුදලක් ලබා ගැනීම සඳහා උකස් තැබූ ඉඩම් අටෙන් හතකට සම්බන්ධවූ ද, උකස්කරුගේ අයිතියට බලපවත්වන්නාවූ ද ඔප්පු දෙකක් ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයේ ලිපි ලේඛන පරීක්ෂා කිරීමේදී අසු නොවී යාම — උකස් කළ ඉඩම් විකිණීමට ඉන් පසුදිනක ලැබූ නියෝගයක් — වෙන්දේසියේදී ඉල්ලුම්කරුවන්ට උකස්කරුගේ අයිතියේ ඇති අඩුලුහුඩුකම් පිළිබඳව දන්වමින් මිලදී ගතහැකැයි සැලකිය හැකි අය අතර ප්‍රචාරයවූ දැන්වීමක් — ඉඩම් හතක් පිළිබඳව සඳහන් කෙරුණු පිටුවල ඔප්පු දෙකක් සඳහන් නොවීම — වෙනත් පිටුවල ඒවා සඳහන් වීම — සඳහන් පිළිබඳ අන්‍යෝන්‍ය විස්තර සටහන් සැක සහිත බව — එහි ප්‍රතිඵලය.

සාක්ෂි ආඥා පණත — 35 වන සහ 114(ඩී) දරණ ඡේද — සමහර ඉඩම්වල නොබෙදූ කොටස් සහ වෙන ඉඩම්වල බෙදූ කොටස් අයිතිවාසිකම් සම්බන්ධ කරන ඔප්පු — මෙවා ලියාපදිංචි කළ හැකි ලිපි ලේඛනද යන්න — ලියාපදිංචි කිරීමේ ආඥා පණත (117 වන අධිකාරය) 49 වන ඡේදය යටතේ සැදුනු රීති — අංක 5, 6, 10(1) 13(3) සහ 14 යන රීති.

පැමිණිලිකාර වෙළෙඳ සමාගම අභාවප්‍රාප්ත "ඒ" නමැති නොතාරිස් තැනගේ බුදලයේ පොල්මෑකාරයන්ට රු: 25,302/78ක අලාභ මුදලක් ඉල්ලා නඩු දැම්මේය. මෙයට හේතුවූයේ එම සමාගමින් රු: 25,000 ක ණය මුදලක් ලබා ගැනීම සඳහා "පී" නමැත්තකු විසින් උකස් තැබූ උකස්කරයකට සම්බන්ධ ඉඩම්වල අයිතිය ගැන නිර්දේශ කිරීමට භාරගත් එම නොතාරිස්වරයා ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයේ කළ ලිපි ලේඛන පරීක්ෂණයේදී ඔහුට ඔප්පු දෙකක් තමාගේ බලවත් නොසැලකිලිකම නිසා අසු නොවී යාමය. පී18 සහ පී19 දමා ලකුණු කොට ඇති මේම ඔප්පු දෙකින් 'පී' නමැත්තා මෙම ඉඩම් අතුරින් හතක අයිතිය තමාගේ පුතුන් දෙදෙනාට පවරා තිබේ. කලකට පසු 'පී' නමැත්තාට විරුද්ධව උකස් ඉඩම් විකිණීමේ තීන්දුවක් නිකුත් වූ විට ඒ අනුව ඇස්කීසි ගසා ඉඩම් විකිණීමට තැන් කිරීමේදී මෙම ඉඩම් හත වෙන්දේසියෙන් ගැනීමට ඉල්ලුම්කරුවන් නොපැමිණීම නිසා මෙය අනාවරණය විය.

එසේ ඉල්ලුම්කරුවන් නොමැති වීමට හේතුව ඉල්ලුම්කරුවන් ලෙස පැමිණෙනැයි සිතිය හැකි පිරිස අතර 'පී' නමැත්තාට ඇත්තේ "විකිණීමට ඉදිරිපත්කොට ඇති ඉඩම්වල සීමාසහිත අයිතියක් පමණකැ" යි ඔවුනට දන්වමින් බෙදා හැර තිබුනු දැන්වීම් පත්‍රිකාවකි.

පී18 සහ පී19 දමා ලකුණු කර ඇති එකී ඔප්පුවල ඇති ඉඩම් ගැන ඉඩම් ලියා පදිංචි කිරීමේ කාර්‍යාලයෙහි සඳහන් වී ඇති කිසිම පිටුවක මේ ඔප්පු දෙක ලියා පදිංචි වී නොමැත. පී නමැත්තාට සම්බන්ධ ඉඩම්වල නොබෙදූ කොටස්වල අයිතිවාසිකම් සහ අනිකුත් බෙදූ ඉඩම් වල තිබූ අයිතිවාසිකම් ඒකාබද්ධකොට සැලැස්මක් සාදවා එය වෙනම ඉඩම් ලෙස සලකා එම ඉඩම් වලින් එක් කොටස බැගින් පුතුන් දෙදෙනා අතරේ බෙදා දී තිබේ.

කෙසේ වුවද මෙම ඔප්පු දෙක සම්පූර්ණයෙන් වෙනස් පිටක ලියා පදිංචිකර තිබේ. ඒ සටහන් නියම පිටුවේ සටහන් සමග අන්‍යෝන්‍ය සම්බන්ධ සටහන්වලින් එකට බැඳී තිබුනු නමුත් මේ අන්‍යෝන්‍ය විස්තර සටහන් බලය නොලත් යමකු විසින් පසුව ඇතුළු කරන ලද ඒවායයි කියන අභියෝගයකට පාත්‍රවිය.

ඉදිරිපත් කරන ලද ලිපි ලේඛන පරීක්ෂා කිරීමෙන් පහත සඳහන් කරුණු පැහැදිලි විය.

(ඒ) මෙසේ වෙන් වශයෙන් සැලකිය හැකි ඔප්පු හතේ ඇති එකම අන්‍යෝන්‍ය විස්තර සටහනක හෝ ඒවා සටහන් කළ දිනය යටතේ හෝ ලිපි ලේඛන ලියාපදිංචි කිරීමේ ආඥා පණතින් හා ඒ අනුව සැදුනු රීතිවලින් එසේ අන්‍යෝන්‍ය විස්තර සටහනක් ඇතුළත් කිරීමට බලයලත් එකම පුද්ගලයා වන රෙජිස්ත්‍රාර් තැන විසින් අත්සන් තබා හෝ ඔහුගේ නමේ මුල් අකුරින් යුත් කෙටි අත්සන තබා හෝ නැත.

(බී) පී18 සහ පී19 දරණ ඔප්පු ලියාපදිංචි වී ඇති පිටේ සහතික කොපියක් ඉදිරිපත් කරන ලද නමුත් වර්ෂ 1963 සැප්තැම්බර් මාසයේ මෙම කොපිය නිකුත් කළ අවස්ථාවේ එහි විද්‍යමාන වන අන්‍යෝන්‍ය විස්තර සටහන කවරකු විසින් වත් කෙටි අත්සනක් තබා ඇති බවක් පෙනී යන අයුරින් කිසිම කරුණක් නැතත් නඩු විභාගයේදී ඉදිරිපත්කොට ඇති මූලික පිටපතේ කෙටි අත්සනක් තිබේ.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 17 වෙනි පිට බලනු.

පැමිණිලිකාර සමාගමේ පාලක අධ්‍යක්ෂවරයාගේ සාක්ෂියෙන් නොතාරිස්වරයා තෙමේම පරීක්ෂණය පැවැත් වූ බවත් ඉඩම්වලින් එකක් ප්‍රාණ භක්තියකට යටත් බවත් ඔහුට දන්වා තිබුනු බව පෙනී ගියේය.

තීන්දුව: (1) මේ කරුණු අනුව සලකා බලන කල මේ සම්බන්ධයෙන් ලියැවී ඇති අන්‍යෝන්‍ය විස්තර සටහන් ඉතාම දැඩි ලෙස සැක සහිතය. මේ සටහන් ගැන විශ්වාසය තබා කරුණු දක්වන්නන් විසින් ඒ සටහන් නිර්ව්‍යාජ බව ඔප්පු කිරීමට සාක්ෂි කැඳවා නැති නිසා විධිමත් කාර්‍යාලිය කටයුතු කෙරෙන අනුසාරයෙන් ඒවා සටහන් වී ඇතැයි සාක්ෂි ආඥ පනතේ 114(ඩී) යටතේ මෙම අධිකරණයට කළ හැකි පූර්ව නිගමනය කිරීම මෙහි නොකළ යුතුය.

(2) මියගිය නොතාරිස් තැනගේ බලවත් නොසැලකිලිමත් බව ස්ථාපිත කිරීමට පැමිණිලිකරුට නොහැකි වී තිබේ.

(3) පී18 සහ පී19 දරණ ඔප්පුවල පරිශ්‍රමයක් දරා ඇති අයුරින් ඉඩමක නොබෙදූ කොටස් තවත් ඉඩම්වල බෙදා ඇති කොටස් සමග ඒකාබද්ධ කොට කඩදාසිවල සටහන් කිරීමෙන් පමණක් අලුත් ඉඩමක් තැනීම නීත්‍යානුකූලවත්, ක්‍රියානුසාරයෙනුත් කිරීමට නොහැකි දෙයකි.

(4) මේ හේතුව නිසා එම ඔප්පු දෙක ලියාපදිංචි කිරීමට රෙජිස්ත්‍රාර්වරයා අලුත් පිටක් විවෘත නොකළ යුතුව තිබුනි. ඔප්පුවල උප ලේඛනයන්හි මේ ඉඩම් හත ගැන මනා විස්තර ඇතුලත් නිසා, ලියාපදිංචි කරන වේලාවේම යථා විධියෙන් අන්‍යෝන්‍ය විස්තර සටහන් දමා ඒවාද නිවැරදි ලෙස ඒ ඒ පිටු හතේම ලියාපදිංචි කළ හැකිව තිබින.

(5) පී18 සහ පී19 දරණ ඔප්පු දෙක අබිභවා යථා පරිදි ලියාපදිංචි කිරීමේ බලමහිමයෙන් මෙම උකස්කරය ප්‍රමුඛත්වය ලබන බැවින් ඇස්කීසි ගසා විකිණීමෙදී මිලට ගත් කවරෙකුට හෝ මනා අයිතියක් ලැබෙන නිසා පැමිණිලිකරුට මෙයින් අලාභයක් සිදු වී නැත.

සිරිමාන්න විනිශ්චයකාරතුමා: ''එබැවින් ඇස්කීසියේ විකිණීමකදී එය මිලට ගන්නා කවරකුට හෝ වෙවා හිමි කමක් ලැබේ. පැමිණිලිකරුගේ උගත් නීතිවේදියා අඩුලුහුඩු හිමිකමක් ඇති ඉඩම් මිලදී ගැනීමට මිනිසුන් සතුටු නැතැයි කියමින් තර්ක කෙළේය. එහෙත් මෙම අඩුලුහුඩුකම නීතිමය අඩුලුහුඩුකමක් මිස හිමිකමේ අඩුලුහුඩුකම් ගැන සැකයක් නොවන බව පෙන්නා දීම අවශ්‍යය.''

සලකා බැලූ නඩු: ප්‍රනාන්දු එ. පෙරේරා, (1917) 20 න.නී.වා. 119.
පුංචිහාමි එ. ප්‍රේමරත්න හාමිනේ, (1925) 27 න.නී.වා. පිටු 1).

රාජනීතිඥ සී. රෙංගනාදන් මහතා, කේ. නඩරාජා මහතා සහ වී. ඇන්. වික්‍රමසිංහ මහතා, සමග ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ එච්. වී. පෙරේරා මහතා, රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඩී. ආර්. පී. ගුණතිලක මහතා සහ ඇන්. ආර්. ඇම්. දලුවත්ත මහතා, සමග වග-උත්තරකරු වෙනුවෙන්.

සිරිමාන්න විනිශ්චයකාරතුමා:

නැසීගිය නොතාරිස් කෙනකු වන අමීන් මහතාගේ බුදලයෙන් රුපියල් 25,302 ශත 78 ක මුදලක් ඉල්ලමින් පැමිණිලිකරුවන් විසින් මෙම නඩුව ඔහුගේ බුදලයේ පොල්මඃකාරයන්ට විරුද්ධව පවරා තිබේ. මෙම මුදල ඔවුන් විසින් ඉල්ලනු ලබන්නේ මියගිය නොතාරිස් මහතාගේ නොසැළකිමේ ප්‍රතිඵලයක් වශයෙන් ඔවුනට විඳීමට සිදුවූ අලාභයක් හැටියටය.

සිද්ධිය පිළිබඳ කරුණු සැකෙවින් දක්වතොත් මෙසේය.

පෙරියසාමි නමැත්තෙකුට පැමිණිලිකරුවන්ගෙන් රුපියල් 25,000 ක මුදලක් ණයට ගැනීමට වුවමනා විය. මේ සඳහා රක්ෂිත ඇපයක් වශයෙන් ඔහු ඉඩම් අටක කම්මාගේ අයිතිවාසිකම් හිමිකම් සහ බලපුළුවන්කම් පිරිනමා සිටියේය. මේ ඉඩම්වලින් අඩුවශයෙන් හතරකට පෙරියසාමි සතුව පැවැත්තේ නොබෙදූ අයිතියක හිමිකමකි. පැමිණිලිකාර සමාගමේ පරිපාලන අධ්‍යක්ෂක වරයා කියන හැටියට ඔහු මියගිය තැනැත්තාට 13.7.1967 දරණ දින ඉඩම් ලියා පදිංචි කිරීමේ කාර්‍යාලයේ මේ සඳහාම සොයා බැලීමේ පරීක්ෂණයක් පැවැත්වීමට යයි කිවිට මියගිය තැනැත්තා එය කිරීමට බාරගත්තෙන් පැය දෙකකට පමණ පසු නැවත පැමිණීමට යයි ඔහුට කියා තිබේ. ඒ අවවාදය අනුව පැමිණි ඔහුට මියගිය තැනැත්තා සොයා බැලීමේ පරීක්ෂණය කළ බවත්, එම ඉඩම් උකසට ගෙන මුදල් දීමට පුළුවන් තත්වයක ඇති බවත් කියා එක් ඉඩමක් ''ප්‍රාණ භක්තියට යටත්ව'' (පී1 දමා ලකුණු කොට ඇති උකස්කරයේ අංක 2 දරණ ඉඩම) තිබේ යැයි අතිරේක වශයෙන් කිවේය. මියගිය තැනැත්තා එක් ඉඩමක පෙරියසාමිට ඇත්තේ ප්‍රාණ භක්තියක් පමණක් යැයි කියන ලද බව සළකා

ගත හැකි සේ පෙනේ. නීතිඥයෙක් නොවන සාමාන්‍ය මිනිහෙකුට මෙබඳු කටයුත්තකදී පහසුවෙන් කියන ලද වචන ගැන වරදවා සිතා ගත හැක. (ඇත්ත වශයෙන්ම පෙරිය සාමි විසින් පී1 දමා ලකුණු කරන ලද අංක 2 දරණ ඉඩම පිළිබඳව තමාට ප්‍රාණ භුක්තිය තබා දුවගේ වාසියට ඔප්පුවක් (පී20) ලියා තිබේ. මෙම ඔප්පුව නිවැරදි ලෙස ලියා පදිංචි කරන ලද ඔප්පුවකි.)

ඉන්පසු පැමිණිලිකරුවන්ට රුපියල් 25,000 ට උකස් කරන ලද ඉඩම 8 පිළිබඳ උකස්කරය පී1 ලියා තිබේ. මෙම ඔප්පුව නිවැරදි පත්තිරුවල එම වෙන්වෙන් වශයෙන් පවතින ඉඩම් පිළිබඳව ලියාපදිංචි කොට තිබේ.

මේ අතර පෙරියසාමි සහ පැමිණිලිකරු අතර ආනුෂංගික සිද්ධියක් වශයෙන් ගත හැකි තවත් කොන්ත්‍රාත්තුවකින් පෙරියසාමි තමා ලත් මුදල ගෙවියන හැටියට පැමිණිලිකරුට අමු තේ සැපයීමට බැඳී තිබේ. මෙම බැඳීම පෙරියසාමි විසින් පැහැර හරින ලදුව පැමිණිලිකරු විසින් මාස කිහිපයකට පසු උකස්කර ඔප්පුව උසාවිට ඉදිරිපත් කොට ඒ අනුව උකස් නඩු තීන්දු ප්‍රකාශයක් ලබාගත්තේය. එම තීන්දුව අනුව කරන ලද ඉඩම් විකිණීමේදී මේවා කෙසේ වෙතත් පැමිණිලිකරුට පෙනී ගියේ විකිණී ඇත්තේ එක් ඉඩමක් බවකි. විකිණී ඇති එම ඉඩම පෙරියසාමිට ප්‍රාණ භුක්තියක් තිබුනු ඉඩමය. අනික් ඉඩම් පහම වෙන්දේසි කළ විට ඒවා මිළදී ගැනීමට ඉල්ලුම්කරුවෝ එහි නොවූහ. පෙරියසාමිගේ වැන්දඹුව විසින් කරන ලද වැඩකැයි සළකා ගත හැකි ලෙස දැන්වීම් පත්‍රිකා වගයක් විසුරුවා හැර තිබුනි. (මෙම නඩුවේ පී6 දමා සළකුණු කොට ඇත්තේ ඉන් එකකි.) ඉඩම් ගැනීමට බලාපොරොත්තු වන්නන්ට දැන්වීම්වලින් නිවේදනය කොට ඇත්තේ විකිණීමට ඉදිරිපත් කොට ඇති ඉඩමවල පෙරියසාමිට ඇත්තේ සීමාසහිත අයිතියක් බවය. මෙම පැමිණිලි පත්‍රිකාවල 9.1.1958 දින දරණ අංක 197 හා 198 දරණ ඔප්පු පිළිබඳව සඳහනක්ද විද්‍යමාන විය. මෙය පී18 හා පී19 දමා ලකුණු කරන ලද ඔප්පු පිළිබඳව කරන ලද සඳහනකැයි එහි එම ඔප්පුවල අංක වැරදිවුනත් අනුමානයෙන් සිතාගත හැක. පත්‍රිකාවල කියැවෙන හැටියට මෙම ඉඩම් (උසාවියේ අවසරයක් නැතිව) විකිණෙන බව දුෂමාණයෙන් කියාපා තිබේ. මෙම ප්‍රකාශය තේරුම් ගැනීම උගහටය. ඉඩම් විකිණීම සඳහා ඉදිරිපත් කරන ලද්දේද එක් වතාවක් පමණි.

මෙම නඩුව දමා ඇත්තේ අමීන් මහතා ඉඩම් ලියාපදිංචි කරණ කාර්යාලයේ සොයා බැලීමේ පරීක්ෂණයක් නොකරන ලදැයිද, එසේ නැතහොත් එය කිරීමේදී බලවත් ලෙස නොසැළකිලිමත් වී එය කිරීම නිසා 9.1.1958 දින සහ අංක 167 හා 168 දරණ (පී 18 හා පී19) එසේම පෙරියසාමි විසින් තමාගේ පුතුන් දෙදෙනාට ඉඩම් හතක තමාට තිබූ අයිතිය පවරා දුන් ඔප්පු දෙක සොයා ගැනීමට නොහැකි වියැයි කියන ප්‍රතිෂ්ඨාව මතය. (මෙම ඉඩම් උකස්කරයේ ලකුණු කොට ඇත්තේ අංක 1 සහ 3 සිට 8 දක්වා දැමීමෙනි.)

මෙම නඩුව මියගිය පුද්ගලයකුගේ බුදලය සම්බන්ධව දැමූ නඩුවක් නිසා එහි සාක්ෂි ''දැඩි ප්‍රවේශමින්-සහ ඕනෑකමින් බැලිය යුතුය.'' (මුරුගප්පා චෙට්ටියාර් එ. මුත්තලච්චි අතර කියැවී 58 නව නීති වාර්තා 25 වන පිටුවේ වාර්තා වී ඇති නඩුව බලන්න.)

මෙම ඔප්පුවල සඳහන්වී ඇති ඉඩම් පිළිබඳව කරුණු ලියැවුනු පත්තිරු හතරෙහිම පී18 සහ පී19 ලියාපදිංචි වී නැත. පෙරියසාමි සමහර ඉඩම්වල ඔහුට තිබුනු නොබෙදූ අයිතිවාසිකම් තවත් සමහර ඉඩම්වල ඔහුට තිබුනු බෙදූ අයිතිවාසිකම් සමග ඒකාබද්ධ කිරීමට දරණ ලද උත්සාහයක් අනුව යම්කිසි සැළැස්මක් වෙනම ඉඩමක් සේ එය පෙනී යන හැටියට සලස්වා එම ඉඩමෙන් එක් කෙනෙකුට දෙකෙන් පංගුව බැගින් ලැබෙන සේ තම පුතුන් දෙදෙනාට ලියා දීමට පරිශ්‍රමයක් ගෙන තිබේ. මෙම ඔප්පු දෙක සම්පූර්ණයෙන් වෙනත් පත්තිරුවක ලියාපදිංචි කරනු ලබා ඇති නමුත් ඒවා එක්තරා විදියක ප්‍රතිබද්ධ සටහන්වලින් ඇදා තිබේ. මෙම ප්‍රතිබද්ධ සටහන්වල සත්‍යතාවය කෙරෙහි අභියෝගයක් එල්ල වී ඇති බැවින් ඒ ගැන මම පසුව සඳහන් කරමි.

පෙරියසාමි විසින් ආයාසයක් ගෙන තිබෙන අන්දමින් ඉඩම්වල නොබෙදූ කොටස් බෙදූ කොටස් සමග එකට ඇඳා කඩදාසියක් මත අළුත් ඉඩමක් නිර්මාණය කිරීම කායික ක්‍රියාවක් ලෙස හෝ නීතිගත ක්‍රියාවක් ලෙස හෝ කිසිම අයුරකින් කළ නොහැක්කකි. මෙය මීට කලින් මෙම අධිකරණය විසින් පෙන්වා දී තිබේ. (ප්‍රනාන්දු එ. පෙරේරා — 20 න.නී.වාර්තා 119 පිට සහ පුංචි හාමි එ. ප්‍රේමරත්න හාමිනේ — 27 න.නී.වා 1) මේ අනුව බලන කල ඉඩම් රෙජිස්ට්‍රාර්වරයා මෙම ලියාපදිංචි කිරීමට අළුත් පත්තිරුවක් විවෘත නොකළ යුතුව තිබුනි. වගඋත්තරකරුවන් වෙනුවෙන් කරුණු මෙහෙයවීමේදී සැළකර සිටියේ පී18 සහ පී19 යේ ''ලියා පදිංචි කළ නොහැකි '' ලේඛන නිසා රෙජිස්ට්‍රාර් වරයා ඒවා ලියාපදිංචි කිරීම තමාගේ නිල පොතක හෝ රෙජිස්ටරයක රාජ්‍ය සේවකයකු විසින් තම රාජකාරිය කිරීමෙහිලා කරන ලද සටහනක් ලෙසින් සැළකීමට බැරි බවකි. වැඩිදුරටත් කරුණු මෙහෙයවමින් සැළකර සිටියේ ඉහත සඳහන් ප්‍රතිබද්ධ සටහන් රෙජිස්ට්‍රාර් වරයා විසින් කරන ලද සටහන් හැටියට සළකා ගත්තත් ඒවා සාක්ෂි ආඥා පනතේ 35 වන ඡේදයෙන් බලාපොරොත්තුවන පරිදි කෙරුණු රාජකාරිය පිළිබඳ ක්‍රියා හැටියට නොගිණිය හැකි බවය.

ඒ කෙසේ වෙතත් පී18 හා පී19 යෙහි ලේඛන ''ලියාපදිංචි කළ නොහැකි ලේඛන'' හැටියට විස්තර කළ හැකැයි මම නොසිතමි. එම ඔප්පු දෙක ඇති උප ලේඛණයන්හි මෙකී ඉඩම් හත පිළිබඳවත් විස්තර වන නිසා ඒවා නිවැරදි ලෙස ඒවාට අයත් පත්තිරු හතේ ලියාපදිංචි කිරීමට පුළුවන්කම තිබුනේය. අළුත් පත්තිරුවක් පටන් ගැනීමෙන් රෙජිස්ට්‍රාර්වරයා වැරැද්දක් කර තිබුනේ වී නමුත් **ලියාපදිංචි කරන අවස්ථාවේදීම** කරන ලද ප්‍රතිබද්ධ සටහන් වෙන් වෙන්ව අනික් පත්තිරු හතේ ඇතුලත්ව තිබී සොයාබැලීමේ පරීක්ෂණයක් කරන පුද්ගලයකුගේ අවධානය පී18 සහ පී19 ලියාපදිංචි වී ඇති පත්තිරුව වෙත යොමුවන අන්දමට කටයුතු

සිදුවී තිබුනි නම් ලියාපදිංචි කිරීම කොතරම් වැරදි හැටියට සිදුවුවත් කඩිසර නොතාරිස්වරයකුට මෙම ඔප්පු දෙක තිබෙන බව තමාගේ සේවාදායකයාට කිය හැකියයි කෙනෙකුට අපේක්ෂා කිරීමට පුළුවන.

නමුත් දැන් පත්තිරුවල පෙනෙන මෙම ප්‍රතිබද්ධ සටහන්වල විශ්වාස කටයුතු භාවය අභියෝගයට පහළ උසාවියේදීද, අප ඉදිරියේ කරන ලද විවාදයේදී කරයේම එල්ල විය.

ප්‍රස්තුත උකස්කරය ලියන ලද දින වන 13.7.1960 දරණ දින මෙම ප්‍රතිබද්ධ සටහන් එහි තිබුණේද?

එක් අතකින් අමිත් මහතා ඉඩම් ලියාපදිංචි කිරීමේ කාර්යාලයේ සොයා බැලීමේ පරීක්ෂණයක් කළ බවත් ඒ අනුව එක් ''ප්‍රාණ භූක්තියකට'' එක් ඉඩමක් යටත්වීම හැර ඉඩම්වල අයිතියෙහි වරදක් නැති බව තමාට සහතික කොට කී බව කියන පැමිණිලිකරුගේ පරිපාලක අධ්‍යක්ෂකවරයාගේ සාක්ෂිය එක් අතකින් අප ඉදිරියෙහි තිබේ. අමිත් මහතා පැමිණිලිකරුට මීට කලින් නොයෙක් අවස්ථාවල තමාගේ සේවය සතුටුදායක අන්දමින් ඉටු කළ නොතාරිස්වරයෙකි. අනික් අතින් අමිත් මහතා (අංක 2 දමා ලකුණු කරන ලද ඉඩම සම්බන්ධයෙන්) ''ප්‍රාණ භූක්තියක් පිළිබඳව සඳහන් කළ නිසා ඔහු ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයේ සොයා බැලීමක් කළ බව පැහැදිලිව පෙනියන කරුණක් ලෙස පිළිගැනීමටද අපට සිදුවී තිබේ. අනික් අතින් දැන් එහි ප්‍රතිබද්ධ සටහන් විද්‍යමාන වන නිසා ඒවා විශ්වාස කටයුතු අවංක සටහන් නම් සොයා බැලීමේ පරීක්ෂණය කරන අවස්ථාවේදීද එහි තිබිය යුතුය යන කරුණටද අපේ සැළකිල්ල යොමු කළ යුතුය.

පහළ උසාවියේදී මූලික රෙජිස්ටර් පොත් නඩුවට ඉදිරිපත්කොට නැවතත් ඉඩම් ලියාපදිංචි කිරීමේ කාර්යාලයට ආපසු යවා තිබේ. අපද මේවා බැලීමට කැමති වූ නිසා අපි දැනට සිටින රෙජිස්ට්‍රාර් වරයාට සිතාසි නිකුත් කෙළෙමු. ඒවා අපට ඉදිරිපත් කළ ඔහු ඒ ගැන සාක්ෂිද කීවේය.

ඔප්පුවක් ලියාපදිංචි කිරීමට කාර්‍යාලයට ඉදිරිපත් කළ විට ඉඩම් ලියාපදිංචි කිරීමේ රෙජිස්ට්‍රාර්වරයා විසින් ගන්නා ක්‍රියා සම්ප්‍රදාය මෙහිලා විස්තර කිරීමට මම කැමැත්තෙමි. ''දිනෙන් දින පොත පිළිබඳ ලිපිකරුවා'' නමින් ඉඩම් කාර්‍යාලයේ හැඳින්වෙන ලිපිකරුවකු ලියාපදිංචි කිරීමට ඉදිරිපත් කළ ඔප්පුව භාරගෙන දිනෙන් දින කරුණු සටහන් කරන රෙජිස්ටරයේ භාරගත් දිනය සටහන් කරයි. නියමිත ග්‍රන්ථයෙහි සහ (රෙජිස්ටරය නමින් හැඳින්වෙන) පත්තිරුවෙහි නියම වශයෙන් එම ඔප්පුව ලිපාපදිංචි කිරීම පසු දිනක සිදුවන්නක් වුවත් මුලින් ලියාපදිංචි කිරීම පිළිබඳ ප්‍රශ්නයක් පැන නැගුනු විට ලියාපදිංචි කළ දිනය හැටියට සැළකෙන්නේ ඉහත කී ලිපිකරු විසින් දිනෙන් දින සටහන් තබන පොතෙහි ලියැවුනු දිනය වේ. ලියාපදිංචි කිරීමට ඉදිරිපත් කරන ඔප්පුව භාරදෙන දිනය සහ නියම වශයෙන් එම ඔප්පුව ලියාපදිංචි වන දිනය අතර ඇති පරතර කාලය රඳා පවතින්නේ එක් එක් ඉඩම් ලියාපදිංචි කිරීමේ කාර්යාලයක තිබෙන වැඩ කොටස අනුවය. දැනට කටයුතු කරන රෙජිස්ට්‍රාර්වරයාගේ අදහසේ හැටියට මහනුවර ඉඩම් ලියාපදිංචි කිරීමේ කාර්යාලයේ මේ සඳහා සති දෙකක් පමණ ගත වේ. නමුත් ලියාපදිංචි කිරීම සිදුවන විට ලියාපදිංචි කළ දිනය හැටියට ඇතුලත් කරන්නේ දිනෙන් දින සටහන් ලියන පොතේ සටහන් වී ඇති දිනය වේ. ඔප්පුවේ අනිත් විස්තර එනම් පවරන්නාගේ නම පවරනු ලබන්නාගේ නම සහ ඉඩම පිළිබඳව කෙරෙන විස්තරය සහතික කරන ලද පිටපත්වල පෙනී යන අන්දමට ඉන්පසුව ඇතුලත් කරනු ලැබීම පත්තිරුවේ දකුණු පැත්තේ කොනේ ''කියයුතු කරුණු'' යැයි අන්තිමට වෙන්වී ඇති තීරුවට පමණක් කලින් රෙජිස්ට්‍රාර්වරයා විසින් අත්සන් තබනු ලැබේ. එම පිටේ වම පස ඉහළ කොනේ හරහට ප්‍රතිබද්ධ සටහනක්ද කෙරේ. අප ඉදිරියේ ඇති නඩුවේ මෙම ප්‍රතිබද්ධ සටහන පී18 සහ පී19 යේ ඊ 386/207 හැටියට ලියාපදිංචි වී (පී10) පහත පෙනෙන පරිදි කියැවේ.

> ''මෙහි අන්තර්ගතවී ඇත්තේ ඊ 322/285 දරණ අංකය යටතේ ලියාපදිංචිවූ ඉඩමත් ඊ 370/163 අංකය දරණ තැන ලියාපදිංචි වී ඇති ඉඩමෙන් දෙකෙන් කොටසකුත් අංක ඊ 322/286, ඊ 322/287, යන තැන්වල ලියාපදිංචි වී ඇති ඉඩම්වලින් කොටසුත් ඊ 275/89 අංකය ඇති තැන සටහන් වී ඇති ඉඩමත් ඊ 264/288, ඊ 354/212 යන ඉඩමත්ය.''

අනිත් පත්තිරු හතේ ඇති සටහන්වලින් කියැවෙන්නේ පහත සඳහන් පරිදිය.

> ''අංක ඊ 386/207 දරණ තැන ලියාපදිංචි වී ඇති ඉඩම මෙම ඉඩම සහ තවත් ඉඩම් කීපයකින් සංයුක්තව පවතී'' (උදාහරණයක් ලෙස පී11 බලන්න.)

රතු තීන්තෙන් ලියන ලද ඉහත කී සටහන්වල අග ''R'' ''L'' යන ඉංග්‍රීසි අකුරු දෙක පෙනේ. සටහනත් මේ අකුරු දෙකත් අතර රෙජිස්ත්‍රාර්වරයාගේ නමේ මුල අකුරු අත්සන් කිරීම සඳහා හෝ නම අත්සන් කිරීම සඳහා ඉඩ තබා ඇත. ඉහත සඳහන් ''R'' ''L'' යන අකුරු දෙකට යටින් 11.1.58 යන දිනය විද්‍යමාන වේ.

ලිපි ලේඛණ ලියාපදිංචි කිරීමේ (117 වන අධිකාරි) ආඥා පනතේ ප්‍රතිපාදනයන්ට අනුව සහ එම පනතට අනුව සකස් කරන ලද රීතිවලට අනුව ප්‍රතිබද්ධ සටහනක් ලිවිය හැක්කේ රෙජිස්ට්‍රාර්වරයාට පමණකි. ලිපිකරුවකුට යම්කිසි ක්‍රියාවක් කිරීමට බලය දුන් කලක ඒ බව රීතිවලින් පැහැදිලි ලෙස කියැවේ. නිදසුනක් වශයෙන් ආඥා පනතේ 49 වන ඡේදයට අනුව සකස් වුනු පස්වෙනි රීතිය දැනට පළවී ඇති ලෙස අතිරේක නීති ග්‍රන්ථයන්හි 101 වන අධිකාරියෙහි පෙනෙන පරිදි රෙජිස්ට්‍රාර්වරයාට හෝ **දිනෙන් දින සටහන් ලියන පොත බාර ලිපිකරුවාට** ලියාපදිංචි කිරීම සඳහා භාර දෙන ලද ලියවිල්ලක් දිනපතා පොතේ ඇතුලත් කිරීමට බලය දේ. එසේම 6(3) වන රීතිය රෙජිස්ත්‍රාර්වරයාට හෝ **දිනෙන් දින සටහන් ලියන පොත බාර ලිපිකරුවාට**

ලියවිල්ලක අලවා ඇති මුද්දර අවලංගුකොට එය දිනෙන් දින සටහන් පොතට ඇතුලත් කිරීමට බලය දේ. එසේම 10(1) වන රීතියෙන් රෙජිස්ට්‍රාර්වරයාට හෝ, **දිනෙන් දින සටහන් ලියන පොත බාර ලිපිකරුවාට** ලියවිල්ලක් ලියාපදිංචි කිරීම සඳහා බාර දෙන පුද්ගලයෙකුට කුවිතාන්සියක් දීමට බලය ලැබෙන හැටියටද සැදහන් වේ.

13(3) දරණ රීතියෙන් රෙජිස්ට්‍රාර්වරයාට (ලිපිකරුවකුට නොවේ.) යම්කිසි ඉඩමක **විස්තරය** කිසියම් අයුරකින් එයට සමාන තවත් ඉඩමකින් වෙනස්වී ඇති බව හැඟී ගිය කලක එයට සරිලන ප්‍රතිබද්ධ සටහනක් ඇතුල් කිරීමට බලය තිබේ. විශාල ඉඩමකින් බෙදා කොටසක් අළුත් පත්තිරුවක ලියා පදිංචි කරනු ලබන විටෙක ප්‍රතිබද්ධ සටහනක් ඇතුලත් කිරීමට 14 වන රීතියෙන් රෙජිස්ට්‍රාර්වරයාට බලය තිබේ. ඉඩම් ලියාපදිංචි කිරීමේ රෙජිස්ට්‍රාර් ධුරය දරණ දිසානායක මහතාගේ මතය අනුවද කෙරෙන ක්‍රියා සම්ප්‍රදාය මෙබඳුය. එය එසේම විය යුත්තේ ප්‍රතිබද්ධ සටහනකින් ඉඩම්වල අයිතියට උඟ ලෙස බල පෑ හැකි නිසා රෙජිස්ටර් පොත්වලට ඉඩම් ලියාපදිංචි කිරීමේ කාර්යාලයේ ලිපිකරුවන්ටද, පෙරකදෝරු මහතුන්ගේ ලිපිකරුවන්ටද, නොතාරිස්වරුන්ටද යනාදි බොහෝ දෙනකුට අතපත ගැසිය හැකි බව නිසායයි කෙනකුට නොපෙනී යාමට නොහැකි වේ. ඉඩම් ලියාපදිංචි කිරීමේ කාර්යාලයේ ලිපිකරුවෙකුට සටහනක් ලිවීමේ කායික කෘත්‍යය කිරීමට අවසර තිබීය හැකි වුවද, එබඳු අවස්ථාවක රෙජිස්ට්‍රාර්වරයා, එම සටහනට අත්සන් තැබීමෙන් හෝ නමේ මුල්කුරු අත්සන් කිරීමෙන් එය අව්‍යාජ විශ්වාසී සටහනක් බවට පත්කළ යුතුය, රෙජිස්ට්‍රාර්වරයා විසින් ප්‍රතිබද්ධ සටහනක් ඇතුළත් කළ කල හෝ ඔහුගේ බල පැවිරීමෙන් එබන්දක් කෙරුණු කල එය කළයුතු අවස්ථාවේ කළ යුත්තක් හැටියට සළකා ගැනීම යුක්ති යුක්ත වන අතරම එය කළ යුතුව තිබුනු අවස්ථාව නම් පී18 සහ පී19 දමා සළකුණු කරන ලද ඔප්පු දෙක ලියාපදිංචි කළ අවස්ථාවේය. (මුදලිහාමි ඒ. පුංචිබණ්ඩා, 5 ලංකා නීති වාර්තා 74 වන පිටුව බලන්න.)

නමුත් මෙම නඩුවෙහිදී සටහන් දෙස බැලූ බැල්මට ඉතාම පැහැදිළි ලෙස පෙනී යන්නේ එම සටහන් රෙජිස්ට්‍රාර්වරයා විසින් නොව (මෙම කරුණට අදාල කාලයේ ඔහු ප්‍රනාන්දු මහතා නමැත්තෙක් විය) වෙන යම්කිසි පුද්ගලයකු විසින් කරන ලදුව ඒවා ඔහු විසින් විශ්වාසී බවට පෙරළා නොමැති බවය.

වෙන් වෙන්ව ඇති මෙම ඉඩම් හත සම්බන්ධයෙන් ඇති පත්තිරුවල අන්තර්ගත ප්‍රතිබද්ධ සටහන් එකක් වත් රෙජිස්ට්‍රාර්වරයා විසින් අත්සන් තබන ලද ඒවා හෝ ඔහුගේ නමේ මූලික අකුරුවලින් අත්සන් තබන ලද ඒවා නොවේ. පී18 හා පී19 අංකවලින් සළකුණු කරන ලද ඔප්පු ලියාපදිංචි කරන ලද අලුත් පත්තිරුවට කෙනකුගේ අවධානය යොමු වන්නේ මෙම සටහන් වලින් පමණක් බව මෙහිලා සැළකිය යුතුය. ''R L'' නමැති ඉංග්‍රීසි අකුරු දෙක යටින් ඇති දිනයෙහි ඒවා විශ්වාසී බවට පෙරළා නැති නිසා එහි ඇති විටිනාකම ඉතාම අල්පය. එහි සඳහන් දිනය (68.1.11) මෙම ප්‍රතිබද්ධ සටහන ඇතුලත් කළ කවර වේලාවක වුවද ඇතුලත් කිරීමට පුළුවන් කම තිබේ. ලිපිකරුවකු විසින් අළුත් පත්තිරුවක ප්‍රතිබද්ධ සටහනක් ලියූ කල එම ප්‍රතිබද්ධ සටහන හා සම්බන්ධ අනිත් සියලුම උචිත පත්තිරුවල සියළුම ප්‍රතිබද්ධ සටහන්වලට එකම වේලාවක අත්සන් තැබීමෙන් ඒවා විශ්වාසී බවට පෙරළන පිණිස රෙජිස්ට්‍රාර්වරයා ඉදිරියෙහි තබන බව දැනට මහනුවර ඉඩම් ලියාපදිංචි කිරීමේ ධුරය උසුලන දිසානායක මහතා කියයි. මේවා ඔවුන් විසින් අනුගමනය කරනු ලබන දෙපාර්තමේන්තු නියෝග බව දිසානායක මහතා කියා සිටී. පී18 සහ පී19 දරණ ඔප්පු අළුත් පත්තිරුවක ඔහුගේ අනුදැනීමෙන් ලියාපදිංචි කරන ලද නම් වෙන් වෙන්ව ඇති මෙම ඉඩම් හත පිළිබඳව ලියැවී ඇති එක් ප්‍රතිබද්ධ සටහනක් වත් මේ අවස්ථාවේදී විශ්වාසී බවට පෙරළීම රෙජිස්ට්‍රාර්වරයා පැහැර හැර තිබේ යැයි විශ්වාස කිරීම උගහටය. එසේම ඔහු විසින් එක පත්තිරුවක් අත්සන් කොට අනිත් පත්තිරු අත්සන් කිරීම පැහැර හැර තිබේය යන්න විශ්වාස කිරීමද අසීරුය. පෙනී යන හැටියට මෙසේ විශ්වාසී බවට පත් නොකළ ප්‍රතිබද්ධ සටහන් ඉතාම සැකකටයුතු බව මට අවබෝධ වේ.

සැහැල්ලු කරුණක් හැටියට නොසළකා සිටිය නොහැකි තවත් කරුණක්ද මෙහි පෙනේ. පී18 සහ පී 19 දරණ ඔප්පු ලියාපදිංචි කරන ලද පත්තිරුවේ සහතික කොපියක් (පී10 දමා ලකුණු කරන ලද) මෙම නඩුව අසන විට උසාවියට ඉදිරිපත් කොට තිබේ. එම සහතික කොපියෙහි පෙනෙන ප්‍රතිබද්ධ සටහන යම්කිසි පුද්ගලයකු විසින් එම සහතික කොපිය නිකුත් කරන විට අත්සන් තබා තිබුනු බව පෙන්වීමට කිසිවක් එම සහතික කොපියෙහි නැත. පී10 දමා ලකුණු කරන ලද සහතික කොපියෙහි අග ඇති සහතිකය අනුව එය නිකුත් කර ඇත්තේ 1967 සැප්තැම්බර් 13 වන දිනයේදීය. මෙම මූලික සටහන් පහළ උසාවියෙහි නඩුවේදී ඉදිරිපත් කරන ලද ඉඩම් ලියාපදිංචි කිරීමේ කාර්යාලයේ ලිපිකරුවාගේ සාක්ෂිය වූයේ ''මෙහි ඇති සියළුම අයිතිය අවහිර කිරීම් උපුටා ගැනීම්වල මූලික පිටපත් වලින් පෙනී යන්නේ එම සටහන් ඉඩම් ලියාපදිංචි කිරීමේ රෙජිස්ට්‍රාර්වරයා විසින් අත්සන් කොට හෝ නමේ මුල් අකුරු අත්සන් කොට හෝ නොමැති ඒවා බවය'' නමුත් අප අබිමුව ඉදිරිපත් කරන ලද පී10 දමා සලකුණු කරන ලද පිටපතේ මූලික ලිපියෙහි දැන් නමක මුල් අකුරු අත්සන් කිරීමක් පෙනේ. කලින් සිටි රෙජිස්ට්‍රාර් තැනගේ අත් අකුරු හඳුනන ප්‍රනාන්දු මහතාට ඒ අකුරු කාගේදැයි හඳුනා ගැනීමට නුපුළුවන.

ඒ ප්‍රතිබද්ධ සටහන් කලේ කවුද කවදාද යන්න ගැන ඒවා අව්‍යාජ සටහන් නම් පහසුවෙන් කැඳවිය හැකිව තිබියදී යම්කිසි සාක්ෂියක් කැඳවීමට පැමිණිලිකරු උත්සාහයක් නොදැරිය. කාර්යාංශයක ඇති පොතක හෝ රෙජිස්ටරයක නිතිගත ව තමා පිට පැවරුණු රාජකාරියක් කරන රාජ්‍ය සේවකයකු විසින් ලියන ලද යම් කිසි සටහනක් මතුවී ඇති කරුණට උචිත සාක්ෂියක්ය යන සාක්ෂි ආඥා පනතේ අංක 35 දරණ ඡේදයෙහි සහ රාජකාර්‍ය සම්බන්ධයෙන් කෙරෙන ක්‍රියාවක් විධිමත්

ලෙස කරන ලද්දක් යැයි අධිකරණයට සලකා ගැනීමට පිළිවනැයි සඳහන් වී ඇති එම ආඥා පනතේ අංක 114(ඩී) ඡේදයෙහි ඔහු විශ්වාසය තැබුවේය.

නමුත් මා සිතන හැටියට කාර්‍යභාරයක ඇති පොතක පෙනෙන සටහන් සැකයට භාජන වන අවස්ථාවක් වේ නම්, ඒ සටහන්වලින් පිළිසරණ පතන අය විසින් එම සැකය දුරු නොකරන්නේ නම් ඒවා ක්‍රමානුකූලව රාජකාරිය ඉටු කිරීමේදී කරන ලද සටහන් යයි සලකා ගැනීම උසාවිය විසින් නොකළ යුතුය. පී1 දමා ලකුණු කළ උකස්කරය ''කලින් ලියාපදිංචි කරන ලද්දක්'' බව පෙන්වන ග්‍රන්ථයෙහි සහ පත්තිරුවෙහි මෙම ඉඩම් අටෙන් තුනක් වෙනුවෙන් ඇති නොම්මර එම ඉඩම් ගැන කලින් සඳහන් වී ඇති පත්තිරුවේ පෙනෙන නොම්මර නොවේයයි කියමින් මේ නිසා අමීන් මහතා ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයේ සොයා බැලීමේ පරීක්ෂණයක් නොකෙළේයයි කියන තමාගේ තර්කයට පැමිණිලි පස එය උපයෝගී කර ගත්තේය. ඇත්ත වශයෙන්ම මෙය වරදක් බව පිළිගත යුතුය. නමුත් මෙය නොයෙක් අන්දමින් තේරුම් කර දිය හැක. යම්කිසි ඔප්පුවක මෙම නොම්මර සඳහන් කරන්නේ එය කිනම් ග්‍රන්ථයක, කවර පත්තිරුවක, ලියාපදිංචි කළ යුතුද යන්න රෙජිස්ට්‍රාර්වරයාට පෙන්වීමටය. වැරදි අන්දමින් වුවත් නොයෙක් විට නොතාරිස්වරු රෙජිස්ත්‍රාර්වරයාගේ අවධානය නිවැරදි පත්තිරුවට යොමුවන අන්දමින් කලින් ලියවුනු ඔප්පුවලින් යම්කිසි ඔප්පුවක පෙනෙන නොම්මරය සඳහන් කරති. මෙහි ඇති ප්‍රතිබද්ධ සටහන් සැක සහිත යයි කලින් මා බැසගත් මතය සමග සසඳා බලන විට මියගිය තැනැත්තා ඉඩම් ලියාපදිංචි කිරීමේ කාර්‍යාලයේ සොයා බැලීමේ පරීක්ෂණයක් නොකළ බව සලකා ගැනීමට තරම් මෙය ප්‍රබල නොවේ.

මේ නිසා සාක්ෂි තුලනාත්මකව බලන කල මියගිය තැනැත්තා නොසැලකිල්ලෙන් කටයුතු කළේය යන්න තහවුරු කිරීමට පැමිණිලිකරු අපොහොසත් විය යනු මගේ අදහසයි.

මෙම කරුණ මේ අයුරින් කල්පනා කරන විට අලාභය පිළිබඳ ප්‍රශ්නය මතු නොවේ. නමුත් පැමිණිලිකරුට අලාභයක් සිදුවී නැතැයි යනුවෙන් උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා බැසගත් නිගමනයට මාද එකඟ වන බව කීමට කැමැත්තෙමි.

මෙම උකස්කරය ලියාපදිංචි කිරීමේ හේතුවෙන් පී18 සහ පී19 දමා ලකුණු කර ඇති ඔප්පු අතර එය ප්‍රමුඛත්වය ලබා ගනී.

යම්කිසි උකස් නඩුවක් ප්‍රමුඛත්වය ලබන, උකස් තැබූ ඉඩමකට කෙනෙකු එම නඩුවෙහි තීන්දු ප්‍රකාශය සටහන් කිරීමට කලින් තමාද එහි පාර්ශ්වකරුවකු වීම පිණිස ගතයුතු පියවර නොගත්තේ නම් ඔහුද එම තීන්දු ප්‍රකාශයෙන් බැඳෙන බව උකස් පණතේ (89 වන අධිකාරය) 16 වන ඡේදයෙහි පැණවී තිබේ.

එබැවින් ඇස්කීසියේ විකිණීමකදී එය මිලට ගන්නා කවරකුට හෝ වේවා හොඳ හිමිකමක් ලැබේ. පැමිණිලි කරුගේ උගත් නීතිවේදියා අඩුලුහුඩු හිමිකමක් ඇති ඉඩම් මිලදී ගැනීමට මිනිසුන් සතුටු නැතැයි කියමින් තර්ක කෙළේය. එහෙත් මෙම අඩුලුහුඩුකම නීතිමය අඩුලුහුඩුකමක් මිස හිමිකමේ අඩුලුහුඩුකමක් ගැන සැකයක් නොවන බව පෙන්නා දීම අවශ්‍යය.

කලින් සඳහන් කළාක් මෙන් විකිණීමේදී නියෝගය නිකුත්කර ඇත්තේ එක් වරක් පමණකි. ඇස්කීසියේ විකිණීම් යම්කිසි ව්‍යාජ හේතුවක් නිසා ණයකරුවන් විසින් හෝ ඔවුන්ගේ තැරැව්කාරයන් විසින් ප්‍රමාද කිරීම හෝ ඒවා බිඳහෙලීම අපේ උසාවි වලදී නිතර පාහේ දක්නට ලැබෙන සිද්ධියකි. එබැවින් විකිණීම ඇත්ත වශයෙන්ම ක්‍රියාකාරීවීමට පෙර විකිණීමට දෙන නියෝග තුන් හතර වරක් නිකුත් කිරීමට සිදුවේ. වැඩිදුරටත් මේ ගැන සලකා බලන විට, උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා පෙන්වා දුන් පරිදි මේ ඉඩම් පැමිණිලි කරුවාටම මිලදී ගැනීමට පුළුවන්කම තිබින. ඔහු වෙනුවෙන් මේ සඳහා කළ කරුණු සැලකිරීමේදී කියා සිටියේ ලියාපදිංචි කිරීමේදී උකස්කරයට ලැබී ඇති ප්‍රමුඛත්වය පැමිණිලිකරු සහ තමන්ගේ පියා විසින් කරන ලද යම් කිසි වංචනශීලී ක්‍රියාමාර්ගයක ප්‍රතිඵලයක් යයි පෙරියසාමිගේ ළමයින් විසින් කවදා හෝ කියනු ලැබීම නිසා පැමිණිලිකරු නඩුවලට පැටලීමට ඉඩකඩ තිබෙන බවකි. මෙය මෙම ඉඩම් මිලදී නොගැනීමට තරම් යුක්ති යුක්ත හේතුවක් යයි මම අදහස් නොකරමි.

මෙහි පැමිණිලිකරුට හොඳ හිමිකමක් සහ මෙතෙක් ක්‍රියාවට යෙදවිය හැකි නීත්‍යානුකූල බලසහිත උකස් නඩු තීන්දු ප්‍රකාශයක් තිබේ.

එබැවින් දිස්ත්‍රික් උසාවියේ තීන්දු ප්‍රකාශය සථිර කරන මම මෙම අභියාචනය ගාස්තුවටත් යටත්කොට නිෂ්ප්‍රභා කරමි.

එච්. ඇන්. ජී. ප්‍රනාන්දු, අග්‍රවිනිශ්චයකාරතුමා

මම එකඟවෙමි.

ගාස්තුවටත් යටත්කොට නිෂ්ප්‍රභා කරන ලදී.

අලස් විනිශ්චයකාරතුමා ඉදිරිපිටදිය

කනිංකහේවගේ සිසිර පණ්ඩිතරත්න එ. කැගල්ලේ උප පොලිස් පරීක්ෂක සහ තවත් අයෙක්*

මැන්ඩාමුස් ආඥාවක ස්වභාවයේ අධිකරණ විධානයක් නිකුත් කිරීම සඳහා ඉල්ලුම් පත්‍රය පිළිබඳ කාරණයයි. ශ්‍රේෂ්ඨාධිකරණ ඉල්ලුම් පත් අංක 343/67

තර්ක කළේ: 1967 නොවැම්බර්, 13
තීරණය: 1967 දෙසැම්බර්, 7
අවසාන තීරණය: 1967 දෙසැම්බර්, 20

මැන්ඩාමුස් ආඥාවක් — අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) සහ 122(1) දරණ ඡේද යටතේ අපරාධ තොරතුරු සටහන් පොතේ යටහන් කළ ප්‍රකාශයන්හි සහතික පිටපත් සම්පාදනය කිරීමට යයි පොලිසියට විරුද්ධව නියෝගයක් ලබා ගැනීමේ පරිශ්‍රමයක්—පොලිස් නිලධාරීන්ට සහ තව තැනැත්තෙකුට පෙත්සම් කරු විසින් තමාට දඩුවම් ලැබිය හැකි වරද කරන ලදැයි ඔහුට විරුද්ධව අපරාධ නඩු විධාන සංග්‍රහයේ 148(1)(බී) දරණ ඡේදය යටතේ නඩු දැමීම සඳහා පියවර ගැනීම — එකක් හැර අනිත් සියල්ලම සංඥේය (Cognisable) වරද වීම—121(1) ඡේදය යටතේ පොලිසියට කිසිම තොරතුරක් දීම හෝ එවැනි ප්‍රකාශයක් 122(1) ඡේදය යටතේ සටහන්කර ගැනීමක් නොසිදුවියයි දිවුරුම් පෙත්සමකින් සැලකර සිටීම — ඒ සැලකර සිටීම අනුව කරුණු සිදුවියයි සලකා ගැනීම යුක්තියුක්ත ලෙස අපහසු වීම.

දණ්ඩ නීති සංග්‍රහයේ 484, 344, 220(ඒ), 314 දරණ ඡේද යටතේ සඳහන් දඩුවම් ලැබිය හැකි වරද පෙත්සම්කරු විසින් පොලිස් නිලධාරීන්ට සහ තව තැනැත්තකුට කරන ලදැයි කැගල්ලේ පොලිසියේ අපරාධ පරීක්ෂක තැන විසින් අපරාධ නඩු විධාන සංග්‍රහයේ 148(1)(බී) ඡේදයට අනුව පෙත්සම්කරුට විරුද්ධව කැගල්ලේ මහේස්ත්‍රාත් උසාවියේ දමන ලද අංක 63125, 68267 සහ 68269 දරණ නඩු සම්බන්ධයෙන් අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) සහ 122(1) දරණ ඡේද යටතේ සටහන්කර ගන්නා ලද ප්‍රකාශයන්හි සහතික පිටපත් ඉහත සඳහන් වගඋත්තරකරුවන් විසින් තමාට හෝ තමාගේ නීතිඥ තැනට නිකුත් කළ යුතුයයි අධිකරණ නියෝගයක් ලබා ගැනීමට පෙත්සම්කරු විසින් මැන්ඩාමුස් ආඥාවක් ලැබීමේ අදහසින් කරන ලද මෙම ඉල්ලීමෙහි යාඥාකොට තිබේ. දණ්ඩ නීති සංග්‍රහයේ 484 වැනි ඡේදය යටතේ ඇති චෝදනාව හැර යෙස්ස සංඥේය වරද බව මෙහිලා සැලකිය යුතුය. අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) ඡේදය යටතේ කිසිම පොලිස් නිලධාරියෙකුට තොරතුරක් දීම හෝ පෙත්සම්කරුට එල්ලකර ඇති චෝදනාවන්ට සම්බන්ධ වරද පිළිබඳව කිසිම පොලිස් නිලධරයෙකු අපරාධ නඩු විධාන සංග්‍රහයේ 122(1) දරන ඡේදය යටතේ ප්‍රකාශයක් සටහන් කර ගැනීම හෝ සිදුවී නොමැති බව දෙවන වගඋත්තරකරු තම දිවුරුම් පෙත්සමෙහි සඳහන් කෙළේ ය.

ඒ හේතුව නිසා අපරාධ නඩු විධාන සංග්‍රහයේ 121(1) ඡේදය යටතේ දෙන ලද තොරතුරු සටහනක හෝ 122(1) දරණ ඡේදය යටතේ කරන ලද කිසියම් ප්‍රකාශයක හෝ සහතික පිටපත් ලැබීමට චෝදිතයකුට හෝ ඔහුගේ නීතිඥ තැනට අයිතිවාසිකමක් ලැබෙන අපරාධ නඩු විධාන සංග්‍රහයේ 122(ඒ) දරණ ඡේදය මෙහිදී අදාල නොවන බව කියමින් මේ ඉල්ලීමට විරුද්ධව තර්ක ඉදිරිපත් කරන ලදී.

තවදුරටත් එම දිවුරුම් පෙත්සමින් පෙත්සම්කරු ඉහත සඳහන් සහතික පිටපත් ඉල්ලූ බවත්, එහෙත් ඒවා ඔහුට නුදුන් බවත් පිළිගෙන තිබේ.

නිගමනය: (1) පෙත්සම්කරු විසින් කළැයි කියන සංඥේය වරදට ලක් වූ අය විසින් හෝ එය පිළිබඳව හෝ ප්‍රකාශයක් කර ඇති බව කෙනෙකුට 148(1)(බී) ඡේදය යටතේ ඉදිරිපත් කරන ලද රජෝර්තුවල පෙත්සම්කරුට විරුද්ධව ඇති චෝදනා පිළිබඳව ඇති සිද්ධිය ගැන සලකා බලන්නෙකුට යුක්තියුක්ත ලෙස සලකා ගත හැක.

(2) අපරාධ නඩු විධාන සංග්‍රහයේ 121 වන ඡේදය පොලිස් නිලධාරීන් සම්බන්ධයෙන් පමණක් ව්‍යතිරේකයක් (exception) පණවා නැත.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 40 වෙනි පිට බලනු.

(3) එහි 121(1) දරණ ඡේදය යටතේ දෙන ලද තොරතුරක් හෝ චෝදිතයා විසින් කරන ලද වරදට ලක් වූ අය විසින් හෝ එම වරදට නිමිත්ත වූ අය පිළිබඳව කරන ලද ප්‍රකාශයක් හෝ පිළිබඳ සහතික පිටපතක් ලබා ගැනීමට අපරාධ නඩු විධාන සංග්‍රහයේ 122 (ඒ) දරණ ඡේදයෙන් චෝදිතයකුට අයිතියක් ඇති බව ප්‍රකාශනීය ලෙස පණවා තිබේ.

විනිශ්චයකාරතුමා තම නියෝගය දීමේදී පහත පෙනෙන සේ ප්‍රකාශ කළහ. "පමණට වඩා උද්‍යෝගය දක්වන නිලධරයන් විසින් නීතිය ගැන ඇති වැරදි අවබෝධය නිසා චෝදිතයකුට ඇති අයිතිවාසිකම් මගහරවන අයුරින් ප්‍රයත්නයක් නොකෙරෙන හැටියට අධිකරණය පරීක්ෂාකාරීව වග බලා ගත යුතු බව යුක්තියේ නාමයෙන් අවශ්‍යයෙන්ම සිදුවිය යුත්තකි"

මෙයේ කී විනිශ්චයකාරතුමා මේ පරීක්ෂණය පිළිබඳ සියළුම සටහන් සහ පොලිස් නිලධාරීන් විසින් කළ ප්‍රකාශ ඇතුළත් කැගල්ල පොලිසියේ අපරාධ තොරතුරු සටහන් පොත තමාගේ අවලෝකනයට භාජන කිරීම සඳහා ශ්‍රේෂ්‍යාධිකරණයේ රෙජිස්ත්‍රාර් තැන වෙත අවසාන නියෝගයට පෙර ඉදිරිපත් කරන සේ වගඋත්තරකරුවන්ට නියෝග කොට අනතුරුව පෙත්සම්කරුගේ ඉල්ලීමට ඉඩ දෙමින් අවසාන තීරණය දුන්හ.

නිමල් සේනානායක, ධර්මසිරි සේනානායක හා ගැමුණු සෙනෙවිරත්න සමග, පෙත්සම්කරු වෙනුවෙන්

වී. ඇස්. ඒ. පුල්ලේනායගම් (රජයේ අධිනීතිඥ), රංජිත් අබේසූරිය (රජයේ අධිනීතිඥ), සමග ඇටෝර්නි-ජනරාල් වෙනුවෙන්.

අලස්, විනිශ්චයකාරතුමා:

මෙයවූ කලී, කැගල්ලේ මහේස්ත්‍රාත් උසාවියෙහිදී අපරාධ නඩු සංවිධාන සංග්‍රහයේ 148(1) (බී) වගන්තිය යටතේ තමාට විරුද්ධව නඩු පවරණු ලැබූ පෙත්සම්කරු විසින් මැන්ඩාමුස් ස්වභාවයේ අධිකරණ විධානයක් සඳහා ඉදිරිපත් කෙරෙන ඉල්ලුම් පත්‍රයකි. ඉල්ලුම්පත්‍රයේ 1 වන වගඋත්තරකරු කැගල්ලේ උප පොලිස් අධිකාරිය; 2 වන වගඋත්තරකරු කැගල්ල පොලිසිය භාර නිලධාරියාය. ස්වකීය ඉල්ලුම් පත්‍රයෙන් පෙත්සම්කරු මෙම උසාවියේ මැදිහත්වීම අපේක්ෂා කරන අතර, පෙත්සම්කරුට විරුද්ධව කැගල්ලේ අපරාධ පරීක්ෂක විසින් පවරන ලද අංක 68125, 68267 හා 68269 යන නඩු සම්බන්ධයෙන් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 121(1) හා 122(1) වගන්ති ප්‍රකාර දෙනු ලැබූ තොරතුරු හා කරනු ලැබූ ප්‍රකාශවල සහතික පිටපත් තමාට හෝ තම නීතිඥයාට හෝ සපයන ලෙස නියෝගයක් ද ඔහු අපේක්ෂා කරන්නේය. කැගල්ලේ ම.උ. 68125 හි, සංවිධාන සංග්‍රහයේ 148(1) (බී) වගන්තිය යටතේ පොලිස් වාර්තාව විසින්, පෙත්සම්කරු කැගල්ලේ පොලිස් පරීක්ෂක ඇම්. පී. ඩබ්ලිව්. මුණසිංහට ඕනෑ කමින් නින්ද කෙළේය යනුවෙන් දණ්ඩ නීති සංග්‍රහයේ 484 වන වගන්තියෙන් දඬුවම් ලැබිය හැකි වරදක් වෙනුවෙන් චෝදනා නැගී ඇති අතර, ඔහු එකී මුණසිංහ වෙත ශාපරාධිකාරී බලාත්කාරයක් (සංග්‍රහයේ 344 වන වගන්තිය) කෙළේයයි ද, තමා එකී මුණසිංහ විසින් සිය භාරයට ගැනීමේ දී එයට බාධා කෙළේ යයි ද (220 (ඒ) වගන්තිය) චෝදනා කොට ඇත. කැගල්ල ම.උ. 68267 හි වාර්තාව මඟින්, මත්වී සිටීමින් ඇන්. බී. සිරිල් ගුණදාසට පෙත්සම්කරු කරදර (සංග්‍රහයේ 488 වගන්ති) කෙළේයයි ද; එකී ගුණදාසට නින්දා (484 වගන්තිය) කෙළේයයිද, ගුණදාස වෙත සාපරාධී බියගැන්වීමක (488 වගන්තිය) යෙදුණේයයිද චෝදනා කෙරේ. කැගල්ල ම.උ. 68269 හි වාර්තාව මඟින්, කැගල්ලේ පොලිසියේ පොලිස් සාර්ජන්ට් පීටර්ස් හා පොලිස් කොස්තාපල් කරුණාදාස යන අයට තුවාල කිරීම සම්බන්ධයෙන් පෙත්සම්කරු දණ්ඩ නීති සංග්‍රහයේ 314 වන වගන්තිය යටතේ වරදක් කළේයයි චෝදනා කෙරේ. 484 වන වගන්තිය යටතේ නින්ද පිළිබඳ වරද හැරුණු විට, සෙසු සියලුම වරදවල් සංඥෙය වරදවල් හැටියට ගැණේ.

මෙම ඉල්ලුම් පත්‍රය වෙනුවෙන් තර්ක කෙරුණු නීති ප්‍රශ්න විටහා ගැනීම සඳහා, පෙත්සම්කරුට විරුද්ධව ඉහතකී අපරාධ නඩු ආරම්භ කිරීමට හේතුභූතවුණු කරුණු කෙටියෙන් මෙනෙහි කිරීම අවශ්‍යය.

2 වන වගඋත්තරකරුගේ දිවුරුම් පෙත්සම අනුව, 67.6.15 වන දින පස්වරු 8 ත් 8.30 ත් අතර කාලය තුළදී පෙත්සම්කරුගෙන් කැගල්ල පොලිසියට පරිහට සහගත ටැලිපෝන් පණිවුඩ කිපයක් ලැබිණ. ඒ පණිවුඩ පෙත්සම්කරු කෙරෙන් පහළවුණු බැව් පොලිස් නිලධාරීන් දැන සිටියේ කෙයේද යන්න දැන ගන්නට නැත. එහෙත් 2 වන වගඋත්තරකරු කියන අන්දමට, පණිවුඩ කැගල්ලේ තානායමෙන් නික්මුණු බැව් සොයා ගත්තා ලද්දේය. පරීක්ෂණ පැවැත්වීම උදෙසා පරීක්ෂක මුණසිංහ හා පොලිස් සාර්ජන්ට් පීටර්ස් ඇතුළු පොලිස් කණ්ඩායමක් තානායම කරා යවනු ලැබිණ. පොලිස්

කණ්ඩායම් තානායම කරා එළඹුණු අවස්ථාවේදී, මත් පැනට බෙහෙවින්ම ඇබ්බැහි වී සිටි පෙත්සම්කරු අශික්ෂිත වචනයෙන් පොලිස් නිලධාරීන්ට බැණ වැදී ඔවුන් කෙරෙහි සාපරාධී බලාත්කාරයෙහි යෙදුණේය. තානායමට පැමිණි ආගන්තුකයකු බැව් පෙනෙන ගුණදාස වෙත කරදරයක ද යෙදුණු ඔහු නින්දාවක් ද කෙළේය. එයිනික්බිතිව අත්අඩංගුවට ගෙන කැගල්ල පොලිස් ස්ථානයට ගෙන යනු ලැබූ පෙත්සම්කරුට විරුද්ධව, පසුව අපරාධ නීති අනුව නඩු පවරණ ලද්දේය,

පෙත්සම්කරු විසින් කරන ලදැයි කියනු ලබන වරදවල් සම්බන්ධයෙන් අපරාධ සංවිධාන සංග්‍රහයේ 121(1) වගන්තිය යටතේ කිසියම් පොලිස් නිලධාරියකු වෙත කවර තොරතුරක් හෝ නොදුන් බවත්, කිසියම් පොලිස් නිලධාරියකු විසින් එය සටහන් කර නොගත් බවත්, එබඳු තොරතුරක් අනුව යමින් මහේස්ත්‍රාත් උසාවියේ නීති කෘත්‍ය ආරම්භ කර නැති බවත් 2 වන වගඋත්තරකරු ස්වකීය දිවුරුම් පෙත්සමෙන් දක්වා සිටින්නේ ය. ඒ නිසා මෙය, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 122(ඒ) වන වගන්තියේ විධිවිධාන අදාළ වන්නා වූ කාරණයක් නොවන බැව් රජයේ අධිනීතිඥ දන්වා සිටියේය. 1961 අංක 42 දරන පනත මගින් සංවිධාන සංග්‍රහයට සංශෝධනයක් හැටියට ඉදිරිපත් කරනු ලැබූ මෙම වගන්තිය, පුද්ගලයකුට විරුද්ධව නීති මගින් කටයුතු කිරීමට හේතු වන්නා වූ 121(1) වගන්තිය යටතේ දෙනු ලබන තොරතුරේ සහතික පිටපතකුත්, කිසියම් පුද්ගලයකුට විරුද්ධව හෝ වෙනුවෙන් හෝ චිත්තිකරු විසින් වරදක් කරන ලදැයි කියනු ලැබේද, එම පුද්ගලයා විසින් 122(1) වගන්තිය යටතේ කරන ලද ප්‍රකාශයේ සහතික පිටපතකුත් නියමිත බලධරයාගෙන් චිත්තිකරුට හෝ ඔහුගේ නීතිඥයාට ලබා ගැනීමට ඉඩ සලසා දෙයි.

පොලිස් ස්ථානයක භාරව සිටින නිලධාරියා වෙත කට වචනයෙන් හෝ ලියවිල්ලෙන් දෙනු ලබන පළමු වන තොරතුර 121(1) වගන්තියෙන් අදහස් කෙරෙන අතර, එය සාමාන්‍යයෙන් සංවිධාන සංග්‍රහයේ දොළොස් වන පරිච්ඡේදය යටතේ නීති කෘත්‍ය ආරම්භ කිරීමට පදනම් වන්නේය.

පෙත්සම්කරු විරුද්ධව චෝදනා කොට ඇති වරදවල් සම්බන්ධයෙන් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 121(1) වගන්තිය යටතේ කවර තොරතුරක් හෝ කැගල්ල පොලිසියේ පොලිස් නිලධාරියකුට නොදුන් බවටත් කවර පොලිස් නිලධාරියකු විසින් හෝ වාර්තා කර නැති බවටත්, එබඳු තොරතුරක් අනුව යමින් මහේස්ත්‍රාත් උසාවියේ නීති කෘත්‍ය ආරම්භ කොට නැති බවටත් 2 වන වගඋත්තරකරු විසින් පළ කර සිටින හුදු ප්‍රකාශය පිළිගැනීමට මම ලැස්ති නොවෙමි. පෙත්සම්කරු 121(1) වගන්තිය යටතේ තොරතුරේත් 121(2) යටතේ සටහන් කරන ලද ප්‍රකාශවලත් සහතික උධෘත පාඨ උදෙසා ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කළ බවත්, ඉල්ලා සිටින ලද සහතික පිටපත්වලට අයිතියක් පෙත්සම් කරුට නැති හෙයින් ඒවා ඔහුට නිකුත් කළ නොහැකි බවත් 2 වන වගඋත්තරකරු ස්වකීය දිවුරුම් පත්‍රය මගින් පිළිගෙන ඇත. පෙත්සම්කරුගේත් 2 වන වග උත්තරකරුගේත් දිවුරුම් පත්‍රවල ප්‍රකාශ අනුව කෙනෙකුට හුදෙක් පෙනී යන්නේ, පරීක්ෂණය කර ගෙන යාමේදී පොලිසිය ඇතැම් ප්‍රකාශ සටහන් කර ගත් නමුදු අපරාධ නඩු සංවිධාන සංග්‍රහයේ 122 (ඒ) වගන්තියේ විධිවිධාන නිබඳීන් පෙත්සම්කරුට ඒවා ලබා ගැනීමට නීතියෙන් අයිතියක් නැතැයි යන තත්ත්වයක 2 වන වගඋත්තරකරු පිහිටා සිටින බවය. ඒකාන්තයෙන්ම, 148(1)(බී) වගන්තිය යටතේ වාර්තාවලින් පෙත්සම්කරුට විරුද්ධව නගා ඇති චෝදනාවල ස්වභාවය ගැන සලකා බලන කල්හි, වාර්තාවල සඳහන් සංඥෙය වරදවල් කිසියම් පුද්ගලයනට විරුද්ධව හෝ වෙනුවෙන් හෝ පෙත්සම්කරු විසින් කරන ලද්දේද එම පුද්ගලයන් විසින් ප්‍රකාශ කරන්නට ඇතැයි යන්න කෙනෙකුට සාධාරණ අන්දමින් පිළිගැනීමට ඉඩ ඇත. තමා කෙරෙහි පෙත්සම්කරු සාපරාධී බලාත්කාරයක් ඔහු නීත්‍යානුකූල භාරයට ගැනීමේ දී ඕනෑකමින් එයට විරුද්ධව බලය යෙදීම හෝ නීතිවිරෝධී අවහිරයන් කළා වූ අන්දම පිළිබඳව පරීක්ෂක මුණසිංහ වාර්තාවක් නොකළ බැව් හෝ, තමන් ගොදුරුවුණු තුවාල කිරීමේ සංඥෙය වරද සිදු කිරීම ගැන පොලිස් සාර්ජන්ට් පිටර්ස් හා පොලිස් කොන්ස්ටාපල් කරුණාදාස විස්තරයක් නොකළ බැව් හෝ, මත් අවස්ථාවක වෙසෙමින් තමාට කරදර වන අන්දමින් පෙත්සම්කරු හැසිරුණු ආකාරය ගැන ගුණදාස කළ ප්‍රකාශය වාර්තාගත වුණු කරුණක් නොවන බැව් හෝ මතයක් පළකර සිටීම නිෂ්ඵලය. ඔවුන්ගේ ප්‍රකාශ ඇත්ත වශයෙන්ම, 121(1) වගන්තිය යටතේ සංඥෙය වරදක යෙදීම පිළිබඳ පළමුවන තොරතුර විය හැක්කේය. නොවේ නම්, ඒවා සංග්‍රහයේ 122(1) වගන්තිය යටතේ කරන ලද ප්‍රකාශ හැටියට කෙනෙකු විසින් පිළිගත යුතුය. 121(1) යටතේ තොරතුරු දෙන ලද්දේද නැද්ද යන්නට පංසෙක නිබඳීදී, පෙත්සම්කරුට එම ප්‍රකාශ ලබාගැනීමට 122(ඒ) වගන්තිය යටතේ නීතියෙන් අයිතියක් ඇත.

පෙත්සම්කරු පොලිස් ස්ථානය කරා ගෙන ඒමෙන් පසුව ස්ථානයේදී කුමක් සිදුවිණිද යන්න ගැන, අභාග්‍යයකට මෙන්, මෙම උසාවිය සම්පූර්ණයෙන්ම අඳුරට පත්වී ඇති අතර, සංග්‍රහයේ 148(1)(බී) වගන්තිය යටතේ වාර්තා ඇඳිණීමට පෙර පොලිසිය ගත් පියවර

කෙසේ සිදුවී දැයි අනුමානයෙන් සිතා බැලීමට හේතුවී ඇත. මෙම වාර්තා සැපයෙන්නේ මුළුමණින්ම පොලිස් නිලධාරීන්ගේ වගකීම පිටය. තවද, නියමිත විභාග හා පරීක්ෂණවලින් පසුවය, 121(1) වගන්තිය යටතේ තොරතුරු ක්‍රම කීපයකින් ලැබිය හැකිය. වාචිකව සැපයුණු තොරතුරු ලියවිල්ලට පෙරළිය හැකිය. නැත්නම් පළමුවරට එය ලියවිල්ලෙන් සැපයිය හැකිය. නැත්නම් තොරතුරු ටැලිපෝන් මඟින් දිය හැකිය. සංඥය වරදක් සිදුකරන අවස්ථාවකදී එහි සිටින්නාවූ පොලිස් නිලධාරියකුට වරදකරුවා අත්අඩංගුවට ගැනීමේ අයිතියක් පොලිස් ආඥා පනතේ 65 වන වගන්තිය යටතේ ලැබෙන බවට කිසිදු සැකයක් නැත. එසේ වුවද ඔහු වරදකරුවා පොලිස් ස්ථානයට ගෙන ගොස්, වරදකරුවාගේ ප්‍රමාද දෝෂය බලධාරීන්ට දන්වා සිටි කල්හි, ඔහු සංග්‍රහයේ 121(1) වගන්තිය යටතේ තොරතුරු සැපයීමක යෙදෙන්නේය. 121(1) වගන්තිය, පොලිස් නිලධාරීන් වෙනුවෙන් විශේෂයක් නොකරයි. සංග්‍රහයේ 148(1)(බී) වගන්තිය යටතේ කරනු ලබන වාර්තාවකට පෙරාතුව, 121(1) වගන්තිය යටතේ කිසියම් තොරතුරක් ලැබී සංග්‍රහයේ 122(1) වගන්තිය යටතේ ප්‍රකාශ යටහත් කර ගැනීමක් සිදු නොවූ අවස්ථාවක් මට අපේක්ෂා කළ නොහැකිය.

පෙත්සම්කරුගේ 1967 අගෝස්තු 4 ('සී' යනුවෙන් ලකුණු කොට ඇති) ලිපියෙන් ඉල්ලා සිටින සහතික කරන ලද උපුටා ගත් කොටස්වලට ඔහුට නිමිකමක් නැතැයි 2 වන වගඋත්තරකරු ස්වකීය දිවිරුම් පත්‍රයෙන් කර සිටින ප්‍රකාශය අනුව ක්‍රියා කිරීමට ලැස්තියක් මා තුළ නැත්තේය. ඔහුට එය අයිතිද නැද්ද යන්න තීරණය කිරීම මෙම උසාවියට භාර වී ඇති නීති ප්‍රශ්නයකි.

පෙත්සම්කරුගේ ලිපියෙන් ඔහු ඉල්ලා සිටින උපුටා ගත් කොටස්වලට ඔහුට අයිතියක් නැතැයි 2 වන වගඋත්තරකරුගේ දිවිරුම් පත්‍රයෙන් සඳහන්වන මතය යුක්තිසහගත බවට මා සැහීමට පත්වීම සඳහා, පෙත්සම්කරු ඉල්ලා සිටින උපුටා ගත් කොටස් මෙම උසාවිය වෙත ඉදිරිපත් කර නැත. සංවිධාන සංග්‍රහයේ 121(1) වගන්තිය යටතේ දෙනු ලබන තොරතුරුද, කිසියම් පුද්ගලයනට විරුද්ධව හෝ වෙනුවෙන් හෝ විත්තිකරු විසින් වරදක් කරන ලදැයි චෝදනා කෙරෙන එම පුද්ගලයා විසින් 122(1) වගන්තිය යටතේ කරනු ලබන ප්‍රකාශයක්ද ලබා ගැනීමට විත්තිකරුට නීතියෙන් අයිතියක් ඇතැයි 122(ඒ) වගන්තියෙන් අපරාධ නඩු සංවිධාන සංග්‍රහයට කර ඇති සංශෝධනයෙහි නිශ්චිතව විධිවිධාන යෙදී ඇත. පමණ ඉක්මවා යන උද්‍යෝගයෙන් ක්‍රියා කරන්නාවූ නිලධාරීන්ගේ නීතිය පිළිබඳ වැරදි දර්ශනයකින් විත්තිකරුවකුගේ නෛතික අයිතිවාසිකම් පෙරළා දැමීමක් නොවන අන්දමට පරීක්ෂාකාරීව සිටීම උසාවි විසින් කළ යුතුයයි යුක්තියෙන් අවශ්‍ය කර වන්නේය. එහෙයින්ම, තමන් විසින් කැඟල්ලේ මහේස්ත්‍රාත් උසාවියේ අංක 68125, 68267 හා 68269 යන නඩුවලදී අපරාධ නඩු සංවිධාන සංග්‍රහයේ 148(1)(බී) වගන්තිය යටතේ කරන ලද වාර්තා සම්බන්ධයෙන් කරන ලද සියලු පරීක්ෂණ සහිත කැඟල්ල පොලිස් ස්ථානයේ තොරතුරු පොතත්, ඒ සමඟම තමන් කළ පරීක්ෂණවලදී සටහන් කරගනු ලැබූ සියලු ප්‍රකාශවල සහතික පිටපතුත් දෙසැම්බර් 15 වන දින හෝ එයට පෙර හෝ මෙම උසාවියේ රෙජිස්ත්‍රාර් වෙත ඉදිරිපත් කරන ලෙස මම වගඋත්තරකරුවන්හට මෙයින් නියම කරමි.

අදාළ ලියවිලි කියවා බැලීමෙන් පසුව, පෙත්සම්කරුගේ ඉල්ලීම සාර්ථක විය යුතු එකක්ද නැද්ද යන වග සම්බන්ධයෙන් මම අවසාන නියෝගයක් කරන්නෙමි.

අවසාන තීරණය

අලස්, විනිශ්චයකාරතුමා:

අදාළ ලියවිලි කියවා බැලීමෙන් පසුව මෙම ඉල්ලීම සම්බන්ධයෙන් මගේ අවසාන තීරණය කරන්නෙමැයි මම මගේ 1967 දෙසැම්බර් 7 වැනි දින දරන නියෝගය නිකුත් කළ අවස්ථාවේදී පැවසුවෙමි.

මෙම ඉල්ලුම් පත්‍රය හා සම්බන්ධවූ පොලිස් පරීක්ෂණ පිළිබඳ සටහන් දැන් මා විසින් කියවා බලා ඇත. එම සටහන් අනුව, පෙත්සම්කරුට විරුද්ධව ඉදිරිපත්වුණු නින්දා පිළිබඳ අසංඥෙය වරද සම්බන්ධයෙන් විමසීම සඳහා උප පොලිස් පරීක්ෂක මුණසිංහ, පොලිස් සාර්ජන්ට් පීටර්ස් හා පොලිස් කොන්ස්තාපල් කරුණාදාස යන අය ගෙන් සමන්විත පොලිස් කණ්ඩායමක් අපර භාග 9.40 ට කැඟල්ලේ තානාමයට ගොස් ඇත. තානායමට පැමිණීමෙන් පසුවද, පෙත්සම්කරු යළිත් පොලිස් නිලධාරීන්ට පරිභව කිරීම ආරම්භ කොට ඇති අතර ඔහු අත් අඩංගුවට ගැනීමෙහිදී එයට විරුද්ධව බලය යෙදුවේය. මෙහිදී බලයෙන්ම ඔහු පොලිස් 'ලැන්ඩ් රෝවරය' කරා ගෙන යන ලද්දේය. වාහනය පොලිසිය කරා පදවා ගෙන යන අවස්ථාවෙහිදී ඔහු පීටර්ස් හා කරුණාදාස යන පොලිස් නිලධාරීන්ට පා පහරදී තුවාල කොට ඇත. අපරභාග 10.05 ට උප පොලිස් පරීක්ෂක මුණසිංහ පොලිස් ස්ථානයට පැමිණි වේලේදී, පෙත්සම්කරු අත්අඩංගුවට ගැනීමට එරෙහිව ක්‍රියා කළ හැටිත් පොලිස් නිලධාරීන්හට පා පහර දුන් හැටිත් සටහන් කර ගෙන ඇත. මෙම සටහන් වනාහි අංක 68125

නඩුවේ 148(1)(බී) වාර්තා බවට විෂය වන කාරණා වශයෙන් යෙදී ඇත. තවද ඒවා දණ්ඩ නීති සංග්‍රහයේ 344 හා 220 (ඒ) යන වගන්ති යටතේ සංඥෙය වරදවල් ගැන සඳහනක් කරයි. වාර්තාවේ දැක්වෙන සංඥෙය වරදවල් හා සම්බන්ධවූද අපරාධ නඩු සංවිධාන සංග්‍රහයේ 121(1) වගන්තිය යටතේ සටහන් කරනු ලැබුවාවූද තොරතුරු හැටියට ඉහත කී සටහන් ගැනේ. මෙම තොරතුර ලබා ගැනීමට පෙත්සම්කරුට අයිතියක් ඇත.

අපරභාග 10.55 ට, පෙත්සම්කරු දොස්තර විසින් පරීක්ෂා කරන ලදුව ආපසු පොලිස් ස්ථානයට ගෙනා පසු උප පොලිස් පරීක්ෂක මුණසිංහ විසින් පොලිස් සාර්ජන්ට් පීටර්ස් විභාග පැවැත්වීම සඳහා නානායම කරා යවන ලද්දේය. පීටර්ස් අපරභාග 11.10 ට එහි පැමිණි අවස්ථාවේදී ඔහු සිරිල් ගුණදාසගේ ප්‍රකාශයක් සටහන් කර ගත්තේය. මත්වූ තත්වයක සිටිමින් පෙත්සම්කරු තමාට කරදර (දණ්ඩ නීති සංග්‍රහයේ 488 වගන්තිය) කළ ආකාරයෙන් ඔහුට සාපරාධී බිය වැද්දීමක (486 වන වගන්තිය) යෙදුණු අන්දමින් ගුණදාස ස්වකීය ප්‍රකාශයෙන් විස්තර කර ඇත. කැගල්ලේ ම.ඵ. 68267 නඩුවේ 148(1)(බී) වාර්තාවට ඉහත කී වරදවල් විෂය වී තිබේ. 488 වන වගන්තිය යටතේ කරන ලද වරද වනාහි, පොලිස් කණ්ඩායම නානායම කරා පැමිණීමට ප්‍රථමයෙන් කරන ලදැයි කියන සංඥෙය වරදක් වන අතර, එය 121(1) වගන්තිය යටතේ පළමුවන තොරතුර වශයෙන් යෙදේ. ගුණදාසගේ ප්‍රකාශයේ සහතික පිටපතක් ලැබීමට පෙත්සම්කරුට අයිතියක් ඇත.

දෙන ලදැයි කියන පා පහරට ලක්වුණු පොලිස් සාර්ජන්ට් පීටර්ස් හා පොලිස් කොස්තාපල් කරුණාදාස, පෙත්සම්කරු විසින් තමන්හට තුවාල සිදු කළ ආකාරය පිළිබඳ ප්‍රකාශ දී ඇති අතර, ඒවා කැගල්ලේ ම.ඵ. 68269 නඩුවේ 148(1)(බී) වාර්තාවේ විෂය කාරණා වශයෙන් යෙදේ. පෙත්සම්කරු විසින් කරන ලදැයි කියන 314 වන වගන්තිය යටතේ වරදවල් සම්බන්ධයෙන් මෙම පොලිස් නිලධාරීන් දෙදෙනාගේ ප්‍රකාශ ලබා ගැනීමට පෙත්සම්කරුට අයිතියක් ඇත.

පහත සඳහන් නඩුවල පහත දක්වනු ලබන ලියවිලිවල සහතික පිටපත් තමා වෙත හෝ තම නීතිඥයා වෙත හෝ නිකුත් කරනු ලැබීම සඳහා පෙත්සම්කරු ඉදිරිපත් කරන්නා වූ ඉල්ලීම එහෙයින්ම සාර්ථක විය යුතුයයි මගේ හැඟීමයි:

(ඒ) උප පොලිස් පරීක්ෂක මුණසිංහ විසින් 67.6.15 දින 10.05 ට සටහන් කරගත් ""at the Rest House with the Police party" යන වචන වලින් පටන්ගෙන "inside the Land Rover he violently struggled and started kicking the Police Sergeant and the party who were in the Land Rover" යන්නෙන් අවසන් වන නිරීක්ෂණ;

(බී) නාරංගල විදානලාගේ සිරිල් ගුණදාස විසින් පොලිස් සාර්ජන්ට් පීටර්ස් වෙත අ.භා. 11.10 ට නානායමේ දී කරන ලද "He dialled on three or four occasions" යන වචන වලින් පටන් ගෙන "His conduct in the Rest House was such that it caused annoyance to me as well as to others and visitors to the Rest House" යන වචනවලින් අවසන් වන ප්‍රකාශය; (කැගල්ල ම.ඵ. 68267)

(සී) පොලිස් සාර්ජන්ට් පීටර්ස් විසින් 67.6.16 වන දින දී සටහන් කර ගන්නා ලද 2042 කරුණාදාස පොලිස් කොස්තාපල්ගේ "on 15.6.67 I accompanied I. P. Munasinghe and P. S. Pietersz to the Rest House" යන වචනවලින් පටන් ගෙන "I received several kicks all over my body" යන වචනවලින් අවසන් වන ප්‍රකාශය; (කැගල්ල ම.ඵ. 68269).

(ඩී) මුණසිංහ උප පොලිස් පරීක්ෂක විසින් සටහන් කර ගන්නා ලද පොලිස් සාර්ජන්ට් පීටර්ස්ගේ "At about 9.55 p.m. I accompanied I.P. Munasinghe and P. S. 2042 and arrived at the Rest House at 10 p.m." යන වචන වලින් පටන් ගෙන "I received several kicks on my body" යන වචනවලින් අවසන් වන ප්‍රකාශය. (කැගල්ල ම.ඵ. 68269)

පෙත්සම්කරුගේ ඉල්ලීමට, මා විසින් නියම කරනු ලබන රු: 105/- ක ගාස්තුවක් සහිතව ඉඩ දෙනු ලැබේ.

ඉල්ලීමට ඉඩ දෙන ලදී.

(පරිවර්තනය ඇල්. ඇම්. ඒ. සිල්වා විසිනි)

ගරු විරමන්ත්‍රී විනිශ්චයකාරතුමා ඉදිරිපිටදිය

වී. එම්. බොන්සේකා එ. කේ. ජයවර්ධන සහ තවත් අය*

හබෙයාස් කෝර්පස් ආඥාවක් ඉල්ලීම—ශ්‍රේ. අංකය 453/1967

විභාග කළේ: 1968, ජූනි 27 වැනිදා
තීන්දුව දුන්නේ: 1968, සැප්තැම්බර් 1 වැනිදා

හබෙයාස් කෝර්පුස් ආඥාවක් — ලාබාල දරුවෙකුගේ භාරය — ඉහළින්ම සැලකෙන කරුණ දරුවාගේ සුභසිද්ධිය — මවගේ නුසුදුසුකම ඔප්පු නොවූ විට පියාගේ විශේෂ අයිතිය නොසලකා හැරිය හැකිය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 55 වෙනි පිට බලනු.

අවුරුදු එකහමාරක් පමණ වයසැති දරුවෙකුගේ මවක් සිය සැමියා විසින් දරුවා තමාගෙන් අයුතු අන්දමින් වෙන් කර තබා ඇතැයි දක්වමින් එකී දරුවාගේ භාරය ඉල්ලා සිටියාය.

තීන්දුව: දරුවන්ගේ භාරය පිළිබඳ කාරණාවලදී ඉහළින්ම සලකා බැලෙන කරුණ වනුයේ දරුවාගේ සුභසිද්ධියයි. එම නිසා මේ නඩුවේදී පියාගේ විශේෂ අයිතිය තිබියේ වී නමුත් දරුවාගේ භාරයට මවගේ නුසුදුසුකම ගැන සාක්ෂි නොමැති නිසා මෙහි දී මේ ලාබාල දරුවාගේ භාරය මවට ලැබිය යුතුය.

ටී. බී. දිල්ලිමුනි, පෙත්සම්කරු වෙනුවෙන්.

රංජන් ගුණරත්න, හේමචන්ද්‍ර පෙරේරා සමග, 1 වැනි වගඋත්තරකාරිය වෙනුවෙන්.

වීරමන්ත්‍රී විනිශ්චයකාරතුමා:

මෙම නඩුවේ ඉල්ලුම් පත්‍රය ඉදිරිපත් කරන කාලයේ තමාගේ ස්වාමිපුරුෂයා වන වගඋත්තරකරු සහ ඔහුගේ දෙමාපියන් විසින් නොමනා ලෙස තමාගෙන් බැහැර කොට වයස අවුරුදු එකහමාරක් පමණ ඇති ළමයෙකුගේ මැණියන් විසින් ඒ ළමයා පිළිබඳ ''හබයාස්කෝපස්'' ආඥාවක් ලබා ගන්නා අටියෙන් මෙම නඩුව ඉදිරිපත් කොට තිබේ. තමාගේ ළමයා තබාගෙන සිටි ගෙයට පෙත්සම්කාරිය පැමිණි විට පළමුවන වගඋත්තරකරු විසින් ඇයට පහර දෙන ලදැයිද ඈ චෝදනා මුඛයෙන් කියා සිටියාය. මේ සම්බන්ධයෙන් විභාගයක් පැවැත්වූ උගත් මහේස්ත්‍රාත්වරයා වගඋත්තරකරුට ළමයා බැලීමට ඇති ඔහුගේ අයිතිය ආරක්ෂාවන පරිදි එම ළමයා මවට භාරදීම සුදුසුයැයි නිර්දේශ කොට ඇත.

මෙම චාර්තාවෙහි අන්තර්ගත කරුණුවලට විරුද්ධව මෙහි කරුණු දක්වන වගඋත්තරකරු එයට හේතුව වශයෙන් දක්වන්නේ ළමයාගේ පියා හැටියට ඔහුට ඇති අයිතිවාසිකම ගැන වැඩිසැලකිල්ලක් දැක්විය යුතු බවය.

සාමාන්‍ය අවස්ථාවක කරුණු සළකා බලන විට කයාදයකින් උපන් ළමයින්ගේ භාරකාරත්වයට මවට ඇති අයිතියට වඩා සැලකිලි දැක්විය යුතු අයිතියක් නිසැකයෙන්ම පියා වෙත පැවරේ. එහෙත් ළමයා ලාබාල වයසේ සිටින්නෙකු නම් එසේම ඒ නිසා මවගෙන් ලැබිය යුතු සුවපහසුවේ සහ ඇගේ ආශ්‍රයෙහි ඇති අවශ්‍යතාවය නිසා වැඩි යැලකිල්ලක් දැක්විය යුතු අයිතියක් භාරකාරත්වය කෙරෙහි පියා වෙත ඇතත් ළමයාගේ භාරකාරත්වය මවට පිරිනැමිය යුතු බව දැන් නිත්‍ය ලෙස ප්‍රතිෂ්ඨාපිත වූ කරුණකි. භාරකාරත්වය සම්බන්ධ කරුණක් විමසීමේදී මුල් ගණයෙහිලා සිතා බැලිය යුතු අංගය ළමයාගේ සුභසිද්ධිය වන නිසා එම ප්‍රඥප්තියට අනුකූලව ඉහත සඳහන් කරුණ ස්ථාපිත වී ඇත්තේ ය. ඇත්ත වශයෙන්ම ළමයාගේ භාරකාරත්වය සහ ආරක්ෂාව පිරිනැමීමට මව නුසුදුසු බව කියැවෙන යම්කිසි සාක්ෂියක් නොමැති නම් එබඳු ලාබාල ළමයෙකුගේ සුභසිද්ධිය ගැන සළකන විට ළමයා ආපසු මවට භාරදිය යුතුය යන්න පැහැදිලිය.

දැනට අප ඉදිරියේ ඇති නඩුවේ මේ සඳහා කිසිම සාක්ෂියක් නැත. ඈ භාරකාරත්වය ලැබීමට නුසුදුසු යැයි ගිනිය හැකි සාක්ෂි නොමැති නිසා ළමයාගේ භාරකාරත්වය මවට පැවරිය යුතුයැයි උගත් මහේස්ත්‍රාත්වරයා නිර්දේශ කර සිටීම ඉතාම හරි බව මගේ මතය වේ.

පෙත්සම්කාරිය ඉකුත් අවධියක සිය දිවි නසාගැනීමට තැත් කළ තැනැත්තියක්යැයි ද, ඈ නරක ගතිපැවතුම් ඇති තැනැත්තියක්යැයි ද කියවෙන පරිදි මෙහි අදහස් මතු කොට තිබේ. මෙම අදහස් මතු වී ඇත්තේ සාක්ෂි වලට ඉදිරිපත් වී ඇති ඇය විසින් ලියා ලද එක් ලියමනක් පදනම් කොටගෙන ය. නමුත් පෙත්සම්කාරිය මෙම ලියමන ලිවීමට තමාට වගඋත්තරකරු බලකළ බව කියා සිටියි. මෙම ලියමනෙහි ඇති නොමනා හැසිරීම් පිළිබඳ ලේඛනයෙහි අතිසූර්ණත්වය ගැන සළකන විට එය බල කිරීම නිසා ලියන ලද ලියමනක්ය යන මතයට එම ලිපියේ ස්වරූපයෙන්ම පිටුවහල ලැබේ. වගඋත්තරකරු කියා සිටින පරිදි මෙබඳු ලිපියක් සිය කැමැත්තෙන් ඈ විසින් ලියන ලදැයි සිතිය නොහේ.

මහේස්ත්‍රාත්වරයා ඉදිරියේ පැවතුන විභාගයේ දී භාර්‍යාවට බල කිරීම නිසා මෙම ලිපිය ලියන ලදැයි යන තත්වය ගැන ස්වාමිපුරුෂයා වන වගඋත්තරකරුගෙන් ප්‍රශ්න මතු කරන ලද බව කියමින් මෙහිදී කරුණක් මතු කරන ලදී. මෙම තත්වය වගඋත්තරකරු ස්වාමි පුරුෂයාගේ විශේෂයෙන්ම විමසීමට යෝග්‍යව තිබූ බවට කිසිදු සැකයක් නැත. නමුත් මෙහි සාක්ෂි සම්පූර්ණ වශයෙන් සළකා බලන විට මට මෙයින් වගඋත්තරකරුගේ අවාසියට යම්කිසිවක් සිදුවී යැයි සිතා ගත නොහැකි ය.

මෙම ලිපියේ ඇති කරුණු විනා, ළමයාගේ භාරකාරත්වය ලැබීමට පෙත්සම්කාරිය නුසුදුසු තැනැත්තියක්ය යන අදහස දීමට පදනම් කොට ගැනීමට කිසිම හේතුවක් නැත. මේ හේතුව නිසා උගත් මහේස්ත්‍රාත් වරයා නිර්දේශ කළ කරුණු ස්ථිර කරන මම ළමයා මහේස්ත්‍රාත්වරයාගේ අභිමතය අනුව තීරණය වන කොන්දේසිවලට සහ ප්‍රඥප්තිවලට අනුව වගඋත්තර කරුට ළමයා බැලීමට ඇති අයිතිය සාධාරණ ලෙස රැකෙන සේ මෑණියන්ට භාරදිය යුතුයැයි ද නියෝග කරමි.

පෙත්සම්කාරියට මෙම නඩු විභාගවල ගාස්තුව ලැබිය යුතුයි. පහළ උසාවියේ සහ මෙහි ඇයට වියදම් වූ ගාස්තුව වශයෙන් මම රුපියල් 315/- නියම කරමි.

ඇපෑලට ඉඩ දෙන ලදී.

ටී. ඇස්. ප්‍රනාන්දු සහ අලස් විනිශ්චයකාරතුමන් ඉදිරිපිට

ඇස්. රාමලිංගම් එ. පී. කන්දසාමි*

ශ්‍රේෂ්ඨාධිකරණ අංකය: 462/1964 සහ යාපනේ දිස්ත්‍රික් උසාවි අංකය: 374/ඇම්

විවාද කළේ 1967 ජූනි 13 සහ 14 දිනවල:
තීන්දු කළ දිනය: 1967 ජූලි 19.

හවුල් ව්‍යාපාරයක් — වර්ෂ 1949 හවුල් ව්‍යාපාරය නිමාවට ගියාට පසු මූල ධනයේ කොටය ආපසු ලබා ගැනීමට පැවරූ නඩුවක් — හවුල් ව්‍යාපාර ගිවිසුමේ කොන්දේසිවලට අනුකූලව පැමිණිලිකරු විසින් තමාට පිළිවෙළින් අඩ වසර දෙකකට හිමි ලාභය ඉල්ලා හවුල්කරුට විරුද්ධව කලින් දමන ලද නඩු දෙකක් — පැමිණිලිකරුගේ මෙම නඩුව කාලාතික්‍රාන්තවී ඇති බව සහ එය සිවිල් නඩු විධාන සංග්‍රහයේ 34 වන ඡේදයේ පැනවීම් නිසා කිය නොහැකි බව සැලකරමින් විත්තිය තම නිදහසට කරුණු දැක්වීම.

හවුල්කරු — එක් හවුල්කරුවකු තවෙකකුට භාරකාරත්වයක් ඇතුව හෝ විශ්වාසනීය තත්ත්වයක් ඇතුව හෝ සිටීද?

වර්ෂ 1948 ඔක්තෝබර් මස සිට 1949 සැප්තැම්බර් මාසය තෙක් ඇති අවුරුද්දේ කාල සීමාව තුළ රේන්දකරුවන් වශයෙන් රජය මගින් පෙරන ලද්දකු මිළට ගැනීමට හා විකිණීමට පී1 දරණ සළකුණු කරන ලද වර්ෂ 1948 ඔක්තුවෙන් පළමුවන විත්තිකරු, පස්වන විත්තිකරු, 'පී' නමැති තව තැනැත්තකු සහ පැමිණිලිකරු අතර තම සම්මුතිය අනුව කරගෙන යන හවුල් ව්‍යාපාරයක මූල ධනයට තමා විසින් ප්‍රදානය කළ කොටස බැවි කියන රු: 13,423/60 ක් සහ 1.10.1949 දින සිට ඊට අයත් නීත්‍යානුකූල පොලිය ආපසු ලබාගැනීම සඳහා පැමිණිලිකරු 1.6.1956 දින පළමුවන විත්තිකරුට විරුද්ධව මෙම නඩුව පවරා තිබේ.

තුන්වන සහ හතරවන විත්තිකරුවෝ අභාවප්‍රාප්ත 'පී' නමැත්තාගේ උරුමක්කාරයන් වූ අතර දෙවන විත්තිකරු තුන්වැන්නාගේ ස්වාමිපුරුෂයාය. දෙවන, තුන්වන, හතරවන සහ පස්වන විත්තිකරුවන්ට විරුද්ධව කිසිම සහනයක් මෙහි ඉල්ලා නැත. මෙම හවුල් ව්‍යාපාරයේ සියලුම මුදල් හදල් පළමුවන විත්තිකරුගේ ආරක්ෂාව යටතේ නිබිය යුතුයැයි ඉහත සඳහන් පී1 දරණ ඔප්පුවේ ඇති අතර, මෙම නඩුව විසඳූ උගත් විනිශ්චයකාරවරයා විසින් පිළිගන්නා ලද්දේ එකී සම්පූර්ණ හවුල් ව්‍යාපාරය පරිපාලනය කරන ලද්දේ පළමුවන විත්තිකරු විසින් බවය.

තමා යතු මූල ධනයෙන් හවුල් ව්‍යාපාරය කළ කාල සීමාවේ පළමුවන අඩ වසර තුළ ඉපැයුණු ලාභය ඉල්ලා පැමිණිලිකරු පළමුවන විත්තිකරුට විරුද්ධව මීට කලින් යාපනයේ දිස්ත්‍රික් උසාවියේ නෝ: 5856 දරණ නඩුව සාර්ථක ලෙස කියා තිබේ. එසේම යාපනයේ දිස්ත්‍රික් උසාවියේ නෝ. 8646 දරණ නඩුවද, දෙවන අඩ වසර තුළ තමාට නිවිවිය යුතු ලාභය ඉල්ලා ඔහු විසින් පවරා ඇති නමුත් දැනට අප ඉදිරියේ ඇති මේ නඩුව නිමවන තුරු එය කල් තබා ඇත.

තවත් කරුණු අතර පළමුවන විත්තිකරු විසින් පහත සඳහන් තර්ක ඉදිරිපත් කරන ලදී.

(ඒ) පැමිණිලිකරුගේ ඉල්ලීම කාලාතික්‍රාන්ත දෙයක් බව;

(බී) සිවිල් නඩු විධාන සංග්‍රහයේ 34 වන ඡේදයේ පැනවීම්වලින් වැළකී ඇති නිසා පැමිණිලිකරුට මේ නඩුව කියාගෙන යාමට නොහැකි බව.

මේ ආයාචනා දෙක ගැන උගත් විනිශ්චයකාරවරයා පළමුවන විත්තිකරුට විරුද්ධව නිගමනය කළේය. කාලාතික්‍රාන්තවීමේ ප්‍රශ්නය විසඳීමේදී චාරකාර ආඥා පනතේ 90 වන සහ 111 වන ඡේද ගැන සඳහන් කළ ඔහු මෙම හවුල් ව්‍යාපාර අරමුදලේ එකම පරිපාලකයා වූ විත්තිකරු ඒ පිළිබඳව අනුචිත භාරකාරයකුගේ (Coustructive Trustee) තත්වය දරමින් හෝ විශ්වාසනීය (Fiduciary) තත්ත්වයක් දරමින් හෝ සිටියේය යන මතයක එල්බ ගත්තේය. මේ නිසා පළමුවන විත්තිකරුගෙන් අභියාචනයක් ඉදිරිපත්ව ඇත.

තීන්දුව: (1) පළමුවන විත්තිකරු (ඇපැල්කරු) අනුචිත භාරකාරයකු ගේ තත්ත්වයෙන් හෝ විශ්වාසනීය තත්ත්වයකින් හෝ සිටියේය යන නිගමනයට බැසගත් උගත් විනිශ්චයකාරවරයා කරුණු වරදවා වටහා ගෙන තිබේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 73 වෙනි පිට බලනු.

(2) අනික් අයවළුන්ට යම්කිසි විශ්වාසනීය තත්ත්වයක පිහිටා ඇති අය විසින් රහසිගතව ලබන ලද ප්‍රති-ලාභයක ස්වභාවය ඇති දේවලටම අදාළ වන නිසා භාරකාර ආඥා පනතේ 90 වන ඡේදය ඇපැල්කරුට මෙහිදී උපයෝගී කරගත නොහැක. මෙම විශ්වාසනීය තත්ත්වය ගැන නිගමනයකට බැසිය යුත්තේ ඉංග්‍රීසි නීතිය අනුව බවත්, එම නීතියම හවුල් ව්‍යාපාර පිළිබඳවද බලපවත්වන බවත් මෙහි ලා සැලකිය යුතුය.

(3) භාරකාර ආඥා පනතේ 111 වන ඡේදයද මෙහිදී පැමිණිලිකරුට සහාය පිණිස යොදවා ගත නොහැක. එම ආඥා පනතේ 5 වන ඡේදයෙන් එංගලන්තයේ පවතින නීතියට අනුව ප්‍රකාශිත භාරයක්යැයි යම්කිසි අනුචිත භාරයක් එහි කරුණු අනුව සලකා ගත හැකි නම් එපමණ දුරට පමණක් මිස එයට වඩා දුර අනුචිත භාරයක් යොදවා ගැනීම බැහැර කර තිබේ.

(4) එක් හවුල්කරුවකු තම හවුල්කරුවකු කෙරෙහි කිසියම් ප්‍රකාශිත භාරයක භාරකරුවකුගේ තත්ත්වයෙන් සිටියයි කියන මතයට නිති ග්‍රන්ථ සහ වියදි ඇති නඩු සියල්ලම පාහේ පටහැනිව තිබේ.

(5) සාමාන්‍යයෙන් පැනවී ඇති කාලය සීමා කිරීමේ ලිඛිත ආඥා අදාළ වන්නේ හවුල් ව්‍යාපාරයක් විසුරුවා හැරීමෙන් පසුව එහි ගණුන් නිලවූ සම්බන්ධයෙන් දමන නඩුවලට හෝ හවුල්කරුවකු ඉවත් කිරීමට දමන ලද නඩුවලටය.

(6) එම නිසා එකී හවුල් ව්‍යාපාරය විසුරුවා හැරීමෙන් සාවුරුද්දකට පසුව දමා ඇති මෙම නඩුව කාල සීමා ආඥා පනතේ 6 වන ඡේදයේ ප්‍රතිපාදනයන්ගේ හේතුවෙන් ගෙන යා නොහැකි නඩුවකි.

ඉහත සඳහන් ඇපැල්කරුගේ දෙවන තර්කය පදනම් කොට දෙන ලද තීන්දුව මෙසේය:

(7) පී1 දරන හවුල් ව්‍යාපාර ඔප්පුවේ ප්‍රඥප්තින්ට අනුව පැමිණිලිකරු පිළිවෙළින් වසර දෙකක තමාට හිමි ලාභය ලබා ගැනීමේ අභිප්‍රායයෙන් කරන ලද වැයමත් නඩු නිමිත්ත හැටියට සලකා දමන ලද එම නඩුව හාත්පසින්ම වෙනස්වූ නඩු නිමිත්තක් මත ගොඩ නැගී ඇති මෙම නඩුවට සිවිල් නඩු විධාන සංග්‍රහයේ 34 වන ඡේදයෙන් වැළකීමක් සිදුනොවේ.

සලකා බැලූ නඩු: පින්තපුර් රාජා එ. සූරියා රෝ, අයි.ඇල්. ආර්. මදුරාසි 520
පලනියප්පා එ. සාමිනාදන්, (1913) 17 න.නී.වා. 56
සෝමසුන්දරම් එ. සින්නතම්බි (1913) 3 සී.ඒ.සී. (ලංකා) 94
සයිබු එ. අබුතාහීර් (1935) 37 න.නී.වා. 319; IV සී ඇල්.ඩබ්ලිව්. 110
හසූ ස්ටීවන්සන් සහ ප්‍රත්‍රයෝ එ. ඇක්ටීන්ජෙසෙල්ශාප්ට් ffර් කාර්ටන්ඒජන්-ඉන්ඩස්ට්රි, (1918) ඒ.සී. 239 ; 118 එල්.ටී. 126
සෝයර් එ. ඇෂ්වෙල් (1893) 2 කිව්.බී.ඩී. 390; 69 එල්.ටී. 585
නොක්ස් එ. ගයි (1871) ඇල්.ආර්. 5 එච්. ඇල්. 656; 42 එල්.ජේ. 234
ගෝර්ඩන් එ. ගොන්ඩා (1955) 2 ඒ.ඊ.ආර්. 762
ගෝපාල චෙට්ටි එ. විජයරාඝවාචාරියර් (1922) 1 ඒ.සී. 488; 127 එල්.ටී. 192 (පී.සී.)

රාජනීතිඥ සී. ත්‍යාගලිංගම් මහතා, පී. සෝමතිලකම්, ජී. ගනේෂ් සහ කේ. කනගීශ්වරන් යන මහතුන් සමග 1 වැනි වගඋත්තරකාර ඇපැල්කරු වෙනුවෙන්.

ඇස්. සර්වානන්ද මහතා, පී. තුරේඅප්පා මහතා සමග පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන්

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා:

පැමිණිලිකරුන්, 1 වැනි වගඋත්තරකරුන් (ඇපැල්කරු), 5 වැනි වගඋත්තරකරුන් පෙරම්බලම් නම් තවත් කෙනකුත් 1948 ඔක්තෝබර් 1 වැනි දින සහ 1949 සැප්තැම්බර් 30 වැනි දින අතර කාලසීමාව තුළ රජයෙන් අරක්කු මිල දී ගැනීමේ සහ විකිණීමේ ව්‍යාපාරය ගෙන යාමට අංක 521 හා 1948 ඔක්තෝබර් 21 වැනි දින දරන හවුල් ව්‍යාපාර ගිවිසුමකින් එකඟවූහ. එම ගිවිසුම අනුව පැමිණිලිකරු ව්‍යාපාරයේ අරම්භයට තමා ගෙවිය යුතුවූ කොටසවන රු. 13,423.00 ක් ගෙවීය. 1956 ජුනි 1 වැනි දින පවරන ලද මෙම නඩුවෙන් ඔහු එම මුදල හා 1949 ඔක්තෝබර් 1 වැනි දින දක්වා එම මුදලට ලැබිය යුතු නීත්‍යානුකූල පොළියද සමග ඇපැල්කරුගෙන් අයකර ගැනීමට සෙවීය.

පෙරම්බලම් දැනට මියගොස් ඇති අතර, 3 වැනි සහ 4 වැනි වගඋත්තරකරුවෝ පෙරම්බලම්ගේ උරුමක්-

කාරයෝය. 2 වැනි වගඋත්තරකරු 3 වැනි වගඋත්තරකාරිය ගේ ස්වාමිපුරුෂයාය. පැමිණිලිකරු 2 වැනි, 3 වැනි හා 5 වැනි වගඋත්තරකරුවන්ගෙන් කිසිවක් ඉල්ලා නැත්තේ මුළු කාලය තුළම හවුල් ව්‍යාපාරයේ මුදල් ඇපැල්කරු අතේ තිබුණු නිසා විය හැකිය. හවුල් ව්‍යාපාරය සම්පූර්ණයෙන්ම බලා ගත්තේ ඇපැල්කරු බව නඩුව විභාග කළ නඩුකාරවරයා තීරණය කර ඇත. (මෙම තීරණයට විරුඬව ඇපැල් විභාගයේදී කරුණු ඉදිරිපත් නොකරන ලදී.) හවුල් ව්‍යාපාරයේ සියලුම මුදල් ඇපැල්කරු භාරයේ තැබීමට පී1 දරන ගිවිසුමෙන් විධිවිධාන යොදා තිබුණු බවද සඳහන් කළ යුතුය.

පී1 දරන ගිවිසුමට අදාල හවුල් ව්‍යාපාරයට සම්බන්ධ මුදල් පිළිබඳව මෙම ඇපෑලේ පාර්ශ්වයන් අතර අධික ලෙස, වුවමනාවට වඩා නඩු හබ පැවති ඇත. මෙම නඩුව පැමිණිලිකරු විසින් පවරන ලද තුන්වැන්නය.

පී1 දරන ගිවිසුමේ 5 වැනි ඡේදය අනුව මාස්පතා හවුල් අයිතිකරුවන් සියලු දෙනාම ගණන් හිලව්වල හරි වැරදි බලා මාස හයකට වරක් සමානුපාතිකව ලාබ ලැබීම හෝ අලාබ විඳීම හෝ සිදුකළ යුතුවිය. හවුල් ව්‍යාපාරයේ කාල සීමාව ගෙවීයාමටත් පෙර 1949 සැප්තැම්බර් 12 වැනි දින පැමිණිලිකරු තමාට ලැබිය යුතු අර්ධ වාර්ෂික ලාබ මුදල් කොටස වශයෙන් රු. 9,000.00 ක් ඉල්ලා ඇපැල්කරුට විරුද්ධව යාපනේ දිස්ත්‍රික් උසාවියේ 5896 දරන නඩුව පැවරිය. ඇපැල්කරුට විරුද්ධව රු. 3,766.00 ක් නියම කෙරුණු නඩු තීන්දුවක් ලබා ගැනීමට (මෙම උසාවියේ ඇපැල් නඩු තීන්දු දෙකකින් පසු) පැමිණිලිකරුට හැකි විය. හවුල් ව්‍යාපාරයේ අරමුදලට පැමිණිලිකරු ගෙවූ කොටස රු. 13,423.00 ක් වන බවද එම නඩුවේදී තීරණය කරන ලදී.

පැමිණිලිකරු 1949 අප්‍රෙල් 1 වැනි දින සිට සැප්තැම්බර් 30 වැනි දින දක්වාවූ කාල සීමාව සඳහා තමාට ලැබිය යුතු අනික් අර්ධ වාර්ෂික ලාබ කොටස ඉල්ලා ඊළඟට ඇපැල්කරුට විරුද්ධව යාපනේ දිස්ත්‍රික් උසාවියේ අංක 8646 දරන තවත් නඩුවක් පැවරිය. එම නඩුව මෙම උසාවිය ඉදිරියේ දැනට ඇති අංක 374/ඇම් දරන මෙම නඩුවේ තීන්දුව දෙන තුරු විභාග කිරීම නතරකර තබා ඇති බව පෙනේ. දැනට මෙම උසාවිය ඉදිරියේ ඇති නඩුව (අංක 374/ඇම්) 1956 ජූනි 1 වැනි දින පවරන ලද අතර, පැමිණිලිකරු ඉල්ලා තිබුණු අන්දමට ඔහුගේ වාසියට තීන්දු කෙරිණි. එම නඩුවේදී ඇපැල්කරු වෙනත් කරුණු ඇතුළුව කාරණා තුනක් ඉදිරිපත් කෙළේය. එම කරුණු දෙක නම් කාල සීමා ආඥා පනතින් සහ සිවිල් නඩු විධාන සංග්‍රහයේ 34 වැනි ඡේදයෙන් පැමිණිලිකරුට මෙම නඩුව පවත්වාගෙන යාමට බාධාවක් වෙතැයි යන්නය. නඩුකාරවරයා එම කරුණු ඇපැල්කරුගේ අවාසියට තීන්දු කෙළේය. මෙම ඇපැල් විභාගයේදී දෙපක්ෂය ඉදිරිපත් කළ තර්ක, නීතිය පිළිබඳ මෙම ප්‍රශ්න දෙකට සීමා විය.

එම ප්‍රශ්න දෙකෙන් දෙවැන්න සම්බන්ධයෙන් ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් කරන ලද තර්ක මෙසේ කෙටියෙන් සලකා බැලිය හැකිය. සිවිල් නඩු විධාන සංග්‍රහයේ 34 වැනි වගන්තිය අනුව පැමිණිලිකරු විසින් සිය නඩුවට අඩංගු කළ ඔප්පුවුණු සම්පූර්ණ ඉල්ලීම එම නඩුව පැවරීමට අදාල නඩු නිමිත්ත සම්බන්ධයෙන් කෙරුණු ඉල්ලීමට සීමාවේ. මේ අන්දමේම ඉන්දියානු සිවිල් නඩු විධාන සංග්‍රහයේ ඇති විධිවිධාන සම්බන්ධයෙන් රාජාධිකරණයේ මතයද එසේමය. (පිත්තපූර් රාජා එ. සූරියා රවූ, අයි.ඇල්.ආර්. මදුරාසි 520) එම වගන්තියෙන් විධානය කෙරෙන්නේ නඩු නිමිත්තක් අනුව ලද හැකි සියලු හිමිකමක්ම ඉවරයක් කිරීම විනා එකම කාරණා සමුදායකින් පැන නැඟුණ ද එකිනෙකට වෙනස් නඩු නිමිති එකම නඩුවකට මුල් කිරීමක් නොවන බව ලංකාවේ පලනිඅප්පා එ. සාමිනාදන් (1913) 17 න.නී.වා. 60, නඩුවේදී එම අධිකරණ මණ්ඩලයම කියා තිබේ. වගන්තියේ පළමුවැනි කොටස අනුව පැමිණිලිකරුවකු සිය ඉල්ලීමේ හැම කොටසක්ම නඩුවට අඩංගු කළ යුතු වන අතර, දෙවැනි කොටසින් විධානය, කෙරෙන්නේ පැමිණිලිකරු සිය ප්‍රතිකර්මයන් සම්පූර්ණයෙන්ම ඉල්ලා සිටි බවය.

ඇපැල්කරු විශ්වාසය තැබූ සෝමසුන්දරම් එ. සින්න තම්බි (1913) 3 සී.ඒ.සී. (ලංකා) 94, නඩුව, ඉදිරිපත් වුණු කාරණා දෙකේම නඩු නිමිත්ත එකම වන නිසා වෙනස් කොට සැලකිය හැකිය. එහි නඩු නිමිත්ත වූයේ එහි වගඋත්තරකරු මියගිය හවුල්කරුගේ බුදලයට හවුල් ව්‍යාපාරයෙන් ලැබිය යුතු කොටස් මුදල පිළිබඳව ගණන් හිලව් පෙන්වීම ප්‍රතික්ෂේප කිරීම හෝ ගණන් හිලව් පෙන්වීමට අපොහොසත් වීමය.

මේ කාරණය සම්බන්ධයෙන් දැනට ඇති නඩුව සයිබු එ. අබුකාසීර්, (1935) 37 න.නී.වා. 319 නඩුවට යම්කිසි සමාන කමක් ඇත්තේය. එහි බැඳුම්කරයෙන් ගිවිසගෙන ඇත්තේ මුල් මුදල ඉල්ලීමේදී ගෙවීමටත්, පොළිය අවුරුදු හතරක් යන තුරු මාසයකට වරක් බැගින් හා රිට පසුව මාස්පතා ගෙවීමටත් ය. එහෙයින් මුල් මුදල සම්බන්ධවන ගිවිසුමත් පොළිය සම්බන්ධවන ගිවිසුමත් ගිවිසුම් දෙකක් වන බවද, පොළිය අයකැර ගැනීමේ නඩුවෙන් මුල් මුදල අයකර ගැනීමට නඩු පැවරීමේ අයිතියට බාධාවක් නොවන බවද උසාවිය තීරණය කෙළේය.

පළමුවෙන් අංක 5896 දරන නඩුවත්, පසුව අංක 8646 දරන නඩුවත් පැවරීමේදී නඩු නිමිත්තවී ඇත්තේ පී1 දරන හවුල් ව්‍යාපාර ගිවිසුමේ කොන්දේසි පරිදි පිළිවෙළින් අඩවස් දෙකක ලාබ කොටස් ප්‍රතික්ෂේප කිරීම හෝ එසේ කිරීමට අපොහොසත් වීමය. දැනට ඇති නඩුව පවරා තිබෙන්නේ සම්පූර්ණයෙන්ම වෙනත් නඩු නිමිත්තක් මතය. එනම්, පැමිණිලිකරු අරමුදලට ගෙවූ කොටස ආපසු ඔහුට ගෙවීම ප්‍රතික්ෂේප කිරීම හෝ එසේ කිරීමට අපොහොසත්වීමය. මෙම ඉල්ලීමට 37 වැනි වගන්තිය බාධා නොකරයි. අදාල කරුණු සම්බන්ධයෙන් නඩුව විභාග කළ නඩුකාරවරයා නිවැරදි ලෙස පිළිතුරු දී ඇති අතර, දෙවැනි ප්‍රශ්නය සම්බන්ධයෙන් ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් කෙරුණු තර්ක මේ නිසා බිඳ වැටේ.

පළමුවැනි නීති ප්‍රශ්නය සම්බන්ධයෙන් දැන් සලකා බලමු. හවුල් ව්‍යාපාරය අවසන්වන දිනයේ සිට අවුරුදු හයක් ගෙවී ගිය පසු පී1 දරන ගිවිසුම උඩ නඩු පැවරීම කාල සීමා ආඥා පනතින් සාමාන්‍ය වශයෙන්, බාධා පැමිණෙන බවට වාදයක් නැත. එතකුදු වුවත් හවුල් ව්‍යාපාර අරමුදලේ එකම කළමනාකරු වශයෙන් ඇපැල්කරු හවුල් ව්‍යාපාරයේ අරමුදල සම්බන්ධයෙන් අනුචිත භාරකරුවකු වන බව නිගමනය කළ නඩු විභාගය පැවැත්වූ නඩුකාරවරයා, මෙම ප්‍රශ්නය ඇපැල්කරුගේ අවාසියට තීන්දු කෙළේය. භාරකාර ආඥා පනතේ 90 වැනි සහ 111 වැනි ඡේද සලකා හිටු ස්ටීවන්සන් සහ පුත්‍රයෝ එ. ඇක්ටින්ගෙෂේල්ෂැප්ටි (1918) ඒ.සී. 239 හා 250 නඩුවේදී ඇටකින් සාමිවරයාද, සොයර් එ. ඇෂ්වෙල් (1893) 2 කිව්.බී.ඩී. 396 සහ 397 නඩුවේ බෝවන් සාමිවරයාද කළ ප්‍රකාශ අනුව යමින් ඇපැල්කරු පැමිණිලිකරුට විශ්වාසනීය තත්ත්වයක සිටිනැයි නඩුකාරවරයා තීරණය කෙළේය.

මෙම තීරණය ගැනීමේදී උගත් නඩුකාරවරයා නොමග ගොස් ඇත. විශ්වාසනීය බැඳීමක් ඇත්නකු රහසින් ලබන ලාභ පිළිබඳව භාරකාර ආඥා පනතේ 90 වැනි ඡේදයේ සඳහන් වෙයි. එහෙත් විශ්වාසනීය සම්බන්ධයක් නිබඳ නැද්ද යන ප්‍රශ්නය විසඳිය යුත්තේ ඊට අදාල නීතිය අනුවය. ඒ අනුව දැනට ඇති මෙම නඩුවේ එම ප්‍රශ්නය විසඳිය යුත්තේ හවුල් ව්‍යාපාර පාලනය වන නීතිය අනුවය. එනම්, ඉංග්‍රීසි නීතිය අනුවය. 111 වැනි ඡේදයෙන්ද පැමිණිලිකරුට පිටුවහලක් නොලැබේ. ඊට හේතුව එම ඡේදයේම 5 වැනි අනු ඡේදයෙන් ඉංග්‍රීසි නීතියෙන් ප්‍රකාශිත භාරකාරය ලෙස සැලකෙන භාරකාරය හැර අනුචිත භාරකාරයට එම ඡේදය බලපෑම වළක්වා තිබීමය. එක් හවුල්කරුවකු නවත් හවුල්කරුවකු කෙරෙහි ප්‍රකාශිත භාරකාරයකුගේ සම්බන්ධයකින් සැලකේයයි යන තර්කයට නීතිය පිළිබඳ හැම ග්‍රන්ථයක් සහ හැම නඩු තීන්දුවක්ම විරුද්ධය.

යට දැක්වුණු නඩුවේදී ඇටකින් සාමිවරයා කළ ප්‍රකාශය ආගන්තුක ප්‍රකාශයක් පමණක් වන අතර, එම ප්‍රකාශයට ඔහු රුකුල් ලබාගෙන ඇත්තේ නොක්ස් එ. ගයි (1871) ඇල්.ආර්. 5 එච්.ඇල්. 656 නඩුවේ හෙදර්ලි සාමිවරයාගේ එකඟ නොවන තීන්දුවකි. එම නඩුවේදී රාජාධිකරණයේ සාමිවරු වැඩි දෙනෙක් හෙදර්ලි සාමිවරයාගේ අදහසට විරුද්ධවූහ. එම නඩුවේදී රාජාධිකරණය තීරණය කළේ ජීවත්ව සිටින හවුල් අයිතිකරුවකු ඔහුගේ මියගිය හවුල් අයිතිකරුගේ පොල්මඃකාරයන්ට භාරකාරයකු නොවන හෙයින් නඩුව පවරා අවුරුදු හයක කාලයක් තුළදී හවුල් ව්‍යාපාරයේ ණය කරුවකුගෙන් ලැබෙන මුදලක් නිසා නඩුව කාලසීමා පනතට අසු නොවීමක් සිදු නොවේය යන්නය. එම නඩු තීන්දුවේ හරය (රේෂියෝ ඩෙසිඩෙන්ඩායි) ඇත්ත වශයෙන් ඇපැල්කරුට පක්ෂව ඇත. එම නඩුවේ වැඩි දෙනා අතර කෙනකුවූ වෙස්ට්බරි සාමිවරයා, ''ජීවත්ව සිටින හවුල් අයිතිකරුවකුත් ඔහුගේ මියගිය හවුල් අයිතිකරුගේ නියෝජිතයනුත් අතර විශ්වාසනීය තත්ත්වයක් නැත; ඇත්තේ ඔවුන් දෙපක්ෂය අතර දෙපක්ෂයට එක සමාන බැඳීමකට යටත් කරන යුතුකමය'' යි කියා ඇත. ''තවද, එකිනෙකාට විරුද්ධව නඩු පැවරීමට ඇති අන්‍යොන්‍ය අයිතිය හැරුණු විට ජීවත්ව සිටින හවුල් අයිතිකරුවකුත්, මියගිය හවුල් අයිතිකරුගේ නියෝජිතයනුත් අතර කිසිම විශ්වාසනීය තත්ත්වයක් පැන නොනඟී. ඔවුන්ට ඇත්තේ අදාල නීතිය අනුව ලැබෙන අයිතිවාසිකම් හා යුතුකම් සමූහයකි. එමගින් ඇතිවන යුතුකම්වලට ''භාරකාරත්වය'' යන වචනය යෙදීම වැරදිය'' (677 පිට) වෙස්ට්බරි සාමිවරයා සමග එකඟවන කොලන්සේ සාමිවරයා (677 පිට) ''මියගිය හවුල් අයිතිකරුගේ පොල්මඃකාරයකු වීසින් ජීවත්ව සිටින හවුල් අයිතිකරුට විරුද්ධව හවුල් ව්‍යාපාරයේ ගණුන් බැලීමට ඉල්ලා පවරනු ලබන නඩුවක් කෙරෙහි කාලසීමා පනත බලපානියි මම තීරණය කරමි; මෙහි පක්ෂකරුවන්ගේ අන්‍යොන්‍ය සම්බන්ධයද එය වන අතර, මෙම නඩුවේදී කර ඇති ඉල්ලීමද එවැන්නයැයි මම තීරණය කරමි; සීමා කාලය වන අවුරුදු හය ආරම්භ වන්නේ ජීවත්ව සිටින හවුල් අයිතිකරුට හවුල් ව්‍යාපාරයේ වත්කම් පැවරෙන දිනයේ සිට යයි ද මම තීරණය කරමි'' යි කියයි. එම සීමා කාලය පවතින කාල සීමාව තුළ මියගිය හවුල් අයිතිකරුගේ පොල්මඃකාරයන්ට ජීවත්ව සිටින හවුල් අයිතිකරුට විරුද්ධව හවුල් ව්‍යාපාරයේ ගණුන් බැලීමට ඉල්ලා නඩු පැවරිය නොහැකිය. එහෙත් සංස්ථාපිත කාල සීමාව ගෙවී ගිය පසු එවැනි නඩුවක් පවත්වාගෙන යාම කළ හැකිය.

පැටලුම් සහිත නඩු තීන්දුවක් බවට ගෝඩන් එ. ගොන්ඩා (1955) 2 ඒ.ඊ.ආර්. 762 නඩුවේදී එවර් ෂෙඩ් (මාස්ටර් ඔෆ් රෝල්ස්) සාමිවරයා සඳහන් කළ යට දැක්වුණු නොක්ස් එ. ගයි නඩුවේ තීන්දුව ගෝපාල චෙට්ටි එ. විජයරාගමචාරියා (1922) 1 ඒ.සී. 488 නඩුවේ රාජාධිකරණය තීන්දුවෙන් පැහැදිලි කරයි.

ගෝපාල චෙට්ටි එ. විජයරාගමචාරියා නඩුවේදී පිලිමෝර් සාමිවරයා, ''අනික් අතින්. ගණුන් බැලීමක් හෝ හවුල් අයිතිකරුවන් එකඟත්වයකට එළඹීමක් හෝ සිදුවී නැතිනම් එවැනි ගනුදෙනුවක් ඇතිවූ විට ගත යුතු නියම පියවර වන්නේ හවුල් ව්‍යාපාරයේ ගණුන් බැලීමක් සිදු කිරීමය. එම පියවර ගැනීමට ප්‍රමාදවීණි නම් හවුල් ව්‍යාපාරයේ වත්කම් ලෙස එවැනි ගනුදෙනුවකින් කොට-

සක් ඉල්ලීමටද ප්‍රමාද වූවා වන අතර, නියම ගණන් බැලීමකදී තමාට එම කොටසට අයිතියක් ඇති බව පැමිණිලිකරු ඔප්පු නොකරනවා මෙන්ම ඔහුට එසේ ඔප්පු කිරීම කළ නොහැකිය.'' යි කීවේය.

දැනට උසාවිය ඉදිරියේ ඇති මෙම නඩුවේදී ඇපැල්කරු ඉදිරිපත් කර ඇති කරුණු සම්බන්ධයෙන් ගත්කතුවරුන්ද කරුණු පැහැදිලිකර ඇත.

(1) පොලොක්ගේ 'හවුල් ව්‍යාපාර නීතිය' (14 වැනි මුද්‍රණය 119 වැනි පිට) යන පොතේ මෙසේ කියයි.

''හවුල් ව්‍යාපාරයක මියගිය හවුල් අයිතිකරුවකුගේ කොටස සම්බන්ධයෙන් ඔහුගේ නියෝජිතයන්ට ජීවත්ව සිටින හවුල් අයිතිකරු භාරකාර තත්ත්වයක සිටිනැයි ඇතැම් විට කියනු ලැබේ. එහෙත් මෙය රූපකවුත්, සාවද්‍යවුත් කියමනකි. ජීවත්ව සිටින හවුල් අයිතිකරුට විරුද්ධව මියගිය හවුල් අයිතිකරුගේ නියෝජිතයන්ට ඇත්තේ සාමාන්‍ය ගිවිසුම් ණයක ස්වභාවයක අයිතියකි. එය කාල සීමා පනතට යටත්වන අයිතියකි.''

(2) අන්ඩර්හිල්ගේ 'හවුල් ව්‍යාපාර නීතිය' (8 වැනි මුද්‍රණය 128 වැනි පිට) යන පොතේ අත්හැර යන හවුල් අයිතිකරුවකුගේ කොටස අයවිය යුතුවන දිනය පිළිබඳ ප්‍රශ්නය සම්බන්ධයෙන් මෙසේ කියයි.

''මියගිය හෝ අත්හැර ගිය හවුල් අයිතිකරුවකුගේ කොටස ගෙවීමේදී ක්‍රමය යටතේ මරණයේදී හෝ අත්හැරීමේදී හෝ ගෙවිය යුතුවන කොටස ණයකරයක්වන අතර, 1939 කාලසීමා පනත සම්බන්ධයෙන් කාල සීමාව ගණන් ගැනීම ඇරඹෙන්නේ එම දිනයේ සිටය.''

(3) ලින්ඩ්ලේගේ 'හවුල් ව්‍යාපාර' (12 වැනි මුද්‍රණය, 344 වැනි පිට) යන පොතේ හවුල් අයිතිකරුවන් නිර්ව්‍යාජත්වය පිළිපැදීම සම්බන්ධව හවුල් අයිතිකරුවන්ගේ සාමාන්‍ය යුතුකම් පිළිබඳව මෙසේ කියැවේ:

''කෙසේ වෙතත්, නිර්ව්‍යාජත්වය පිළිබඳ මෙම යුතුකම් හවුල් අයිතිකරුවන් අතර ඇති නියෝජන භාවය කෙරෙහි විශ්වාසනීය තත්ත්වයක් ආරූඪ නොකරන බව මෙහිලා සඳහන් කළ යුතුය. නිදසුනක් වශයෙන් ගනිනොත් කාල සීමා කිරීමේ සාමාන්‍ය පනත් හවුල් ව්‍යාපාරයක් විසුරුවා හැරීමෙන් හෝ හවුල් අයිතිකරුවකු ඉවත් කිරීමෙන් පසු ගිණුම් පිළිබඳ නඩුවලට බලපායි.''

එම පොතේම හවුල් අයිතිකරුවන් අතර නඩුවලට කාලසීමා පනත බලපාන අයුරු මෙසේ පැහැදිලි කෙරෙයි:

''ඇත්ත වශයෙන්, හවුල් ව්‍යාපාරයකුත්, එක් එක් හවුල් අයිතිකරුවන් සිය අයිතිවාසිකම් හා තමන්ට අයිති දේපොළ භුක්ති විඳීමත් පවතින තාක් කාල සීමා පනත කිසිම විධියකින් බලනොපාන බව පිළිගැනේ. එහෙත් හවුල් ව්‍යාපාරයක් විසුරුවා හැරීමේදී හෝ හවුල් අයිතිකරුවන් විසින් එක් හවුල් අයිතිකරුවකු ඉවත් කරනු ලැබූ වහාම හෝ ඇති වන්නේ වෙනත් තත්ත්වයකි. එවැනි අවස්ථාවක කාලසීමා පනත එයට බල පැමිට පටන් ගනී. මෙය නොක්ස් එ. ගයි නඩුවේදී රාජායිකරණය මගින් තීරණය කරන ලදී. එම නඩුවේදී ජීවත්ව සිටි හවුල්කරුට විරුද්ධව මියගිය හවුල් අයිතිකරුවකුගේ පොල්මෑකාරයා විසින් ගණන් බැලීමට ඉල්ලා නඩු පැවරුණු අවස්ථාවේ ජීවත්ව සිටි හවුල් අයිතිකරු සිය පිළිසරණ සඳහා කාල සීමා පනත කෙරෙහි විශ්වාසය තැබීය.''

දැනට උසාවිය ඉදිරියේ ඇති මෙම නඩුව පිළිබඳව මුල් විභාගය පැවැත්වූ නඩුකාරවරයා විසින් තරමක විශ්වාසයක් තබන ලද යට දැක්වුණු සොයාගැ එ. ඇෂ්වෙල් නඩුව හිටපු හවුල් අයිතිකරුවන් අතරවූ මෙවැනි නඩුවකට කිසිසේත් බල නොපායි. එම නඩුවට අදාල වුණු කරුණු මීට වඩා වෙනස්ය. එහිදී සිදුවූයේ විශේෂ තත්ත්වයක් උසුලන්නකුවූ සොලිසිටර්වරයකු එක්තරා භාරකරුවන් පිරිසක් වෙනුවෙන් මුදල් භාරගෙන තමා අතේ තබා ගැනීමය.

දැනට ඇති මෙම නඩුව මුලදී විභාග කළ නඩුකාරවරයා යට සඳහන් කෙරුණු පරිදි නොමග යාම නිසා ඔහු කාල සීමා ප්‍රශ්නය සම්බන්ධයෙන් ඇපැල්කරුගේ අවාසියට නඩුව තීන්දු කර ඇත. මෙම නඩුව හවුල් ව්‍යාපාරය විසුරුවා හැරීමෙන් අවුරුදු හයකට පසු පවරනු ලැබුවක් නිසා, කාල සීමා ආඥා පනතේ හය වැනි වගන්තිය අනුව මෙම නඩුව පවත්වාගෙන යා නොහැකිය. එම නිසා එය මෙයින් නිෂ්ප්‍රභ කරනු ලැබේ.

මම ඇපැලට ඉඩ දෙමින් නඩුව නිෂ්ප්‍රභ කරමි. ඇපැල්කරුට උසාවි දෙකේම නඩු ගාස්තු අයකර ගැනීමට අයිතියක් තිබේ.

අලස් විනිශ්චයකාර තුමා

මම එකඟවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

ඕ. ඇල්. ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා ඉදිරිපිට

පොලිස් පරීක්ෂක, (දූෂණ මර්දන අංශය) කොටුව, කොළඹ එ. මොහමඩ් කසිම්*

ශ්‍රේෂ්ඨාධිකරණ නඩු අංක 1000/67 — කොළඹ නාගරික මහේස්ත්‍රාත් උසාවියේ නඩු අංක 45491

තර්ක කළේ: 1968 ජූලි 12 වැනි දින
තීන්දු කළේ: 1958 ජූලි 15 වැනි දින

මිල පාලන පනත (173 වන අධිකාරය) — තමා ළඟ ගිනිපෙට්ටි තිබියදී ගිනි පෙට්ටියක් විකිණීම ප්‍රතික්ෂේප කිරීමෙන් 8(2)(බී)(i) ඡේදයට අනුව ඉදිරිපත්වූ චෝදනාවක් — පෙට්ටියක ගිනිකුරු 50 සිට 10 දක්වා ඇති කල එහි මිල සත පහේ සිට සතය දක්වා ක්‍රමානුකූලව වෙනස් විය යුතුයයි ගැසට් පත්‍රයේ පළවී තිබීම — පෙට්ටිවල තිබූ ගිනිකුරු සංඛ්‍යාව ඔප්පු කිරීමට නොහැකිවීම.

තමා ළඟ ගිනි පෙට්ටි 120 ක් තිබියදීත්, ඉන් එක් පෙට්ටියක් විකිණීම ප්‍රතික්ෂේප කිරීමේ හේතුවෙන් මිල පාලන පනතේ 8(2)(බී)(i) ඡේදය යටතේ චෝදිතයාට විරුද්ධ චෝදනා ඉදිරිපත් කෙරිණි. පී3 දමා සලකුණු කොට ඉදිරිපත් කරන ලද ගැසට් පත්‍රයේ නිර්දේශයන් අනුව එක් ගිනි පෙට්ටියක මිල එහි කුරු 50 සිට 10 දක්වා ඇති කලක පිළිවෙලින් සත පහේ සිට සතය දක්වා වෙනස් විය යුතුවිය.

එක් ගිනි පෙට්ටියකවත් තිබිය යුතු ගිනි කුරු සංඛ්‍යාව අසුරා තිබුනු බවට සාක්ෂි නොමැති විය. කුරු 10 ට අඩු වූ හෝ කුරු 50 ට වැඩිවූ හෝ ගිනි පෙට්ටි වෙළඳ පොළේ නො තිබුනු බවටද සාක්ෂි නොවිය.

තීන්දුව: චෝදනාව ඔප්පු කිරීමට පැමිණිලි පක්ෂයට නොහැකි වී තිබේ.

බාලා නඩරාජා, ඇපැල්කරු වෙනුවෙන්.

රංජිත් ගුණතිලක, ඇටෝර්නි-ජනරාල් වෙනුවෙන්.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

පී3, ජී.ජී. 14459 දරණ 23.7.65 වැනි දින ගැසට් පත්‍රයේ ගිනිකුරු අඩංගු ගිනි පෙට්ටි කොපමණ මිලකට වැඩියෙන් විකිණිය නොහැකිදැයි දැක්වේ. ඒ අනුව ගිනි පෙට්ටියක මිල එහි අඩංගු ගිනිකුරු සංඛ්‍යාව පනහත් දහයත් අතර සංඛ්‍යාවක් වන විට ශත 5 ත්, ශත 1 කටත් වේ.

චිත්තිකරුට විරුද්ධව නඟා ඇති චෝදනාව නම් ගිනි පෙට්ටි 120 ක්ම ළඟ තිබියදීත් ගිනි පෙට්ටියක් විකිණීමට ප්‍රතික්ෂේප කරමින් ව්‍යවස්ථා ආඥා පනත්වල 6 වැනි වෙළුමේ 173 වැනි කාණ්ඩයේ 8(2)බී(1) ඡේදය උල්ලංඝනය කිරීමයි.

පාලන මිලට යටත් වූ ගිනිපෙට්ටි ලෙස ගිනිය හැකි වන සේ මේ ගිනි පෙට්ටිවල ගිනිකුරු 10 ත්, 50 ත් අතර සංඛ්‍යාවක් අඩංගුව තිබුණු බවට සාක්ෂි ඉදිරිපත් කොට නැත. අප දන්නා තරමින් ඒවා හිස් පෙට්ටි වීමට ද ඉඩ ඇත. ඒවායේ ගිනිකුරු තිබිනැයි අපි සිතමු. එහෙත් ඒවා පාලන මිලට යටත් වූ ගිනිපෙට්ටි වීම සඳහා ප්‍රමාණවත් සංඛ්‍යාවක් ගිනිකුරු ඒවායේ අඩංගු වීද? එසේ නොවී නම් ඒවා විකිණීමට ප්‍රතික්ෂේප කිරීමෙන් චිත්තිකරු වරදක් කර නැත. ගිනිකුරු 10 ට අඩුවෙන් හෝ 50 ට වැඩියෙන් අඩංගු ගිනි පෙට්ටි වෙළඳ පොළේ නැති බවට සාක්ෂි ඉදිරිපත් කොට නැත.

පැමිණිල්ලේ මෙම අඩුපාඩුව නොපෙනී ගොස් ඇති බව පෙනේ. එහි ප්‍රතිඵලය වී ඇත්තේ චෝදනාව ඔප්පු කිරීමට පැමිණිල්ල අසමත් වීමයි. ඇපැලට ඉඩ දෙමින් චිත්තිකරු නිදහස් කරමි.

(ඇපැලට ඉඩ දී චිත්තිකරු නිදහස් කරන ලදී.

(පරිවර්තනය: අධිනීතිඥවුල්පත්මෙන්ද දහනායක, විසිනි).

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 79 වෙනි පිට බලනු.

ගරු විජයතිලක විනිශ්චයකාරතුමා ඉදිරිපිට

පී. ඒ. හංසා නාසිනා එ. ගම්පහ පොලිස් පරීක්ෂක

ග්‍රේ. අ. අංක 668/68 — ගම්පහ මහේස්ත්‍රාත් උසාවිය අංක 8233/ඒ

විවාද කළ සහ තීන්දු කළ දිනය: 1968, ඔක්තෝබර් 30

1950 අංක 29 සහ 1952 අංක 31 දරණ මිළ පාලන ආඥා පනත — 15.10.1964 වැනි දින අංක 14199 දරණ අතිවිශේෂ ගැසට් පත්‍රයේ පළ කරන ලද මිල පාලන නියෝගය — කොළඹ නගර සභාවෙන් පිටස්තර වූ එහෙත් කොළඹ දිස්ත්‍රික්කය ඇතුළත පිහිටි යක්කල දී පාලන මිලට වැඩියෙන් හරක් මස් විකිණීමේ චෝදනාවක් — චෝදිත වරද කළේ යැයි කියනු ලබන ස්ථානය කොළඹ දිස්ත්‍රික්කය ඇතුළත වූ බවට සාක්ෂි නොමැතිකම — පූර්ව නිගමනය — අධිකරණ සැලකිල්ල — සාක්ෂි පනත — 57 වැනි ඡේදය — පරි පාලන දිස්ත්‍රික්ක ආඥා පනත, 392 වෙනි අධිකාරය.

1952 අංක 31 හා 1950 අංක 29 දරණ මිල පාලන ආඥා පනතේ 3(2) හා 4 යන ඡේදවලින් ලත් බලය යටතේ කොළඹ දිස්ත්‍රික්කයේ නියෝජ්‍ය ආහාර මිල පාලක විසින් සම්පාදිතව, 15.10.64 වැනි දින හා අංක 14199 දරණ ආණ්ඩුවේ (අතිවිශේෂ) ගැසට් පත්‍රයේ පළ වූ මිල නියෝගයේ සඳහන් පාලන මිලට ඉහළින්, යක්කල ගම්පහ—කිරිදිවැල පාරේ අංක 3 දරණ ස්ථානයේ දී හරක් මස් විකුණන ලදැයි චෝදිතව විත්තිකරු චෝදනාවට වරදකරු බව තීන්දු කරන ලදී.

(අ) 15.10.1964 මිල පාලන නියෝගයේ උප-ලේඛනය අනුව එහි නියෝගය කොළඹ නගර සභා සීමාවෙන් පිට කොළඹ දිස්ත්‍රික්කයේ ඇතුළත පමණක් වලංගු වූ බවත්,

(ආ) හරක් මස් විකුණන ලදැයි කියනු ලබන යක්කල නම් ස්ථානය කොළඹ දිස්ත්‍රික්ක සීමාව තුළ පිහිටියේ යැයි ඔප්පු කිරීමට පැමිණිල්ල අසමර්ථ වී ඇති බවත් ඇපෑලේ දී විත්තිකරු වෙනුවෙන් තර්ක කරන ලදී.

මේ කාරණය සම්බන්ධයෙන් ඉදිරිපත් කරන ලද එක ම සාක්ෂිය වූයේ තමා කොළඹ දිස්ත්‍රික්කයේ සීමාවන් නොදන්නේ යැයි පැවසූ උප-පොලිස් පරීක්ෂකගේ සාක්ෂියයි.

පරිපාලන දිස්ත්‍රික් ආඥා පනතේ පරිපාලන දිස්ත්‍රික් සීමාවන් සඳහන් වන්නේ වුව ද, මෙහි දී සාක්ෂි වශයෙන් කොළඹ දිස්ත්‍රික්කය පෙන්නුම් කරන සිතියමක් හෝ කොළඹ දිස්ත්‍රික් සීමාවන් ගැන පිළිගත හැකි පරිදි කරුණු කිව හැක්කකුගේ සාක්ෂියක් හෝ ඉදිරිපත් කිරීමට පැමිණිල්ල අපොහොසත් විය. උගත් මහේස්ත්‍රාත් තුමා තම තීන්දුවේදී මෙසේද සඳහන් කළේය. "විත්තිකරුගේ මස් කඩය තිබූ යක්කල නොවේ 3 දරණ ස්ථානය කොළඹ නගර සභා සීමාවෙන් පිට පිහිටි තැනක් බවට කිසිම සැකයක් නැත". තවද "කොළඹ ඒජන්ත තුමාගේ බල සීමාව පවතින කොළඹ දිස්ත්‍රික්කයට ගම්පහ අයිතිය".

තීන්දුව: මේ කරුණු උඩ මෙම හරක් මස් කඩය කොළඹ දිස්ත්‍රික් සීමාව ඇතුළත පිහිටියේ යැයි පූර්ව නිගමනයකට මහේස්ත්‍රාත්තුමා බැසීම යුක්ති සහගත නොවේ. මක්නිසාද යත්, උගත් මහේස්ත්‍රාත් වරයා හොඳින් දන සිටිය යුතු හැකි අධිකරණ ප්‍රදේශ පරිපාලන ප්‍රදේශ සමග නියම ලෙස නොසැසඳෙන බැවින් ය.

ඊ. එච්. සී. ජයතිලක මහතා, චෝදිත ඇපැල්කරු වෙනුවෙන්.

ට්‍රියන්ත පෙරේරා (රජයේ නීතිඥ) මහතා, නීතිපතිවරයා වෙනුවෙන්.

විජයතිලක විනිශ්චයකාරතුමා:

වර්ෂ 1950 අංක 29 සහ වර්ෂ 1952 අංක 31 දරණ මිළ පාලන ආඥාපනතේ 4 වන ඡේදය සහ 3(11) එකට කියවනු ලැබූ කල ඇති බලතල අනුව කොළඹ දිස්ත්‍රික්කයේ සහකාර මිළ පාලක (ආහාර) තැන විසින් නිකුත් කරන ලදුව, 15.10.64 වැනි දින සහ අංක 14199 දරණ (අතිවිශේෂ) ගැසට් නිවේදනයේ පළවූ 15.10.64 දාතම සහ අංක ඇෆ්.සී./බී ඇස්.ඇෆ්. 7(6) දරණ මිළ නියෝගය උල්ලංඝනය කරමින් හරක් මස් නියමිත ඉහාම වැඩිමිලටත් වැඩි මිලට විකුණන ලදැයි චෝදිනයාට විරුද්ධව මෙම නඩුව පවරා තිබේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි ඇඟයෙහි 75 වෙනි කාණ්ඩයෙහි 90 වෙනි පිට බලනු.

උගත් මහේස්ත්‍රාත්වරයා විසින් චෝදිතයා වරදකරු යයි තීරණය කරනු ලැබ ඔහුට මාස 4ක බරපතල වැඩ ඇතිව සිර දඬුවමක් සහ රු: 100/- ක දඩයක්ද, එම දඩය නොගෙවිචොත් තව මාස 6 ක බරපතල වැඩ ඇතිව සිර දඬුවමක්ද නියම කරන ලද්දේ ය. මෙම මස් කඩය පිහිටා ඇත්තේ ගම්පහ කිරිදිවෙල පාරේ යක්කල නො: 3 දරණ ස්ථානයේ ය. ඇපැල්කරු වෙනුවෙන් පෙනී සිටි ජයතිලක උගත් නීතිවේදියා චෝදනාවෙහි සඳහන් කරන ලද ගැයට පත්‍රය කෙරෙහි මගේ අවධානය යොමුකොට, එහි ඇති උප-ලේඛනය අනුව මෙම මිළ නියෝගය බලපවත්වන්නේ කොළඹ නාගරික සභා ප්‍රදේශයට බාහිරව ඇති කොළඹ දිස්ත්‍රික්කයේ යයිද, ඒ හේතුවෙන් පැමිණිලි පක්ෂය විසින් මෙම දඬුවම් ලැබිය හැකි වරද කරන ලද්දේ කොළඹ නාගරික සභා කොට්ඨාශයෙන් බාහිර කොළඹ දිස්ත්‍රික්කයට අයත් පෙදෙසක බව ඔප්පු කළ යුතුයැයිද කියා සිටියේ ය. වැඩිදුරටත් කරුණු දැක්වූ ඔහු මෙම දඬුවම් ලැබිය යුතු වරද කරමින් හරක් මස් විකුණන ලදැයි කී ස්ථානය කොළඹ දිස්ත්‍රික්කයට ඇතුළත් නැනක් බව ඔප්පු කිරීමට පැමිණිලි පක්ෂය අපොහොසත් වූ බව කියයි. මෙහි සාක්කි දුන් පොලිස් උප-ඉන්ස්පැක්ටර්වරයාගෙන් කෝන්තර ඇසීමේදී මෙම කරුණ ගැන විමසූ විට, ඔහු කොළඹ දිස්ත්‍රික්කයේ මායිම් පිළිබඳව මතු කළ ප්‍රශ්නයට පිළිතුරු දෙමින් කියා සිටියේ කොළඹ නගර සභායත්ත ප්‍රදේශය පැලියගොඩ පාලම තෙක් විහිදෙන බවත්, එම ප්‍රදේශය පැලියගොඩ පාලමින් අවසන් වන බවත් ය. කොළඹ දිස්ත්‍රික්කයේ සීමාව ගැන ප්‍රශ්න කරනු ලැබූ ඔහු ඒවා පිළිබඳව තමාට කිමට නොහැකි යයි පිළිගත්තේ ය. කොළඹ දිස්ත්‍රික්කයට අයත් ප්‍රදේශ කුමක්දැයි තමාට කීමට බැරි බව ඔහු ස්ථිර කෙළේ ය. මෙම විරෝධය ගැන සලකා බැලූ උගත් මහේස්ත්‍රාත්වරයා තම නඩු තීන්දුවට හේතු දැක්වීමේදී මෙම සැළකිරීම් ගැන ''චෝදිතයා විසින් හරක් මස් විකුණන ලද යක්කල නො: 3 දරණ ස්ථානය කොළඹ නාගරික සභායත්ත ප්‍රදේශයෙන් පිට නැනක් වීම ගැන තමාට කිසිම සැකයක් ඇතිවිය නොහැක'' යනුවෙන් සඳහන් කර තිබේ. මෙම ප්‍රකාශය කිරීමට පොලිස් පරීක්ෂක වරයාගේ සාක්කිය වාර්තාගත වී තිබේ. එය කෙසේ වෙතත් මෙය තම පොලිස් වසමට අයත් කොට්ඨාශයක සිදුවූ නිසා, ගම්පහ පොලිසිය විසින් අල්ලා ගනු ලැබූ හෙයින් තමාට ''ගම්පහ ප්‍රදේශය කොළඹ දිස්ත්‍රික්කයේ දිසාපතිතුමා යටතට පරිපාලන ක්‍රමය අනුව පත්වන බව' සලකා ගැනීමට බලය තිබෙය'' යනුවෙන් සිතා නිබේ. මෙහිදී සාක්ෂියක් වශයෙන් පරිපාලන කොට්ඨාශ පෙන්වීමට කොළඹ දිස්ත්‍රික්කයේ සිතියමක් ඉදිරිපත් කිරීමට පොලිසියට නොහැකි වීය. එමතු ද නොව, කොළඹ දිස්ත්‍රික්කයේ සීමා පිළිබඳ සාක්කි කීමට බලය ඇති කෙනෙකුගේ සාක්කි ඉදිරිපත් කිරීමට ද ඔවුනට නොහැකි වීය. 392 වන අධිකාරයෙහි සඳහන් වී ඇති පරිපාලන ප්‍රදේශ පනතේ පරිපාලන දිස්ත්‍රික්කවල සීමා සඳහන්ව තිබේ. එහි 2(2) වන ඡේදයෙහි සඳහන් වී ඇත්තේ උප-ලේඛනයේ පළමුවන තීරුවේ විදාමාන වන පරිපාලන කොට්ඨාශයේ සීමා එම පනතේ 3 වන ඡේදය යටතේ කළ හැකි යම්කිසි වෙනස් කිරීමකට යටත්ව, එම උප-ලේඛනයේ ඊට අදාළ 2 වන තීරුවේ සඳහන්ව ඇති සීමා බවය. මේ නිසා නො: 3 යක්කල නැමැති ස්ථානය, මෙම තීරු දෙකේ ඇති හුමි ප්‍රදේශ ගැන සියුම් පරීක්ෂණයක් නොපවත්වා කොළඹ දිස්ත්‍රික්කයේ පිහිටා ඇති නැනක් යයි සලකා ගෙන ඇත්තේ කෙසේ ද යනු කොයි ලෙසකින්වත් පැහැදිලි නැත. **සාක්ෂි ආඥා පනතේ** 57 වන ඡේදයට මගේ සැලකිල්ල යොමු කළ රජයේ අධිනීතිඥවරයා එම ඡේදයෙහි ඇති දේවලින් පිටස්තර දේ ගැනත් කරුණු විනිශ්චයාත්මකව සලකා ගත හැකි බව පෙන්වා දුනි. ඔහු 26 සහිපතා නීති සංග්‍රහයේ 5 වැනි පිටුවේ වාර්තා වී ඇති **බොග්ස්ටර්** එ. **සතුරන්ගේ දේපල භාරකාරයා** අතර කියැවුණු නඩුවේ ගැබ් වී ඇති ප්‍රඥප්තියේ පිළිසරණ සොයයි. තවද 69 න.නී.වා. 152 වැනි පිටුවේ සඳහන් වී ඇති **ගලහිටියාව** එ. **ජේශප්** පරීක්ෂකවරයා අතර කියැවුණු නඩුවට සහ 43 න.නී.වා. 34 වැනි පිටුවේ වාර්තා වී ඇති **මෙනන්** එ. **ලැන්ටින්** නමැති නඩුවට ද මගේ අවධානය යොමු කරන අතර, මහේස්ත්‍රාත්වරයාට තමාගේ පුද්ගලික දැනීම් ක්‍රියාවේ යොදවා යම් යම් නිගමනයන්ට බැසීමට බලය නිබෙන බව ද සැලකර සිටී. ඔහුගේ ඒ තර්කය අනුව අප ඉදිරියේ ඇති නඩුවෙහි උගත් මහේස්ත්‍රාත්වරයාට ඔහු ගම්පහ උසාවියේ මහේස්ත්‍රාත්වරයා නිසා මෙම නියමිත ස්ථානය කොළඹ දිස්ත්‍රික්කයට අන්තර්ගත නැනක් බව සලකා ගැනීමට බලය ඇති බව සැළකරයි. එය කෙසේ වෙතත් ලංකාවේ මහේස්ත්‍රාත්වරයකු හොඳින් දන්නා අධිකරණ ප්‍රදේශ පරිපාලන ප්‍රදේශ සමග නියම ලෙස නොසැසඳෙන බව මෙහි ලා සිතා ගතයුතු ය. මෙම නඩුවෙහි මේ හුමි ප්‍රදේශය ගැන වඩා හොඳින් දැනුමක් නිබිය යුතු පොලිස් පරීක්ෂකවරයා කොළඹ දිස්ත්‍රික්කයේ මායිම් ගැන නොදත් බව පිළිගෙන තිබේ.

අවිස්සාවේල්ල මහේස්ත්‍රාත් උසාවියේ අංක 80838 දරණ ශ්‍රේණ්‍යාධිකරණයේ අංක 543/68 සහ 23.10.68 දාතම දරණ **මැන්ඩිස්** එ. **ජයවර්ධන** අතරේ කියැවී නොබෝදා තීන්දු වූ නඩුවකට ජයතිලක මහතා මගේ සිත යොමු කළේ ය. එම නඩුවේ මෙබඳුම ප්‍රශ්නයක් වියදී තිබේ. මා ඉදිරියට ඇති මෙම නඩුවේ ඇති සාක්ෂිය එම ගව මස් කඩය ගම්පහ කිරිදිවෙල පාරේ යක්කල අංක 3 දරණ ස්ථානයය යන්න බැවින් මා ඉදිරියේ ඇති කරුණුවලට මගේ සහෝදර ක්‍රෙට්සර් විනිශ්චයකාරතුමා තමාගේ නඩු තීන්දුවේ දක්වා ඇති ප්‍රඥප්තිය අදාළ වන බව ගෞරව පෙරටුව සඳහන් කරමින් මෙහි මහේස්ත්‍රාත්වරයා විසින් යළෝක්ත මස් කඩය ඔප්පු වී ඇති කරුණුවලට අනුව කොළඹ දිස්ත්‍රික්කයේ පිහිටි නැනක් යයි සලකා ගැනීම් යුක්තියුක්ත නොවේය යනුවෙන් චෝදිතයාගේ නීතිවේදියා මතු කළ විරෝධයට මම එකඟ වෙමි. සමහර විට මෙම මස් කඩය කොළඹ

නගර සභා සීමාවට කිට්ටුව පිහිටා තිබේ යයි හෝ මනා සේ සනිටුහන් කරන ලද ඉතාම ප්‍රකට මායිම්-වලට මැදිව තිබේ යයි හෝ යාක්ෂි නිබුනා නම් මහේස්ත්‍රාත්වරයා විසින් මෙසේ සළකා ගැනීම සනාථ කළ හැක. නමුත් මේ නඩුවේ දී එබඳු විමතියක් මත රඳා ඇති සලකා ගැනීමක් අනුව කෙනකු වරදට පත් කිරීම ආරක්ෂා සහිත නොවන සේ පෙනියේ.

මේ අනුව චිත්තිකරු වරදට පත්කිරීම නිෂ්ප්‍රභා කරන මම චිත්තිකරු නිදහස් කර හරිමි.

චිත්තිකරු නිදහස් කරන ලදී.

ගරු සිරිමාන්න විනිශ්චයකාරතුමා ඉදිරිපිට

ඇම්. එච්. ඇග්නස් පොන්සේකා එ. ඩබ්ලිව්. ඊ. එච්. පෙරේරා

පොලිස් පරීක්ෂක, කඳුන*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය 656/68 — කනුවන මහේස්ත්‍රාත් උසාවියේ අංකය 10954/කේ

විවාද කළ හා තීන්දු කළ දිනය: 1968 සැප්තැම්බර් 18 වැනි දින

සුරා බදු ආඥා පනත — සුරා බද්දට යටත් ද්‍රව්‍යයක් — පළමුවැනි වරට වරදකරුවූවෙක් — සාමාන්‍ය නඩුවලදී දඩයක් ගෙවීමට ඉඩදීම ප්‍රමාණවත් බව.

තීන්දුව: සුරා බදු පනත යටතේ ඉදිරිපත් කෙරෙන අපරාධවලදී සාමාන්‍යයෙන් පළමුවරට වරද කළ පුද්ගලයකුට දඩයක් ගෙවීමේ සහනය දිය යුතුයි.

ඩී. ඩබ්ලිව්. අබේකෝන් මහතා, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ලලිත් රුදිගු (රජයේ නීතිඥ) මහතා, ඇටෝර්නි-ජනරාල්තුමා වෙනුවෙන්.

ගරු සිරිමාන්න විනිශ්චයකාරතුමා.

රජයේ රස පරීක්ෂක අදහස් කරන පරිදි මත්පැන් සැදීමට යොදාගත හැකි, චෝදනා පත්‍රයේ 'ගෝඩා' යන නමින් හඳුන්වනු ලබන තහනම් කළ ද්‍රව්‍යයක් තමා ළඟ තබා ගැනීම නිසා චිත්තිකාරි වැරදිකාරිය බවට තීන්දු විය. එම තීන්දුව ඉවත ලැම සඳහා මැදහත් වීම යුක්ති සහගත නොවන බව මම කල්පනා කරමි.

චිත්තිකරු ස්ත්‍රියක් වන අතර, මුල්වරට වැරදිකාරියකවූ තැනැත්තියකි. ඇය බරපතලවැඩ සහිතව හය මසකට බන්ධනාගාරගත කිරීමට තීන්දු කරන ලදී. සුරා බදු ආඥා පනතට යටත්වූ අපරාධ සම්බන්ධයෙන් පළමුවන වරට වැරදිකරුවකු වූ තැනැත්තකුට බන්ධනාගාර ගත කරනවා වෙනුවට දඩයක් ගෙවීමේ වරප්‍රසාදය සාමාන්‍යයෙන් ලබාදිය යුතුයි. උගත් මහේස්ත්‍රාත්තුමා මේ චෝදනාව සම්බන්ධයෙන් දිය හැකි උපරිම දඩුවම දී ඇත්තේ. මත්පැන් ප්‍රමාණය විශාලවූ නිසාත්, ඔහුගේ මනය අනුව මෙවැනි අපරාධ රටේ — මේ පළාතේ පැතිරී නිබෙන නිසාත්ය. නමුත් චිත්තිකාරිය සම්බන්ධයෙන් මෙය ඇගේ මුල්ම අපරාධය බව අමතක නොකළ යුතුයි.

චිත්තිකරුට නියම කර ඇති දඩුවම රු. 350/- ක දඩයකට මම වෙනස් කරමි. එය නොගෙවිටොත් චිත්තිකරුට සති හයක බරපතල වැඩ සහිතව බන්ධනාගාර ගත කිරීමේ දඩුවමක්ද නියම කරමි. තීන්දුවේ දඩුවම වෙනස් කිරීම හැර ඇපැල නිෂ්ප්‍රභා කරමි.

දඩුවම වෙනස් කරන ලදී.

(පරිවර්තනය: අධිනීතිඥ ශ්‍රීයාංගනී සේනාරත්න විසිනි.)

---

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 88 වෙනි පිට බලන්න.

ගරු ඕ. ඇල්. ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා ඉදිරිපිට

කේ. ඒ. වීරසිංහ සාජන්ට් 2169, මොරටුව එ. උපසේන චන්නිආරච්චි*

ශ්‍රේෂ්ඨාධිකරණ අංක 498/68 — පානදුර මහේස්ත්‍රාත් උසාවියේ නඩු අංක 7742

තර්ක කළේ: 1968 ජූලි 19 වැනි දින
තීන්දු කළේ: 1968 ජූලි 22 වැනි දින

මිල පාලනය — ගිනි පෙට්ටියක පාලන මිල සත පහක්ව තිබියදී එය සත අටකට විකුණන ලදැයි චෝදනාවක් — ගිනි පෙට්ටියක කුරු 50 සිට 10 දක්වා ඇති හෙයින් ඒ අනුව ගිනි පෙට්ටිවල පාලන මිල සත පහේ සිට සතය දක්වා වෙනස් වීම — එක් පෙට්ටියක තිබූ කුරු සංඛ්‍යාව කෙතෙක් දැයි සාක්ෂි නොමැති වීම — චෝදනාව තහවුරු කළ නොහැකිවීම

පී1 දමා ලකුණු කොට ඉදිරිපත් කරන ලද ගිනි පෙට්ටියක් පාලන මිලට වඩා සත තුනක් වැඩියෙන් — සත අටකට—විකුණන ලදැයි චෝදිතයාට විරුද්ධව චෝදනා ඉදිරිපත් කිරීමෙන් පසු ඔහු වරද කරු කරනු ලැබිය.

තීන්දුව: (1) ගිනි පෙට්ටියක කුරු 50 සිට 10 දක්වා අසුරා තිබීම අනුව එහි පාලන මිල සත 5 සිට සත 1 දක්වා වෙනස් වන බැවින් පී1 දරණ ගිනි පෙට්ටියේ තිබූ කුරු සංඛ්‍යාව ගැන සාක්ෂි නොමැත්තෙන් මෙම චෝදනාව සනාථ කළ නොහැක. (3.7.65 දින දරණ සහ අංක 14459 දරණ ලංකාණ්ඩුවේ ගැසට් පත්‍රය බලන්න.)

(2) පී1 දරණ ගිනි පෙට්ටියේ ඇති එය විකිණිය හැකි වැඩිම මිල සත පහය යන්න කියැවෙන මුද්‍රිත සටහන එම මුද්‍රිත සටහන සහ එය මත තිබෙන වැඩිම මිල කවරකු විසින් අලවන ලද්දක්ද යන්න සහ එය අලවා ඇත්තේ කුරු 50 ක් ඇති ගිනි පෙට්ටිවලය යන්න කියැවෙන සාක්ෂි නොමැතිවීම නිසා එයින් චෝදනාව සනාථ නොකෙරේ.

ආචාර්ය කොල්වින් ආර්. ද සිල්වා, ඇම්. ඇල්. ද සිල්වා සමග විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

රජයේ අධිනීතිඥ ලලිත් රුදිගු, ඇටෝර්නි-ජනරාල් වෙනුවෙන්.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

මෙම විත්තිකරුට විරුද්ධව ඇති චෝදනාව වූකලී අබේරත්න පොලිස් කොස්තාපල්ට ගිනි පෙට්ටියක් පාලන මිලට වඩා ශත 3 ක් වැඩියෙන්, එනම් ශත 8 කට විකිණීමයි.

ගිනිකුරු අඩංගු සෑම ගිනි පෙට්ටියක්ම මිල පාලනයට අසුවන්නේ නොවේ. උදාහරණයක් ගතහොත් ගිනිකුරු දහයකට අඩුවෙන් අඩංගු ගිනි පෙට්ටියක් වෙතොත් එය අසුවල් මිලකට වැඩියෙන් විකිණීම වරදක් යැයි කිසි තැනක දක්වා නැත. පී1 දරණ ගිනි පෙට්ටියට මිල පාලන රෙගුලාසිය අදාල වන බව පැමිණිල්ලෙන් ඔප්පුවීමට නම් ඉහත කී විධියේ ගිනි පෙට්ටි නිෂ්පාදනය නොකෙරෙන බවට පැමිණිල්ල සාක්ෂි ඉදිරිපත් කළ යුතුය. මේ නඩුවේ එවැනි සාක්ෂි ඉදිරිපත් කොට නැත. ගිනි පෙට්ටියේ අඩංගු ගිනිකුරු සංඛ්‍යාව ගැන සාක්ෂි ඉදිරිපත් කළ යුතුව තිබුනේය. එසේ කරන ලද නම් මෙම ගිනි පෙට්ටිය මිල පාලනයට යටත් වූවක්ද, නැද්ද යන්න පැහැදිලිවම තහවුරු කිරීමට තිබිණ. මේ නඩුවේ එවැනි සාක්ෂි නොමැත. පී1 දරණ ගිනි පෙට්ටිය විවෘත කොට එහි වූ ගිනිකුරු සංඛ්‍යාව උසාවියේදීම ගණන් කිරීම ඉතාම පහසුවෙන් කළ හැකි දෙයක්ව තිබිණි. එහෙත් මොනයම් හේතුවක් නිසා හෝ මෙය සිදු වී නොමැත. එම ගිනි පෙට්ටියෙහි එය විකිණිය හැකි වැඩිම මිල ශත පහක් යැයි මුද්‍රණය කොට තිබෙන හෙයින් එය පෙට්ටියෙහි ගිනි කුරු 50 ක් අඩංගු වී යැයි නිගමනය කළ යුතු යැයි මහේස්ත්‍රාත්වරයා (ජේ. ජේ. ඇෆ්. ඒ. ඩයස් මහතා) කියයි.

ගිනි පෙට්ටියක් විකිණිය හැකි වැඩිම මිල අඩංගු ලේබලය එහි අලවන ලද්දේ කා විසින් ද යන්නත් එවැනි ලේබල් අලවන ලද්දේ ගිනිකුරු 50 ක් හෝ ඊට වැඩි ගණනක් අඩංගු පෙට්ටිවල පමණක් බවටත් සාක්ෂි නොමැතිව මහේස්ත්‍රාත්වරයා සමග එකඟවීමට මට කිසිසේත්ම නොහැකිය.

ඇපැලට ඉඩ දෙමින් විත්තිකරු නිදහස් කරමි.

ඇපැලට ඉඩ දී විත්තිකරු නිදහස් කරන ලදී

(පරිවර්තනය: අධිනීතිඥ චූල්පත්මේන්ද්‍ර දහනායක, ඇල්. ඇල්. බී. (ලංකා) විසිනි)

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 92 වෙනි පිට බලනු

ජී. පී. ඒ. සිල්වා, වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා සහ සිව සුබ්‍රමනියම්, විනිශ්චයකාරතුමා ඉදිරිපිට

දිසානායක මුදියන්සේලාගේ පුංචිමහත්මයෝ එ. ඩී. විජේදෝරු මහනුවර ගොවිජන සේවා උප-කොමසාරිස්වරයා සහ තවත් අයෙක්

ශ්‍රේෂ්ඨාධිකරණ අංකය 257/1968
සර්ටියෝරේරයි නියෝගයක ස්වභාවයෙන් ආඥාවක් නිකුත් කරන ලෙස ඉල්ලීමක්

විවාද කළ දිනය: 1968 ඔක්තෝබර් 9
තීන්දු කළ දිනය: 1969, ජනවාරි 29

කුඹුරු පනත — පෙත්සම්කරු විසින් 1963 දී බදු ගොවියා අස්කිරීමේ වෝදනාව — කෘෂිකර්ම ව්‍යාප්ති මණ්ඩලයේ කොමසාරිස්තුමා විභාගයක් පැවැත්වීම — අස්කරන්ට යෙදුන බදුකරු පෙත්සම්කාරියගේ පුරුෂයාත් සමග එකට ගොවිතැන් කළ ගොවියෙකැයි තීරණයවීම — ඔහුට එය පැවරීමට නියෝග කිරීම — එම නියෝගයට විරුද්ධව සමීක්ෂණ මණ්ඩලයට අභියාචනයක් ඉදිරිපත් කිරීම — එය අසාර්ථකවීම — 'සර්ටියෝරේරායි' ආඥාවක් — එමගින් ඉහත සඳහන් විභාග වාර්තා සහ නියෝගය අහෝසි කිරීමට ඉල්ලීම — පැමිණිල්ල ඉදිරිපත් කරන අවධියෙහි කුඹුරු පනතේ අඩංගු නීතිවලට ඒවා පටහැනිය කියා සිටීම — 1964 සංශෝධිත පනතේ 1ඒ ඡේදයේ පරමාර්ථය අතීතයට බලපානා පරිදි නීති සංශෝධනය කිරීම.

පෙත්සම්කාරිය විසින් තමා කුඹුරක භුක්තියෙන් පිටමං කරන ලදැයි කියමින් මෙහි 2වන වගඋත්තරකරු (බදු ගොවියෙක්) විසින් පළමුවන වගඋත්තරකරුට (ගොවිජන සේවා දෙපාර්තමේන්තුවේ උප කොමසාරිස්වරයා) කරන ලද ආයාචනයක හේතුවෙන් දිගු කාල සීමාවක් තුල ඔහු විසින් විභාගයක් පවත්වනු ලැබ, වර්ෂ 1965 අගෝස්තු මස නිම වූ එම විභාගයේ දී පෙත්සම්කාරියගේ ස්වාමිපුරුෂයා සමග හවුලේ වගා කළ තැනැත්තකු වූ එම දෙවන වග උත්තරකරු අයථා ලෙස ඒ කුඹුරින් බැහැර කරන ලදැයි නිගමනය කළ කොමසාරිස්වරයා එම වගාකරුට යළින් කුඹුරේ භුක්තිය දියයුතු යයි ද නියෝග කළේය.

කුඹුරු පනතේ ප්‍රතිපාදනයන්ට අනුව සංවිධානය කළ සමීක්ෂණ (*Board of Review*) මණ්ඩලයට අසාර්ථක වූ අභියාචනයක් ඉදිරිපත් කිරීමෙන් පසු පෙත්සම්කාරිය එකී පරීක්ෂණයෙන් පළමුවන වග උත්තරකරු විසින්, කළ කරුණු විභාගය අවලංගු කිරීමට සහ දෙවන විත්තිකරුට යළින් කුඹුරේ භුක්තිය පවරා දීමට යයි කළ නියෝගය ඉවත් කිරීමට ආඥා කරමින් ශ්‍රේෂ්ඨාධිකරණයට මෙම ආයාචනය ඉදිරිපත් කළාය.

පෙත්සම්කාරිය වෙනුවෙන් පහත සඳහන් පරිදි අධිකරණයට කරුණු සැල කරන ලදි.

(ඒ) දෙවන වගඋත්තරකරු විසින් එම ආයාචනය ඉදිරිපත් කරන ලද අවධියේ හවුලේ බදු ගෙන කුඹුරක් වගා කරන තැනැත්තකුගේ අයිතිවාසිකම් කුඹුරු පනතින් පිළිනොගැනී තිබීම නිසා එහි 3(1) වැනි ඡේදයේ සඳහන් වූ බදු ගෙන වගා කරන්නකු ගැන ඇති විග්‍රහයට 2 වන වගඋත්තරකරු ඇතුළත් නොවේ.

(බී) වර්ෂ 1964 අංක 11 දරණ සංශෝධන පනතින් මෙම අඩු-ලුහුඬුව පිරවීමට අදහස් කරනු ලැබ ඒ නයින් හවුලේ බදු ගෙන වගා කරන්නන්ද එම විග්‍රහයේ සීමාවට ඇතුළත් කොට තිබේ.

(සී) සංශෝධන පනත අතීතයට බල පා ක්‍රියා නොකරන බැවින් එම ආයාචනය පිළිගෙන ඒ අනුව කටයුතු කිරීමට හෝ සංශෝධන පනතට අනුව නියෝග දීමට හෝ 1 වන වග උත්තරකරුට බලයක් නැත.

තීන්දුව: (1) ඉහත සඳහන් (ඒ) දරන කරුණ අඩංගු තර්කය පහතින් පෙනෙන කරුණු දෙක නිසා පිළිගත නොහේ.

(i) අර්ථකථන ආඥා පනතේ (*Interpretation Ordinance*) 2(ii) ඡේදයේ ප්‍රතිපාදනයන්ට අනුව සලකන විට ඒක වචනාර්ථ පදවල බහු වචනාර්ථ ද ඇතුලත් විය යුතුවීම.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 75 වෙනි කාණ්ඩයෙහි 104 වෙනි පිට බලනු.

(ii) වී ගොවිතැනෙහි විවිධ කාර්යාංශයන් ලෙස ගැනෙන සී සෑම, වැපිරීම සහ කැපීම පිණිස සාමාන්‍යයෙන් හවුලේ කෙරෙන සහභාගිවීම් අවශ්‍ය වීම.

(2) වර්ෂ 1964 සංශෝධන පනතින් 1ඒ දරණ අලුත් උප-ඡේදය 3(1) දරණ ඡේදයට පසුව ඊළඟින්ම ඇතුළත් කර තිබීමේ පරමාර්ථය, වාරයෙන් වාරයට වගා කරන්නන්ගේ තත්වය පැහැදිලි ලෙස විග්‍රහ කිරීම යේ පෙනීයේ.

(3) මුල් පනත පැනවීමට අවුරුදු දෙකකට තරම පෙර මැසිවිලි කීමට සිදු වූ අයද එම පනතින් සහනයක් ලැබීම නිසා එය වර්ෂ 1958.2.1 වන දින නීතිගත වූ නමුදු එයම අතීතයටද බලපාන ස්ථාවරයක් උසුලන බැවින් සංශෝධන පනතින් බදු ගෙන වගා කරන අලුත් වගා කරන්නන් පංක්තියක් ඇති වූවත් එහි එම අයට සහනය දිය යුත්තේ කවද සිටදැයි යන්න එහි සඳහන් වී නැති නිසා දැන් සංශෝධන පනත ද ඇතුළත් කොට සැලකෙන පනතෙහිම කලින් සිට සඳහන් වන දිනය මෙම සහනය දීම ක්‍රියාත්මක වන දිනය හැටියට සලකා ගැනීම යුක්තිසහගත වේ.

මාර්ක් ප්‍රනාන්දු මහතා, පෙත්සම්කාරිය වෙනුවෙන්.

ඇන්. සින්නතම්බි (රජයේ අධිනීතිඥ) මහතා, පළමුවන වග උත්තරකරු වෙනුවෙන්.

ඇම්. කනකසුන්දරම් මහතා, දෙවන වග උත්තරකරු වෙනුවෙන්.

ජී. පී. ඒ. සිල්වා, වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා:

තමා අයථා පරිද්දෙන් මෙහි පෙත්සම්කාරිය විසින් කුඹුරකින් පිටමං කරන ලදුව, එහි භුක්තිය තමාට නැවතත් ලබා දීමට යයි දෙවන වගඋත්තරකරු විසින් ගොවිජන සේවා දෙපාර්තමේන්තුවේ උප කොමසාරිස් පදවියක් දරණ පළමුවන වගඋත්තරකරු වෙත ඉදිරිපත් කරන ලද ඉල්ලුම් පත්‍රයක කරුණු සලකා බලා පවත්වන ලද වග-විභාගය සහ ඊට අනුකූලව දෙන ලද නියෝගය නිෂ්ප්‍රභා කර ගැනීම පිණිස කුඹුරු හිමිකාරියක වන එකී පෙත්සම්කාරිය විසින් සර්ටියෝරෙරයි (*Writ of Certiorari*) ආඥාවක් ලබා ගැනීමේ අපේක්ෂාවෙන් මෙම ආයාචනා පත්‍රය අධිකරණය වෙත ඉදිරිපත් කර ඇත. කුඹුරු පනතේ ප්‍රතිපාදනයන් පිළිසරණ කොට ගෙන දෙවන වගඋත්තරකරුවා තමා ඉහත සඳහන් කුඹුර බදු ගෙන වපුරන තැනැත්තා හැටියට ඉකුත් අවධියේ සිටි බවත්, එය දිගටම තමාගෙන් කෙරිගෙන ගිය බවත්, එයින් තමා අයථා අන්දමින් පිටමං කළ බවත් චෝදනා මුබයෙන් සැල කරමින් එය නැවතත් තමාගේ භුක්තියට පත්කර දීමට යයි ඉල්ලමින් වර්ෂ 1963 සැප්තැම්බර් මස 2 වන දින ආයාචනයක් පළමුවන වග උත්තරකරු වෙත ඉදිරිපත් කෙළේය. පළමුවන වග උත්තරකරු මේ පිළිබඳව ඇරඹූ කිසියම් වග-විභාගයක් වර්ෂ 1964 ජූලි මස 29වන දින ඇරඹී, වර්ෂ 1965 නොවැම්බර් මස 29වන දින නිමවිය. එම විභාගය අවසානයේ මෙහි දෙවන වගඋත්තරකරු පෙත්සම්කාරියගේ සැමියා සමග එක්ව එම කුඹුර වපුරන ලද බවත්, එසේම එය කුලියට ගත් වැපුරුම්කරුවකු වග ප්‍රකාශයට පත්කරමින්ද, ඔහු එකී කුඹුරේ භුක්තියට නැවතත් පත්කරමින්ද නියෝගයක් පළමුවන වගඋත්තරකරුවා නිකුත් කෙළේය. ඉන්පසු පෙත්සම්කාරිය විසින් කුඹුරු පනතට අනුව ස්ථාපිත කර ඇති සමීක්ෂණ මණ්ඩලයට (*Board of Review*) අභියාචනයක් ඉදිරිපත් කරන ලද නමුත්, එයද එකී මණ්ඩලය විසින් ප්‍රතික්ෂේප කර තිබේ.

පෙත්සම්කරුගේ ප්‍රධාන තර්කය වූයේ මෙහි 2වන වගඋත්තරකරු විසින් ආයාචනය කුඹුරු පනතේ පැනවීම් යටතේ ඉදිරිපත් කළ අවස්ථාවේ එම පනතේ එකට සම්බන්ධව වගා කරන්නකුගේ අයිතිවාසිකම් පිළිගැනෙන කිසිම පැනවීමක් නැති අතර, එබඳු අයිතිවාසිකම් පිළිගැනීම් ඇත්තේ පනතට වර්ෂ 1964 අගෝස්තු 24වන දින පනවන ලද සංශෝධනයෙහිය යන්නය. එම හේතුවෙන් එකී ආයාචනය පිළිගෙන කටයුතු කිරීමට හෝ ඒ අනුව නියෝගයක් දීමට හෝ පනතට අතීත කාලයක සිට බලපාන ප්‍රතිපාදනයක් සංශෝධනයෙහි නැති බැවින් පළමුවන වග උත්තරකරුට ආඥා බලයක් නැතැයිද, ඔහු වැඩිදුරටත් තර්ක කෙළේය. මේ නිසා මෙම තර්කය දෙයාකාරයකින් සලකා බැලිය යුතුය. එනම්, දෙවන වගඋත්තරකරු කෙරෙහි සුදුසු ලෙස ඇති මොනම අයිතිවාසිකමක් වුවද එය මූලික පනතේ පැනවීම් අනුවම නිශ්චය කළ යුතු බව හා වර්ෂ 1964 අගෝස්තු 2වන දින තරම් මැත කාලයක ක්‍රියාත්මක වූ සංශෝධන පනතින් තමා පිට පැවරුණු බලතල ක්‍රියාවේ යෙදීමේදී 1වන වගඋත්තරකරු ආඥා බලයකින් තොරව කටයුතු කළ බවය.

පෙත්සම්කරු වෙනුවෙන් සිටි නීතිවේදියා තමාගේ තර්කයේ පළමුවන කොටස ගැන කරුණු දක්වමින් සැලකර සිටියේ වර්ෂ 1958 අංක 1 දරණ පනතේ 3වන ඡේදයෙන් එක් වගා කරන්නකු විනා එකට සම්බන්ධව කටයුතු කරන වගා කරන්නන් පිළිගෙන නොමැති බවත්, ඒ හේතුවෙන් දෙවන වගඋත්තරකරුගේ තත්වයේ කෙනකු ඒ ඡේදය යටතේ විග්‍රහ වන — කුලියට ලබා වගා කරන අයකුගේ ගණයට නොවැටෙන බවත්ය. ඔහුගේ කරුණු සැලකිරීමේ හැටියට වර්ෂ 1963 අංක 11 දරණ සංශෝධන පනතින් අදහස් කරන ලද්දේ මේ අඩු-ලුහුඬුව පිරවීම සහ ඒ අනුසාරයෙන් එකට සම්බන්ධව වගා කරන්නන්ද එයට අසුවන පරිදි සකස් කිරීමය. එහි 3(1)වන ඡේදයෙහි මෙසේ පැනවී තිබේ.

මෙම පනත යම්කිසි පරිපාලන ප්‍රදේශයක ක්‍රියාකාරී වීමට පෙරාතුව හෝ පසුව හෝ කරගත් යම්කිසි වාචික හෝ ලිඛිත හෝ ගිවිසුමකට අනුව යම් පුද්ගලයකුට බදු දෙන ලද කවර ප්‍රමාණයක හෝ කුඹුරක් එම පරිපාලන ප්‍රදේශයේ මුලුමනින්ම හෝ ප්‍රධාන වශයෙන් හෝ පිහිටා ඇත්නම්, එසේම එම පුද්ගලයා ලංකාවේ පුරවැසියකු නම්, ඔහු මෙම පනතේ ප්‍රතිපාදනයන්ට අවනතව එම කුඹුරු ප්‍රමාණය බද්දට ගෙන වගා කරන තැනැත්තා විය යුතුය.

අර්ථ කථන (*Interpretation Ordinance*) ආඥා පනතේ 2(ii) දරණ ඡේදයේ ප්‍රතිපාදනයන්ට අනුව එක වචන පදවලට එහි බහු වචනයන් ඇතුළත් කොට ගතයුතු බැවින් කුඹුරු පනතේ 3වන ඡේදයෙන් සැලකෙන්නේ එක් වගාකරුවකු පමණක්ය යන තර්කය පිළිගැනීමට අමාරුය. දෙවන කරුණ නම් වී වැපිරීමේ ස්වභාවය ගැන සලකන විට එම වැඩපිළිවෙලට නිසඟයෙන් ම වෙනත් විවිධ වගා කර්මයන්හි ඉතාම ප්‍රකට අන්දමිනුත් පෙනී යන කරුණක් නම් සීසෑම, වැපිරීම හා කැපීම ආදී විවිධාකාර කෘෂිකර්ම ක්‍රියාවන්හි නිරත වීම සඳහා එකට එකතුවීමේ අවශ්‍යතාවය වේ. එකම පවුලක අයවලුන් හෝ අනිකුත් අයවලුන් හෝ එකට එකතුවී එහි නොඑන කුඹුරු හිමියන් සතු කුඹුරු ඔහුගෙන් බදු ගත් අය මෙන් වපුරන ලද බොහෝ අවස්ථා ගැන මූලික පනත සකස් කළ නිර්මාපකයන් නොසිතන ලදැයි සිතීම උගහටය. පෙත්සම්කරුගේ නීති වේදියාගේ තර්කය සනුවණ තර්කයක් නම් මෙම මූලික පනතින් හෝ සංශෝධන පනතින්, බදු ගෙන වගා කරන යම් පුද්ගලයකුට එය බදු දීමද, එක් කුඹුරු හිමියකු විසින්ම කළ යුතුය යන්න නිගමනය අදහස් කැරෙන බවද නොවැළැක්විය හැකි කරුණක් වේ. එයට හේතුව මෙම පනත් දෙකේම කුඹුරු හිමියා යන වචනය මූලික පනතෙහි ප්‍රස්ථාවනාවේ හැර යෙදී තිබෙන්නේ ඒක වචනයෙන්ම විටයි. මේ අනුව කරනු ලබන අර්ථකථනයකින් ලංකාවේ කුලියට ගෙන වගා කරන අයට දී ඇති කුඹුරු හිමියන්ට හවුලේ හිමිකම් ඇති සියලු කුඹුරු — මෙය කලාතුරකින් සිදුවන පිළිවෙල නොවී සාමාන්‍යයෙන් කෙරෙන පිළිවෙල වුවද — කුඹුරු පනතේ පැනවීම් වලින් බාහිරව පවත්වාගෙන යන කුඹුරු සංඛ්‍යාවට වැටීමේ කිසිම තේරුමක් නැති ප්‍රතිඵලයක් උද්ගතවිය හැක. මේ සියලු හේතූන් කල්පනා කරන විට මේ කරුණු සම්බන්ධයෙන් පෙත්සම්කරු මතු කරන තර්කයට එකඟ වීම දුෂ්කර ලෙස හැඟේ.

පෙත්සම්කරුගේ මූලික තර්කය ගැන විනිශ්චයකට බැසීමට පහත සඳහන් කරන කරුණු ගැන සලකා බැලීම නුවුවමනා වුවද, නීතිවේදියා මතු කළ කරුණු සැලකිරීම අනුව මූලික පනතේ 3(1)වන ඡේදයෙන් පසුව ඊළඟින්ම ඇති 1ඒ දරණ උප ඡේදය ඇතුළත් කිරීමේ පරමාර්ථය කුමක්දැයි යන පැනය මතු වේ. මට වැටහෙන අන්දමට තම තමාට අයත් වාරයේ වගා කරන අයගේ තත්වය විග්‍රහ කිරීම පිණිස මෙය දැමීමට අදහස් කරන ලද සේ සිතා ගැනීමට හොඳාකාර ව ම ඉඩ තිබේ. යම් හෙයකින් එක් කුඹුරු හිමියකු හෝ කුඹුරු හිමියන් කිප දෙනකු සහ බදු ගෙන වගා කරන්නන් එක් අයකු හෝ කිප දෙනකු හෝ අතර මූලික පනතේ 3(1)වන ඡේදයේ සඳහන් අයුරින් යම්කිසි ගිවිසුමක් ඇති වී බදු ගත් අය අතර එය වගා කිරීම එක් එක් වාරය අනුව කෙරේ නම් එක් වරක් වගා කළ එකී කුලියට ගත් වගා කරුවකුට හෝ එබඳු වගා කරුවන්ට හෝ ඊළඟ එළඹෙන වාරයෙහි වගා කළ නොහේ. මෙසේ ඇති කලෙක සංශෝධන පනතේ 3(1 ඒ) දරණ අලුත් ඡේදය නොමැති නම් තමාට අයත් නොවන වාරයක ඒ හේතුවෙන් වගාවැඩ කිරීමෙන් තොරව සිටි එසේ බදු ගත් වගාකරුවකුට හෝ වගාකරුවන්ට ඒ තත්වය අනුව තමන් කුඹුරු හිමියා සමඟ ඇති කරගත් ගිවිසුම උල්ලංඝනය කිරීම නිසා ඒ ගිවිසුම අනුව ඇතිවන තමාගේ හෝ තමන්ගේ අයිතිවාසිකම් අහිමි වී යනු ඇත. එම නිසා උප ඡේදයෙහි ඇති වචනවලින්ම කියැවෙන පරිදි යම් ප්‍රමාණයක (තමාට වාචික හෝ ලිඛිත හෝ ගිවිසුමෙකින් දෙන ලද) කුඹුරක් බදු ගෙන එම ප්‍රමාණයේ වගාව යම්කිසි වාරයක හෝ වාරවල හෝ කරන වගා කරුවකුගේ ආරක්ෂා සැලසීම සඳහා එම අලුත් උප ඡේදය යෙදීමට අදහස් කරන ලදැයි පෙනී යන සේ ය. සංශෝධන පනතේ ප්‍රමුඛස්ථානයක් ''බදු ගෙන වගාකරන්නා'' යන වචන විග්‍රහ කිරීමේදී ''වාරය හෝ වාර'' යන වචන ඇතුළත් වී ඇතත්, එම වචන කලින් කී වචන ප්‍රධාන

පනතින් විග්‍රහ වේද්දි එයට ඇතුළත්ව නොතිබීමෙන් මගේ මේ මතය තවත් ශක්තිසම්පන්න වී තහවුරු වේ. වාරය හෝ වාර යන වචන සඳහන් වී ඇති පද සම්බන්ධය අනුව සිතා බලන විට එම වචන පිළිබඳ ප්‍රශ්නය පැන නගින්නේ වාර පිළිවෙලින් වගා කරන අවස්ථාවකදී පමණි. තමාට හෝ තමන්ට බදු දුන් කුඹුරු ප්‍රමාණය සැම වාරයකම සාමාන්‍ය ආකාරයෙන් වගාකරන අවදියක බදු ගෙන වගාකරන්නකු හෝ කරන්නන් හෝ ගැන මේ ප්‍රශ්නය පැන නැගිය නොහේ. මෙම ඡේදයෙහි ගැබ්ව ඇති ''හවුල් ක්‍රමයකට'' යන වචන මෙසේ අර්ථ නිරූපණය කිරීමේදී එම නිරූපණයට විරුද්ධ යයි කියනු නොහැක. එබඳු තත්වයකදී කුඹුරු හිමියා සමග ඇති කර ගන්නා ගිවිසුම කුඹුර බදු ගෙන වපුරන්නන් බොහෝ දෙනකු විසින් තමන් හවුලට එම කුඹුර වගා කිරීමේ පොරොන්දුව පිට ඇතිකරගත හැකි අතර ඒ සමගම ඉන් එක් වගාකරන්නකු විසින් හෝ (හවුලට වගා කළ යුතු අය දෙදෙනකු පමණක් ඇති වීටෙක) හෝ ඉන් වගා කරන්නන් කණ්ඩායමක් විසින් හෝ (වගා කරන්නන් බොහෝ දෙනකු ඇතිවීටෙක) ඒ කාල සීමාවේදීම වාර පිළිවෙලින් වගා කිරීමට එකඟ වී එසේ කිරීමේ බාධාවක් නොපෙනේ.

නමුත් මා ඉදිරියෙහි ඇති මේ ආයාචනයෙහි වාර අනුව වගා කිරීමේ කිසිම ප්‍රශ්නයක් පැන නොනගී. දෙවන වග උත්තරකරු විසින් නඩුවට අමුනා ඇති දිවුරුම් පෙත්සමේ හැටියට ඔහු පෙත්සම්කරු යටතේ බදු ගෙන මෙම කුඹුර වගාකරන්නා ලෙස වර්ෂ 1947 සිට කටයුතු කර තිබේ. කුඹුරෙන් පිටමං කිරීමේ පැමිණිලි විභාග කළ 1වන වග උත්තරකරුට පෙනී ගිය හැටියට — එම පෙනීයාම මෙහිදී තර්කයට භාජන වී නැතත් — යටත් පිරිසෙයින් දෙවන වග උත්තරකරු පෙත්සම්කාරියගේ ස්වාමී පුරුෂයා වූ, කුඩා බණ්ඩාගෙන් බදු ගෙන වගා කළ තැනැත්තා හැටියට මෙසේ පැමිණිලි කරන ලද අවදියේ කටයුතු කර ඇත. මා විසින් කලින් බැසගත් නිගමනයේ අන්දමට ඒ නිසා පළමුවන වග උත්තරකරු මෙම පරීක්ෂණය පැවැත්වීමේ දී හා සමීක්ෂණ (*Board of Review*) මණ්ඩලය විසින් ද නිවැරැදියයි නිගමනය කොට ඇති පරිදි එහි තීරණය දීමේ දී කටයුතු කර ඇත්තේ ආඥා බලයකින් යුක්තවය. ආඥාවක් නිකුත් කරන ලෙස මෙම ඉල්ලීම කර ඇත්තේ ඒ නියෝගයට විරුද්ධවය.

පළමුවන වග උත්තරකරු වෙනුවෙන් පෙනී සිටින රජයේ අධිනිඥවරයා මුල් පනතින් හවුල්ව වගා කරන වගාකරුවන් ද පිළිගෙන තිබේ යයි කරුණු සැලකර සිටී. අනිත් අතින් හවුලේ වගා කරන වගාකරුවන් ප්‍රධාන පනතේ ක්ෂේත්‍රයට ඇතුළත් වී ඇත්තේ වර්ෂ 1964 අගෝස්තු 24වන දා ක්‍රියාකාරී වූ 1 ඒ දරණ උප ඡේදයෙන් වුවත් ඔහු වැඩිදුරටත් කරන තර්කය අනුව සංශෝධන පනත ක්‍රියාත්මක වූ වහා ම බදු ගෙන වගා කරන අය, කෙනකු හෝ වේවා නැතහොත් වැඩි දෙනකු හෝ වේවා, ඒ සෑම පුද්ගලයකුම මූලික පනත වර්ෂ 1958 පෙබරවාරි මස 1 වන දින නිතිගත ව ඇති බදු ගෙන වගා කරන්නන් පිට මං කිරීම පිළිබඳව සලකා බැලිය යුතු පනතේ 4(6) වන ඡේදය අනුව වර්ෂ 1958 පෙබරවාරි මස 1වන දින සිට ආරක්ෂා වී ඇති බව ද පවසයි. මෙම තර්කය සැහෙන තරම් සාර ගර්භයයි මම සිතමි. මුල් පනතට වුව ද අතීතයටත් බලපාන පනතක් ලෙස සැලකිය හැක්කේ එම පනත සම්මත වීමට දැවුරුද්දකට කලින් මැසිවිලි කීමට සිදු වූ අයවලුන්ට පවා මේ පනතින් සහනය ලැබී තිබීමේ ස්වභාවයක් එහි රැඳී තිබේ. මුල් පනතින් ලැබිය හැකි සහනය ලබා ගැනීමට සුදුසුකම් ඇති අලුත් වගාකරන්නන් කණ්ඩායමක් බදු ගෙන වගා කරන්නන් යයි සංශෝධන පනතින් නිර්මාණය කොට ඇතත්, එම සහනය ලබා දිය යුත්තේ කවදා සිට ද යන්න එහි ගැබ් වී නැති නිසා, එම සංශෝධන පනත දැන් ඇතුළත් කොට ඇති මුල් පනතේ මේ පිළිබඳව සඳහන් වී ඇති දිනය සහනය පිළිබඳව ක්‍රියාත්මක බලපවත්වන දිනය හැටියට සලකා ගැනීම යුක්ති යුක්තය.

පළමුවන වගඋත්තරකරුගේ නීතිවේදියාගේ මෙම තර්කයට ආධාර කරන දෙවන වග උත්තරකරුගේ නීතිවේදියා බදු ගෙන වපුරන එකම තැනැත්තකු පමණක් ආරක්ෂා වීමේ පැනවීමක් නියම වශයෙන් හෝ අනියම් වශයෙන් හෝ මුල් පනතින් සලකාගත හැකි බවක් කෙසේ වත් නොපෙනේ යයි කරුණු සැල කරයි. වර්ෂ 1964 සංශෝධන පණත පැනවීමට පෙර බදු ගෙන හවුලේ වගා කරන අය කුඹුරකින් බැහැර කිරීමේ ප්‍රශ්නය පැන නැංගේ නම් මුල් පනතින් බදු ගෙන හවුලේ වපුරන්නන්ට ආරක්ෂාව සැලසී නැතැයි කිසිම අධිකරණයක් යුක්තියුක්ත ලෙස නිගමනය නොකරනු ඇතැයි ඔහු වැඩිදුරටත් කරුණු සැළකර සිටී. මෙය ද මා එකඟවන කරුණු සැලකිරීමකි. මෙම පරිසරය අනුව සලකන විට, පෙත්සම්කාරියගේ නීතිවේදියා මතු කළ තර්ක දෙකම බිඳ වැටේ. ඒ අනුව ගාස්තුවටත් යටත් කොට මෙම ආයාචනය නිෂ්ප්‍රභා කරමි.

සිව සුබ්‍රමනියම්, විනිශ්චයකාරතුමා;

මම එකඟවෙමි.

ආයාචනය නිෂ්ප්‍රභා කරන ලදී.