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with a Section in Sinhala

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WITH A DIGEST

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Held: (1) That in regard to bail, the provisions of Section 10 of the Offensive Weapons Act No. 18 of 1966 leave unaffected the provisions of the Courts Ordinance as they stand enacted in section 31.

(2) That therefore, an application for bail by persons charged with offences under the Offensive Weapons Act should be considered as any other matter would be considered which comes before the Supreme Court in the normal way in terms of section 31.

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The plaintiff Company were ship owners who had entered into a freight agreement for the carriage of railway sleepers. Certain letters of credit had been opened with the defendant Bank in favour of the plaintiff Company in connection with this agreement. The plaintiff alleged that these letters of credit had been wrongfuly transferred by the defendant in favour of a third party, and sued the defendant for damages on several causes of action. Prior to the action the plaintiff wrote letter marked XI in the proceedings to the defendant in which after stating that some of its files in connection with the letters of credit were missing, and that letters written by a former Director of the plaintiff authorizing the transfer of the letters of credit only *purported* to authorize the transfer, it called for copies of all correspondence in the possession of the defendant with all parties connected with the letters of credit.

After action was instituted, the plaintiff's application for discovery of documents under section 102 Civil Procedure Code was allowed. Thereafter the plaintiff applied to inspect the documents so discovered. The defendant, in an affidavit made under section 102(2) by its Attorney in Ceylon, objected to inspection on the grounds that certain documents related solely to its own case; that certain documents were protected by legal professional privilege; that certain documents were protected by section 131 of the Evidence Ordinace and that certain documents were protected by the privilege against self-incrimination. The plaintiff maintained *inter alia* that the attorney had no capacity to swear the affidavit on behalf of the defendant, and that the affidavit did not satisfy the requirement of section 181 of the Civil Procedure Code.

Held: (1) (Following *Nandawathie de Silva v. Yasawathie de Silva* 58 N.L.R. 100) That our law on the question of protection from inspection follows the procedure and practice of England.

(2) That an affidavit made under section 102(2) of the Civil Procedure Code had to satisfy the requirement of section 181 of the same Code.

(3) That on the facts of the case the affidavit did comply with section 181 of the Civil Procedure Code.

(4) That an affidavit, once made by a person competent to make it, is conclusive in regard to the possession, and relevancy of the documents in it, and as to the privilege set up. Once privilege is claimed, "inspection will only be ordered where the Court is reasonably certain from the affidavit of documents itself or from the nature of the case, or of the documents in question, or from admissions made by the party in his pleadings or in any other affidavit that he has erroneously represented or misconceived the nature or effect of the documents in question". None of these exceptional circumstances were present in this case.

(5) That the Attorney, personally having claimed the privilege that the documents related solely to the case of the defendant with a due sense of responsibility the privilege applied and should be upheld.

(6) That the plea of legal professional privilege also applied in regard to the documents in regard to which it was claimed. The terms of the letter XI were such a that after its receipt the defendant would reasonably have anticipated litigation with the plaintiff. The plea that the documents were correspondence in connection with legal advice sought by the defendant at the instance of their legal advisers in Germany, in connection with litigation that was then anticipated and was in contemplation and was accordingly privileged, was valid.

(7) That there was insufficient material to hold that the plea that some of the documents might tend to incriminate the defendant was made out. This plea accordingly failed.

(8) That section 131 of the Evidence Ordinance did not protect the documents in regard to which protection under that sections was claimed. The fact that certain documents in the possession of the Bank of Ceylon were protected did not mean that copies of those documents in the hands of the defendant were protected.

(9) That the Courts in Ceylon have no power to inspect documents for which privilege for inspection is claimed to decide on the validity of the claim for privilege. The statutory rule which empowers the English Courts to exercise this power is no part of our law, nor does the Civil Procedure Code give the Court any such power.

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By a warrant published in the Ceylon Government Gazette of 22nd October 1965, Mr E. G. Wikramanayake, Q.C. was appointed Commissioner under Section 2 of the Commissions of Inquiry Act (Cap. 393) to inquire into and report on abuses in connection with certain tenders to or contracts entered into by contractors between 1st June, 1957 and 31st July, 1965. He was appointed for the purpose of:—

"(1) Inquiring into, and reporting on, whether, during the period commencing on the first day of June 1957, and ending on the thirty-first day of July, all or any of the following acts or things, hereafter referred to as 'abuses', occurred, directly or indirectly, in relation to, or in connection with, all such tenders (including quotations or other offers by whatsoever name or description called) made by persons or bodies of persons (other than any local authority or Government department), hereafter referred to as 'contractors', for the performance of contracts for the construction of buildings or any other works (including contracts for the supply of services or equipment in connection with such first-mentioned contracts), by whatsoever name or designation called, for or on behalf of any Government department, and all such contracts of the description hereinbefore referred to given to contractors, whether in consequence of the making of tenders or otherwise, as you the said Commissioner may in your absolute discretion deem to be, by reason of their implications financial or otherwise, to or on the Government, of sufficient importance in the public welfare to warrant such inquiry and report (hereafter referred to as 'relevant tenders' and 'relevant contracts', respectively:"

There followed an enumeration in very general terms of "relevant tenders" and "relevant contracts".

Paragraph 2 of the warrant of appointment (so far as relevant) continued as follows:

"(2) making such recommendations as you the said Commissioner deems necessary as a result of the inquiry to prevent the recurrence of such abuses in the future, and, in particular, with regard to the law, practice and procedure relating to the custody, receipt, scrutiny or disposal of tenders for the performance of, contracts with Government departments, the giving or performance of such contracts, and the supervision of the performance of such contracts."

Following upon this there are two paragraphs in the following terms:

"And I do hereby direct you, the said Commissioner, to recommend to me the action that should be taken against the persons, if any, whom you have found to be guilty of any such abuses:

And I do hereby authorise and appoint you, the said Commissioner, to hold all such inquiries and make all such investigations into the aforesaid and other like matters as may appear to you to be necessary, and require you to transmit to me, with as little delay as possible, a report thereon under your hands."

The Commissioner summoned the appellant to attend as a witness and the appellant appeared at the proceedings on 8th January, 1968.

Before the proceedings commenced the appellant placed before the Commissioner an affidavit in which he alleged that he had no confidence in the Commissioner for the reasons stated therein.

The appellant also stated that he was not residing in Ceylon having surrendered his passport and become registered as a British citizen.

The Commissioner directed the appellant to be sworn or affirmed. The appellant then stated that he would not proceed further with the proceedings. He again declined to take the oath or affirmation, when requested to do so.

The Commissioner then issued a Certificate, in term of Section 12(2) of the Commissions of Inquiry Act, to the effect, *inter alia*, that in his view the appellant was guilty of contempt of Court.

The Supreme Court issued a Rule on the appellant under Section 47 of the Courts Ordinance, and found him guilty of the offence of contempt committed against or in disrespect of the Commissioner.

Held: (1) The appointment of the Commissioner was *ultra vires* of the Commissions of Inquiry Act and could not stand inasmuch as:—

(*a*) The scope of the inquiry was left entirely to the Commissioner's discretion, and in effect he was empowered to inquire into whether during the period in question any abuses occurred in relation to such tenders and such contracts as the Commissioner should in his absolute discretion deem to be of sufficient importance to warrant an inquiry and report;

(*b*) Under Section 2 of the Act, the matters to be inquired into must be one in respect of which an inquiry will "in the opinion of the Governor-General" be in the interests of the public welfare, whereas under the warrant, the Commissioner was given the power to select such matters. The power of selection had been delegated to the Commissioner.

(*c*) The validity of the appointment of the Commissioner could not be tested by the result of the inquiry, and the decision had to be based on the terms of the actual warrant of appointment.

(*d*) If the ambit of the inquiry was not limited to any particular matter but was at large, there would be no limit to the questions which a witness might be obliged to answer, whereas Section 12(1) (b) of the Act which provides the safeguard against irrelevant questions deals with questions touching the matter to be inquired into by the Commissioner.

(2) The conviction for contempt should therefore be set aside.

CONTROL OF PRICES ACT

Price Control Act — Charge of selling loaf of bread above controlled price — Should the charge specify the kind of bread?

Held: That where a person is convicted on a charge of selling a loaf of bread in excess of the maximum controlled price, the failure to specify the kind of bread e.g. brown bread, sandwich bread etc. in the charge does not vitiate the conviction.

Price Control Act — Section 4 *— Sale of Bombay Onions in excess of controlled price — Charge of selling in Main Street Deniyaya — Evidence led failed to establish the area within which it was an offence to sell above controlled price — Price Order requiring traders to ascertain prices chargeable by referring to Price Orders made from time to time for Municipal limits of Colombo — Does it render Price Orders bad? — Report by Food Control Inspector re Bombay Onions admitted without calling the Inspector — Is it admissible — How far is such Inspector an expert? — Admission by Conduct.*

The accused was convicted of selling Bombay onions at No. 133, Main Street, Deniyaya above the controlled price fixed in Price Order P4, which in its schedule, column 2 specified the area Village Committee of Deniyaya as the area within which it was operative.

The only evidence to prove that No. 133, Main Street, Deniyaya was within the V.C. area of Deniyaya was that of a clerk of the Food Control Department, who said that No. 133 Main Street, Deniyaya falls within the Administrative District of Matara.

Held: (1) That the prosecution failed to prove that the sale took place in an area within which it was an offence to sell Bombay Onions at more than the controlled price.

(2) That the provision in the said Price Order P4 requiring traders to ascertain the price they could charge in their particular area by referring to Price Orders made from time to time for the Municipal limits of Colombo did not make the Price Order bad in law, as section 4 of the Control of Prices Act deals only with the right of the controller to fix a maximum price, and not with how it should be fixed.

(3) That the learned Magistrate erred in admitting "of consent" a report from the Inspector of Foods, (who was absent) in proof of the fact that the onions in question were Bombay Onions, as no admission by counsel in a criminal case can relieve the prosecution of its duty to satisfy the court by proper evidence.

(4) That Food Control Inspectors who stated that P1 contained Bombay Onions were competent to speak what variety of onions it contained, as they continually deal with such matters.

(5) That the evidence of the Inspector to the effect that the accused asked for Bombay Onions and the accused handed over to him the parcel of onions produced as P1 amounted to an admission of the accused by conduct.

Control of Prices Act — Conviction on a charge of selling a box of matches containing 50 *sticks above controlled price — Relevant Price Order fixing prices of boxes of matches containing varying number of sticks at different prices — Maximum number of sticks at five cents — Submission on behalf of accused that Price Order bad as it conflicts with Regulations made under the Manufacture of Matches Ordinance* (*Cap.* 170) *— Regulations* 42, 43, 44 (*Vol.* 3, *Subsidiary Legislation*).

The accused was convicted of selling a box of matches containing 50 sticks for six cents when the controlled price for it was five cents. The relevant Price Order *inter alia* fixed the price for boxes of matches containing

not less than 50
not less than 40
not less than 30
not less than 20
not less than 20
not less than 10

at five cents, four cents, three cents, two cents, and one cent respectively.

It was submitted on behalf of the accused that this Price Order was bad in law in that it conflicts with regulations 43 and 44 made under Section 10(1) of the Manufacture of Matches Ordinance (Cap. 170). Rule 43 forbids the sale by any person to another of any matches manufactured in Ceylon unless there is securely fixed to every box so sold a Government banderol issued by the Director.

Rule 44 reads "the banderol must be so fixed as to prevent the box from being opened in the ordinary way without first breaking the banderol". Further, Section 12 of the said Ordinance makes it an offence to sell a box with a broken banderol.

Regulation 42 enacts that no more than 50 match sticks shall be packed in any box sold or offered for sale.

There is nothing on the banderol or the label affixed on each box to show the number of sticks in each of them.

Held: That the said Price Order under which the accused was charged and convicted is manifestly unreasonable because it requires a trader to fix his price in accordance with the number of sticks in the box which he cannot know with certainty except by breaking the banderol. It goes beyond the authority given to the Controller of Prices by Section 4 of the Control of Prices Act.

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Price Control Act — Sale of Bombay onions and gram dhal above maximum controlled price — Both offences joined in one charge — Conviction — Illegality of charge — Criminal Procedure Code, section 178.

Where an accused person was convicted on a charge of selling one pound of Bombay onions and 8 1/2 ounces of gram dhal for one rupee, when the maximum controlled price he could have charged for both commodities was 59 9/16 cents.

Held: (1) That the sale of each of these commodities above the controlled price amounted to a distinct offence and therefore the joinder of these offences in one charge rendered it illegal.

(2) That the accused is entitled to an acquittal despite the false defence he has attempted in this case.

PRICE CONTROL INSPECTOR, NUWARA-ELIYA *v.* VEERAPUTHRAN 88

CO-OPERATIVE SOCIETIES

Co-operative Societies Ordinance (Cap. 124), *Section* 33—*Stamp Ordinance (Cap.* 247), *Sections* 2, 8 —*Award by Arbitrator under Co-operative Societies Ordinance — Documents filed in Court by Co-operative Society to enforce Award — Are these documents liable to Stamp duty — Rule* 38(13) *of the Co-operative Societies Rules of* 1950.

After an Award of an Arbitrator under the Co-operative Societies Ordinance had been filed in the Court of Requests for enforcement in accordance with Rule 38(13) of the Co-operative Societies Rules of 1950, the learned Commissioner of Requests held, after inquiry, that the documents filed in Court were liable to Stamp Duty. The following were the documents.

Letter of Appointment
Award
Petition
Application for execution of Writ
Notice

It was submitted in appeal on behalf of the Society that Section 33 of the Co-operative Societies Ordinance exempted it from Stamp duty. Learned Crown Counsel on the other hand submitted that the documents referred to were neither "instruments" with the meaning of that section nor executed *by or on behalf* of the Society as required by that Section.

Held: (1) That none of those documents were liable to stamp duty.

(2) That the word "instruments" in section 33 of the Co-operative Societies Ordinance was wide enough to cover the word "documents" and that these documents had been executed on behalf of the Society within the meaning of this Section.

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CO-OWNERS

Co-owners — Prescription — Whether a co-owner has lost his rights as a result of prescriptive possession depends on facts of each case — Stranger purchasing entirety of co-owned property — In what circumstances can he acquire prescriptive title?

Civil Procedure Code, section 187 *— Judgment — Reasons for decision necessary — Need to assess the oral evidence.*

Held: (1) That the question whether a co-owner has lost his rights as a result of prescriptive possession by another is a question of fact depending on the facts of each case.

(2) That where a stranger having purchased the entirety of a co-owned land possesses it in a manner inconsistent with the rights of any other co-owner, he can acquire prescriptive title to the land by such possession for a period of over ten years.

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COURT OF CRIMINAL APPEAL DECISIONS

Court of Criminal Appeal — Conspiracy to murder — Murder — Abetment of Murder — Arsenic poisoning — Circumstantial evidence only — Duty of prosecution to exclude alternate hypothesis — Failure to call witness to exclude such evidence of witness — Evidence of experts — Relevancy of finding of arsenic in dispensary of doctor — Experts not competent to express opinions without expert knowledge — Duty of trial Judge to direct jury to disregard opinions — Misdirection re expert evidence— Conjectural evidence

re the arsenic found on alleged plate of deceased — Misdirection on this point — Duty of prosecution to prove identity of productions by direct evidence and not by inference — Non-direction re items of subsequent conduct of accused —

Meaning of "police officer" in section 122(3) *Criminal Procedure Code —Use of statements made under section* 122, *Criminal Procedure Code —Duty to direct, case against each accused to be considered separately — Amendment of indictment — Misdirection and non-direction re unsworn statement from the dock — Exclusion of suicide, duty of prosecution and misdirection — Verdict unreasonable and insupportable by evidence — Case to go before jury — Criminal Procedure Code sections* 121, 122, 172, 173, 176 *and* 234.

The three accused-appellants were charged on Count 1 in the indictment as amended with having conspired to murder the wife of the 1st accused-appellant between the 10th of March, 1967 and the 9th of April, 1967. On Count 2 the 3rd accused was charged with murder and on Count 3 the 1st accused was charged with abetting the 3rd accused to commit murder.

There was no doubt that the deceased had died of arsenic poisoning. The 2nd accused was the mother-in-law of the deceased. The 3rd accused was a cook in the household.

The appellants were convicted on all three Counts by the unanimous verdict of the Jury.

The case rested entirely on circumstantial evidence. There was strong evidence of motive against the 1st accused, including a pending action for divorce which the deceased was determined to resist. The 2nd accused was shown to have a strong dislike for the deceased.

The case for the prosecution which depended on the evidence of the deceased's daughter A was that the 1st and 2nd accused had used the 3rd accused to serve some '*biling achcharu*' (a pickle) which contained poison on to the deceased's plate that afternoon.

There was also another C who had prepared food and served food on to the deceased's plate that afternoon. C was not called as a witness. There was no evidence either way regarding motive on the part of C. There was no evidence of motive against the 3rd accused.

The evidence did not positively exclude the possibility that the poison may have been in one of the foods that C had cooked. There was no evidence whether or not all the different kinds of vegetables that had been dished by C to the deceased's plate had also been sent to the table for the others.

Held: (1) that when the evidence led for the prosecution lends itself to a reasonable inference that either of two persons could have committed an act, then the burden is on the prosecution to exclude effectively one of them if it seeks to attach responsibility for that act to the other and this can often be achieved only by calling as a witness the person sought to be excluded as a witness.

(2) that (*a*) C was not a witness available to the defence on any realistic basis and the prosecutor ought to have called her.

(*b*) The failure to call her resulted in a serious deficiency in the proof of the prosectuion case.

(*c*) When the trial judge directed the jury that if the defence wanted to question C, they could have called her, there was grave danger of his being misunderstood by the Jury in regard to the burden of proof.

(*d*) The prosecution had failed to exclude the reasonably possible inference that the poison may have been in the food served by C.

(3) That (*a*) The failure of the trial Judge to give any specific direction to the Jury relating to the legal framework within which previous statements of A to the coroner and to the Magistrate marked Y1 and Y3 could be used, might well have induced the Jury to think that, however unreliable A's evidence in Court might be, her statements Y1 and Y3 constituted substantive evidence on which they could act.

(*b*) There was accordingly a non-direction on this point which was vital in the circumstances of the case.

(4) That where the learned trial Judge told the Jury that if they were satisfied that there was arsenic on the plate and the poison had been introduced through the food, then there was a killer at work in the house. He then invited the Jury to consider how a killer who desired to poison a single member of a large household would work and he placed before them three theories, such an approach to A's credibility was fraught with danger, inasmuch as the jury when faced with the difficulty of choosing one hypothesis in preference to another would be too strongly inclined to follow the one recommended by the trial Judge, despite the strongest direction that they were free to ignore it and act on their own.

(5) That the trial Judge rejected the first two theories and stated that if the Jury accepted the third theory as correct, then A's evidence in court must be true, and that A's evidence was inherently credible.

That the strong suggestion to the Jury to test A's evidence on the basis of the third theory being the correct one was a misdirection.

(6) That the trial Judge also directed the Jury as follows: "What has happened in the case? This somebody who wanted to poison the deceased has got it done in this way. That is the fact ..... but it has happened in this way. It seems to me if it has happened this way, it was planned this way."

(*a*) that it was very likely that the Jury accepted A's version in court only because it fitted the third theory, and believed that on that evidence the presence of arsenic in the food served by the third accused was not merely a possible inference but that it was an established fact.

(*b*) that there was a misdirection in the passage quoted above.

(7) The 1st accused-appellant, a doctor, had in his dispensary in a locked cupboard, the key of which was with the dispenser, two bottles of Liquo Arsenicalis, a compound of arsenic known as potassium arsenite, as distinct from sodium arsenite and white arsenic.

The opinions of two "experts" Dr. F., Professor of Forensic Medicine, and Mr. S., an Assistant Government Analyst, were led by the prosecution in an effort to prove that the Potassium found in the stomach of the deceased was in excess of the quantity that one should find in the stomach of a "normal" person, and that therefore the inference that Potassium arsenite was used could reasonably be drawn.

The two witnesses depended for their opinions on an examination of the Potassium content in the stomachs of seven deceased persons whose antecedents were unknown. Both witnesses agreed that they would not contribute an article to any scientific, paper commending any inference on the basis of the experiment made with the seven stomachs.

Held: (*a*) That the finding of arsenic in the dispensary of a doctor is not in itself an incriminating circumstance, though it is a circumstance, to be taken into considertaion, as there was the opportunity for using it;

(*b*) That the expert evidence led in this case did not amount to a scientific method of ascertaining any fact and would have tended to mislead the jury and its effect would have been damaging and prejudicial to the 1st accused-appellant;

(*c*) That such witnesses should not be permitted to express opinions on any matters in a field where they had no expert knowledge, and if such opinions had been expressed before it was found that it was outside their sphere of specialised knowledge, then the trial judge should give a clear direction to the jury categorically to disregard those opinions altogether;

(*d*) That in this case the opinion was commended to the jury and the jury was invited to consider whether they could not agree with the opinion and to form an opinion themselves on criteria which were not scientific; that it was dangerous for the jury to take figures which the experts themselves considered unworthy of recommendation as a scientific fact into account in arriving at any conclusion;

(*e*) That the direction to the jury to infer from the evidence of the two witnesses that the use of Potassium Arsenic was more probable was a misdirection and it was impossible to say that the jury was not thereby vitally influenced to draw the conclusion that it was the 1st accused-appellant who supplied the arsenic.

(8) (*a*) That evidence based purely on conjecture regarding the arsenic found on the plate from which the deceased was alleged to have eaten the last meal had been placed before the jury and the fact that there was no evidence at all as to who washed the plate on that day or placed it on the rack or whether it was placed on the rack before the deceased became sick had been overlooked and all these facts had been assumed:

(*b*) That the direction to the jury to consider the possibility of the plate being contaminated by some means other than the food served on it *only* on the basis that the deceased had washed her plate and placed it on the rack and that she had done so before she became sick was a misdirection as it was unsupported by the evidence.

(9) (*a*) That the prosecution had to prove beyond reasonable doubt that the plate on which the anlayst found a trace of arsenic was the plate on which the deceased had her last meal;

(*b*) That in this case the plate produced (P7) by the Analyst was not shown either to the Inspector who took charge of it or to the witness A who handed it to him and its identity was left to be inferred; that that identity of productions ought to be accurately proved by the direct evidence which is available and not by way of inference;

(*c*) That in this case the evidence placed before the jury in regard to the identity of the plate was inconclusive.

(10) That in regard to some of the items of subsequent conduct of the 1st accused-appellant on which the prosecution relied, the jury ought to have been directed that on a proper evaluation of the evidence no inference at all could have been drawn against the 1st accused-appellant from his subsequent remarks or conduct.

(11) (*a*) That the words "police officer" referred to in section 122(3) of the Criminal Procedure Code should not be given a narrow interpretation as meaning an officer incharge of a police station or someone deputed by him as set out in section 121(1);

(*b*) That a statement made in the course of an inquiry under section 122 of the Criminal Procedure Code cannot be used to form the basis for an inference that the conduct of the person who made it was suspicious;

(*c*) That all the evidence that was thereafter led to establish that such statement was untrue was inadmissible and its reception would have undoubtedly prejudiced the jury.

(12) That the direction to the jury regarding the trip undertaken by the 1st accused-appellant on the previous night was inadequate inasmuch as it did not refer to the evidence of a witness Dr. G. and the statement of the 1st accused-appellant from the dock.

(13) That there was not sufficient evidence against the 2nd accused-appellant from which a reasonable jury could draw an inference of guilt against her.

(14) That the failure to direct the jury that each accused was entitled to have the case against him or her considered separately from the others had caused prejudice to the others.

(15) (*a*) That before a charge is amended particularly at a late stage the defence should be given an opportunity of makng their submissions on the point;

(*b*) That thereafter if the amendment is made, before the Judge decides whether or not to proceed with the trial immediately under section 172 or 173 of the Code, the defence should be consulted again;

(*c*) But that in the present case having regard to the nature of the amendment (the 2nd accused-appellant was dropped on the second and third charges) and as no application had been made by either side under section 176 of the Code, no prejudice had been caused to the appellants on this ground.

(16) (i) That an unsworn statement from the dock by an accused person must be looked upon as *evidence* subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed, but the jury must also be directed that:

(*a*) if they believe the unsworn statement, it must be acted upon;

(*b*) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed; and

(*c*) it should not be used against another accused.

(ii) That in the present case, although the trial judge referred to the statement earlier and stated that the prosecution could make use of it, he made no reference to it until the conclusion of his charge when he told the jury that this statement was not evidence, but that it could be taken into account as a circumstance. It was likely that the jury thought that they were not called upon to pay any attention to that statement.

(17) (*a*) That the prosecution had to exclude in this case the possibility of suicide, and whether they had done so or not was a question of fact which the jury had to decide;

(*b*) That it was not a question that could be decided by an admission or a concession by one or more of the Counsel appearing in the case;

(*c*) That the earlier direction on this matter to the jury constituted a clear misdirection and that it was impossible to say that the later direction had removed the effect of the earlier, and it was most probable that the jury gave no consideration at all to the possibility of suicide.

(18) That quite apart from misdirections the verdict of the jury was unreasonable, and in any event, could not be supported having regard to the evidence.

(19) (by a majority of the court) That the trial judge was right in not giving a direction to the jury under section 234(1) of the Criminal Procedure Code to acquit the accused at the end of the prosecution case.

(20) That the material placed before the jury fell far short of evidence on which a reasonable jury could have concluded that the only rational inference that could have been drawn was one of guilt.

Court of Criminal Appeal — Murder and attempted murder — Application by defence to cross-examine defence witness — Refusal incorrect — Words used in unusual sense — Meaning must be left to the jury — Possibility of lesser verdicts ought to have been left to the jury — Defence suggestion that appellant was not the assailant — Direction regarding failure of appellant to explain — Misdirection — When explanation necessary — Strong expressions of opinions by judge on demeanour and credibility and unfair cross-examination — Cumulative effect amounting to removal of questions of fact from jury — Evidence Ordinance, sections 154 and 155 — Criminal Procedure Code, section 245(b).

The appellant was convicted of the murder of G and the attempted murder of G's wife, K. who was also the only witness to the transaction for the prosecution. She stated that when bathing at the stream she heard her husband's cry and ran in the direction of the compound of the line room in which they lived and saw the appellant dealing two blows on him with an iron pipe. The appellant also attacked her after dealing another blow on the deceased. She saw a tapping knife in his waist. She had fallen down unconscious upon being attacked.

Another witness, S. stated that he saw the appellant coming in the direction of the Superintendent's bungalow having a tapping knife in his hand. When he questioned him why he was running the appellant stated, "One is finished, there is doubt about the other."

The defence suggested to K. that she had a lover called K.D.S. and it was he who was responsible for the injuries on the deceased and K. and that she was giving false evidence to exonerate her lover and implicate the accused.

(1) In support of this suggestion, the defence sought to place evidence before the jury that when K was taken away from the scene she had said that she knew nothing. This evidence was sought to be led through a defence witness C who had stated in the Magistrate's Court that when he arrived on the scene he heard K. say that she did not know what had happened when she was questioned by one L.A defence application to put this to C. under sections 154 and 155 of the Evidence Ordinance was rejected on the ground that the trial judge could not see any substance in the submissions made.

Held: that the premature rejection of the application was wrong inasmuch as it was a proper application under section 154.

(2) There was only one fatal injury. The prosecution case was that the appellant had used two weapons on the deceased. K only saw the iron pipe being used. It was not clear in what circumstances the two weapons were used.

The trial Judge appeared to have been considerably influenced by the evidence of S as to the words uttered by the appellant after the transaction was over.

Held: That (*a*) these words may have indicated that the appellant was giving effect to his own observations of the injuries caused to the deceased and K by another;

(*b*) it was therefore a misdirection to tell the jury that the "only inference to be drawn from the words which the appellant used was the set purpose of finishing the deceased and K";

(*c*) it was the duty of the trial judge to place the alternative construction of the words before the jury and under section 245(b) of the Criminal Procedure Code it was the duty of the jury to determine the meaning of words used in an unusual sense;

(*d*) having regard to the above observations and the fact that the deceased had only one fatal injury the trial judge ought not to have withdrawn from the purview of the jury the possibility of a lesser verdict;

(*e*) considering the nature of the injuries on K, it was incumbent on the trial judge to direct the jury to consider the possibility of a lesser verdict on the charge of attempted murder as well.

(3) The defence suggested to K that the appellant was not the assailant and had arrived on the scene to intervene in the quarrel between K.D.S. and the deceased. The trial Judge asked the jury why, if these were matters which he put as suggestions to the Crown, the appellant did not enter the witness box and offer his evidence. He added that it was because he was convinced that the evidence of fact to support this suggestion would have operated against him.

Held: That (*a*) there is no obligation on the intervenient in a quarrel between two persons to give an explanation how the participants received their injuries;

(*b*) the direction of the trial judge almost suggested that it was incumbent on the appellant to prove how the deceased and K came by their injuries;

(*c*) comment by a trial judge on the failure of an accused person to give evidence should be confined to those cases in which there are special circumstances which the accused only can explain and which therefore call for an explanation;

(*d*) in this case there were no such special circumstances.

(4) **Held further:** That (*a*) the strong views expressed by the trial judge regarding questions of fact virtually deprived the jury of an opportunity to arrive at an independent view of the facts in spite of the general direction that all questions of fact were for the jury;

(*b*) it is undesirable for a trial judge to give expression in strong language to his personal views on the question of demeanour;

(*c*) the expressions of the judge in regard to the credibility of the witness K, the strong views of the judge unsupported by evidence that the defence sought unfairly to besmirch her character, the commendation of S's evidence as being consistent only with a murderous intention and the absence of a direction that it might be equivalent and equally consistent with the defence suggestion that the appellant was not the assailant, had the cumulative effect of removing from the consideration of the jury what were essentially questions of fact for their determination.

Court of Criminal Appeal — Comment by trial Judge in charge to Jury on accused's failure to give evidence — Scope of trial Judge's discretion to so comment — Proper approach to question — Can inference that such evidence would have been adverse be drawn — Applicability of Evidence Ordinance, section 114(f).

The accused in this case did not give evidence but called as his witness his sister who gave evidence of an *alibi*. The learned trial Judge in his charge to the Jury commented on the accused's failure to give evidence and also said (i) that "the accused had sat dumb in the dock, (ii) that he had not had "the manly courage" to give evidence but had got his sister to substantiate his defence. He further invited the Jury to infer that he was withholding evidence as that evidence if led "would be adverse to his case."

Held: (1) That the circumstances of the case precluded the inference that the evidence which the accused withheld would have been adverse to his case. He had through his sister, led evidence of an *alibi* and it would be inapt to infer that he kept out of the witness box because the assertion of an *alibi* was inconsistent with the truth.

(2) That though it is a matter for the Judge's discretion whether he should comment on the fact that an accused has not given evidence, he should exercise great care in so doing.

(3) That in the present case, the terms in which the directions of the learned Judge on this point were made and his faulty formulation of the inference that might be drawn from the failure of the accused to give evidence may well have prevented the Jury giving due consideration to the evidence of *alibi* led by the defence and from giving proper effect to it.

(4) That however, as there was in fact evidence upon which a Jury properly directed might reasonably have convicted, a re-trial should be ordered.

Court of Criminal Appeal — Several accused indicted on counts of unlawful assembly, murder and grievous hurt — Towards close of prosecution counsel for defence stating in the presence of the Jury that he advised his client the 3rd accused to plead guilty of culpable homicide not amounting to murder — Trial proceeding without such plea — Conviction of only 3rd accused despite careful direction by trial Judge to Jury to ignore counsel's statement regarding 3rd accused's guilt — Whether re-trial should be ordered.

Five accused were tried on counts of unlawful assembly, murder and grievous hurt committed in the course of the same transaction. Towards the close of the prosecution case, following a remark by the learned trial Judge that there was no evidence of unlawful assembly, counsel for the defence made a statement in the presence of the Jury that he advised his client, the 3rd accused, to plead guilty to the offence of culpable homicide not amounting to murder and added that it had been his position from the beginning.

The trial was adjourned thereafter and on the next day, without the 3rd accused pleading guilty, the trial proceeded. The 3rd accused gave evidence denying the charges and the 5th accused admitted from the dock that he took responsibility for the assault which resulted in the death of the deceased.

Notwithstanding a careful direction by the trial Judge that the Jury should ignore the defence counsel's statement as to the plea of guilty of the 3rd accused, they found the 3rd accused guilty.

Held: That in the circumstances (*a*) it was difficult to exclude the possibility that in reaching that verdict the Jury did take into account Counsel's statement that his position all the time had been that the 3rd accused had been guilty of the offence of culpable homicide.

(*b*) it was not a proper case to exercise the discretion to order a new trial.

Evidence Ordinance, section 27 — *Portion of statement made by accused led in evidence — Trial by Jury — Duty of trial Judge to explain to jury effect of admission of such statement — Proper inference to be drawn — Failure to explain is non-direction amounting to a misdirection.*

Held: (1) That when part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more.

(2) That the failure to explain to the Jury the inference which they may properly draw from a fact discovered in consequence of a statement made by an accused person, is a non-direction amounting to a mis-direction.

Court of Criminal Appeal — Murder — Prosecution version conflicting with defence version — Non-direction on circumstances supporting defence version — Duty of trial judge to refer to important and significant points — Grave and sudden provocation — Verdict of culpable homicide not amounting to murder substituted.

The appelant was convicted of the murder of one R. The prosecution version was that the appellant caused the fatal injuries on the deceased with a club. The deceased had not only club injuries but also an incised injury on her face which according to the doctor could have been caused by a sharp cutting instrument.

The appellant's version was that the deceased approached him with a katty and tried to assault him whereupon he hit her several times with the fence stick with which he was making holes to fix a fence. The incised injury supported his version that the deceased had a katty in her hand and cut herself with it while struggling with the appellant. The prosecution version, unlike the defence version, did not account for the reason why the assault took place or for the incised injury. A katty was found near the body.

Held: (1) That although a trial judge is not required to mention to the jury every item of evidence which might favour the defence, yet where as in this case the only matter in dispute at a trial is whether a mitigatory defence is made out, it is the duty of the trial judge to direct the jury to consider important and significant points which can serve to test the credibility of prosecution evidence.

(2) That in this case the trial judge had failed to direct the jury on the matters which afforded some independant corroboration of the appellant's version.

(3) That the Court could not say that the jury in this case would have rejected the defence of grave and sudden provocation if they had received an adequate direction as to the significance of the evidence referred to above.

COURTS ORDINANCE

Courts Ordinance (*Cap.* 6), *section* 71 — *Jurisdiction of District Courts — Failure to plead lack of jurisdiction — Requirement that such plea be taken in first instance — Can such plea be taken thereafter by way of amendment of pleadings.*

Waiver — Jurisdiction — Distinction between patent and latent want of jurisdiction — Can right to plead latent want of jurisdiction be waived by conduct of party.

Held: (1) That where a defendant in an action in the District Court pleads without taking the plea that such Court has no jurisdiction to hear the action, section 71 of the Courts Ordinance precludes him from objecting to the jurisdiction of the Court thereafter. Such Court must then be taken and held to have jurisdiction over such proceedings.

(2) That a defendant who has so failed to plead to jurisdiction in the first instance, cannot by reason of the bar imposed by section 71 be permitted to take such plea even by way of amendment of his answer. The existence or absence of prejudice is rendered irrelevant by the express provision found in section 71.

(3) That the present case, not being one of total or absolute want of jurisdiction, the conduct of the defendant also precluded him from raising the question in an amended answer.

CRIMINAL PROCEDURE CODE

Sections 121, 122, 172, 173, 176 *and* 234.

Sections 347 *and* 357 — *Application to review order of discharge of accused after non-summary proceed-*

ings — Revisionary powers of the Supreme Court — Powers and functions of Attorney-General in respect of non-summary proceedings.

Held: (1) That the Supreme Court has undoubted powers to revise any order made by a Magistrate in its discretion, including an order of discharge of accused persons after non-summary proceedings.

(2) That these powers must only be exercised, if it will be exercised at all, in the most extraordinary cases where a positive miscarriage of jutsice would otherwise result.

(3) That in view of the Attorney-General's powers and functions under sections 388 and 391 of the Criminal Procedure Code, it ought never to be necessary for the Supreme Court to be called upon to exercise its powers in respect of matters vested in his discretion.

Section 339 — *Is Sunday a dies non — Holidays Act No.* 17 *of* 1965.

Section 245(*b*) —

DEBT CONCILIATION ORDINANCE

Debt Conciliation Ordinance (*Cap.* 81), *Sections* 14(1), 17(*e*), 24(2)(*c*), 26(1), 56 *and* 64 — *Meaning of 'Debtor' in Ordinance as amended by Act No.* 5 *of* 1959 — *Action on pormissory note — Order staying proceedings on the ground that court had no jurisdiction as the matter was pending before Debt Conciliation Board — Argument in appeal that matter pending before Board was a separate mortgage debt on an application under Section* 14(1) — *Can a debtor make an application under Section* 14(1) *for settlement of an unsecured debt*: — *Circumstances in which unsecured debts can be reviewed by the Board.*

The plaintiff sued defendant on a promissory note. The learned District Judge made order staying proceedings as he took the view that the matter was pending before the Debt Conciliation Board and there fore under section 56 of the Debt Conciliation Ordinance he had no jurisdiction.

In appeal it was contended on behalf of the plaintiff that the matter pending before the Board was a debt in respect of a mortgage bond on an application made under Section 14(1) of the said Ordinance. The disclosure of this unsecured debt as a particular required by Section 17(e) did not have the effect of making it "a matter pending before the Board." Hence the learned District Judge was wrong in taking the view he did.

Held: (1) That the learned District Judge erred in the view he had taken in dismissing this action.

(2) That a debtor could not under Section 14(1) of the Ordinance make an application to the Board for the settlement of an unsecured debt owed to a secured creditor.

(3) That unsecured debts can be reviewed by the Board only in certain circumstances, e.g. under section 24(2)(c) and section 26(1).

DEEDS

Deed — Construction of — Conditional transfer by co-owners — Repurchase of property by these vendors — Second conditional transfer by them — Retransfer again without specifying shares — Can there be a change in the extent of their rights?

Held: That when the property which is conveyed on a conditional transfer is purchased back by the vendors, the deed in their favour must be construed to mean that the property was returned to them in the same proportions in which they held at the time of the conditional transfer, unless there is something to indicate to the contrary.

DISCOVERY

Discovery of Documents — On what grounds can such application be resisted — Whether Court has right to inspect documents.

DISTRICT COURTS

Jurisdiction —Failure to plead lack of jurisdiction— Requirement that such plea be taken in first instance — Can such plea be taken thereafter by way of amendment of pleadings?

DIVORCE

Divorce — Malicious desertion — Uncontradicted evidence of plaintiff that defendant committed adultery in 1949 *and thereafter lived with that man — Now, child born by him — Also that during long period of plaintiff's illness a woman now, his mistress with* 3 *children by him looked after him, — Delay in bringing action explained — Discretion to withhold granting divorce — Should it be exercised in plaintiff's favour? — Civil Procedure Code, Section* 602.

This is an appeal from an order dismissing an action for divorce filed by the husband against his wife on the ground of malicious desertion. According to the uncontradicted evidence of the plaintiff parties were married on 7/7/1943; the defendant committed adultery in 1949 and thereafter continued to live with that man, by whom she has a child; the delay in filing this action was due to illness, several transfers to various places in the course of his employment,

to lack of funds, inability to ascertain whereabouts of the defendant; he was disabled for about 1 1/2 years, during which period another woman looked after him and by her he has now three children; he filed this case as there was no future for his children.

Held: (1) That, in the circumstances it is apparent that the marriage has completely broken down and the discretion vested in the court under the proviso to section 602 of the Civil Procedure Code should be exercised in favour of the plaintiff-appellant.

(2) That in the interests of the children, the woman who lives with him and also in the interests of the defendant and her child, a decree *nisi* should be entered granting the plaintiff a divorce from his wife.

DOCUMENTS

Inspection of — Privilege — Grounds upon which inspection may be resisted.

EVIDENCE

Of experts.

Unsworn statement from the dock by accused — Weight to be attached to.

Inspection of documents — Privilege — Grounds upon which inspection may be resisted.

EVIDENCE ORDINANCE

Section 27.

Section 131

Sections 154 *and* 155.

FIDEICOMMISSUM

Fideicommissum—Gift of 1/3 *of share of land to C subject to condition if C dies without children and without alienating it, the share should devolve on Donor's two sons, W. and P. by* 3rd *wife Porlentina, subject to donee's wife's S's life-interest — Gift of balance* 2/3 *share to said* 3rd *wife subject to fidiecommissum in favour of W and P — Deaths of C in* 1928 *issueless, of S in* 1928 *and of W and P intestate and issueless in* 1925 *— Gift by* 3rd *wife, Porlentina by P4 of* 1937 *to plaintiff and another — Could Porlentina have transferred rights to the land as the conditions of the fideicommissum were still pending — Could W and P have transmitted their expectations of the fideicommissum as they predeceased the donee?*

R the original owner of certain lands was married thrice. By his 1st wife he had a son C. to whom he gifted by P1 of 1919, 1/3 share of the land subject to the condition that if C died without children and without alienating his share, his wife S should during her life-time possess it without selling mortgaging or alienating it and on her death the said share would devolve on R's two sons by 3rd wife Porlentina, viz. W & P. The balance 2/3 share was gifted to Porlentina, viz (3rd wife) subject to a fideicommissum in favour of her two children, the said W & P.

C died issueless in 1928, S (his wife) died in 1952 and W & P died in 1925 intestate and issueless. Porlentina by deed No. 3205 of 1937 (P4) gifted the said lands to V and the plaintiff. V devised his 1/2 share by last will to his son subject to life interest of the plaintiff.

Plaintiff instituted action for declaration of title to 1/2 share and for declaration that she was entitled to possess the balance 1/2 share against the 1st and 2nd defendants (husband and wife) who claimed rights from one of the four children of R's second marriage stating that when W & P predeceased the fiduciaries in the said gift P1, the *fideicommissum* failed and the land reverted to R (original owner) and therefore the 2nd defendant was entitled to possess.

The learned District Judge gave judgment for the plaintiff. In appeal it was contended *inter alia* on behalf of the defendants appellants.

(*a*) that W & P were not fideicommissaries who could transmit their expectations of the *fideicommissum* as they had predeceased C and the conditions were still pending.

(*b*) that the plaintiff has no claim as the deed by Porlentina in favour of plaintiff's predecessor was executed in 1937 before title to the property had vested in Porlentina as the conditions of the *fideicommisum* were still pending and that the principle of *rei traditae et venditae* would not operate here.

(*c*) that upon a gift of the property itself the spes or expectation of *fideicommissum* would not pass to the donee.

Held: (1) That W & P were *fideicommissaries* notwithstanding the fact that conditions on which they were to be vested with rights under the *fideicimmissum* were still pending, as the *fideicommissum* had been created by deed and not by last will.

(2) That the words in P4, the gift by Porlentina viz. "together with all the rights title and interest whatsoever therein and thereto of me the aforesaid donor" are sufficient to pass the expectation of the *fideicommissum* to the donee.

FOOD AND DRUGS ACT

Sections 56(1) *and* 57 — *Sale of outdated drug—Purchase after scrutinising labels by purchaser — Can sale be said to be one to the prejudice of purchaser.*

HOLIDAYS ACT NO. 17 OF 1965

Holidays Act, No. 17 *of* 1965, *section* 2(*a*) — *Criminal Procedure Code, section* 339 — *Inconsistency between the two statutes regarding computation of time within which an appeal must be preferred — What is a dies non? — Are Sundays to be regarded as dies non since the Holidays Act?*

Held: That with the enactment of section 2(a) of the Holidays Act No. 17 of 1965, the provision in section 339 of the Criminal Procedure Code for the exclusion of Sundays in computing time within which an appeal must be preferred ceased to be law.

HOUSING & TOWN IMPROVEMENT ORDINANCE

Housing and Town Improvement Ordinance, (*Cap.* 268) *Sections* 5 *and* 13 — *Conviction for erecting boundary wall without permission of Chairman of Urban Council — Evidence indicating erecting or reparing old one — Reference by prosecution witness to joining new wall to old wall — No sketch or plan — Unsatisfactory nature of prosecution evidence.*

Continuing offence — Need to prove it again.

The accused was convicted of constructing a boundary wall without the approval of the Chairman of the Urban Council. There was evidence to the effect that the accused was repairing or re-erecting an old one. The evidence of the prosecution witnesses too referred to "joining the new wall to an old wall and to the existence of an old boundary wall on the northern side, without any indication that it was within or outside the premises. There was no sketch or plan to support the charge."

Held: (1) That in view of the unsatisfactory nature of the evidence the conviction should be set aside.

(2) That section 13 of the Housing & Town Improvement Ordinance should not be used in order to impose a fine on a person in anticipation of his continuing the offence.

(3) That the continuing of an offence after conviction is itself an offence and should be proved again before a person is held liable to pay the daily fine referred to in the Section.

INCOME TAX ORDINANCE

Income Tax Ordinance — Relief under Section 18(1)(e) — *Support of dependants by assessee in educational establishments — Dependants living away from the educational establishments — Is assessee entitled to relief — Construction of the words "maintained ... in ... an educational establishment."*

The assessee claimed relief under section 18(1)(e) of the Income Tax Ordinance in respect of three dependants (two brothers and a sister) whom he supported during the relevant years of assessment as students in different educational institutions in Colombo while residing at addresses outside such institutions. The assessee was a public servant who during the relevant period held office under the Government at Puttalam and Galle.

Section 18(1)(e) aforesaid offers relief in respect of two categories of persons, namely, those who throughout the year preceding the year of assessment either (*a*) lived with the assessee and were maintained by him or (*b*) were maintained by him in any sanatorium asylum or educational establishment. The category relevant to this case is (b).

On a case stated for the opinion of the Supreme Court under section 78(1) of the Income Tax Ordinance the Crown contended that inasmuch as the said dependants resided at places away from the respective institutions where they received their education they did not satisfy the condition of being "maintained ... in ... an educational establishment."

Held: (1) That the word "maintained" in section 18(1)(e) of the Income Tax Ordinance is used in relation to educational establishments in the sense of being supported therein rather than in the sense of living and being supported therein.

(2) That therefore, the assessee was qualified for the relief asked for.

INDUSTRIAL DISPUTES ACT

Labour Tribunals — Duty of Tribunal to assess all evidence led before it — Erroneous assumption that no evidence led on certain point — Whether question of law — No just and equitable order possible — Industrial disputes Act, section 36(4).

Held: (1) That where a Labour Tribunal has erroneously taken the view that there was no evidence at all on a certain point when in fact there was, this would amount to a question of law.

(2) That an order based on such an erroneous view was not a just and equitable order as the

evidence that has been led has to be assessed. Such order should, therefore, not be permitted to stand.

CEYLON STEEL CORPORATION *v.* THE NATIONAL EMPLOYEES UNION 64

Labour Tribunals — Duty to act judicially — Ratio decidendi in United Engineering Workers' Union v. Devanayagam — Need for proper findings of fact before an order that is just and equitable can be made — Such Tribunal precluded from travelling outside the evidence led before it — Industrial Disputes Act, section 31C and rules 20, 21, 25 of the Regulations — Appeal — Question of law — Findings of fact unsupported by evidence — Whether error of law — Duty to consider admissions of applicant proved before Tribunal — Whether strict proof of documents required in inquiry before Labour Tribunal.

Held: (1) That where in an inquiry before the Labour Tribunal, the employer (respondent-appellant) had proved admissions of the charges against him by the workman (applicant-respondent) whose services had been terminated, such admissions constituted evidence before the Tribunal which it was under a duty to consider. In the absence of any evidence by the workman to the contrary, the employer was entitled to rely on such evidence.

(2) That a Labour Tribunal is under a duty to act judicially. In arriving at findings of fact such a Tribunal is as closely bound to the evidence adduced before it and completely dependent thereon as any Court of law. This is a necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by statute of making such orders as they consider to be just and equitable.

(3) That this duty to act judicially becomes clear when one considers that the Labour Tribunals is required to give both parties a full opportunity of stating their cases, a notice of the full statement of the opposite party and a notice of time and place of hearing and inasmuch as the Tribunals is impressed with the duty to hear evidence and its orders are made subject to a right of appeal to the Supreme Court on matters of law.

CEYLON TRANSPORT BOARD *v.* GUNASINGHE .. 75

Industrial Disputes Act, section 49 — Coconut Research Ordinance (Cap. 440) — Employee of Coconut Research Board seeking relief under Industrial Disputes Act — Contention of Board that it is entitled to claim privileges available to Crown employees on the basis that it performed functions and duties traditionally performed by the Crown or the Government — Is such contention valid — Interpretation Ordinance (Cap. 2) section 3.

In a dispute regarding the right of an employee of the Coconut Research Board to seek relief under the provisions of the Industrial Disputes Act, it was contended on behalf of the Board that as it performed functions and duties traditionally performed by the Crown or the Government and as such was in *consimili casu* with a servant or agent of the Crown and therefore entitled to the privileges claimed by the Crown or Government under section 49 of the Industrial Disputes Act. Section 49 made the other provisions of the Act inapplicable to the Crown or Government in its capacity as employer or to a workman in the employ of the Crown or Government.

Held: That the contention must fail and that the Board would be amenable to the jurisdiction of a Labour Tribunal in terms of the Industrial Act.

COCONUT RESEARCH BOARD *v.* SUBRAMANIAM .. 100

JURISDICTION

See under—COURTS ORDINANCE

KANDYAN LAW

Kandyan Law — Revocation of gift of immovable property — Intention as expressed in the deed of gift — Kandyan Law Declaration and Amendment Ordinance (1939), *section* 4(1).

A deed of gift was executed prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance, 1939, the donor and donee both being subject to Kandyan Law.

The deed contained *inter alia*, the terms that the donors **"do hereby transfer, set over and assure by way of gift unto the said donee, his heirs executors administrators and assigns the said several premises .....and all the estate, right title and interest claim and demand whatsoever of us the said donors into upon or out of the said premises hereby gifted and assigned.....unto the said donee his aforewritten for ever."**

The donor thereafter revoked the donation by a subsequent deed. The right of the donor to revoke the donation was questioned.

Held: (1) That as the deed of gift was executed prior to the enactment of the Kandyan Law Declaration Amendement Ordinance, section 4(1) of the Ordinance enabled the donation to be revoked in so far as such revocation did not prejudice to a greater extent than the right which would have accrued to the donee, had the donor purported to exercise his right of revocation before the enactment of the Ordinance. Hence the Kandyan law prevailing prior to the enactment of the Ordinance would be applicable in determining the donor's ability to revoke such a donation.

(2) That where all the provisions of a deed taken together show that there has been an effective renunciation of the donor's rights, the donation is irrevocable. The formula "*the donor shall possess forever*" stated by itself and without more, does not constitute an effective renunciation of the donor's rights to revoke a gift. The words "for ever" in such a context merely manifest an intention to rest the donee with the full dominion.

KEKULANDARA *v.* MOLAGODA 69

KANDYAN LAW DECLARATION AND AMENDMENT ORDINANCE 1939

See Under KANDYAN LAW.

LABOUR TRIBUNALS

See under INDUSTRIAL DISPUTES ACT

LANDLORD AND TENANT

Landlord and Tenant — Sub-letting of premises subject to Rent Restriction Act — Premises owned by Crown — Written agreement that tenant shall not sub-let — Statutory right of landlord under National Housing Act to cancel tenancy and recover possession on breach of this provision — Such right not exercised — Can the tenant sue sub-tenant for ejectment — Privity of contract between tenant and his sub-tenant — Sub-tenant not protected under Rent Restriction Act where premises belong to the Crown.

Pleadings — Plea of estoppel not taken — Can issue be raised at trial.

The premises in question were governed by the provisions of the Rent Restriction Act. The plaintiff-respondent took the premises on rent from its owner, the Department of National Housing, on a written agreement which provided *inter alia*, that the tenant shall not let or sub-let any part of the premises. Breach of this provision gave the landlord a right to cancel the tenancy and recover possession of the premises by virtue of the provisions contained in Part V of the National Housing Act. The respondent sub-let the premises to one P. S. Perera who in turn sub-let a portion of it to the appellant. The Commissioner of National Housing did not choose to cancel the tenancy of the respondent, but brought an action to eject the sub-tenant — the appellant. In that action it was held that the provisions of the National Housing Act did not empower the Commissioner to eject the appellant. The respondent then filed the present action for his ejectment.

Held: (1) That the respondent's action to eject the appellant was properly constituted, although under the tenancy agreement the landlord of the premises was the Department of National Housing (the Commissioner of National Housing having been held to have no right to eject the appellant).

(2) That the respondent could enter into a valid contract to let the premises to the appellant even though he had no right or title to it nor any authority from the true owner to do so.

(3) That rent receipts produced in evidence showing that the appellant paid rent direct to the respondent and an admission of tenancy in the appellant's answer (although tenancy was later denied in an amended answer) afforded adequate proof of privity of contract between the appellant and respondent.

(4) That it is not open to the appellant, as a sub-tenant, to avail himself of the protection afforded to a tenant under the Rent Restriction Act, in view of the fact that the premises in question belong to the Crown.

(5) That where the plea of estoppel had not been taken in the pleadings no issue may be raised thereon.

NANDIAS SILVA *v.* UNAMBUWA 25

MAINTENANCE

Maintenance Ordinance, Section 2 — Application by wife for maintenance — Magistrate ordering defendant to pay Rs. 75/- monthly — At trial admission by wife that she was in receipt regularly of Rs. 50/- monthly on a consent order as interim maintenance in a pending divorce action between the parties — Was there a neglect or refusal to maintain wife? — Jurisdiction to make such order in the circumstances.

Where a Magistrate made order directing the defendant-appellant to make a monthly payment of Rs. 75/- as maintenance towards his wife — the applicant respondent — while admittedly she was regularly in receipt of a sum of Rs. 50-/ monthly on a consent order made in a pending divorce action between the parties by way of interim maintenance.

Held: (1) That the learned Magistrate had no jurisdiction to entertain the application, as there has been no neglect or refusal to maintain the applicant within the meaning of Section 2 of the Maintenance Ordinance.

(2) That where after a reconciliation was effected between the parties to a maintenance case, they appeared before the Court and stated that they were living together and the learned magistrate made order "I discharge the respondent, the proper order for the Magistrate to have made was one dismissing the application.

DAVID SINGHO *v.* GUNAWATHIE 23

Maintenance Ordinance (Cap. 91) section 20 — Whether payment of a lump sum absolves a father from all liability thereafter to maintain a child — Whether an agreement not to apply for maintenance debars an applicant from obtaining relief under section 2 — Factors relevant to the assessment of the quantum of maintenance.

Held: (1) That the payment of a lump sum of money in lieu of monthly payments and a notarial agreement to the effect that no further sum shall be claimed as maintenance, do not relieve a father of

his obligation to maintain his children, if the sum so agreed upon is manifestly inadequate.

(2) That the quantum of maintenance should be arrived at having regard to the society in which the dependent children have been brought up and the prevailing cost of living.

SELLIAH *v.* SINNAMMAH 27

Maintenance, application for — Absence of applicant on date of inquiry — Dismissal of application — Has Magistrate jurisdiction to re-open proceedings?

Where an application for maintenance in respect of a child is dismissed for default of appearance of the applicant on the date of inquiry.

Held: That, in the absence of any statutory provision to the contrary, it is the imperative duty of a Magistrate to give a hearing to the applicant, if she wishes to show cause and re-open proceedings in a fit case, provided the application to re-open is made within a reasonable time.

SENEVIRATNE *v.* PODI MENIKE 105

MISDIRECTION

See under COURT OF CRIMINAL APPEAL DECISIONS

MUSLIM MARRIAGE & DIVORCE ORDINANCE

Muslim Marriage and Divorce Ordinance, Section 64(1)—Enforcement Order under — Duty of Quazi to hold inquiry after notice to respondent before making order.

Held: That before an enforcement order under Section 64(1) of the Muslim Marriage and Divorce Ordinance issues, a Quasi should notice the respondent and inquire into any objections he may raise.

THAHIR *v.* SHAFI 112

NON-DIRECTION

See under COURT OF CRIMINAL APPEAL DECISIONS

OFFENSIVE WEAPONS ACT No. 18 of 1966

Effect of Section 10 of Act on Section 31 of the Courts Ordinance.

PERERA *v.* THE ATTORNEY-GENERAL 19

PADDY LANDS ACT

Paddy Lands Act — Action for declaration of title and ejectment against cultivator — Plea by defendant that he is protected by provisions of Paddy Lands Act — What defence has to establish— Burden of Proof.

Plaintiff sued his cultivator (defendant) for declaration of title and ejectment in respect of a paddy field and the defendant pleaded that he could not be ejected by reason of the provisions of the Paddy Lands Act.

Held: That the burden lay on the defendant to satisfy the trial Judge that he did not employ hired labour for the work specified in paragraph (b) of the definition of 'cultivator' in Section 63 of the Act, and did not employ hired labour for at least two of the operations of work mentioned in paragraph (b) of the definition viz. for the operation of tending or watching the crop.

DODANWELA *v.* BANDIYA 42

Paddy Lands Act, sections 3 and 63 — Interests of a tenant cultivator — Is he entitled to get his right specified as an encumbrance in a Partition decree? — Partition Act of 1951, section 48.

The defendant, who owned a paddy field in equal shares with his brother the plaintiff was the "tenant cultivator" of the brother's half share.

The plaintiff instituted this action to partition the said field and the question arose as to whether the defendant's right or interest as tenant of the plaintiff's share can be specified in the partition decree as being an encumbrance affecting the share and the lot to be allotted to the plaintiff.

Held: (1) That the interest of a "tenant cultivator" may properly be specified in a partition decree.

(2) That the phrase "or any interest whatsoever howsoever arising" in the definition of "encumbrance" in section 48 of the Partition Act amply confirms this conclusion.

ODIRIS *v.* ANDRAYAS 89

PARTITION

Paddy Lands Act — Interests of tenant cultivator — Is he entitled to get his rights specified in a Partition decree?

ODIRIS *v.* ANDRAYAS 89

PLEADINGS

Plea of estoppel not taken — Can issue be raised at trial.?

PORT CARGO CORPORATION ACT No. 13 of 1958

Port (Cargo) Corporation Act No. 13 of 1958 — Damages, action for, against Port Cargo Corporation — Non-delivery of two cases of sewing machine needles consigned to plaintiff — Allegation of negligence against Corporation — Liability of Corporation limited under section 79 of the Act — Nature of burden of proof on plaintiff — Issue based on alternative cause of action whether Corporation took the cases into custody on express or implied contract — Who is in effective control of goods in Queen's warehouse — Custom's Ordinance, section 69.

The plaintiff sued the defendant, the Port Cargo Corporation established under Act No. 13 of 1958, for damages resulting from the non-delivery of two cases of sewing machine needles consigned to the plaintiff, which arrived at the Port of Colombo on 11.12.62, and according to the prevailing custom, the defendant, through its agents and servants took charge of the cases, landed them on shore and deposited them in a Queen's warehouse. The said cases were found to contain sulphate of ammonia and broken pieces of wood and gunny sacks and the metal bands of some cases were broken.

The plaint averred (*a*) that the said non-delivery of the two cases was due to the negligence and/or default and/or wrongful and/or unlawful acts or omissions of the defendant or of its officers, agents or servants consisting of (i) failure to exercise due care and diligence in looking after them, (ii) failure to take necessary steps to guard against theft or pilferage, (iii) failure and negligence in not securing the said cases in special grilles within the warehouse.

(b) as an alternative cause of action — that the defendant, having had the custody, control, charge and care of the two cases, was under a legal duty or obligation to look after and deliver the cases to the plaintiff in good and proper order, was liable for breach of this duty or obligation.

Under the said Act No. 13 of 1958 the Port Cargo Corporation was created to provide all "port services" in the Port of Colombo, that is to say "Any services for stevedoring, landing and warehousing of cargo, wharfage .... and other services incidental thereto".

Section 79 of the said Act enacted that the Corporation shall not be liable for any loss or damage to goods deposited in a Government warehouse, unless such loss or damage had been caused by the negligence or by the wrongful or unlawful acts of the Corporation or any of its officers servants etc.

The learned District Judge held that the plaintiff paid warehouse rent in this case on the footing that the warehouse in question is one approved under Section 69 of the Custom's Ordinance. This finding was not canvassed in appeal.

On the 2nd cause of action he held that there was no positive evidence of negligence, but because the Corporation took charge of a consignment in good condition and when the plaintiff went to obtain delivery it was found to contain sulphate of ammonia instead of sewing machine needles, there was a presumption of negligence and therefore *prima facie* proof that the goods were stolen as a result of wrongful or unlawful act on the part of the Corporation or its servants.

Held: (1) That the only basis of the liability of the defendant Corporation being section 79 of the Act aforesaid, the burden lay on the plaintiff to prove some negligent, or wrongful or unlawful act as being the cause of the loss of his goods.

(2) In the absence of such proof the plaintiff's action must fail as the mere fact of injury in this case, without proof of the manner in which it was caused, cannot give rise to a presumption of negligence.

Despite the failure on the part of the learned District Judge to answer the issue based on the 2nd cause of action, viz. whether the defendant took the cases on the express or implied contract to land, warehouse and deliver the cases to the plaintiff, counsel for the plaintiff argued that there was ample evidence to find that there was here an implied contract upon which the Corporation assumed the obligations of a common carrier or carrier by trade, and that one of these obligations was to store the goods in the warehouse and to be responsible for their care and custody, while in the warehouse.

The evidence referred to in this connection was to the effect:

(*a*) that in each warehouse there are in attendance during the day a number of officers and

servants of the Corporation who are on duty at all times throughout the day and perform various tasks such as stacking, weighing and opening packages, moving them to other places as and when required by the Customs authorities, carrying and loading them for the purpose of delivery out of the warehouse and of the port premises;

(*b*) that the Coporation recovers charges from the consignees for handling goods from the time of commencement of discharge from ships and until the time of their removal from the Port premises.

It was further argued that the above facts together with the evidence that the warehouses are locked by Customs authorities between 3.30 p.m. and 4.30 a.m. and the keys kept in their custody and that the Customs officers and the Police guard the warehouses during the night, were sufficient to establish that the Corporation was liable on the basis of an implied contract for safe custody at least during the day; and in the absence of evidence that the Corporation or its agents took due care for the safe custody of the plaintiff's goods, the presumption of regularity must apply in regard to the night as the Customs officials and the Police guarded the warehouses during that time.

Held: (1) That the effective custody and control of the goods in the warehouse was in the Customs officials because according to the evidence.

(a) there is always on duty at each warehouse at least one Customs officer.

(b) goods cannot be removed from the warehouse without his authority and his authority for delivery out of the warehouse is given only after some other Customs officer passes a Bill of Entry upon the payment of duty by means of an endorsement "satisfied" being made thereon.

(2) That this control and the liability of the Customs isrecognised by section 108 of the Custom's Ordinance, although that liability has been always arbitrarily (and perhaps even unreasonably) limited.

(3) That in the present case the presumption of regularity does not justify the inference that the goods missing from the warehouse could not have been stolen during the night.

(4) That having regard to the fact that the Port Cargo Corporation is a body established by statute, its power validly to undertake the liability of a custodian for hire is not clear.

(5) That section 79 of the Port Cargo Corporation Act is a special provision which limits the liability of the Corporation for loss of damage to goods discharged from ships by it and thereafter desposited in a Government warehouse.

PRESCRIPTION

Among co-owners.

REVISION

Revisionary powers of Supreme Court.

STAMP ORDINANCE

Stamp Ordinance (Cap. 247), sections 31, 33 and 55 (old sections 26, 27 and 51 respectively) — Deficiency in Stamp Duty on deed of agreement to transfer business executed in 1947 — Who is liable to pay, transferor or transferee?

Conflict between old sections 26 and 27 (now 31 and 33) on the one hand and old section 51 on the other — Amending Act No. 19 of 1956 introducing new sub-section 3 into section 51 (now 55) — Does it operate retrospectively — Need for clear language in statutes imposing taxes on subjects.

This is an application by the Commissioner of Inland Revenue to recover Rs. 3,307/- being the amount of deficiency of Stamp duty due on a Notarial deed of agreement executed in 1947 to transfer a business. The Magistrate found that the petitioner had failed to show sufficient cause why this amount should not be recovered as if it were a fine imposed by court and ordered the same to be paid or in default 6 months' imprisonment.

The petitioner applied to the Supreme Court for review of this order.

Held: (1) That the Amending Act No. 15 of 1956 which brought in section 5(3) of the Stamp Ordinance is not retrospective in its operation. Hence the principle laid down by H. A. de Silva, J. in *Gaebele v. Commissioner of Stamps*, 54 N.L.R. 231 applied to the instant case, viz: that section 51 (now section 55) being a general clause did not control the specific enactment contained in sections 26 and 27 (now sections 31 and 33) of the Stamp Ordinance.

(2) That, therefore in this case under section 31 of Stamp Ordinance it is the transferee who is liable to pay Stamp duty, and the petitioner who is the transferor is not liable.

RATNASEKERA *v.* COMMISSIONER OF INLAND REVENUE 32

Sections 2, 8 — *Award by arbitrator under Co-operative Societies Ordinance — Documents filed in court by Society to enforce award — Are documents liable to stamp duty?*

ELUVAITHEEVU NORTH CO-OPERATIVE CREDIT SOCIETY *v.* NAGALINGAM 110

STATUTES

Interpretation of — Imposing taxes on the subject — Retrospective effect.

RATNASEKERA *v.* COMMISSIONER OF INLAND REVENUE 32

WORDS AND PHRASES

"Police officer" in section 122(3) *of Criminal Procedure Code.*

THE QUEEN *v.* KULARATNE & TWO OTHERS .. 1

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JAYAWARDHENA *v.* THIRUCHELVAM 43

"Instruments" in section 33 *of Co-operative Societies Ordinance.*

ELUVAITHEEVU NORTH CO-OPERATIVE CREDIT SOCIETY *v.* NAGALINGAM 110

IN THE COURT OF CRIMINAL APPEAL

Present: **Sirimane, J. (President), Alles, J. and Samerawickreme, J.**

THE QUEEN *v.* D. G. DE S. KULARATNE & TWO OTHERS

Appeals Nos. 56, 57 & 58 *of* 1968 *with applications Nos.* 79, 80 & 81 *of* 1968
S.C. No. 119/67 — *M.C. Galle* 48232

Argued on: 30th September, 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 22, 23, & 25th October, 1968
Decided on: 10th November, 1968.

Court of Criminal Appeal — Conspiracy to murder — Murder — Abetment of Murder — Arsenic poisoning — Circumstantial evidence only — Duty of prosecution to exclude alternate hypothesis — Failure to call witness to exclude such hypothesis — Non-direction regarding purpose of proving previous statement — Misdirection re approach to evidence of witness — Evidence of experts — Relevancy of finding of arsenic in dispensary of doctor — Experts not competent to express opinions without expert knowledge — Duty of trial Judge to direct jury to disregard opinions — Misdirection re expert evidence — Conjectural evidence re the arsenic found on alleged plate of deceased — Misdirection on this point — Duty of prosecution to prove identity of productions by direct evidence and not by inference — Non-direction re items of subsequent conduct of accused —

Meaning of "police officer" in section 122(3) *Criminal Procedure Code — Use of statements made under section* 122 *Criminal Procedure Code — Duty to direct, case against each accused to be considered separately — Amendment of indictment—Misdirection and non-direction re unsworn statement from the dock — Exclusion of suicide, duty of prosecution and misdirection — Verdict unreasonable and insupportable by evidence — Case to go before jury — Criminal Procedure Code sections* 121, 122, 172, 173, 176 *and* 234.

The three accused-appellants were charged on Count 1 in the indictment as amended with having conspired to murder the wife of the 1st accused-appellant between the 10th of March 1967 and the 9th of April 1967. On Count 2 the 3rd accused was charged with murder and on Count 3 the 1st accused was charged with abetting the 3rd accused to commit murder.

There was no doubt that the deceased had died of arsenic poisoning. The 2nd accused was the mother-in-law of the deceased. The 3rd accused was a cook in the household.

The appellants were convicted on all three Counts by the unanimous verdict of the Jury.

The case rested entirely on circumstantial evidence. There was strong evidence of motive against the 1st accused, including a pending action for divorce which the deceased was determined to resist. The 2nd accused was shown to have a strong dislike for the deceased.

The case for the prosecution which depended on the evidence of the deceased's daughter A was that the 1st and 2nd accused had used the 3rd accused to serve some '*biling achcharu*' (a pickle) which contained poison on to the deceased's plate that afternoon.

There was also another cook C who had prepared food and served food on to the deceased's plate that afternoon. C was not called as a witness. There was no evidence either way regarding motive on the part of C. There was no evidence of motive against the 3rd accused.

The evidence did not positively exclude the possibility that the poison may have been in one of the foods that C had cooked. There was no evidence whether or not all the different kinds of vegetables that had been dished by C to the deceased's plate had also been sent to the table for the others.

Held: (1) that when the evidence led for the prosecution lends itself to a reasonable inference that either of two persons could have committed an act, then the burden is on the prosecution to exclude effectively one of them if it seeks to attach responsibility for that act to the other and this can often be achieved only by calling as a witness the person sought to be excluded as a witness.

(2) that (*a*) C was not a witness available to the defence on any realistic basis and the prosecutor ought to have called her.

(*b*) The failure to call her resulted in a serious deficiency in the proof of the prosecution case.

(*c*) When the trial judge directed the jury that if the defence wanted to question C, they could have called her, there was grave danger of his being misunderstood by the Jury in regard to the burden of proof.

(*d*) The prosecution had failed to exclude the reasonably possible inference that the poison may have been in the food served by C.

(3) That (*a*) The failure of the trial judge to give any specific direction to the Jury relating to the legal framework within which previous statements of A to the coroner and to the Magistrate marked Y1 and Y3 could be used, might well have induced the Jury to think that, however unreliable A's evidence in Court might be, her statements Y1 and Y3 constituted substantive evidence on which they could act.

(*b*) There was accordingly a non-direction on this point which was vital in the circumstances of the case.

(4) That where the learned trial Judge told the Jury that if they were satisfied that there was arsenic on the plate and the poison had been introduced through the food, then there was a killer at work in the house. He then invited the Jury to consider how a killer who desired to poison a single member of a large household would work and he placed before them three theories, such an approach to A's credibility was fraught with danger, inasmuch as the jury when faced with the difficulty of choosing one hypothesis in preference to another would be too strongly inclined to follow the one recommended by the trial Judge, despite the strongest direction that they were free to ignore it and act on their own.

(5) That the trial Judge rejected the first two theories and stated that if the Jury accepted the third theory as correct, then A's evidence in court must be true, and that A's evidence was inherently credible.

That the strong suggestion to the Jury to test A's evidence on the basis of the third theory being the correct one was a misdirection.

(6) That the trial Judge also directed the Jury as follows: "What has happened in the case? This somebody who wanted to poison the deceased has got it done in this way. That is the fact.....but it has happened in this way. It seems to me if it has happened this way, it was planned this way."

(*a*) that it was very likely that the Jury accepted A's version in court only because it fitted the third theory, and believed that on that evidence the presence of arsenic in the food served by the third accused was not merely a possible inference but that it was an established fact.

(*b*) that there was a misdirection in the passage quoted above.

(7) The 1st accused-appellant, a doctor, had in his dispensary in a locked cupboard, the key of which was with the dispenser, two bottles of Liquo Arsenicalis, a compound of arsenic known as potassium arsenite, as distinct from sodium arsenite and white arsenic,

The opinions of two "experts" Dr. F., Professor of Forensic Medicine, and Mr. S., an Assistant Government Analyst, were led by the prosecution in an effort to prove that the Potassium found in the stomach of the deceased was in excess of the quantity that one should find in the stomach of a "normal" person, and that therefore the inference that Potassium arsenite was used could reasonably be drawn.

The two witnesses depended for their opinions on an examination of the Potassium content in the stomachs of seven deceased persons whose antecedents were unknown. Both witnesses agreed that they would not contribute an article to any scientific paper commending any inference on the basis of the experiment made with the seven stomachs.

Held: (*a*) That the finding of arsenic in the dispensary of a doctor is not in itself an incriminating circumstance, though it is a circumstance, to be taken into consideration, as there was the opportunity for using it;

(*b*) That the expert evidence led in this case did not amount to a scientific method of ascertaining any fact and would have tended to mislead the jury and its effect would have been damaging and prejudicial to the 1st accused-appellant;

(*c*) That such witnesses should not be permitted to express opinions on any matters in a field where they had no expert knowledge, and if such opinions had been expressed before it was found that it was outside their sphere of specialised knowledge, then the trial judge should give a clear direction to the jury categorically to disregard those opinions altogether;

(*d*) That in this case the opinion was commended to the jury and the jury was invited to consider whether they could not agree with the opinion and to form an opinion themselves on criteria which were not scientific; that it was dangerous for the jury to take figures which the experts themselves considered unworthy of recommendation as a scientific fact into account in arriving at any conclusion;

(*e*) That the direction to the jury to infer from the evidence of the two witnesses that the use of Potassium Arsenite was more probable was a misdirection and it was impossible to say that the jury was not thereby vitally influenced to draw the conclusion that it was the 1st accused-appellant who supplied the arsenic.

(8) (*a*) That evidence based purely on conjecture regarding the arsenic found on the plate from which the deceased was alleged to have eaten the last meal had been placed before the jury and the fact that there was no evidence at all as to who washed the plate on that day or placed it on the rack or whether it was placed on the rack before the deceased became sick had been overlooked and all these facts had been assumed;

(*b*) That the direction to the jury to consider the possibility of the plate being contaminated by some means other than the food served on it *only* on the basis that the deceased had washed her plate and placed it on the rack and that she had done so before she became sick was a misdirection as it was unsupported by the evidence.

(9) (*a*) That the prosecution had to prove beyond reasonable doubt that the plate on which the analyst found a trace of arsenic was the plate on which the deceased had her last meal;

(*b*) That in this case the plate produced (P7) by the Analyst was not shown either to the Inspector who took charge of it or to the witness A who handed it to him and its identity was left to be inferred;that the identity of productions ought to be accurately proved by the direct evidence which is available and not by way of inference;

(*c*) That in this case the evidence placed before the jury in regard to the identity of the plate was inconclusive.

(10) That in regard to some of the items of subsequent conduct of the 1st accused-appellant on which the prosecution relied, the jury ought to have been directed that on a proper evaluation of the evidence no inference at all could have been drawn against the 1st accused-appellant from his subsequent remarks or conduct.

(11) (*a*) That the words "police officer" referred to in section 122(3) of the Criminal Procedure Code should not be given a narrow interpretation as meaning an officer in charge of a police station or someone deputed by him as set out in section 121(2);

(*b*) That a statement made in the course of an inquiry under section 122 of the Criminal Procedure Code cannot be used to form the basis for an inference that the conduct of the person who made it was suspicious;

(*c*) That all the evidence that was thereafter led to establish that such statement was untrue was inadmissible and its reception would have undoubtedly prejudiced the jury.

(12) That the direction to the jury regarding the trip undertaken by the 1st accused-appellant on the previous night was inadequate inasmuch as it did not refer to the evidence of a witness Dr. G. and the statement of the 1st accused-appellant from the dock.

(13) That there was not sufficient evidence against the 2nd accused-appellant from which a reasonable jury could draw an inference of guilt against her.

(14) That the failure to direct the jury that each accused was entitled to have the case against him or her considered separately from the others had caused prejudice to the others.

(15) (*a*) That before a charge is amended particularly at a late stage the defence should be given an opportunity of making their submissions on the point;

(*b*) That thereafter if the amendment is made, before the judge decides whether or not to proceed with the trial immediately under section 172 or 173 of the Code, the defence should be consulted again;

(*c*) But that in the present case having regard to the nature of the amendment (the 2nd accused-appellant was dropped on the second and third charges) and as no application had been made by either side under section 176 of the Code, no prejudice had been caused to the appellants on this ground.

(16) (i) That an unsworn statement from the dock by an accused person must be looked upon as *evidence* subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed, but the jury must also be directed that:

(*a*) if they believe the unsworn statement, it must be acted upon;

(*b*) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed; and

(*c*) it should not be used against another accused.

(ii) That in the present case, although the trial judge referred to the statement earlier and stated that the prosecution could make use of it, he made no reference to it until the conclusion of his charge when he told the jury that this statement was not evidence, but that it could be taken into account as a circumstance. It was likely that the jury thought that they were not called upon to pay any attention to that statement.

(17) (*a*) That the prosecution had to exclude in this case the possibility of suicide, and whether they had done so or not was a question of fact which the jury had to decide;

(*b*) That it was not a question that could be decided by an admission or a concession by one or more of the Counsel appearing in the case;

(*c*) That the earlier direction on this matter to the jury constituted a clear misdirection and that it was impossible to say that the later direction had removed the effect of the earlier, and it was most probable that the jury gave no consideration at all to the possibility of suicide.

(18) That quite apart from misdirections the verdict of the jury was unreasonable, and in any event, could not be supported having regard to the evidence.

(19) (by a majority of the court) That the trial judge was right in not giving a direction to the jury under section 234(1) of the Criminal Procedure Code to acquit the accused at the end of the prosecution case.

(20) That the material placed before the jury fell far short of evidence on which a reasonable jury could have concluded that the only rational inference that could have been drawn was one of guilt.

Cases referred to: *R. v. Blom* — Hoffman, S.A., *Law of Evidence*, p. 31
R. v. *Buddharakkita* 63 N.L.R. 433
R. v. *Tambiah*, 68 N.L.R. 25.
The King v. *Sittambaram*, 20 N.L.R. 257.
Plomp v. *The Queen*, (1963) 110 Comm. L.R. 234.

Case Followed: *Rodrigo* v. *R.* 55 N.L.R. 49.

G. E. Chitty, *Q.C.*, with *Eardley Perera*, *G. Candappa*, *A. M. Coomaraswamy*, *M. Underwood*, *Anil Obeysekera*, *G. E. Chitty* (*Jnr.*), and *A. S. L. Gunasekera*, for the 1st accused-appellant.

E. R. S. R. Coomaraswamy, with *Kumar Amarasekera*, *Gamini Wanigasekera*, *C. Chakradaran*, *T. Joganathan*, *Asoka de Z. Gunawardena*, *Kosala Wijetilleke*, *M. S. Aziz* and *Shanti Perera*, for the 2nd accused-appellant.

Dr. Colvin R. de Silva, with *B. C. F. Jayaratne*, *R. I. Obeysekera*, *Bala Nadaraja*, *P. D. W. de Silva*, *I. S. de Silva* and *P. Tennekoon*, for the 3rd accused-appellant.

Clarence M. Fernando (assigned), for all accused-appellants.

V. S. A. Pullenayagam, Senior Crown Counsel, with *A. C. de Zoysa*, Senior Crown Counsel, *Kenneth Seneviratne*, Crown Counsel, and *T. D. Bandaranayake*, Crown Counsel, for the Crown.

The Judgment of the Court:

Padmini Kularatna died on the evening of 9.4.67.

There can be no doubt that her death was due to arsenic poisoning.

The Crown alleged that her husband, the 1st accused, his mother, the 2nd accused, and a woman servant who did the cooking, the 3rd accused, were responsible for her death.

On the first count in the indictment, in its amended form, all three were charged with having conspired to murder the deceased between 10.3.67 and 9.4.67. On the second count, the 3rd accused alone was charged with murder and on the third count the 1st accused was charged with abetting the 3rd accused to commit murder. It was conceded at the argument that the date 10.3.67 had been inserted in the indictment on inadmissible evidence, but nothing turns on this point.

The appellants were convicted on all three counts by the unanimous verdict of the jury, and sentenced to death.

There were several matters argued before us at the hearing of the appeal, when it was strongly urged that the verdict of the jury was unreasonable, or that it cannot be supported having regard to the evidence. In fact, learned Counsel for the appellants submitted that at the close of the prosecution case there was no evidence that the accused had committed the offences, and that the learned trial Judge should have directed the jury, under section 234(1) of the Criminal Procedure Code, to return a verict of not guilty. Submissions were also made that there were several misdirections and non-directions in the learned trial Judge's charge to the jury and reception of inadmissible evidence, which vitiated the convictions.

The case rested entirely on circumstantial evidence, and it is necessary to examine that evidence, not for the purpose of considering whether that evidence raises a reasonable doubt in *our* minds (which we must guard against doing) but to consider the submissions made for the appellants, whether there have been misdirections on the evidence, and whether the verdict is un reasonable or cannot be supported having regard to the evidence.

There was, to begin with, strong evidence of motive against the 1st accused. The prosecution led evidence to show that there was a great deal of unpleasantness between the 1st accused and the deceased, that she had been treated harshly, in a humiliating manner, and that he (1st accused) had filed an action for divorce. There was also evidence which indicated that the deceased was determined to resist the 1st accused's claim for a divorce and that the 1st accused was prepared to pay a large sum of money to the deceased if he could rid himself of the marriage tie.

It was also shown that the 2nd accused had some influence over her son, and that she had a strong dislike for her daughter-in-law. When the deceased died in the circumstances that she did, it is natural that suspicion should fall on them. It is of some importance to remember this, because it was urged right-throughout the arguments for the appellants that the jury was "in a mood to convict" regardless of all the infirmities in the evidence, on the basis, "if not they, who else?"

The case for the prosecution was that the 1st and the 2nd accused had made use of the 3rd accused to serve some *bilin achchāru*, which contained poison, on to the deceased's plate that afternoon. To prove this, the prosecution relied on the evidence of the deceased's daughter Achini.

The main grounds urged on behalf of the appellants were that it was unreasonable for the jury to have acted on Achini's evidence, and that even if that evidence was accepted, there was no basis for a reasonable inference that the poison was contained in the foods served by the 3rd accused, as the possibility of the presence of the poison in the foods served by Cicilin (another cook) had not been excluded.

According to the evidence led by the prosecution, there were two people who served food on the deceased's plate that day — Cicilin and the 3rd accused-appellant. The prosecution had to prove beyond reasonable doubt that the poison could not have been introduced by, or through food served by, Cicilin.

Cicilin was not called as a witness.

Learned Crown Counsel submitted that Cicilin was excluded, (a) by absence of motive, and (b) by the evidence that other people also ate food cooked by her on that day. In regard to the first

point, learned Counsel for the 3rd accused-appellant had suggested to Achini in cross examination that Cicilin was not well-disposed towards the deceased. Achini's answer was that she did not know. The only other evidence on this point was that the deceased, a few weeks before this incident, wanted only food cooked by Cicilin. That was not because Cicilin was on good terms with her but because food cooked by her (Cicilin) was eaten by everybody in the house, and the 3rd accused-appellant prepared certain special dishes for the 1st and 2nd accused-appellants. As the deceased was apparently in fear of being charmed, she probably thought that a charm could more easily be introduced, to the special dishes cooked by the 3rd accused-appellant. On the evidence, therefore, there was no evidence of motive against Cicilin, but at the same time there was no evidence to show that she had no motive. As stated by Channel, J. in *Rex* v. *Ellwood* (see Cross on Evidence at page 28): "There is a great difference between absence of proved motive and proved absence of motive." There was no evidence of any motive against the 3rd accused-appellant either. The learned trial Judge, in dealing with this question, said, (at page 981) that Achini's answer to Counsel's question "I do not know" meant much the same thing as "no", and went on to say, "as for Cicilin the available evidence is that she was on perfectly good terms with the deceased." There is no evidence to support this statement.

The first ground, absence of motive, on which it was sought to exclude Cicilin, therefore, in our opinion, fails.

On the second point, the evidence of Achini was that Cicilin dished food on to her mother's plate straight from the pots and pans and not from the dishes, and one gathers that at the time she went to Cicilin's kitchen some part of the food had already been dished out to dishes that were on the table (at page 698). In answer to a question (at page 765) Achini said that Cicilin did not put on the plate any food that had already been dished out from the chatties. It was the food which had been put on the dishes that were taken to the table and eaten by her and her sister. The evidence on this point does not positively exclude the possibility that the poison may have been in one of the foods which Cicilin had cooked. Achini was twice asked whether she remembered the food that was dished to her mother's plate by Cicilin (at pages 318 and 643) and she said she could not remember, and there was no evidence whether all the different kinds of vegetable that were dished on to her mother's plate from Cicilin's pots and chatties had also been sent to the dining table for the others to eat. On the second ground, too, therefore, Cicilin cannot necessarily be excluded. When the evidence led for the prosecution lends itself to a reasonable inference that either of two persons could have committed an act, then the burden is on the prosecution to effectively exclude one if it seeks to attach responsibility for that act to the other; and the best way — often the only way — in which this can be achieved is by the prosecution calling as a witness the person sought to be excluded. In *Rex* vs. *Blom* referred to in Hoffman (South African Law of Evidence page 31) Watermeyer, J. referred to two cardinal rules of logic which governs the use of circumstantial evidence in a criminal trial: (1) the inference sought to be drawn must be consistent with all the proved facts. If it does not, then the inference cannot be drawn. (2) The proved facts should be such that they *exclude every reasonable inference from them, save the one to be drawn.* If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

Counsel for the 3rd accused-appellant had urged this matter at the trial and told the jury in his address that the failure by the prosecution to call Cicilin had left the inference that there was any poison in the food served by the 3rd accused-appellant in doubt. Counsel had also apparently added that had the prosecution called Cicilin the defence would have got something favourable to them by questioning her. But his real contention was that it was incumbent on the prosecution to call Cicilin as a witness. In dealing with this submission, the learned trial Judge, quite rightly, told the jury, that it was not the law that the prosecution should call a witness to enable the defence to question her. But when he added that if the defence wanted to question Cicilin, they could call her, — there was grave danger of his being misunderstood by the jury in regard to the burden of proof, for they may well have thought that once the prosecution showed that the 3rd accused-appellant had served some food and alleged that this was unusual, then they were bound to infer that the poison was in the food served by her, if the defence failed to call Cicilin to negative that inference.

On any realistic basis, Cicilin was not a witness available to the defence. On the contrary, the prosecution should have called her, and their

failure to do so resulted in a serious deficiency in the proof of the prosecution case.

On the question whether the 3rd accused-appellant's conduct was unusual, the defence pointed out that up to a period of about three weeks before this incident, food cooked by both — the 3rd accused-appellant and Cicilin — was eaten by everyone in the house. It was thereafter that the deceased preferred to eat Cicilin's food only and the 2nd accused-appellant, too, told Achini not to take food cooked by the 3rd accused-appellant to her mother. But there was no definite evidence that the 3rd accused-appellant was told, or that she knew, that food cooked by her should not be taken to the deceased.

We are of the view that the prosecution has failed to exclude the reasonably possible inference that the poison may have been in food served by Cicilin.

There is then the vital evidence of Achini. She had stated in Court that after Cicilin had served some food — the details of which she could not remember — the 3rd accused-appellant took her by the hand into her kitchen and served *bilin achchāru* once from a small dish and again from a pot, and also some fish. It was strongly urged, particularly by the Counsel for the 3rd accused-appellant, that the jury had acted unreasonably in accepting this evidence. He pointed out that Achini's evidence against the 3rd accused-appellant grew from nothing (in her statement to the police XI) to a conscious and deliberate act, in her evidence in Court. He pointed out instances when, in denying previous statements, she was obviously untruthful and a number of other infirmities, which it is not necessary to deal with in detail, as a result of which it was submitted no reasonable jury could have acted on her evidence. But these matters must have been placed before the jury and we would have been slow to interfere on those grounds alone. There were, however, certain submissions made regarding non-direction and misdirection on Achini's evidence which have to be examined. The learned trial Judge himself referred to Achini's evidence as very much cast in doubt and said that on certain matters her evidence was quite unreliable or inexplicable. There was the statement (XI) which she made on the night of her mother's death to a police officer who was obviously trying to find out the persons who had served food on the deceased's plate that afternoon. Achini had said then that Cicilin dished out rice, wattakka, beans, *mellun* and radish, and added, "I found fish and *bilin achchāru* dished out to be taken to the dining table and I served the fish and *bilin achchāru* from the dishes and served myself, and brought and handed over to mother." This is indeed a very vital contradiction of her evidence in Court. It excludes the 3rd accused-appellant altogether. Achini denied having made that statement.

The learned trial Judge told the jury that it could not be explained in that way, or that the police made some mistake. In order to "counter", as the learned trial Judge put it, this statement, the prosecution produced the evidence given by Achini at the inquest next morning marked Y1 where she had stated that after Cicilin served rice, *wattakka*, etc., she (Achini) went to the other kitchen and the 3rd accused-appellant served into the same plate fish and *bilin achchāru*. At the argument in appeal learned Counsel for the 3rd accused-appellant submitted that Y1 and her evidence at the magisterial inquiry Y3 were admitted by the learned trial Judge "in rebuttal." The record at page 916, where the learned trial Judge says that he allows Y3 in rebuttal, and the use of the word "counter" in the charge in relation to Y1, lends support to this argument. Both Y1 and Y3 were produced as part of the prosecution case before it was closed. It was pointed out that evidence in rebuttal can only be led after the defence has been closed, vide section 237(1) of the Criminal Procedure Code. But though inadmissible under that section, learned Crown Counsel submitted that the statements were admissible under section 157 of the Evidence Ordinance. It was argued by the defence that Y1 did not corroborate Achini's evidence that she was held by the hand and taken into the kitchen, but contradicted it. We think, however, that Y1, in substance, corroborates her position in Court that the 3rd accused-appellant served food on to her plate in her kitchen. There is some technical merit in the objection taken that Y1 was not properly produced. It was a statement made to the Coroner (who also happened to be the Magistrate); proceedings before the Coroner do not form part of the Magistrate's Court record. In this instance, it appears that it had been accidently bound with the Maigstrate's Court proceedings, and sent up to the trial court. The inquest proceedings, therefore, were not strictly in the proper custody of the Clerk of Assize, and the Coroner should have been called to prove it. But the objection, in our view, to the admission of Y1 is only technical.

In regard to Xl, the learned trial Judge placed before the jury the possibility that in her distress that night Achini may have been inaccurate. In regard to Yl, he said, (at page 994) "So the prosecution tells you, you must hold that what is said here is true because that is what Achini told the Magistrate in the morning." This statement is correct, but he did not give any specific direction to the jury relating to the legal framework within which statements like Yl and Y3 made outside the Court of trial could be used. In Golder, Jones and Porrit, 1961, (45 Criminal Appeal Reports, page 5) though the facts were different — in that the statement was contradictory and a wrong direction was given — it was held,

> "that when a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, but should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act."

We think that these remarks apply to any previous statement made outside Court. The jury, in the absence of directions, may very well have thought that, however unreliable Achini's evidence in Court may be, her evidence next morning at the inquest (Yl) (or later at the non-summary inquiry Y3) was *substantive evidence* on which they could act. In our view, there was a non-direction on this point which was vital in the circumstances of this case.

There is another matter affecting the manner in which the jury was directed to assess Achini's credibility on which a great deal of argument was addressed to us. The learned trial Judge told the jury that if they were satisfied that there was arsenic on the plate, and the poison had been introduced through the food, then there was a killer at work in the house. He then invited the jury to consider how a killer, who desired to poison a single member of a large household, would work. He placed before them three theories:

(1) The killer could put the poison into a chatty or pot before the food was cooked and get it served from that pot.

(2) He could do so after the food was cooked.

(3) He could put the poison into a vessel into which some of the food had been dished and see that the victim was served from that vessel.

We are in agreement with the submissions made hy Counsel for the appellants that such an approach to Achini's credibility is fraught with danger. When faced with the difficulty of choosing one hypothesis in preference to another, the jury would only be too strongly inclined to follow the one recommended by the trial Judge, despite the strongest direction that they were free to ignore it and act on their own. They would also be tempted to adopt it if that particular hypothesis provided a positive answer to the question, "Who was the killer in the house?" without leaving the matter in doubt. Hoffmann, South African Law of Evidence, page 31, says.

> "All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a non sequitur, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of facts is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred."

It is clear that the learned trial Judge thought that the third was the one and only hypothesis, and expressed that opinion, to use his own words, "in very strong language." He rejected the first two theories as they involved the risk of people other than the intended victim being poisoned. It was urged, with much force, that this rejection was made on grounds which were not compelling, for, in either of the first two theories, the poisoner could have thrown away the rest of the food in the chatty or pot after the victim's plate was served and if there had been a conspiracy with the cook, a small chatty could have been used, so that little food would have been wasted. The learned trial Judge then went on to say that if the jury accepted the third theory as correct — "*then Achini's evidence in Court must be true.* The proposition was conveyed to the jury in the following terms (at page 1000):

> "If somebody wants to put the poison on the plate of one person, to poison that one person only in that house ..... If somebody wants to do that, how would he set about it? Gentlemen, the only way that the killer would set about it is to have it served, either serve it himself or see that it is served from a separate vessel on to the plate.
>
> If you are sure, purely on a rational basis, forgetting all the people in the accused's family, that this is the way, the only way that this could have been done — that is precisely what Achini tells you — if you, applying your intelligence carefully, have to come to an irresistible conclusion, you have to consider how the poisoner would act. If the only irresistible conclusion is that it had to be put in a separate vessel, and from that vessel put

on the plate, then you have the point. I think that is precisely what Achini tells you.

You have then the point, the reasonable point that what Achini tells you is inherently credible. If you are convinced that this is the only way that this could have been done, then Achini is saying no more than what had happened."

Achini's evidence was that food prepared by Cicilin had been put on to dishes from the chatties in which they were cooked when Achini took her mother's plate into the kitchen, and Cicilin served food on to the plate from the remaining food in the chatties. It is possible that the poison may have been introduced into the food remaining in one of the chatties and served on to the plate of the deceased. In this way, poison could have been put into the food consumed by the deceased without food that was served on to the dishes that went to the table being affected. Thus, the only way that this could have been done was *not* that spoken to by Achini; and accordingly no inference could be drawn that Achini was speaking the truth on the basis that the way she spoke to, was the only possible way. The learned trial Judge added a little later (at page 1004):

"I think I have expressed an opinion very strongly in this matter in the last 10 or 15 minutes. I will warn you again. I have suggested one way in which you can solve this problem by asking yourselves whether this is the inevitable means of doing this, and if you are sure that this is the one necessary way to achieve the transaction of poisoning, you then, perhaps will have no difficulty in believing Achini who just says 'Sopia served.' "

It was urged by Counsel for the 3rd accused-appellant that the third theory was quite consistent with Achini's statement to the Police set out in XI being true and her evidence in Court being false. (The evidence led in the case indicated that Achini usually served food for her mother from the table and if the 2nd accused-appellant was present she would tell her what foods should not be served). It was submitted that the killer could easily have placed the poisoned food on the table so that Achini would serve it herself as she said she did in XI. The only risk was that Achini may not take food from that particular dish. But, on the other hand, if Achini's version was true, the killer ran, what Counsel called, a triple risk. As the prosecution alleged that the deceased had asked Achini not to bring food cooked by the 3rd accused-appellant, if the killer had planned to get the 3rd accused-appellant to serve the poisoned food, then Achini may refuse to let her serve the food, or if that was forcibly done, she may refuse to take the food to her mother, or she may take the food to her mother and tell her what the 3rd accused-appellant had done and that would lead not merely to a failure of the plan but to its discovery. It was submitted, therefore, that the strong suggestion to the jury to test Achini's evidence on the basis of the third theory being the correct one was a misdirection, and we are in agreement with that submission.

There is a passage, dealing with a submission of Counsel for the 1st accused-appellant a little later in the summing up which may, to put it at its lowest, have been misunderstood by the jury. Learned Counsel for the 1st accused-appellant had contended that if, as suggested by the prosecution, food cooked by the 3rd accused-appellant was not usually taken by Achini to her mother, then the poisoner would take into account that routine and introduce the poison through Cicilin rather than the 3rd accused-appellant. The learned trial Judge said (at page 1006):

"Mr. Ponnambalam in this connection refers to the fact that everyone in the house knew that the deceased's food was served from the dishes on the dining table. Also, that everyone in the house knew that food cooked by Sopia would not have been taken by Achini to her mother. And, Mr. Ponnambalam says, therefore, anyone who planned to put poison in the deceased's plate would have taken account of that routine and fitted the plan to that routine. They would not have made a plan contrary to that routine. They would not have made a plan according to which the food would be served in the kitchen and the *achcharu*, the poison, would be served by Sopia. That is what Mr. Ponnambalam says. Mr. Ponnambalam says that somebody who knew the routine in the house, and who wanted to poison the deceased would have planned differently. *But, gentlemen, what has happened in this case? This somebody who wanted to poison the deceased has got it done in this way. That is the fact. ..... But it has happened in this way. It seems to me, gentlemen, if it has happened this way, it was planned this way.*"

Counsel for the appellants contended that, having developed a favoured theory, the learned trial Judge had inadvertently, at this stage, slipped into the error of looking upon the theory as a fact. On the other hand, learned Crown Counsel argued that the learned trial Judge, when he said, "This somebody who wanted to poison the deceased has got it done this way. That is the fact" meant, "That is the evidence of Achini." But, it was Achini's evidence which was being tested, and it is futile to deal with an argument that her evidence is untrustworthy by saying, "But Achini says so."

We have, however, to consider the impact of these words on the jury in the context in which they were used. We are of the view that it is very likely that the jury accepted Achini's version in Court

only because it fitted the third theory, and believed that on that evidence the presence of arsenic in the food served by the 3rd accused-appellant was not merely a possible inference but that it was an established fact. We think there is a misdirection in the passage quoted above.

The 1st accused-appellant is a doctor and had in his dispensary, in a locked cupboard the key of which was with his dispenser, two bottles of Liquo Arsenicalis, which is a compound of arsenic known as Potassium Arsenite as distinct from Sodium Arsenite and white arsenic.

The finding of arsenic in the dispensary of a doctor is not in itself an incriminating circumstance, but, of course, it is a circumstance to be taken into consideration, for there was the opportunity for using it.

If the arsenic found in the internal organs of the deceased was Potassium Arsenite, it would indeed be a relevant fact which would tell against the 1st accused-appellant. The opinions of two "experts" — Dr. Fernando, Professor of Forensic Medicine, University of Ceylon, and Mr. Satkunanandan, an Assistant Government Analyst — was led by the prosecution in an effort to prove that the potassium found in the stomach of the deceased was in excess of the quantity one should find in the stomach of a "normal" person, and that, therefore, the inference that Potassium Arsenite was used could reasonably be drawn. As a good deal of argument was addressed to us on the evidence of these two witnesses, we might deal with that evidence at this point.

Mr. Satkunanandan found 730 milligrams of potassium in the stomach of the deceased and its contents. But neither he, nor Dr. Fernando, knew the quantity of potassium which one would expect to find in the stomach of a normal person. This quantity must depend, to a large extent, on the nature of the food a person has taken shortly before the examination.

After the conclusion of the non-summary inquiry by the Magistrate, Mr. Satkunanandan had examined the potassium content in the stomachs of seven deceased persons, whose antecedents were unknown, and on these figures Dr. Fernando thought that 200 milligrams as the quantity of potassium to be expected in the stomach of the deceased was a "generous estimate". It is hardly necessary to emphasise that this is not a scientific method of ascertaining any fact. Dr. Fernando said that the method was "empirical" and not scientific, and both witnesses were agreed that they would not contribute an article to any scientific paper commending any inference on the basis of the experiment made with the seven stomachs. It was clear that neither of these witnesses claimed to be an expert competent to express an opinion in this field. To this 200 milligrams Dr. Fernando added 390 milligrams (it should have been 380) which, according to a textbook written by one Jacobs, would be the quantity of potassium one might find in four ounces of rice, which was the quantity Dr. Fernando found in the deceased's stomach at the postmortem examination. He thus made up a total of 590 milligrams, which was deducted from the 730 milligrams, and it was suggested that the excess of 140 milligrams might have found its way into the deceased's stomach in combination with arsenic. If, in his conclusions, he had allowed for the deceased having taken one more ounce of rice (she had, in fact, vomitted a part of her meal) and also taken into account (had he known) the potassium content in the vegetables and fish taken with the rice and some coffee taken later the total to be deducted from the 730 milligrams might well have been much higher, and left no excess at all, and on this basis potassium arsenite might have been eliminated altogether. Counsel for the 3rd accused-appellant also argued that on an analysis of the evidence of these two witnesses, the use of potassium arsenite must be excluded. Mr. Satkunanandan analysed the potassium arsenite found in the bottle P23 and ascertained the proportion of arsenic and potassium in that liquid. He found in the internal organs of the deceased 633 grains of arsenic. He expressed the view that if potassium arsenite had been taken by the deceased there must be a minimum of 176 grains of potassium (which would be over and above the normal quantity which he did not know and which was a matter for medical opinion). His evidence on the point (at page 450 of the record) is as follows:

> "*Q.* You cannot say whether the potassium found was extraneous to the normal potassium contents of the body?
>
> *A.* That will be a medical opinion.
>
> *Q.* You cannot say?
>
> *A.* Yes."

As pointed out earlier, the potassium extraneous to the normal potassium content even according to Dr. Fernando was 140 milligrams, i.e,

less than the minimum of 176 milligrams referred to by the Analyst. The learned trial Judge himself, in the course of Dr. Fernando's cross examination, remarked (at page 623), "His estimate of the potassium in this case seems to be no more an expert's estimates than one I can make."

We agree with the submission of the Counsel for the 1st accused-appellant that the large volume of evidence of these two witnesses on this topic would have tended to mislead the jury and its effect would have been damaging and prejudicial to the 1st accused-appellant.

Witnesses like Doctors and Analysts usually preface their evidence with a list of their qualifications and experience (as they did in this case) and there is the danger that a jury would look upon anything said by them as based on expert knowledge. Such a witness should not be permitted to express an opinion on any matter in a field where he has no expert knowledge, and if such an opinion has been expressed before it is found that it is outside his sphere of specialized knowledge, then we think that a trial Judge should give a clear direction to the jury to categorically disregard that opinion altogether. In this instance, the learned trial Judge dealt with this evidence at some length, and invited the jury to consider whether they could not agree with that opinion. He said (at page 1013):

> "As I told you, it is not expert testimony. He has worked out somethng which you could have yourselves worked out. I have given you the figures and the question is, firstly, do you agree with Professor Fernando whose figure Mr. Ponnambalam did not challenge that this is a commonsense, reasonable estimate? That is all that Professor Fernando claims (it) to be although he found more arithmetically, he says this is only a rough estimate. It is arbitrary."

The opinion was, therefore, commended to the jury who were invited to form an opinion themselves on criteria which was not scientific.

Wills, on Circumstantial Evidence, 7th Edition, says (at page 176) :

> "The reasonable principle appears to be that scientific witnesses as such shall be permitted to testify only on such matters of professional knowledge or experience as have come within their cognizance, or as they have learned by their reading, and to such inferences from them or from other facts provisionally assumed to be proved as their particular studies and pursuits specifically qualify them to draw; so that the jury may thus be furnished with the necessary scientific criteria for testing accuracy of their conclusions and enabled to form their own independent judgment by the application of those criteria to the facts established in evidence before them."

Here, an important part of the criteria was such that the experts themselves considered unworthy of recommendation as a scientific fact. It was far too dangerous for the jury to take these figures into account in arriving at any conclusion. Sodium arsenite was eliminated on the ground that there was no colouring found. Agro chemicals, particularly weed killers, commonly contain this compound and those substances are usually coloured, according to the information that Dr. Fernando had received from certain importers of these substances. But when the question was specifically put to him (at page 551) whether he could say that uncoloured sodium arsenite could not be obtained in Ceylon, he admitted that he did not know. White arsenic was eliminated on the ground that no "particles" were visible to the naked eye of the Assistant Government Analyst. No microscopic examination was made, and in this context, Dr. Fernando thought in one part of his evidence that the use of potassium arsenite was probable. Our attention was drawn to the real effect of Dr. Fernando's evidence (at page 510) which is as follows:

> "*Q.* Because from the very rough estimate that you have been able to act on 730 is somewhat excessive?
>
> *A.* It is a little above what I would expect. It is possible that it could have been used. I cannot say that it was by any means used."

The learned trial Judge, dealing with this evidence, told the jury at page (1016):

> "That evidence, therefore gentlemen, the evidence of the Analyst and Professor Fernando leaves us only with this. That having regard to the Analyst's examination; the question for you, gentlemen, is, was it an efficient examination? Was it the sort of examination which would be done anywhere in any civilized progressive country? Did he do such an examination? If so, can you rely implicitly on him? Only for this, not that it was potassium arsenite. He does not say so only for this, that probably it was, that it could have been and it was more probable than the others."

In our view, the direction to the jury to infer from the evidence of these two witnesses, that the use of potassium arsenite was *more probable* was, with respect, a misdirection, and it is impossible to say that the jury was not vitally influenced to draw the conclusion that it was the 1st accused-appellant who supplied the arsenic. Counsel for the 1st accused-appellant also complained that some evidence based purely on conjecture had

been placed before the jury which must have influenced their verdict against his client. One of the bottles found in the dispensary (P23) contained 13 to 14 grams of Liqua Arsenicalis. There was no evidence as to when this liquid had been purchased except the 1st accused-appellant's statement from the dock that it had been purchased in about 1950 and had been used for mixtures that he had prescribed. The label on the bottle (P23) was a very old one. But *on the assumption* that this bottle was full on or about 9th of April a conjecture — it was really nothing more — was made by the Analyst that the amount of arsenic obtainable from the quantity missing would account for the quantity of arsenic found in the internal organs of the deceased.

The evidence of Dr. Fernando in a field, where he was competent to express an opinion, was that the poison could have been taken shortly before, with, or shortly after, the mid-day meal. It was the case for the prosecution that the poison was contained in the food that the deceased had eaten that afternoon. To establish this, the prosecution relied very heavily on the evidence of the Analyst that seven millionth of a gram of arsenic was found on the plate from which the deceased is alleged to have eaten her food. We cannot agree with the submission of learned Crown Counsel, when, in answer to certain important contentions relating to this evidence made by the appellants, he said that the plate and the arsenic found on it were of little importance, because suicide (so he claimed) had been excluded. The presence of arsenic on the plate was prominently placed before the jury, both in the evidence and in the summing up and would undoubtedly have influenced their verdict. In fact, the learned trial Judge referred to this point as the first basic fact in the case.

There was evidence that the deceased had vomitted several times — that the vomit matter contained arsenic — that her daughters Achini and Sulari held vessels like tins and basins into which she vomitted — that they helped her to the bath room and changed her soiled clothes. The quantity of arsenic found on the plate was microscopic, and Counsel submitted that the plate could have been contaminated in "a hundred different ways." Achini had stated in evidence that her mother *usually* washes the plate she eats from and places it on a rack. There was no evidence whatsoever as to who washed the plate on this day or who placed it on the rack or when that was done. According to Achini, it was found on the rack next morning. It is quite clear that the learned trial Judge was strongly of the view that the minute trace of arsenic must have come from the food, and nowhere else. He told the jury that the first thing a person does when he finishes eating is to wash his fingers, and then wash the plate. Dealing with suggestions made by the defence he told the jury that if the children got vomit on their fingers when helping their mother, they would wash their hands. Though he told the jury that it was a matter for them to decide, he made his own view clear. With all respect to that view, the learned trial Judge had overlooked the fact that there was no evidence at all as to who washed the plate on that day or placed it on the rack, or whether it was placed on the rack before the deceased started getting sick. All this was assumed. That is clear from this passage at page 972:

> "Now, gentlemen, in regard to that matter, you will remember the evidence. The evidence is that this plate had been washed, and one of the tasks which an old girl of Holy Family and Ladies College had to do was to wash her plate. *Well, she had washed it and kept it on the rack.*"

And, again,

> 'But if that plate was found exactly where it should have been *where the mother had left it*, is it a reasonable possibility — it is a matter for you to decide — is it a reasonable possibility to think that somebody will touch that plate and then go away, touch it, leave it and go away? That is a suggestion."

As stated earlier, the learned trial Judge *did* tell the jury more than once that on this point, as on others, they alone were the judges of fact and that this was a matter for them to decide. But in case of circumstantial evidence, particularly one like this where the evidence (except of motive) is far from clear and unambiguous, the jury would be only too willing to follow the Judge as to the inferences which they are told could reasonably be drawn from the evidence. The suggestion by the defence that the arsenic may have got on to the plate in some way other than the food, having regard to the circumstances, was severely criticised by the learned trial Judge. He told the jury (at page 975):

> "Did she finish this operation of washing? No. It is for you to ask yourselves whether it is a possibility which has been conjured up by a fertile imagination, whether there is any common-sense, any real possibility, any real likelihood that such things as are suggested could have any possibility that they happened. That is enough. If you think that such a possibility could have happened you are the judges of fact — you hold in favour of the defence."

In our view, the direction to the jury to consider the possibility of the plate being contaminated by some means other than the food served on it, *only* on the basis that the deceased had washed her plate and placed it on the rack and that she had done so before she started getting sick, was a misdirection as it is unsupported by the evidence.

There was another contention relating to the plate (P7) raised by the Counsel for the appellants which cannot be lightly brushed aside. The prosecution had to prove beyond reasonable doubt that the plate on which the Analyst found a trace of arsenic was the plate on which the deceased had her last meal. It was urged by the defence that this fact was not proved. The evidence on this point is as follows: at the trial the Analyst produced the plate (P7) on which he found the trace of arsenic. The plate had been brought to him on 18.4.67 by Police Constable Balasuriya whose deposition was read. The Police Constable had got it along with the other productions in the case from the Record-keeper of the Magistrate's Court whose deposition was also read. On 10.4.67 Inspector Padiwita had asked Achini for the plate on which her mother had taken her mid-day meal. The defence raised the objection that the Inspector's evidence relating to the plate amounted to a statement made by Achini to him in the course of an inquiry under Chapter 12 of the Criminal Procedure Code, and was inadmissible in view of the provisions of section 122(3). But we take the view that the fact the Inspector asked for the plate, describing what he wanted, and Achini produced one, is a circumstance which may lead to an inference that Achini produced what she thought the Inspector wanted. At the trial the plate produced (P7) by the Analyst was not shown to the Inspector. It was not shown to Achini either though other productions were shown to her. Its identity was left to be inferred. We wish to observe that in a criminal case the identity of productions must be accurately proved by the direct evidence, which is available, and not by way of inference. There are many known instances where mistakes have been made in regard to productions in cases. We have to face the unpleasant fact that due to lack of space and proper storage facilities in Magistrate's Courts, productions in cases are piled up in tiny dilapidated rooms without order or method. Though we have examined the evidence on the footing that the trace of arsenic was found on the plate of the deceased, we must agree with the contention of the defence that the evidence placed before the jury in regard to the identity of the plate was inconclusive.

At this point we might deal with certain other submissions made on behalf of the 1st accused-appellant with reference to his subsequent conduct. The prosecution relied on three matters relating to such conduct as indicative of guilt.

Firstly, there was the evidence of one Mrs. Nanayakkara that the 1st accused-appellant, who was at the Y.M.B.A. at about 6 p.m. on that day had, on receipt of a telephone message, left the place making a remark that his wife was vomitting. This remark was relied on as evidence which pointed to guilt. There was also a remark which the 1st accused-appellant is alleged to have made to one Mrs. Gunasekera that he did not know what the sisters were up to. The second remark could well be understood. As the learned trial Judge told the jury, the deceased's sister's visit was an unusual one and he had come to know by then that the police had come to his house. In regard to the remark about his wife vomitting, there was the evidence of Achini that when her mother was vomitting upstairs she came down and told the 1st accused-appellant, who was seated at the dining table, that her mother was sick. She also said in evidence that her mother "continued to vomit." There is no evidence that the vomitting could not have been heard downstairs. It would indeed have been a very remarkable thing if the 1st accused-appellant did not know that his wife had been vomitting that afternoon. The learned trial Judge in his charge dealt with this matter in the following way (at page 1034):

> "But there is this other remark, as I told you, that the prosecution tells you that his knowledge that the wife was vomitting is only explicable on the basis that he knew that there was some reason why she should vomit."

And, later,

> "..... it (the prosecution) relies on these remarks which were made and it relies on the evidence and on the statement of the doctor which shows that he could not have known from anybody — certainly I do not say could not have known from anybody — certainly I do not say could not have known. There is no evidence that anybody told him about the vomitting, no evidence that from the downstair room in the front part of the house he would have heard this lady vomitting in the back regions upstairs. So that the prosecution suggests that that remark, to put it at its highest I suppose, is a suspicious matter, that he should have made that remark. It is one of the small circumstances which the prosecution says you should add to that collection of which I spoke."

In his statement from the dock, the 1st accused-appellant did not say that he had heard his wife vomitting. One would not expect him to refer to such a thing in such a statement. From the fact

that there is *no evidence* that vomitting could be heard downstairs, it has been assumed that it could *not* be heard. We think that the jury should have been directed — as also learned trial Judge did in regard to the first remark — that on a proper evaluation of the evidence, no inference at all could have been drawn against the 1st accused-appellant from this remark.

The next point was a telephone message, which a police constable said he received at about 4.55 p.m. from the 1st accused-appellant inquiring for the A.S.P. or the Inspector. There is no record of that message or the time at which it was received. The constable had said that he remembered the approximate time as a complaint had been made shortly after, relating to this same matter. The 1st accused-appellant, in his statement from the dock, had said that he had telephoned the police at about 6.45 p.m. But assuming that the constable was right, one could hardly look upon this evidence as a circumstance from which one could draw a reasonable inference pointing to guilt. The suggestion that the 1st accused-appellant, having committed a crime, was trying to contact the A.S.P. or one Inspector Elias, who was one of his many free patients, in order to get some assistance from them is too far-fetched. In regard to this evidence the learned trial Judge said (at page 1032):

> "I think Crown Counsel suggested — I am certainly not going to endorse that suggestion that there was anything suspicious in the fact — that he wanted to speak to Elias, but there is this fact. Why did he telephone at all? .....So, gentlemen, if you are convinced beyond reasonable doubt that that 'phone call was made, does it not suggest that the accused had some reason ? ..... And the prosecution suggests that the reason is that he had some knowledge about what was happening upstairs and that it was in that connection that he 'phoned."

Here again, we think that the jury might have been told that it would be unfair to speculate on the reason for this call and draw any inference adverse to the 1st accused-appellant.

On this point, it was further urged by the defence that a good deal of inadmissible evidence was led which must have prejudiced the jury against the 1st accused-appellant.

A.S.P. Rajaguru of Ambalangoda, to use his own words, "was directed to take charge of the inquiry," and, in fact, did so. On arriving at the scene tnat night he questioned the 1st accused-appellant, who, it is alleged, told this officer that he, (the 1st accused appellant) had tried to contact Inspector Elias and the A.S.P. ,Galle, and that the telephone wires were out of order. (It was suggested in cross-examination, and in the statement from the dock of the 1st accused-appellant, that the A.S.P. had misunderstood him on account of an impediment in his speech). It was submitted for the 1st accused-appellant that this was a statement made in the course of an inquiry under Chapter 12 of the Criminal Procedure Code to which the provisions of section 122(3) would apply. Learned Crown Counsel contended that a police officer referred to in section 122(3) was an officer in charge of a police station or someone deputed by him as set out in section 121(2). We do not think that a narrow interpretation should be placed on the words "a police officer" in section 122(3). To do so would be to defeat the very purpose of that section. The officer in immediate control of a police station is usually the Inspector attached to that station, but there are other officers who are, in one way or another, in charge of a police station in so far as the investigations are concerned, e.g. an Assistant Superintendent of Police of the town, the Superintendent of Police of the District, the Inspector-General of Police and his Deputies. Any officer in a police station is bound to carry out an order given by a superior officer, and all the provisions of the section can be defeated if a Superintendent of Police, for instance, orders a particular officer at a station to carry out the investigations. In the two cases cited to us, this point did not directly arise for consideration. In *Buddharakkhita's case* (63 N.L.R. page 433) it was held, obiter, that a police officer, who is not empowered to investigate cognizable offences under Chapter 12 may not legally act under that Chapter though he is attached to the Criminal Investigations Department. In *Tambiah's case*, (68 N.L.R. page 25) the Privy Council held that the protection of section 122 endures "during the course of the investigation" i.e. from the time when the investigation starts to the time when it ends and the report is made under section 131 of the Criminal Procedure Code. In that case, too, the status of the officer investigating the crime did not arise. We are of the view, as stated earlier, that the term "any police officer" in section 122 is not restricted to an officer in charge of a station or one deputed by him. A statement made in the course of an inquiry under this section can only be used for the limited purpose permitted by that section, viz. to contradict the person making it if he subsequently says something different. It cannot be used to form the basis for an inference that the *conduct* of the person who made it was suspicious.

Other evidence was then led to establish that the statement (assuming that it had been correctly recorded) was untrue, and a number of witnesses was called to show that the telephone lines were not out of order at that time. In our view, all this evidence was inadmissible, and its reception would have, undoubtedly, prejudiced the jury.

Thirdly, there was the fact that the 1st accused-appellant left for Kondadeniya late on the previous night, met a priest there, from whom he got a talisman and returned home about 2 p.m. on the day in question.

As the learned trial Judge told the jury, the evidence showed that this was a family which believed in charms. The deceased, too, had made preparations to get a charm for herself at about this time. The inquiry in regard to alimony in the divorce case was approaching. Crown Counsel suggested that this trip was made by the 1st accused-appellant to provide an *alibi* for himself. If that were so, it is hardly likely that he would return to the scene so close to the time when the offence is alleged to have been committed; and to say that the plan assumed that the deceased would go to her sister's place as usual on that day and die there, is to think that though he was a doctor, he would not know how soon the poison he had provided would act. However that may be, there was, on this point, the evidence of Dr. Grero led by the proseuction rather early in the case which had not been referred to in the charge. According to Dr. Grero, the priest whom the 1st accused-appellant went to meet had come to his residence at Galle and the 1st accused-appellant had met him there between the 25th and 30th of March, 1967, so that the trip could have been arranged for that day at that meeting as stated by the 1st accused-appellant in his statement from the dock. The trip may perhaps be looked upon as a suspicious circumstance, but certainly not one which is inconsistent with innocence. The learned trial Judge told the jury that it was:

> "a very strange thing that the 1st accused made this all-night journey on the day before the 9th April in order to get a talisman for his protection."

He did not place the evidence of Dr. Grero and the statement of the 1st accused-appellant before the jury on this question. We think the direction on this point was inadequate.

At the hearing before us, Crown Counsel urged another matter, which has not been referred to at all in the summing up, as indicative of guilt.

In the course of his statement from the dock, the 1st accused-appellant has said that the stock of Liquid Arsenic is kept in a large bottle (P23) and for convenience of dispensing poured into a small bottle (P19). The Analyst has stated that the liquid in the larger bottle (P23) was less than the normal strength as it contained 8% arsenic instead of 1%. He had also stated what the proportion of arsenic and potassium was in the smaller bottle (P19); there was slightly less of potassium. Assuming that he meant that the liquid in (P19) was of normal strength, we think it would be unreasonable to draw an inference unfavourable to the 1st accused-appellant. There was no evidence as to whether this liquid if kept, for instance, in a larger bottle which was open or ineffectively closed would diminish in strength when part of the same liquid in a securely closed small bottle would retain the normal strength. If indeed the prosecution relied on this difference in strength in the liquids contained in the two bottles as having any significance the matter should have been probed further. They might, at least, have called the dispenser in whose custody these two bottles were. We think that it would be unreasonable, from the difference in strengths, to draw the inference that the statement from the dock was false. Nor is it a reasonable inference, as Crown Counsel suggested, that the arsenic solution in (P19) had been procured at a different time and used to poison that deceased. In fact, the suggestion for the prosecution was, as stated earlier, that some part of the solution in the larger bottle (P23) had been used.

As regards the 2nd accused-appellant, there was evidence of motive, that she generally supervised the kitchen and ordered meals, that there were bottles of *bilin achchāru* in her room, and that the 3rd accused-appellant, an old servant, slept in that room. It may be mentioned here that the Analyst found no arsenic in the *bilin achchāru* in her room, or in the fish or *bilin achchāru* found in the 3rd accused-appellant's kitchen. There was no evidence at all of any overt act done by her (2nd accused-appellant) which the prosecution relied upon to suggest guilt.

We think that there was no sufficient evidence against the 2nd accused-appellant from which a reasonable jury could draw an inference of guilt against her.

At the conclusion of his argument, learned Counsel for the 3rd accused-appellant submitted that there were misdirections as to how the jury should deal with circumstantial evidence. Certain

passages read in isolation may be open to some criticism. But there are others which are quite impeccable. It is unnecessary to quote these passages in detail, as we are of the view that on a reading of the whole of the directions relating to circumstantial evidence, there is no misdirection on this point. Perhaps, the only prejudice that may have been caused was the failure to direct the jury that each accused was entitled to have the case against him or her considered separately from the others. Learned Counsel for the 3rd accused-appellant pointed out that the charge always assumed that the 3rd accused-appellant knew that there was some foreign matter, either a charm or a poison, in the food she served. The possibility that she knew nothing of the presence of any foreign matter was not placed before the jury.

Counsel for the 3rd accused-appellant next complained against the manner in which the indictment was amended. The indictment, in this case, was amended after both the prosecution and the defence were closed, and Crown Counsel had completed his address to the jury. Counsel complained that there was no time for any of the accused-appellants to consider whether they should now give evidence, or call witnesses or whether witnesses for the prosecution should be recalled and cross-examined — as the addresses proceeded forthwith.

We agree that before a charge is amended, particularly at a late stage, the defence should be given an opportunity of making their submissions on the point (see *Rodrigo* v. *The Queen*, 55 N.L.R. 49). Thereafter, if the amendment is made, before the Judge decides whether or not to proceed with the trial immediately under section 172 or 173 of the Criminal Procedure Code, the defence should be consulted again. But, in this particular instance, having regard to the nature of the amendment (the 2nd accused-appellant was dropped from the second and the third charges) and as — no application had been made by the prosecution or the defence under section 176 of the Criminal Procedure Code to examine any witness with reference to such amendment, — and having considered the submissions made by Counsel — we are of the view that no prejudice had been caused to the appellants on this ground.

The next point raised by Counsel for the appellants related to the directions given in regard to the statement from the dock of the 1st accused-appellant. It was a long statement in which the 1st accused-appellant protested his innocence, gave his version of some of the matters on which the prosecution had led evidence and said, *inter alia*, that he never touched the bottles of arsenic in his dispensary, or that he took part in any plot to kill his wife.

Though there is no statutory provision for it, the right of an accused to make an unsworn statement from the dock has been recognized by our Courts for many years (see *The King* v. *Sittambaram*, 20 N.L.R. 257) and is now part of the established procedure in our criminal courts.

In *Buddharakkhita's case* (63 N.L.R. 433) it was held (at page 442) that,

> "The right of an accused person to make an unsworn statement from the dock is recognised in our law. That right would be of no value unless such statement is treated as evidence on behalf of the accused, subject, however, to the infirmity which attaches to statements that are unsworn and have not been tested by cross examination."

We are in respectful agreement, and are of the view that such a statement must be looked upon as *evidence* subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(*a*) If they believe the unsworn statement it must be acted upon,

(*b*) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and

(*c*) That it should not be used against another accused.

In this case the learned trial Judge referred to it in the early part of his charge when dealing with the telephone call of the 1st accused-appellant to the police and said that the prosecution can make use of it. But he made no reference to it at all until the conclusion of his charge, when Crown Counsel reminded him of that statement. Thereupon, he told the jury that this statement was not evidence, but that it can be taken into account as a circumstance. In the manner in which it was dealt with, it is likely that the jury thought that they were not called upon to pay any attention at all to that statement.

Another point raised by the appellants was that the learned trial Judge had failed to explain the nature of the charges, particularly the charge of conspiracy, to the jury. We have considered this submission, and though the charge relating to,

conspiracy was not dealt with in much detail we are of the view that the essence of the charge was adequately explained to the jury.

There is, then, the complaint relating to directions in regarding to the possibility of suicide.

There is, of course, no burden on the defence to explain how the deceased had taken poison. But, as in most cases, where death ensues from a single dose of poison, the possibility of suicide arises. In this instance — as Counsel put it — it was "a live issue in the case." From the cross examination of prosecution witnesses, particularly Achini and the deceased's sister Mrs. Suriyawansa, it was established that about two years prior to her death, there was a time when the deceased was shouting from her room and from near her window — that she had been taken to a nursing home, and treated by a psychiatrist who had to see her daily — and that ultimately she had to be given what is known as "shock treatment." It was also proved that within about a couple of months of her death, she herself had been in fear of a "nervous breakdown" — term often used to describe mental strain rather than a physical illness. It is clear from the record that the learned trial Judge was very strongly opposed to any suggestion of suicide. But, as a matter of law, the prosecution had to exclude, beyond reasonable doubt, that possibility;and whether they had done so or not was a question of fact which the jury had to decide. It is not a question that could be decided by an admission or a concession by one or more of the Counsel appearing in the case. In the first part of his charge relating to this matter the learned trial Judge categorically withdrew this issue from the jury. He said (at page 977):

> "Now, a great deal of time and my patience, I think, was spent on evidence about mental depression, delusion, hallucination and so on. Mr. Ponnambalam has explained, quite rightly, that it was the duty of the defence to probe the possibility of suicide.
>
> *Court:* Mr. Ponnambalam, correct me if I am wrong. (apparently, the Defence Counsel remained silent.)
>
> I think he has now conceded that suicide is out in this case. I will not, gentlemen, therefore, repeat all the reasons which Crown Counsel has mentioned against the suicide theory, but there are one or two matters that struck me, her conduct after this meal, her statement to her sister, her urgency to be taken to the hospital: she said so in so many words, 'If I am taken to the hospital quickly, my life may be saved.' As I said, as the matter is not really in dispute, I do not propose to spend more time on it, but no doubt, gentlemen, you will realise that there is no question in this case that this lady was determined to live; she was determined to live meaning, fight for her life, for her living conditions, for her status and for her children. *So, there is no question of suicide. Bear that in mind.*"

It was an opinion on a question of fact very strongly expressed, as the learned trial Judge was entitled to do, but, with much respect, we think the passage contained a clear misdirection. The learned trial Judge himself had realized this at a later stage in the charge, for an effort has been made to correct this error. But in doing so, the learned trial Judge referred to all the grounds on which the prosecution sought to exclude suicide, and made no reference at all to a single item of evidence relating to the mental instability of the deceased which formed the basis of the suggestion. He said (at page 1038):

> "It is the duty of the prosecution to exclude suicide affirmatively. I think I told you that the matter had been conceded, but nevertheless there is a burden on the prosecution to exclude suicide. The prosecution has sought to do that by saying there is evidence upon which Crown Counsel says: 'Here was a lady who was determined to live.' You remember she had made arrangements to go down to Colombo to interview her lawyers. She was taking a small gift for Mr. Thiagalingam. She had arranged to get an amulet or talisman for herself. She said, on what turns out to be her death-bed, 'Take me to hospital so that my life can be saved.' Perhaps Mrs. Suiryawansa, to her lasting regret, might be thinking that if not for this unfortunate fact of a divorce action, this lady might have been quickly removed and we would not be sitting here if her life was indeed saved. *I think, gentlemen, you will have no difficulty in excluding suicide.*"

It is impossible to say that this passage would have removed the effect of the earlier misdirection. Indeed, it is most probable that in their deliberations, the jury gave no consideration at all to the possibility of suicide, and this undoubtedly would have greatly influenced them to accept the third theory and the evidence of Achini.

Our attention was drawn by Crown Counsel to the decision in *Plomp* v. *The Queen* (1963 110 Commonwealth Law Reports, page 234). In that case Plomp was charged with the murder of his wife by drowning her. Dixon, C.J., dealing with the facts in that case, said that,

> "it would put an incredible strain on human experience if Plomp's evident desire to get rid of his wife at that juncture ..... were fulfilled by her completely fortuitous death".

Crown Counsel submitted that those remarks were applicable to the facts of this case.

We cannot agree. The facts in that case can easily be distinguished. Menzies, J. set out the

facts, which are shortly as follows: The deceased met with her death when she was in the sea alone with her husband at dusk. There was evidence that the surf was not dangerous, and that the deceased was a good swimmer. There were no eye-witnesses and the only account of what happened was given by the husband. He gave two versions. One was that when he and the deceased were about waist deep in the sea he suddenly felt an undertow which swept him off his feet; another version was that a wave struck him and knocked him down and he saw his wife "sucked under a wave." He went to her aid but was only able to slip his hand in the shoulder strap of her bathing costume which broke, and he lost sight of her.

When her body was found, the bathing costume was hanging down with both straps unbuttoned. The only mark on the deceased's body was a superficial abrasion on the forehead which could have been caused by contact with the sand. There were no marks on Plomp's body. The medical evidence showed that she had been breathing when she was drowning and that death was due to asphyxia which would probably have taken 4 to 5 minutes. Having set out these facts, Menzies, J. said:

> "Were what I have just stated the only evidence, I do not think that it would have sufficed to warrant the appellant's conviction for murder .....".

He then dealt with the other evidence referred to as "motive" but which went beyond that. It has proved that Plomp's statement that he was very happily married was false, that he had formed an association with a young woman, that he had told her that his wife was dead, and a few days before his wife's death he had introduced the young woman to one of his children as their "new mummy"; that a day or two after his wife's death, he had made arrangements to marry the young woman and when the Registrar-General refused to perform the ceremony before the inquest on his wife's death, he had taken the young woman to live in his house as his mistress; he had lied about their relationship and had got her to lie to the police about that relationship. He had told the Minister, who objected to his marrying the young woman, that he was not concerned about the inquest — that the police were satisfied that the drowning was accidental — and added,

> "I am the only witness to the drowning, and if I claim privilege and refuse to give evidence, that is the end of the inquest."

It was with reference to these facts that the remarks quoted above were made. We think that the facts in this case are quite different.

Quite apart from the misdirections referred to above, which in our opinions must have prejudiced the appellants, we are unanimously of the view that the verdict af the jury is unreasonable, and in any event that it cannot be supported having regard to the evidence. We have reached this conclusion on the basis that there was a case to go before the jury.

Lastly, there is the question whether the learned trial Judge should have given a direction to the jury at the close of the case for the prosecution under section 234(1) to return a verdict of not guilty. That section casts a duty upon the trial Judge to direct the jury to acquit, if he is of opinion that there is no evidence that the accused has committed an offence. This provision is in accordance with the principle underlying a criminal trial by judge and jury that matters of law are for the Judge to decide and matters of fact for the jury. It does not appear to us to be a departure from that principle. It has always been considered that the question whether there is no evidence upon an issue is a question of law. Thus, in cases where an appeal is given on a matter of law, a plea that there was no evidence to support a determination is always permitted to be raised as a question of law. Whether there is sufficient evidence or whether the evidence is reasonable, trustworthy or conclusive or, in other words, the weight of evidence is a question of fact. Accordingly, the Judge has to decide whether there is evidence upon the different matters which the prosecution has to prove in order to establish the guilt of the accused. It is for the jury to decide whether those matters are proved by such evidence and guilt established, Thus, in a case, which the prosecution seeks to prove by direct evidence, the Judge has to decide whether there is evidence upon the different matters required to be proved to establish the commission of the offence and the jury has to decide whether it believes that evidence and whether the evidence accepted by them establishes those matters to their satisfaction. In a case of circumstantial evidence, the Judge has to decide whether there is evidence of facts from which it is possible to draw inferences in regard to the matters necessary to establish the guilt of the accused. It is for the jury to decide what facts are proved and whether it is prepared, in the circumstances, to draw from them inferences

in regard to guilt and whether in all the circumstances those inferences are the only rational inferences that may be drawn or are irresistible inferences.

It appears to the majority of us, there was, in this case, evidence of facts from which a jury may possibly have drawn inferences in regard to matters necessary to establish guilt of each of the accused. The majority of us are, therefore, of the view that the learned trial Judge was right in not giving a direction under this section to the jury to acquit the accused at the end of the prosecution case.

There still remains the question whether the inferences that the jury appears to have made are the only rational inferences that could have been drawn in the circumstances or whether they are irresistible inferences. We are unanimously of the view that the material placed before the jury fell far short of evidence on which a reasonable jury could have concluded, that the only rational inference that could have been drawn was one of guilt. Accordingly, we have taken the view that the verdict of the jury cannot be supported having regard to the evidence.

We quash the convictions and acquit the appellants.

All appellants acquitted.

Present: **Weeramantry, J.**

AUGUSTIN PERERA *v.* THE ATTORNEY-GENERAL*

Application No. 166/1968 — *M.C. Negombo* 20978

Argued and decided on: June 20th, 1968

Bail — Application for, by persons charged with offences under Offensive Weapons Act, No. 18 *of* 1966 *and with attempted murder—Effect of Section* 10 *of the Act on Section* 31 *of the Courts Ordinance — Power of Supreme Court to grant bail unaffected.*

Held: (1) That in regard to bail, the provisions of Section 10 of the Offensive Weapons Act No. 18 of 1966 leave unaffected the provisions of the Courts Ordinance as they stand enacted in Section 31.

(2) That therefore, an application for bail by persons charged with offences under the Offensive Weapons Act should be considered as any other matter would be considered which comes before the Supreme Court in the normal way in terms of Section 31.

S. D. Percy Valentine, for the Petitioner.

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

Weeramantry, J.

This is an application by two persons charged with offences under the Offensive Weapons Act No. 18 of 1966. There is also a charge of attempted murder against the two accused.

Learned Crown Counsel submits that this application should be dealt with as an application made under section 10 of the Offensive Weapons Act and not as an application under section 31 of the Courts Ordinance. It seems to me that the provisions of section 10 of the Offensive Weapons Act leave unaffected the provisions of the Courts Ordinance in regard to bail as they stand enacted in section 31. The effect of section 10 of the Offensive Weapons Act is merely to state that no Court other than the Supreme Court shall release an accused-person on bail where there is a charge under the Offensive Weapons Act but there is not in any way any departure from the normal principles that would guide this Court in making an order for bail under section 31. The matter would therefore have to be considered as any other matter would be considered which comes before the Supreme Court in the normal way in terms of section 31.

The application is opposed by the Crown on the grounds that in the event of the accused being enlarged on bail there is a strong danger of a breach of the peace. This position is substantiated

* For Sinhala translation, see Sinhala section, Vol. 18, Part 1 p. 1

by an affidavit filed by the Head Quarters Inspector of Police, Negombo who has stated that he has reasonable grounds to apprehend that having regard to the circumstances of the case, if the petitioners are released on bail the witnesses for the prosecution will be deterred from giving evidence at the trial. He states further in his affidavit that there has been enmity between the petitioners and the injured party in this case even prior to the incident in question and that even subsequent to the incident there had been complaints made by the mother of the injured that persons interested in the petitioners had intimidated her. In support of this, two complaints to the police have been produced one of which reveals that the mother of the accused had abused the daughter of Josephine, the mother of the complainant. There is also another complaint by Josephine to the effect that one Jamis had been threatening her with the throwing of a hand-bomb.

There is also the circumstances that the injured party and the petitioners live in adjoining land and although learned Counsel for the accused states that the family of the accused have now left these premises, there is every likelihood of the accused returning to these premises adjacent to that of the complainant in the event of the accused being enlarged on bail.

In all the circumstances of the case I consider that it would be unsafe to make an order enlarging the accused on bail having regard in particular to the very strained feelings between the parties, the fact that they live in adjoining premises and, what is most important in the context of their proximity of residence, namely the fact that the charge in this case is a charge of throwing a hand-bomb. The dangers of these offences are so great and their commission so easy as to have necessitated the enactment of special legislation to deal with them.

In the circumstances of the case I consider that the application for bail ought not to be allowed. The application is, therefore, refused.

Application refused.

Present: **Weeramantry, J.**

POOSARI KOVINDEN VELU *vs.* VELU, SON OF RAMASAMY & ANOTHER*

S.C. No. 125/68 — *M.C. Kurunegala No.* 51908

Argued on: 17th March, 1968
Decided on: 10th April, 1968.

Criminal Procedure Code, Sections 347 *and* 357 — *Application to review order of discharge of accused after non-summary proceedings—Revisionary powers of the Supreme Court—Powers and functions of Attorney-General in respect of non-summary proceedings.*

Held: (1) That the Supreme Court has undoubted powers to revise any order made by a Magistrate in its discretion, including an order of discharge of accused persons after non-summary proceedings.

(2) That these powers must only be exercised, if it will be exercised at all, in the most extraordinary cases where a positive miscarriage of justice would otherwise result.

(3) That in view of the Attorney-General's powers and functions under sections 388 and 391 of the Criminal Procedure Code, it ought never to be necessary for the Supreme Court to be called upon to exercise its powers in respect of matters vested in his discretion.

Cases referred to: *The King* v. *Noordeen*, (1910) 13 N.L.R. 115
Attorney-General v. *Kanagaratnam* (1950) 52 N.L.R. 121 at 125
The Attorney-General v. *Don Sirisena alias Micheal Baas*, S.C. 327/67—S.C.M. 27.1.68 (LXXIV C.L.W. 1)

N. Balakrishnan, for the Petitioner.

* For Sinhala translation, see Sinhala section, Vol. 18 part 1, p 2.

Weeramantry, J.

This is a most unusual application, in which this Court is asked to review an order of a Magistrate discharging two accused persons in a murder case after non-summary proceedings. The applicant asks that the order of discharge be set aside and that the respondents be committed to stand their trial in the Supreme Court.

I understand from Mr. Balakrishnan, though it is not so specifically averred in the petition, that the Attorney General has been interviewed in regard to this discharge and has refused to interfere.

There is no doubt that this Court has very wide powers in revision and that these may be exercised in cases where the record of proceedings is called for by this court or where a matter otherwise comes to the knowledge of this Court. Section 357 of the Criminal Procedure Code contains express provision to this effect. Read with section 347 this provision would entitle the court in revision, as in appeal, to alter or reverse any order in respect of which relief is sought from this court.

But do these provisions enable this court to set aside an order of discharge and require a Magistrate to commit to this court an accused person whom he has discharged?

Commitment to this Court is a duty imposed on Magistrates by section 163 if they consider the evidence sufficient to put the accused on his trial. Discharge of an accused person where the Magistrate considers the evidence against the accused insufficient to put him on his trial is likewise rendered obligatory by section 162.

When a Magistrate discharges an accused person under the provisions of this latter section the appropriate though not perhaps the exclusive authority for reviewing this order is the Attorney-General, who, in terms of section 391, may direct the commitment of such accused to the court nominated by him or order the Magistrate to re-open the inquiry and give such instructions with regard thereto as appear requisite. It should also be observed that in the converse situation of a commitment when the Attorney-General is of opinion that there is not sufficient evidence to warrant it, the Attorney-General is by section 388 given a corresponding power of quashing such commitment.

Although, then, this Court may in theory have the power to revise an order of discharge made by a Magistrate, the Court would in so doing be entering upon a field where, to say the least, another authority namely the Attorney-General enjoys a concurrent jurisdiction.

The difficulties resulting from such a situation became clearly apparent in the case of *The King* v. *Noordeen* (1910) 13 N.L.R. 115, where the Attorney-General pointed out that an order made by this Court in similar circumstances would be a mere *brutum fulmen* since it would be open to the Attorney-General to enter a *nolle prosequi* at any stage of the subsequent proceedings.

It becomes apparent therefore that the undoubted powers of this Court to revise any order in its discretion, including as was pointed out in *The King* v. *Noordeen*, such an order as an order of discharge, must only be exercised, if it will be exercised at all, in the most extraordinary cases where a positive miscarriage of justice would otherwise result. In view however of the Attorney-General's powers and functions in this respect, there can be no doubt that through their exercise such cases of positive miscarriage of justice will not arise. The subject is therefore not lacking in a remedy against orders of discharge or commitment with which he is dissatisfied, and in the result it ought never to be necessary for this Court to be called upon to exercise its powers. The fact however that this Court does enjoy such powers cannot be controverted and has been assumed on more than one occasion, *The King* v. *Noordeen*, *supra* *Attorney-General* v. *Kanagaratnam* (1950) 52 N.L.R. 121 at 125.

I should also make reference to the recent case of *The Attorney-General* v. *Don Sirisena alias Michael Baas*, S.C. 327/67—S.C.M. 27.1.68,* where a Divisional Bench had occasion to review the scope of the sections of the Criminal Procedure Code relating to commitment by a Magistrate. In this case it was held that the Attorney-General clearly had the power in the case of an order of discharge made in the exercise or purported exercise of the power conferred by section 162(1), to give him subsequent direction for commitment under section 391. A Magistrate's refusal to comply with such directions was held in that case to be unlawful. It was further observed that the powers of the Attorney-General which have been described as *quasi* judicial, have traditionally formed an integral part of our system of Criminal Procedure and that the Attorney-General is vested

* LXXIV C.L.W. p. 1.

with a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter 16 will terminate in a manner determined in the exercise of that discretion. Into the sphere where this discretion is excercised it is not the province of this Court to enter save for the gravest cause and I may add that in the present case no cause whatever has been made out, for the Magistrate would appear in a considered order to have given his careful attention to all the features of the evidence and to have set out compelling reasons in support of the order of discharge which he made.

The application is accordingly refused.

It only remains for me to record my appreciation of the assistance rendered to me by Dr. Colvin R. de Silva and Mr. M. M. Kumarakulasingham, who made available to me at my request the benefit of their fund of knowledge and experience of our criminal law, in what seemed to me to be an application for the exercise of this Court's powers in an unprecedented way.

Application refused.

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

R. P. GUNASINGHE *v.* G. B. YATIGAMANA, I. P. ARANAYAKE*

S.C. 1007/68 — *M.C. Kegalle* 71369

Argued on: 2nd, 9th, and 30th December, 1968.
Decided on: 22nd February, 1969.

Price Control Act — Charge of selling loaf of bread above controlled price — Should the charge specify the kind of bread?

Held: That where a person is convicted on a charge of selling a loaf of bread in excess of the maximum controlled price, the failure to specify the kind of bread e.g. brown bread, sandwich bread etc. in the charge does not vitiate the conviction.

Per **Pandita-Gunawardena, J** "It is not so abstruse and difficult to understand what a man seeks, when he asks for a pound of bread. It is not brown bread or "pink" bread or any special kind of bread but bread so commonly known which is white in colour. Any other bread would, I expect, to all intents and purposes be of the fancy kind; fancy meaning a departure from the ordinary."

V. Kumaraswamy, with *T. P. Amerasinghe*, and *Miss S. M. Senaratne*, for the accused-appellant.

S. W. B. Wadugodapitiya, Crown Counsel, for the Attorney-General.

Pandita-Gunawardene, J.

The appellant, a tea-kiosk keeper at Gevilipitiya, Kegalle, was charged and convicted of selling a loaf of bread 16 ounces for -/37 cents a price in excess of the maximum controlled price of -/36 cents in contravention of Food Price Order No. KE 125 published in Government Gazette of 27.11.67. He was sentenced to a term of four weeks R.I. in addition to the imposition of Rs. 50/- in default two weeks R.I.

Learned Counsel for the appellant did not seriously contest the findings of fact of the Magistrate. He has however challenged the conviction on two grounds.

It has been contended that the Price Order KE 125 which the appellant is alleged to have contravened is invalid in that the Deputy Controller of Prices has no power to issue such an Order covering the Administrative District of Kegalle. The Administrative Districts Act (Chapter 392, Vol. XI L.E.C.) established. Administrative Districts with limits specified. By this Act an Administrative District of Kegalle has been established and the limits defined — vide item 20 first Schedule to the Act.

Section 3(2) of the Control of Prices Act (Chap. 173, Vol. VI L.E.C.) read with Section 4 of the same Act empowers a Deputy Controller within the area of his appointment to make Orders

*For Sinhala translation, see Sinhala section, Vol. 18, part 3, p. 5.

fixing prices and prescribing conditions of sale to be operative within the area of his appointment. The Price Order KE 125 has been made by Stanley Maralanda, Deputy Controller of Prices (Food) Kegalle District. And the evidence is that Gevilipitiya is within the Kegalle Administrative District. This contention of learned Counsel is without substance and must therefore fail.

The second ground of appeal advanced by Learned Counsel was that the Price Order KE 125 is vague and ineffective, for the reason that the particular kind of bread subject to the Control Order has not been specified. It was submitted that there are various kinds of bread, e.g. brown bread, sandwich bread, and white bread: and that there is bread made of maize and also bread made from flour. In these circumstances it is said that there should be a particularisation of the bread in the Order. This argument is not without ingenuity.

Chambers 20th Century Dictionary (1954 Reprint) gives to the word bread the following meanning "food made of flour or meal baked: food:" There is in Volume VIII of the Legislative Enactments an Ordinance titled Bread (Chap. 217). It is an Ordinance to regulate the sale of bread and to prevent the adulteration of bread offered for sale. Section 2 which deals with the sale of bread and marking of the weight of loaves is in these terms:—

> 2(1) No baker or vendor of bread shall sell any bread other than fancy bread or rolls, except by weight, and except in loaves weighing one-quarter of a pound one-half of a pound, one pound, two pounds, or four pounds avoirdupois.
>
> (2) Subject as hereinafter provided, no baker or vendor of bread shall sell any loaf of bread or expose any such loaf for sale unless. the weight of the loaf is clearly marked on the loaf by an impression made in baking, or on a band or wrapper affixed round or enclosing the loaf:
>
> Provided that nothing in the preceding provisions of this subsection shall apply —
>
> (*a*) in the case of fancy bread or rolls, or of any loaf of bread which is under one-half of a pound in weight; or
>
> (*b*) .....

Bread is nowhere defined in this Ordinance but there is a differentiation between bread and fancy bread and rolls.

Learned Counsel posed the rhetorical question, What is bread? Bread as a common article of food has been known throughout the ages. It is not so abstruse and difficult to understand what a man seeks, when he asks for a pound of bread. It is not brown bread or "pink" bread or any special kind of bread but bread so commonly known which is white in colour. Any other bread would, I expect, to all intents and purposes be of the fancy kind; fancy meaning a departure from the ordinary.

In the result I am satisfied that the appellant has been rightly convicted. The appeal is dismissed.

Appeal dismissed.

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

K. A. DAVID SINGHO *vs.* K. D. GUNAWATHIE

S.C. No. 727/68 — *M.C. Colombo South* — 71408/*A*

Argued and decided on: 13th December, 1968

Maintenance Ordinance Section 2 — *Application by wife for maintenance — Magistrate ordering defendant to pay Rs.* 75/- *monthly — At trial admission by wife that she was in receipt regularly of Rs.* 50/- *monthly on a consent order as interim maintenance in a pending divorce action between the parties — Was there a neglect or refusal to maintain wife?— Jurisdiction to make such order in the circumstances.*

Where a Magistrate made order directing the defendant-appellant to make a monthly payment of Rs. 75/- as maintenance towards his wife — the applicant respondent—while admittedly she was regularly in receipt of a sum of Rs. 50/- monthly on a consent order made in a pending divorce action between the parties by way of interim maintenance,

Held: (1) That the learned Magistrate had no jurisdiction to entertain the application, as there has been no neglect or refusal to maintain the applicant within the meaning of Section 2 of the Maintenance Ordinance.

(2) That where after a reconciliation was effected between the parties to a maintenance case, they appeared before the Court and stated that they were living together and the learned magistrate made order " I discharge the respondent, the proper order for the Magistrate to have made was one dismissing the application.

M. M. Kumarakulasingham, for the defendant-appellant.

No appearance, for the applicant-respondent.

Pandita-Gunawardane, J.

This is an appeal by the defendant-appellant from an order under section 2 of the Maintenance Ordinance, Chapter 91, Volume 4 L.E.C. made by the Magistrate, Colombo South directing him to make a monthly payment of Rs. 75/- as maintenance towards his wife, the applicant-respondent. The applicant-respondent, whom I shall hereafter refer to as applicant, is not represented at the hearing of this appeal. Learned Counsel appearing for the appellant contends that the order made by the learned Magistrate cannot be sustained. My attention has been invited to section 2 of the Maintenance Ordinance which enacts, "If any person having sufficient means neglects or refuses to maintain his wife.....the Magistrate may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife.....". It would appear that there is pending a divorce action between these same parties and in that divorce action by consent a payment order was made in favour of the applicant by which the appellant was to pay Rs. 50/- a month by way of interim maintenance. There is no complaint that the appellant has defaulted in making this monthly payment. In the course of her evidence the applicant has said this:— "In the divorce case of consent I agreed to accept Rs. 50/- as maintenance per month ..... From that date the defendant (appellant) sends me regularly Rs. 50/- per month ..... From that date up to the end of April I have received Rs. 50/- a month from the defendant regularly". This evidence has been given in May 1968. In view of this evidence of the applicant I fail to see how the learned Magistrate could have entertained her application. For the learned Magistrate to have entertained the complaint of the applicant, the complaint should have been that the appellant neglected or refused to maintain the applicant. Evidence in this case is to the contrary. In the course of his order the learned Magistrate proceeds to say, "the defendant did not state that he maintained her in any other way after that date except by making a payment of Rs. 50/- by way of interim maintenance in the divorce case". I would ask the question how else can a person be maintained. Perhaps the learned Magistrate means to say that this sum of Rs. 50/- by way of interim maintenance which has been regularly paid is insufficient for the applicant's upkeep. The question of sufficiency or insufficiency is not the question to which the Magistrate should have addressed his mind. The only question that arises in an application of this kind is whether there has been a neglect or refusal to maintain. It appears to me as submitted by learned Counsel for the appellant that the learned Magistrate had no jurisdiction to entertain this application. But before I make order allowing the appeal, I think it is necessary to have the learned Magistrate's attention invited to certain journal entries in the record of this case.

The applicant appears to have made an earlier complaint on 14.6.66. Thereafter after several calling dates in the Magistrate's Court a reconciliation appears to have been effected between the parties. That reconciliation was not to last. On 9.10.66 when this matter was called before the Magistrate, the journal entry of that date records that both parties were present and they stated that they were living together. Upon that statement the learned Magistrate has made the following order:— "I discharge the respondent". I am not quite certain whether this is a correct order for the Magistrate to have made. I rather think that he should have dismissed the application for maintenance. In any event, whatever form of words the Magistrate used, on 9.10.66 the case must be deemed to have ended. In view of what transpired in Court on 9.10.66 the learned Magistrate made order discharging the respondent (appellant). Six months after on 27.4.67 the applicant's proctor appears to have filed a motion in the same case and the applicant has been permitted to continue proceedings in the case which I thought should have been closed. The proper procedure was for the applicant to have filed a fresh complaint in terms of the Maintenance Ordinance. I trust Magistrates will pay some attention to legal procedures in matters which come before them in their Courts. The appeal is allowed.

Appeal allowed.

Present: **Wijayatilake, J.**

G. P. NANDIAS SILVA *vs.* T. P. UNAMBUWA

S.C. 3/67 (*R and* E) — *C.R. Colombo* 89415

Argued on: 31.8.68 and 30.9.68
Decided on: 25th November, 1968

Landlord and Tenant—Sub-letting of premises subject to Rent Restriction Act — Premises owned by Crown — Written agreement that tenant shall not sub-let—Statutory right of landlord under National Housing Act to cancel tenancy and recover possession on breach of this provision—Such right not exercised — Can the tenant sue sub-tenant for ejectment—Privity of contract between tenant and his sub-tenant—Sub-tenant not protected under Rent Restriction Act where premises belong to the Crown.

Pleadings — Plea of estoppel not taken — Can issue be raised at trial.

The premises in question were governed by the provisions of the Rent Restriction Act. The plaintiff-respondent took the premises on rent from its owner, the Department of National Housing, on a written agreement which provided *inter alia*, that the tenant shall not let or sub-let any part of the premises. Breach of this provision gave the landlord a right to cancel the tenancy and recover possession of the premises by virtue of the provisions contained in Part V of the National Housing Act. The respondent sub-let the premises to one P. S. Perera who in turn sub-let a definite portion of it to the appellant. The Commissioner of National Housing did not choose to cancel the tenancy of the respondent, but brought an action to eject the sub-tenant—the appellant. In that action it was held that the provisions of the National Housing Act did not empower the Commissioner to eject the appellant. The respondent then filed the present action for his ejectment.

Held: (1) That the respondent's action to eject the appellant was properly constituted, although under the tenancy agreement the landlord of the premises was the Department of National Housing (the Commissioner of National Housing having been held to have no right to eject the appellant).

(2) That the respondent could enter into a valid contract to let the premises to the appellant even though he had no right or title to it nor any authority from the true owner to do so.

(3) That rent receipts produced in evidence showing that the appellant paid rent direct to the respondent and an admission of tenancy in the appellant's answer (although tenancy was later denied in an amended answer) afforded adequate proof of privity of contract between the appellant and respondent.

(4) That it is not open to the appellant, as a sub-tenant, to avail himself of the protection afforded to a tenant under the Rent Restriction Act, in view of the fact that the premises in question belong to the Crown.

(5) That where the plea of estoppel has not been taken in the pleadings no issue may be raised thereon.

Followed: *De Alwis* vs. *Perera* (1951) 52 N.L.R. 433; XLIV C.L.W. 100
Robert vs. *Rashad*, (1954) 55 N.L.R. 517.
Fonseka vs. *Wanigasekera*, (1963) 65 N.L.R. 552.

Cases referred to: *Sumanatissa Thero* vs. *Pagnananda Thero*, (1968) 70 N.L.R. 313.
Jayawardane vs. *Jayawardane*, (1939) 40 N.L.R. 467
G. P. N. Silva vs. *Commissioner of National Housing*, (1968) 70 N.L.R. 573.
Ibrahim Saibo vs. *Mansoor*, (1953) 54 N.L.R. 217; XLVIII C.L.W. 35
David Appu vs. *The Attorney-General*, (1948) 49 N.L.R. 356.

H. W. Jayawardene, Q.C, with *W. S. Weerasooria*, for the appellant.

Walter Jayawardene, Q.C. with *Lakshman Kadirgamar*, for the respondent.

Wijayatilake, J.

In this case the plaintiff has sued the defendant for ejectment from the annexe to premises 623 Nawala Road, Rajagiriya on the basis of a monthly tenancy. The learned Commissioner entered judgment for the plaintiff as prayed for.

Admittedly the premises in question are owned by the National Housing Department and the plaintiff is a tenant of this Department. (Vide tenancy agreement D1 of 2.12.60). It would appear that the plaintiff, who is a President, Labour Tribunal, was transferred to Kandy and one P. S. Perera came into occupation as his tenant and sometime thereafter the defendant occupied a distinct portion of this house as a sub-tenant on a monthly rental of Rs. 90/-.

Learned Counsel for the appellant has raised several defences: Firstly, whether this action is properly constituted as admittedly the National Housing Department is the landlord under the agreement D1. Clause 8 of this agreement provides that the tenant (the present plaintiff) shall not let or sub-let any part of the premises. The National Housing Act 37 of 1954 has in Part V set out the procedure for the recovery of possession of houses let out by the Department. In fact the defendant in the present action was a party to an application made under the aforementioned procedure by the Commissioner of National Housing in respect of these very premises, and it was held by this Court that the procedure referred to is not available in a case where the original occupier holding under the Commissioner sub-lets the premises or permits some other person (not being a dependant) to occupy the premises. The Amending Act No. 36 of 1966 clarifies the position. (Vide *G. P. N. Silva* vs. *Commissioner of National Housing* 70 N.L.R. 573). Therefore in my view the objection to this action on this ground cannot be sustained.

Secondly the question has been raised as to whether the defendant is a tenant of the plaintiff. Counsel for the appellant submits that on the evidence of plaintiff himself it is clear that there is no privity of contract as between the plaintiff and the defendant; the defendant having come into occupation as a 'tenant' of the plaintiff's 'tenant' P. S. Perera. Counsel for the respondent has drawn my attention to the original answer which categorically admits the tenancy averred in the plaint, although in the amended answer the defendant has sought to deny it. The plaintiff has produced a series of letters P1 to P9 for the period 11.3.63. to 10.1.64 showing that the defendant had forwarded the monthly rent in respect of these premises to the plaintiff; so that there can be no doubt whatever that although it was through P. S. Perera the defendant had come into occupation of the premises the defendant had recognised the plaintiff as the landlord. In my view this affords adequate proof of the privity of contract.

Thirdly, the Counsel for the appellant submits that the sub-letting is void in law in view of clause 8 of the agreement D1. Counsel for the respondent has met this submission by relying on the principle set out by Wille in Landlord and Tenant (3rd ed.) at page 18, that a person may let to another immovable property without having any right or title in it or any authority from the true owner. (Vide *de Alwis* vs. *Perera* 52 N.L.R. 433). No doubt sub-letting in breach of a prohibition contained in the contract of tenancy gives a landlord a right to cancel the tenancy. However, in the instant case despite clause 28 of the agreement which provides for a termination the Commissioner of National Housing has not availed himself of it to terminate the tenancy. (Vide Wille pp. 114—116 and 176) and the case of *Robert* vs. *Rashad* 55 N.L.R. 517. I might state that the only witness in this case is the plaintiff and his evidence is that in view of clause 8 of the agreement he got the necessary permission from the Commissioner of National Housing. It is true that he has not called any evidence in support but the defendant has not made any attempt to controvert this assertion. I do not think the submission of the appellant on this ground can be accepted in the circumstances.

Fourthly, the Counsel for the appellant submits that the premises are governed by the Rent Restriction Act and therefore a sub-tenant can rely on the statutory protection given to a tenant. *Ibrahim Saibo* vs. *Mansoor* 54 N.L.R. 217. He further contends that the principle set out in the case of *Fonseka* vs. *Wanigasekera*, 65 N.L.R. 552 in which Sri Skanda Rajah, J. held that the Rent Restriction Act does not apply to the premises belonging to the Crown is of no avail to the plaintiff in the light of the judgment of Gratiaen, J. in the case of *Davith Appu* vs. *Attorney-General* 49 N.L.R. 356. The facts in the case of *Fonseka* vs. *Wanigasekera* appear to be analogous to the facts before me and with respect I see no substantial reason to take a different view. In the earlier case the question was the right of the Crown to eject an overholding tenant, and I think it can be distinguished from the instant case.

Learned Counsel for the respondent has submitted that the issue raised by him as to whether the defendant is estopped in law from denying the tenancy under the plaintiff had been wrongly rejected by the learned Commissioner. He relies on the cases of *Jayawardene* vs. *Jayawardene*, 40 N.L.R 467 (P.C.) and *Sumanatissa Therunnanse* vs. *Pangnananda Therunnanse* 70 N.L.R. 313 (P.C.) Learned Counsel for the appellant has drawn my attention to the fact that estoppel has not been pleaded and therefore Commissioner was well within his right in rejecting this issue. I am inclined to agree with him.

As I have already observed I see no merit in the several points raised in this appeal by the appellant. I would accordingly dismiss the appeal with costs.

Appeal dismissed.

Present: **Wijayatilake, J.**

SANDANAM SELLIAH *vs.* SINNAMMAH

S.C. 730/68 — *M.C. Jaffna* 34660

Argued on: 8th November, 1968
Decided on: 30th November, 1968

Maintenance Ordinance (*Cap.* 91) *section* 20 — *Whether payment of a lump sum absolves a father from all liability thereafter to maintain a child — Whether an agreement not to apply for maintenance debars an applicant from obtaining relief under section* 2—*Factors relevant to the assessment of the quantum of maintenance.*

Held: (1) That the payment of a lump sum of money in lieu of monthly payments and a notarial agreement to the effect that no further sum shall be claimed as maintenance, do not relieve a father of his obligation to maintain his children, if the sum so agreed upon is manifestly inadequate.

(2) That the quantum of maintenance should be arrived at having regard to the society in which the depedent children have been brought up and the prevailing cost of living.

Per **Wijayatilake, J.** ".....even where a mother seeks to renounce such rights" (rights to the maintenance of her children) "the question arises whether such renunciation can be given legal recognition to the prejudice of the children. I do not think so as the maintenance of children is a continuing obligation which cannot be bartered away by a mother foolishly or mistakenly. I should think that the duties of parents to the children are intimately connected with their duty to the public and the claims of society would forbid such renunciation."

Followed: *Parupathipillai* vs. *Kandiah Arumugam*, (1944) 46 N.L.R. 35; XXIX C.L.W. 17

Cases referred to: *Sebastian Pillai* vs. *Magdalene*, (1949) 50 N.L.R. 494; XLI C.L.W. 2
Vidane vs. *Ukkumenike*, (1946) 48 N.L.R. 256; XXXIV C.L.W. 21
Jinadasa vs. *Dingiri Amma*, (1965) 67 N.L.R. 568.

V. Tharmalingam, for the defendant-appellant.

Applicant-respondent absent. No appearance for her.

Wijayatilake, J.

This is an appeal from the order of the learned Magistrate in an application for maintenance under Section 2 of the Maintenance Ordinance by the applicant who is admittedly the mistress of the defendant in respect of her three children Sivarajah aged 4 years, Sivarangani aged 2 years and Rajeswary aged 1 year on the ground that she has no means to maintain them and the defendant has failed to support and maintain them.

The paternity of these children is admitted. The only question that has arisen in this appeal is whether the applicant has discharged the onus under Section 2 of the Maintenance Ordinance in regard to the alleged failure or neglect on the part of the defendant to maintain these children and as to whether he has suffi-

cient means. Counsel for the appellant relies on the judgments in the cases of *Sebastian Pillai* v. *Magdalene* (50 N.L.R. 494 at 498), and *Vidane* v. *Ukkumenika* (48 N.L.R. 256) where it was held that under Section 2 *inter alia* an applicant has to establish that the defendant has sufficient means and that he either neglects or refuses to maintain the children. Counsel submits that there is no foundation at all for this application as the parties had entered into an agreement (P2) on 15.1.67, just two months prior to the instant application according to which the applicant had received a sum of Rs. 2,500/- in respect of maintenance payable to the children and she had by P2 undertaken not to claim any further maintenance. The applicant admits the execution of P2 but she states that the contents were not explained to her. However, on this point the Magistrate has rightly disbelieved her — in view of the evidence of the Notary. Moreover, the applicant's father had been an attesting witness.

The question does arise whether the application under Section 2 could be maintained in the circumstances — particularly just two months after this settlement. The applicant has admitted that the sum she received has been invested and she receives 12% interest which would be Rs. 25/- per month. The defendant has stated that she receives as much as Rs. 60/- per month as interest — which is obviously a gross exaggeration. The applicant states that the interest she receives is inadequate for the maintenance of her children.

Counsel for the defendant-appellant relies on the judgment in the case of *Jinadasa* v. *Dingiri Amma* (67 N.L.R. 568) where it was held that where an order has been made for the maintenance of a child, the mother may subsequently accept either a sum of money or property in lieu of liability of the father to maintain the child. However, the question before me is whether the applicant is completely shut out from claiming further maintenance if the amount agreed upon is manifestly inadequate. In my opinion the principle set out in the case of *Parupathipillai* v. *Kandiah Arumugam* (46 N.L.R. 35) which had been cited by Counsel for the applicant before the learned Magistrate is applicable to the facts in the instant case. With great respect I am in agreement with the view expressed in that judgment that a compromise of the nature of (P2) did not relieve the defendant of his obligation of maintaining his children in a manner suitable to the society in which they have been brought up. The prevailing conditions in the country with the cost of living rising daily are also relevant. It is unreasonable to expect this woman to maintain these three children on a bare Rs. 25/- per month, till they attain their 16th year.

In my opinion despite the Agreement P2 the applicant was well within her right in pursuing the application under Section 2 of the Maintenance Ordinance. It would appear that this woman has been lured by the offer of a lump sum of Rs. 2,500/-. If only she had been aware of the legal rights of the children to be maintained till they attain the age of sixteen years it is very unlikely that she would have renounced her rights in respect of these children as she has purported to do in (P2). Furthermore, even where a mother seeks to renounce such rights the question arises whether such renunciation can be given legal recognition to the prejudice of the children. I do not think so as the maintenance of children contemplated is a continuing obligation which cannot be bartered away by a mother foolishly or mistakenly. I should think the duties of parents to the children are intimately connected with their duty to the public and the claims of society would forbid such renunciations. This aspect of the law is discussed in the cases referred to in the judgment reported in 46 N.L.R. 35.

The learned Magistrate has ordered the defendant to pay a sum of Rs. 10/- per month in respect of each child. It is in evidence that the defendant is a goldsmith. I see no reason whatever to vary the quantum fixed by the Magistrate, which appears to be quite reasonable.

I accordingly dismiss the appeal without costs.

Appeal dismissed.

Present: **Samerawickrame, J. and Weeramantry, J.**

SUSEW HEWAGE LILY FERNANDO

vs.

RONALD *alias* ROLAND ANTON VANLANGENBERG

S.C. No. 208(*Inty*)/1967 — *D.C. Panadura Case No.* 9135

Argued on: 22nd January, 1969.

Decided on: 13th February, 1969.

Courts Ordinance (*Cap.* 6), *section* 71 — *Jurisdiction of District Courts — Failure to plead lack of jurisdiction — Requirement that such plea be taken in first instance — Can such plea be taken thereafter by way of amendment of pleadings.*

Waiver — Jurisdiction — Distinction between patent and latent want of jurisdiction — Can right to plead latent want of jurisdiction be waived by conduct of party.

Held: (1) That where a defendant in an action in the District Court pleads without taking the plea that such Court has no jurisdiction to hear the action, section 71 of the Courts Ordinance precludes him from objecting to the jurisdiction of the Court thereafter. Such Court must then be taken and held to have jurisidiction over such proceedings.

(2) That a defendant who has so failed to plead to jurisdiction in the first instance, cannot by reason of the bar imposed by section 71 be permitted to take such plea even by way of amendment to his answer. The existence or absence of prejudice is rendered irrelevant by the express provision found in section 71.

(3) That the present case, not being one of total or absolute want of jurisdiction, the conduct of the defendant also precluded him from raising the question of jurisdiction in an amended answer.

Case referred to: *Kandy Omnibus Co. Limited* vs. *Roberts* (1954) 56 N.L.R. 293

Authorities cited: *Halsbury — Laws of England* (3rd ed.) Vol. 9, sec: 824
Spencer Bower — Estoppel by Representation (1st ed.) pp. 188-9.
Odgers — Pleading and Practice (19th ed.) p. 125.

S. Sharvananda, with *T. Kanagasabai*, for the plaintiff-appellant.

Sam P. C. Fernando, with *D. S. Wijewardena*, for defendants-respondents.

Weeramantry, J.

Arising out of an accident in which the plaintiff's husband was killed, the plaintiff instituted this action against the defendants, who are respectively the driver and the owner of the motor vehicle which came into collision with the deceased.

The accident occurred on February 4th 1962 and the plaintiff came into Court as late as 31st January, 1964. The defendants entered no appearance initially and the case was heard *ex parte* and decree *nisi* entered. Thereafter objections were filed to the decree *nisi* and it was vacated of consent. Answer was accordingly filed on 28th January, 1967.

Many months later, on 29th September 1967, the defendants moved to amend their answer. The amendment involved the withdrawal of a specific admission contained in the original answer, relating to the jurisdiction of the Court to hear and determine the action and a plea that the Court had no jurisdiction. No reasons are stated for the denial of jurisdiction and the place at which the accident occurred would seem to be within the territorial jurisdiction of the Court in which the action was instituted. The reason for denial of jurisdiction would appear to be that the death of

the plaintiff's husband occurred outside the jurisdiction of this Court. It is not necessary for the purpose of disposing of the present appeal to arrive at a determination on the validity of this ground of objection, suffice it to say that if the wrongful act complained of, namely the collision, occurred within the territorial limits of that Court's jurisdiction, it is difficult to see how the mere circumstance that death occurred in another area can deprive that Court of its jurisdiction.

Objection was taken to this amendment on the ground that section 71 of the Courts Ordinance precludes a defendant who has pleaded in any cause, suit or action in a District Court, without pleading to the jurisdiction of such District Court, from afterwards objecting to the jurisdiction of such Court. This matter was inquired into by the learned District Judge who made order allowing the proposed amendment. It is from this order that the plaintiff appeals.

The learned District Judge has, in permitting this amendment, proceeded on the basis that no prejudice would be caused to the plaintiff in consequence of the amendment being allowed. He draws a distinction between the present case, where, in consequence of the lateness of the plaint, the first answer would be filed after prescription has run, and a case where the first answer can be within the prescriptive period and the amended answer, taking exception to the jurisdiction, is filed after prescription has run. An amendment allowed in the latter circumstances, the learned Judge observes, would cause prejudice whereas in the present case there would be none.

Another ground on which the learned District Judge has permitted the amendment is that the attempt to object to the jurisdiction has been taken, in the learned District Judge's language, "before pleadings are closed". He observes that the trial as such has not yet commenced and that the bar imposed by section 71 would apply only after the trial as such has commenced or in appeal.

It would appear that both these grounds on which the learned District Judge has relied are untenable.

In regard to the first ground it seems clear upon an examination of section 71 that that express provision of statute law does not depend on the existence or absence of prejudice. All that it stipulates is that the defendant should have pleaded in the cause without pleading to the jurisdiction and if that requirement is satisfied, irrespective of questions of prejudice, the consequences set out in that section must follow. Questions of prejudice would indeed be appropriate had the matter for consideration before the learned District Judge been one falling purely within the purview of section 93 of the Civil Procedure Code. Here however the proposed amendment must be considered not merely in terms of section 93 of the Civil Procedure Code but also in terms of section 71 of the Courts Ordinance. Although the latter provision does not in so many words speak of amendments to pleadings, it covers this matter for by the amendment it is sought to object to jurisdiction after pleadings have been filed without such objections having been raised. The objection visualised by section 71 though not necessarily one by way of pleading may well be taken in many a case, as indeed in the present, through the filing of amended pleadings, and in such an event such amendments of pleadings would be shut out by the bar imposed by section 71.

In regard to the second ground which has weighed with the learned District Judge I need only observe that what the secton requires is that the party should have pleaded. It does not state that the case should have reached the stage where the entirety of pleadings which he would file in the action has already been filed, for till the close of the trial it would not be possible to say whether a party may seek and be granted permission to file amended pleadings. There is no limitation in law on the number of amended pleadings that may be filed or on the time within which they should be filed and there is nothing in section 71 to indicate that the entirety of pleadings should have been filed or that the stage of possible amended pleadings should have been passed before a defendant is precluded thereby from challenging the jurisdiction. Indeed if the construction placed by the learned District Judge on this section be correct it would be well nigh impossible to give effect to section 71 in the trial Court, for the possibility would always exist that amended pleadings would be filed even at a late stage of trial. If therefore objection were taken to the amended pleading in which it is sought to challenge jurisdiction, such an objection could be met by the plea that all the party's pleadings in the action had yet not been filed and that application would be made to Court for permission to file fresh pleadings taking objection to the jurisdiction. Such a conclusion is clearly one which cannot be sustained.

An examination of section 71 shows that two consequences follow from the fact that a party has pleaded in the first instance without pleading to the jurisdiction. The first is that he shall not afterwards be entitled to plead to the jurisdiction and the second is that the Court shall be taken and held to have jurisdiction over such proceedings. When therefore a defendant pleads without pleading to the jurisdiction it would appear that the section brings into operation the legal result that the Court is taken and held to have jurisdiction. That legal result when once it has come into effect cannot be negatived or taken away by any subsequent pleadings.

In the present case it would appear that the defendants had more than one opportunity of registering their objection to the jurisdiction of the Court. They had that opportunity in the first place when they filed papers seeking to have the decree *nisi* vacated. They had their second opportunity when they filed their original answer. On neither of these occasions was the opportunity availed of for objection to the jurisdiction. It may well be argued that these acts amount to a submission to the jurisdiction. Furthermore, in the special circumstances of this case it is necessary to note that the decree *nisi* was vacated of consent — a consent which may not have been forthcoming from the plaintiff had the plaintiff been aware that the defendants would take advantage of the vacation of the decree *nisi* to object to the jurisdiction.

It would thus be seen that it is not merely the provisions of section 71 but the conduct of the defendants as well which would stand in the way of the proposed amendment. It is also pertinent to observe that there was not in the original answer merely a general denial of averments including averments relating to jurisdiction but a specific admission in so many words that the Court did have jurisdiction.

This is a type of action and a claim for relief which would undoubtedly fall within the jurisdiction of a District Court. It is only on the basis that the cause of action falls outside the territorial limits of its jurisdiction that it is sought to be urged that this particular Court lacks jurisdiction to hear this particular suit. It will be seen then that such a case is completely different from cases of total and absolute want of jurisdiction in a particular Court or Tribunal, as where a matter exclusively within the purview of the District Court comes before the Court of Requests or a matter clearly outside the jurisdiction of a Tribunal is brought before it. In such cases, unlike in the present, no amount of submission to the jurisdiction can confer on the Court or Tribunal a jurisdiction it altogether lacks. The case before us is rather one where the Court is spared the trouble of satisfying itself of the facts on which its jurisdiction depends, for the party by his conduct is taken to have accepted those facts, thus dispensing with the need for an inquiry into their existence. This would appear to be the principle underlying the section. So also it would appear that in English law by virtue of a similar principle, a defendant is considered to waive an objection to the jurisdiction if, knowing the facts, he enters an unconditional appearance to the writ, *Odgers on Pleadings*, 19th edition p. 125.

As Sansoni, J. observed in *Kandy Omnibus Co. Ltd.* v. *Roberts* (1954), 56 N.L.R. 301, there is a sharp distinction between cases of patent and latent want of jurisdiction. Where it appears on the face of the proceedings that the Court had no jurisdiction the case is differently treated from cases where the difficulty is not apparent and depends upon some fact in the knowledge of the applicant which he might have put forward but has kept back. In the former case conduct does not preclude a party who took part in the proceedings from raising the question of jurisdiction whereas in the latter case the parties may by appearing without protest or by taking any steps in the action waive their right to object to the jurisdiction, *Halsbury, Vol.* 9 Part 824. It is in cases where there is a total lack of jurisdiction not depending on the existence of any fact that questions of estoppel or consent do not arise, See Spencer Bower's *Estoppel by Representation*, 1st ed. pp. 188-9.

In conclusion a contrast should be drawn between section 71 of the Courts Ordinance and section 21 of the Indian Code of Civil Procedure V of 1908. The latter section provides that objection to the territorial jurisdiction will not be allowed by an Appellate or Revisional Court unless taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice. It will be seen that section 71 of the Courts Ordinance is more absolute in its terms and that the notion that objection may be taken at any time before issues, which finds a place in the Indian section, finds no place in ours. Where the Statute is in the absolute terms in which section 71 is

framed there would thus be no room for giving to it the extend interpretation which the learned District Judge has sought to give, for which express statutory provision, totally absent in our law, was required in India.

In all the circumstances, therefore, it seems that the learned District Judge's order conflicts with the provisions of section 71 of the Courts Ordinance and cannot be upheld. Consequently the application for amendment by a denial of jurisdiction is refused with costs both here and in the Court below.

Samerawickrame, J.

I agree.

Appeal allowed.

Present: **Wijayatilake, J.**

L. D. RATNASEKERA *vs.* THE COMMISSIONER OF INLAND REVENUE, COLOMBO*

S.C. Application No. 525/1968 — *M.C. Colombo South No.* 88223/*B*

Argued on: 21st November, 1968
Decided on: 15th January, 1969

Stamp Ordinance (*Cap.* 247), *sections* 31, 33 *and* 55 (*old sections* 26, 27 and 51 *respectively*)— *Deficiency in Stamp Duty on deed of agreement to transfer business executed in* 1947— *Who is liable to pay, transferor or transferee*?

Conflict between old sections 26 *and* 27 (*now* 31 *and* 33) *on the one hand and old section* 51 *on the other—Amending Act No.* 19 *of* 1956 *introducing new sub-section* 3 *into section* 51 (*now* 55)—*Does it operate retrospectively — Need for clear language in statutes imposing taxes on subjects.*

This is an application by the Commissioner of Inland Revenue to recover Rs. 3,307/-, being the amount of deficiency of Stamp duty due on a Notarial deed of agreement executed in 1947 to transfer a business. The Magistrate found that the petitioner had failed to show sufficient cause why this amount should not be recovered as if it were a fine imposed by court and ordered the same to be paid or in default 6 months' imprisonment.

The petitioner applied to the Supreme Court for review of this order.

Held: (1) That the Amending Act No. 15 of 1956 which brought in section 55(3) of the Stamp Ordinance is not retrospective in its operation. Hence the principle laid down by H. A. de Silva, J. in *Gaebele* v. *Commissioner of Stamps*, 54 N.L.R. 231 applied to the instant case, viz: that section 51 (now section 55) being a general clause did not control the specific enactment contained in sections 26 and 27 (now sections 31 and 33) of the Stamp Ordinance.

(2) That, therefore in this case under section 31 of Stamp Ordinance it is the transferee who is liable to pay Stamp duty, and the petitioner who is the transferor is not liable.

Per **Wijayatilake, J.** "In dealing with this matter it would be well to keep in mind that it is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language. The subject is not to be taxed unless the language of the Statute clearly imposes the obligation."

Cases referred to: *Gaebele* vs. *Commissioner of Stamps* (1952) 54 N.L.R. 231.
Mersey Dock and Harbour Board Trustees vs. *Cameron*, (1865) 11 H.L.C. 443; 12 L.T. 643
Puranchand vs. *Manmothu Nath*, 1928 A.I.R. (P.C.) 38.
Cape Brandy Syndicate vs. *Inland Revenue Commissioners*, (1921) 2 K.B. 403; 125 L.T. 108; 37 T.L.R. 402
Royal Crown Derby Porcelain Co. Ltd. vs. *Raymond Russell*, (1949) 2 K.B. 417; (1949) 1 A.E.R. 749
Ormond Investment Co. Ltd. vs. *Betts* 1928 A.C. 143; 138 L.T. 600
Inland Revenue Commissioners vs. *Dowdall O'Mahoney and Co. Ltd.* 1952 A.C. 401; (1952) 1 A.E.R. 531; (1952) 1 T.L.R 560
Camille and Henry Dreyfus Foundation Inc. vs. *Inland Revenue Commissioners*, (1954) Ch. 672; (1954) 2 A.E.R. 466
Kirkness vs. *John Hudson and Co. Ltd.*, 1955 A.C. 696; (1955) 2 A.E.R. 345

M. Amerasingham, with *W. H. Perera*, for the petitioner.

S. Sivarasa, Crown Counsel for the Attorney-General.

* For Sinhala translation, see Sinhala section, Vol. 18 part 4, p 7.

Wijayatilake, J.

This is an application by the Commissioner of Inland Revenue to recover a sum of Rs. 3,307 being the amount of deficiency of stamp duty due under Part 1. Schedule A of the Stamp Ordinance (Chapter 247) from the petitioner in respect of an Agreement to transfer No. 280 of 1.4.47 attested by S. H. E. Thiedeman, Notary Public. By the said deed the present petitioner agreed to transfer the business carried on by him under the name, style and firm of Velanto Hygienic Wine Co. to the Velanto Hygienic Wine Co. Ltd.

The learned Magistrate has found that the petitioner has failed to show sufficient cause why this amount should not be recovered as if it were a fine imposed by Court. He has accordingly ordered that the said sum be recovered as if it were a fine in default 6 months imprisonment.

Learned counsel for the petitioner submits that the deficiency in stamp duty is payable not by the transferor but by the transferee. He further submits that in any event the petitioner is not personally liable to pay the deficiency and further the imposition of a term of imprisonment is bad in law. He relies on the judgment of H. A. de Silva, J. in *Gaebele* vs. *Commissioner of Stamps* 54 N.L.R. 231 which has dealt with a similar transaction. There it was held as follows:

> "In the absence of an agreement to the contrary, section 26(a) of the Stamp Ordinance (now section 31) has the effect of making the grantee or transferee liable to stamp duty in respect of an agreement or contract to convey as though it were an actual conveyance provided for in section 27 (now section 33). Section 51 of the Stamp Ordinance (now section 55) being a general clause, does not control the specific enactment contained in sections 26 (a) and 27 (now sections 31 and 33)".

De Silva, J. has considered the alleged conflict between sections 26 (a) and 27 on the one hand and section 51 on the other and he has come to the conclusion that the sections 26 and 27 which contain specific provision in regard to liability to stamp duty must prevail over section 51. It is noteworthy that after this decision in November, 1952, by Ordinance No. 18 of 1956, section 51 was amended. This amendment now appears as sub-section 3 of Section 55;

> "55(3)— The provisions of sub-sections (1) and (2) shall have effect notwithstanding anything to the contrary in any other provisions of this Ordinance specifying the person who shall, or the persons who shall and the shares in which they shall, pay stamp duty in respect of any instrument chargeable with such duty."

Counsel for the petitioner has drawn my particular attention to clause 3 of the statement of Legal Effect annexed to the amending Bill which reads as follows:

> "The provisions of sub-sections (1) and (2) of section 51 of the principal enactment impose on every person who has executed an instrument in Ceylon and on every person in Ceylon who has executed an instrument out of Ceylon the liability to pay any stamp duty due in respect of such instrument and any sum due as penalty attaching to the non-payment of such duty. Those provisions are in conflict with other provisions (eg. section 26 (a) and 27) which specify the person who shall, or the persons who shall and the shares in which they shall, pay stamp duty in respect of any instrument. The effect of clause 3 of the Bill will be that —
>
> (*a*) sub-sections (1) and (2) of the aforesaid section 51 will have effect notwithstanding the other provisions aforesaid with which those sub-sections are in conflict ....."

He submits that it is quite clear that the amendment seeks to meet the difficulty of the specific charge created by Sections 26, and 27 and it is not retrospective in operation. The deed in question having been executed on 1.4.47 the amendment would not be of any avail to the Crown. He relies on the judgment in the case of *Mersey Dock and Harbour Board Trustees* vs. *Cameron* 11 H.L.C. 443. He submits that the amendment in effect has recognised the construction placed on these sections by de Silva, J.

Learned Crown Counsel in a very exhaustive argument has sought to question the correctness of the judgment of de Silva, J. and invited this Court to give a different interpretation to these sections. He has traced the history of the relevant amendments and drawn my attention to the Notice of a draft Ordinance published in Government Gazette No. 7731 of 6.9.29 and to the observations of the then Attorney-General, E. St. J. Jackson prior to the amending Ordinance No. 18 of 1930. He submits that the Amending Act No. 15 of 1956 which brought in sub-section 3 of the present section 55 read with the statement of legal effect has removed the effect of the judgment of de Silva, J. He relies on the following cases:

1. *Puranchand* vs. *Manmothu Nath* 1928 A.I.R. (P.C.) at 38.
2. *Cape Brandy Syndicate* vs. *Inland Revenue Commissioner* (1921) 2 K.B.D. 403.
3. *Royal Crown Derby Porcelain Co. Ltd.* vs. *Raymond Russell* (1949) 2 K.B. 417.
4. *Ormond Investment Co. Ltd.* vs. *Betts* H.L. 1928 A.C. 143 at 155.

5. *Inland Revenue Commissioners* vs. *Dowdall, O'Mahoney and Co. Ltd.* 1952 A.C. 401 at 426.
6 *Camille and Henry Dreyfus Foundation Inc.* vs. *Inland Revenue Commissioners* (1954) 1 Chancery 672.
7. *Kirkness* vs. *John Hudson and Co. Ltd.* H.L. 1955 A.C. 696 at 710.

Crown Counsel submits strenuously that if there be an ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier; and he accordingly invites this Court to interpret these relevant sections having regard to the Amendment Act No. 15 of 1956 which brought in the present section 55(3). He submits that section 55(1) states clearly who shall be liable to stamp duty and that the judgment of de Silva, J. is erroneous. He points out that this judgment has overlooked section 51(3) — (now section 55(4)) and it had wrongly gone on the basis that there is a conflict between the relevant sections. He submits that the Legislature has by the Amending Act 18 of 1956 clearly nullified the effect of this judgment and therefore the present Section 55(3) applies to the facts before me. In dealing with this matter it would be well to keep in mind that it is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language. The subject is not to be taxed unless the language of the Statute clearly imposes the obligation. In a case of reasonable doubt the construction most beneficial to the subject is to be adopted. Still less is the language of a section to be strained, in order to tax a transaction which, had the Legislature thought of it, would have been covered by appropriate words. Vide *Maxwell on Interpretation of Statutes* (11th ed.) page 278.

It is a fundamental rule of English Law which has been adopted by us that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. A statute is not to be construed to have a greater retrospective operation than its language renders necessary. Even a statute which confers a benefit, such as abolishing a tax, would not be construed retrospectively to relieve the persons subject to the burden before it was abolished. Vide *Maxwell on Interpretation of Statutes* 11th ed. page 206 — 212. It is also relevant to note that section 6(3) of the Interpretation Ordinance provides that where any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected the past operation of or anything duly done or suffered under the repealed written law.

In my view the Amending Act 15 of 1956 which brought in Section 55(3) is not retrospective on a construction of its terms, nor can one treat it so even by implication.

The question does arise as submitted by Mr. Sivarasa whether Section 55(3) is a Legislative declaration of the meaning of the relevant provisions dealt with by de Silva, J. Although the bare recital in a statute is not sufficient to repeal the positive provisions of a former statute without a clause of repeal yet where it is gathered from a later Act that the Legislature attached a certain meaning to certain words in an earlier cognate Act this would be taken as a Legislative declaration of its meaning. Vide *Maxwell on Interpretation of Statutes*, page 305. In my opinion even this principle is of little avail to the Crown as the Legislative declaration cannot be retrospective in effect, the deed in question having been executed prior to the Amending Act. It is the function of the Legislature to enact and the Courts to interpret. In the case decided by de Silva, J. he has given a categorical interpretation as far back as 27.11.1952 and the Legislature did not intervene and seek to restrict that interpretation to the deed dealt with in that case. Furthermore the statement of Legal effect clearly accepts the fact that there is a conflict between the relevant sections. It does not question the judgment of de Silva J. In the circumstances, I do not think it correct to apply Section 55(3) retrospectively to the deed in question which was executed on 1.4.1947.

Mr. Sivarasa submits that the interpretation given by de Silva, J. is erroneous, and the Legislature has declared it to be so. I do not think the Legislature has gone thus far. It has not questioned the correctness of the judicial interpretation as such. It has only sought to remove the conflict in the Sections and has set out its object — an object which the draftsman had failed to convey in the sections before amendment.

With great respect I am in agreement with the principle set out by de Silva J. that Section 51 (now Section 55) being a general clause, does not control the specific enactment contained in Sections 26 and 27 (now Sections 31 and 33). I see no valid reason to take a different view and I would adopt

it in dealing with the dispute that has arisen in this case. I would accordingly hold that it is the transferee who is liable to stamp duty and not the transferor.

In view of my above finding the question whether the petitioner is personally liable does not arise.

I quash the order of the learned Magistrate and I hold that the Commissioner of Inland Revenue is not entitled to recover the duty from the grantor on the said deed.

Order quashed.

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

PORT CARGO CORPORATION *vs.* KADER MEERAN MOHIDEEN

S.C. No. 574/66(*F*) — *D.C. Colombo* 63324/*M*

Argued on: 15th — 17th, 25th and 26th October, 1968.
Decided on: 23rd January, 1969.

Port (Cargo) Corporation Act No. 13 *of* 1958—*Damages, action for, against Port Cargo Corporation — Non-delivery of two cases of sewing machine needles consigned to plaintiff — Allegation of negligence against Corporation—Liability of Corporation limited under section* 79 *of the Act — Nature of burden of proof on plaintiff— Issue based on alternative cause of action whether Corporation took the cases into custody on express or implied contract — Who is in effective control of goods in Queen's warehouse — Customs Ordinance, section* 69.

The plaintiff sued the defendant, the Port Cargo Corporation established under Act No. 13 of 1958, for damages resulting from the non-delivery of two cases of sewing machine needles consigned to the plaintiff, which arrived at the Port of Colombo on 11.12.62, and according to the prevailing custom, the defendant, through its agents and servants took charge of the cases, landed them on shore and deposited them in a Queen's warehouse. The said cases were found to contain sulphate of ammonia and broken pieces of wood and gunny sacks and the metal bands of some cases were broken.

The plaint averred (*a*) that the said non-delivery of the two cases was due to the negligence and/or default and/or wrongful and/or unlawful acts or omissions of the defendant or of its officers, agents or servants consisting of (i) failure to exercise due care and diligence in looking after them, (ii) failure to take necessary steps to guard against theft or pilferage, (iii) failure and negligence in not securing the said cases in special grilles within the warehouse.

(b) as an alternative cause of action — that the defendant, having had the custody, control, charge and care of the two cases, was under a legal duty or obligation to look after and deliver the cases to the plaintiff in good and proper order, was liable for breach of this duty or obligation.

Under the said Act No. 13 of 1958 the Port Cargo Corporation was created to provide all "port services" in the Port of Colombo, that is to say "Any services for stevedoring, landing and warehousing of cargo, wharfage .... and other services incidental thereto".

Section 79 of the said Act enacted that the Corporation shall not be liable for any loss or damage to goods deposited in a Government warehouse, unless such loss or damage had been caused by the negligence or by the wrongful or unlawful acts of the Corporation or any of its officers servants etc.

The learned District Judge held that the plaintiff paid warehouse rent in this case on the footing that the warehouse in question is one approved under Secton 69 of the Custom's Ordinance .This finding was not canvassed in appeal.

On the 2nd cause of action he held that there was no positive evidence of negligence, but because the Corporation took charge of a consignment in good condition and when the plaintiff went to obtain delivery it was found to contain sulphate of ammonia instead of sewing machine needles, there was a presumption of negligence and therefore *prima facie* proof that the goods were stolen as a result of wrongful or unlawful act on the part of the Corporation or its servants.

Held: (1) That the only basis of the liability of the defendant Corporation being section 79 of the Act aforesaid, the burden lay on the plaintiff to prove some negligent, or wrongful or unlawful act as being the cause of the loss of his goods.

(2) In the absence of such proof the plaintiff's action must fail as the mere fact of injury in this case, without proof of the manner in which it was caused, cannot give rise to a presumption of negligence.

Despite the failure on the part of the learned District Judge to answer the issue based on the 2nd cause of action, viz. whether the defendant took the cases on the express or implied contract to land, warehouse and deliver the cases to the plaintiff, counsel for the plaintiff argued that there was ample evidence to find that there was here an implied contract upon which the Corporation assumed the obligations of a common carrier or carrier by trade, and that one of these obligations was to store the goods in the warehouse and to be responsible for their care and custody, while in the warehouse.

The evidence referred to in this connection was to the effect:

(*a*) that in each warehouse there are in attendance during the day a number of officers and servants of the Corporation who are on duty at all times throughout the day and perform various tasks such as stacking, weighing and opening packages, moving them to other places as and when required by the Customs authorities, carrying and loading them for the purpose of delivery out of the warehouse and of the port premises;

(*b*) that the Coporation recovers charges from the consignees for handling goods from the time of commencement of discharge from ships and until the time of their removal from the Port premises.

It was further argued that the above facts together with the evidence that the warehouses are locked by Customs authorities between 4.30 p.m. and 7.30 a.m. and the keys kept in their custody and that the Customs officers and the Police guard the warehouses during the night, were sufficient to establish that the Corporation was liable on the basis of an implied contract for safe custody at least during the day; and in the absence of evidence that the Corporation or its agents took due care for the safe custody of the plaintiff's goods, the presumption of regularity must apply in regard to the night as the Customs officials and the Police guarded the warehouses during that time.

Held: (1) That the effective custody and control of the goods in the warehouse was in the Customs officials because according to the evidence

(a) there is always on duty at each warehouse at least one Customs officer.

(b) goods cannot be removed from the warehouse without his authority and his authority for delivery out of the warehouse is given only after some other Customs officer passes a Bill of Entry upon the payment of duty by means of an endorsement "satisfied" being made thereon.

(2) That this control and the liability of the Customs is recognised by section 108 of the Customs Ordinance, although that liability has always been arbitrarily (and perhaps even unreasonably) limited.

(3) That in the present case the presumption of regularity does not justify the inference that the goods missing from the warehouse could not have been stolen during the night.

(4) That having regard to the fact that the Port Cargo Corporation is a body established by statute, its power validly to undertake the liability of a custodian for hire is not clear.

(5) That section 79 of the Port Cargo Corporation Act is a special provision which limits the liability of the Corporation for loss or damage to goods discharged from ships by it and thereafter deposited in a Government warehouse.

Per **Wijayatilake, J.** "While we are dealing with a case of needles and ammonia I might comment that the whole atmosphere of the Port is tainted with a cloud of suspicion and fraud. However, in the present state of the Law it would appear that the Courts are helpless to give relief except to draw attention to Section79(2) of the Act which provides for an *ex gratia* payment in a fit case. In my view the instant case merits consideration."

Cases referred to: *Smith v. Great Western Railway Company* (1922) 1 A.C. 178;
Asana Marikar v. Livera (1903) 7 N.L.R. 158.
The Ceylon Wharfage Co. Ltd. v. Dada (1957) 59 N.L.R. 110.
Cargo Boat Despatch Co. Ltd. v. Moosajees Ltd. (S.C. 500/59 — S.C.M. of 6th July, 1964).
Coonji Moosa and Co. v. The City Cargo Boat Co. (1947)49 .N.L.R. 25
Alibhoy v. Ceylon Wharfage Co. Ltd. (1954)56 N.L.R. 470.

H. W. Jayawardena, Q.C., with *Mark Fernando* and *E. B. Paul Perera*, for the defendant-appellant.

C. Ranganathan, Q.C, with *K. N. Choksy* ad *Miss N. Naganathan*, for the plaintiff-respondent.

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

The Port Cargo Corporation established under Act No. 13 of 1958, now provides all "port services" in the Port of Colombo, that is to say services for stevedoring, landing and warehousing of cargo, wharfage ..... and any other services incidental thereto". According to the findings of fact reached in this case by the District Judge:—

(1) 2 cases of sewing machine needles consigned to the plaintiff arrived at the Port of Colombo on the SS "Mannar", and according to the prevailing custom, the defendant, the Port Cargo Corporation, through its agents and servants took charge of the cases, landed them on shore and deposited them in a Queen's warehouse on 11th December, 1962;

(2) the 2 cases remained in the Queen's warehouse until 13th December on which date a bill of entry was signed by an appropriate officer of Customs in terms of section 47 of the Customs Ordinance as authority for the delivery of the cases to the consignee;

(3) in accordance with custom, the cases were removed from the warehouse on 13th December by the defendant's officers and servants for the purpose of delivery to the plaintiff by loading them in a lorry, but it was found at this stage that ammonia was pouring out of the cases;

(4) on examination by a ship's surveyor, the cases were found to contain sulphate of ammonia and broken pieces of wood and gunny sacks; some of the metal bands of the cases were found to be broken;

(5) upon the evidence, it was held that the cases, which had contained sewing needles at the time of their deposit in the warehouse, had been tampered with and their contents pilfered while they were in the warehouse.

Paragraph 10 of the plaint in this action averred the non-delivery of the two cases of needles was due to the negligence and/or default and/or wrongful and/or unlawful acts or omissions of the defendant or of its officers, agents or servants, consisitng *inter alia* of:—

(*a*) the failure to exercise due care and diligence in looking after and/or safeguarding the said two cases and the contents thereof;

(*b*) the failure to take necessary steps to guard against theft or pilferage of the said two cases and/or their contents;

(*c*) failure and/or negligence in not securing the said two cases in special grilles within the warehouse.

It is clear that in this paragraph the plaintiff sought to exclude his case from the operation of section 79 of Act No. 13 of 1938, which provides that the Corporation shall not be liable for any loss or damage to goods deposited in a Government warehouse, unless such loss or damage had been caused by the negligence or by the wrongful or unlawful acts of the Corporation or any of its officers, servants etc. The learned District Judge has held that the plaintiff paid warehouse rent in this case on the footing that the warehouse in question is a warehouse approved under section 69 of the Customs Ordinance and that this is sufficient evidence of the fact that the two cases of needles were deposited in a warehouse referred to in section 79. During the argument in appeal, Counsel appearing for the plaintiff did not contest the correctness of this finding. There was in fact other evidence concerning the practice in the Port which was quite sufficient to establish that these cases were in fact deposited in a Queen's warehouse.

Upon the issues framed upon the cause of action pleaded in paragraph 10 of the plaint, the learned District Judge has held that there was no positive evidence of negligence, but that a presumption of negligence arose because the Corporation took charge of a consignment in good condition, whereas then the plaintiff went to obtain delivery, the packages contained sulphate of ammonia instead of sewing machine needles. On the ground that the substitution could not have taken place without the intervention of some person whilst the packages were in the custody of the Corporation, the learned Judge found in the circumstances *prima facie* proof that the goods were stolen as a result of a wrongful or unlawful act on the part of the Corporation or its servants.

In appeal, Counsel appearing for the Corporation has argued that, in the absence of proof of negligence or of some wrongful or unlawful act on the part of the Corporation or its servants, section 79 of the Act protects the Corporation from liability. The argument, in other words, is that this is not a case in which the principle of *res ipsa loquitar* can apply to permit negligence to be presumed, because it is only the loss which has been proved and not the time at which or the manner in which the loss occurred. Where for instance a motor vehicle mounts a pavement and strikes a pedestrain, or where a person is injured by the fall of goods from the side of a ship, there is evidence of a fact showing the manner in which injury was actually caused to the plaintiff, and a presumption of negligence can arise from the proved fact; but the mere fact of injury, without proof of the

manner in which it was caused, cannot give rise to the same presumption.

Counsel for the Corporation also argued that section 79 of the Act is equivalent to the "owner's risk clause" in an ordinary contract of carriage, and that where such a clause is invoked, there is a burden on the plaintiff to prove actual negligence on the part of the carrier or its servants. Counsel relied in this connection on the decision of the House of Lords in *Smith* v. *Great Western Railway Company* (1922: 1 A.C. 178), in which Lord Buckmaster stated the law as follows:—

> "I am unable so to regard this clause; it is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the railway company. All he has been able to show is this: he has proved the delivery of the goods in the manner that I have mentioned to the railway company's servants, and he has put in evidence a correspondence between himself and the railway company, and their answers to certain interrogatories".

If then the only basis of the liability of the Corporation is to be found in section 79 of the Act the burden lay on the plaintiff to prove some negligent or wrongful or unlawful act as being the cause of the loss of his goods; and if so his inability to adduce such proof must result in the dismissal of his action.

For an alternative cause of action, the plaintiff pleaded that the Corporation, having had the custody control charge and care of the two cases, was under a legal duty or obligation to look after and deliver the cases to the plaintiff in good and proper order and that the Corporation was liable for the breach of this duty or obligation. The learned Judge however, has not answered issue No. 4 (a) which raised the question whether the Corporation took the cases into custody on an express or implied contract to land, warehouse and deliver the cases to the plaintiff; and the answer to issue No. 10 shows also that the learned Judge regarded the case as being one only of a breach by the Corporation of a duty imposed on it by the Act. Thus the learned Judge has not held that there was any express or implied contract for the breach of which the Corporation is liable.

Despite the fact that the trial Judge has not held in this case that there was an express or implied contract between the plaintiff and the Corporation, Counsel for the plaintiff has argued that there was ample evidence upon which to find that there was here an implied contract upon which to find that there was here an implied contract upon which the Corporation assumed the obligations of a common carrier or carrier by trade, and that one of these obligations was to store the goods in the warehouse and to be responsible for their care and custody while in the warehouse.

The evidence referred to in this connection may be summarized as follows:—

(*a*) in respect of each Warehouse there are in attendance during the day a number of officers and servants of the Corporation, such as a Unit Supervisor apparently supervising the Corporation's activities on a wharf or Quay, a Storekeeper who checks goods at the time of their deposit in the Warehouse and at the time of their delivery out of the Warehouse; delivery checkers to check goods in the Warehouse before delivery out; and workers who performs the tasks of stacking, weighing and opening packages, of moving packages to other places as and when required by the Customs authorities, and of carrying and loading packages for the purpose of delivery out of the Warehouse and of the port premises;

(*b*) these officers and servants are on duty at all times throughout the day, and it is claimed that they are in a position to see that goods in the Warehouse are not stolen, damaged or tampered with at such times;

(*c*) the Corporation recovers charges from consignees for handling goods from the time of commencement of discharge from ships and until the time of their removal from the Port premises.

While admitting that the Warehouses are locked by Customs authorities at fixed times in the evening, that the keys of the warehouses are in the custody of those authorities, that the Customs and the Police, perform the duty of guarding warehouses during the night, and that the Corporation has no responsibility for the safe custody of goods between the hours of 4.30 p.m. and 7.30 a.m., Counsel nevertheless argued that the facts sufficed to establish that the Corporation does assume liability for safe custody during the day and that this liability is equivalent to the liability

of a warehouseman who stores goods for reward. On this basis, Counsel argued that the Corporation must be held liable for negligence in this case because no evidence was led to establish that the Corporation or its officers and servants took due care and precaution for the safe custody of the plaintiff's goods while they were in the warehouse. There being in these circumstances an implied contract for the safe custody of the goods, it was urged that section 79 of the Act does no more than state the ordinary obligation of a warehouseman for reward, and that a breach of that obligation was established by proof of the loss of the goods, and in the absence of proof of due care and precaution on the part of the Corporation.

In regard to the fact that the Corporation does not have custody and control of goods in a Warehouse during night hours, it was argued that the presumption of regularity must apply to establish that the warehouse was duly locked and guarded at night, and that in the absence of any evidence showing that there had been any tampering with the warehouse itself or its locks, the possibility of pilferage at night was excluded. On these grounds it was urged that the learned trial Judge should have found that the pilferage in this case occurred during the day, that is to say at a time during which the Corporation did have effective custody of the goods in the warehouse.

I have to consider therefore whether in all the circumstances it is reasonable or possible to infer that the Corporation did have effective custody and control of these goods, and did impliedly undertake the obligation to keep the goods in safe custody at least during the day.

A similar question was considered in the case of *Asana Marikar* v. *Livera* (1903) 7 N.L.R. 158. In that case a Landing Company had the exclusive privilege of landing goods from a particular line of steamers and accordingly landed all the goods consigned to the Port of Colombo which arrived on one such steamer, including a package of umbrellas consigned to the plaintiff. The package was duly deposited in a warehouse indicated by the Collector of Customs, but when the plaintiff went to obtain delivery he could not find the package of umbrellas, and he sued the Company for the value of the package. It is useful for present purposes to cite at length from the judgment of Layard C.J.:—

> ..... There appears to have been an express agreement with the owners of the Clan Line of Steamers that the defendant should land all goods arriving in their ships and should deliver them at the Customs premises. The defendant is not a warehouseman. All goods landed by him appear from the evidence to be warehoused by the Customs authorities, who receive them into their warehouse and there detain them until the Government dues are paid. That the Customs authorities (i.e. the Crown) are the real warehousemen is evidenced by the fact that they make a charge for warehousing if the goods are not removed in three days.
>
> It is argued for respondent in this case that, though there is no express contract upon which the defendant could be sued by the plaintiff, there is an implied contract to land, warehouse, and deliver to the plaintiff. It seems to me doubtful whether any such contract can be implied at all in this particular case. The defendant was acting under an express contract with the shipowners, the Clan Line. It is suggested that, because he paid the defendant the landing charges, an implied contract arises not only to land the goods and deliver them to the Customs authorities, but subsequently to deliver them from the Customs warehouse to the plaintiff. Is such the case? Say the plaintiff had demanded his goods from the defendant, merely tendering him the amount due for landing, could he have compelled the defendant to deliver to him the goods? Certainly not. There might be freight due on the goods, and until such freight was paid the goods would be under line to the ship-owner, and the plaintiff could not demand delivery of his goods by merely paying the defendant's charges for landing. Assuming there was an implied contract of some kind between plaintiff and defendant, what was it? According to defendant's evidence, when he undertakes to clear and deliver goods to consignees he enters into a special agreement with them. In those cases he pays all the harbour dues, duty &c., and sends the goods on to the consignees. He acts then as agent of the consignees, and takes upon himself the duty of clearing the goods at the Customs and of delivering the goods to the consignees. Did the defendant undertake the duty of warehouseman until plaintiff came to take delivery? The evidence shows that the practice is that, on a consignee taking delivery at the Customs, one of the defendant's servants fills up a cart note and signs it, and this is countersigned by the Government landing waiter if he is satisfied that all Government dues have been paid but the landing waiter deposes that a cart note alone signed by him would be sufficient authority to pass out goods, whereas one signed by defendant's servant alone would not. The Custom House authorities could not make a charge for warehousing if they are not the acutal warehousemen. The presence of watchers of the defendant as well as his store-keeper in each warehouse where he landed goods it is argued, shows that he is the real warehouse man. This is explained by the defendant to be done for the purpose of recovering the landing charges and also for securing the safe custody of those goods which he had expressly contracted to deliver. His watchers were only there by day; at night he had no means of controlling or safeguarding the goods of which, it is said, he was bailee. The contention that goods could not be stolen at night except by the Collector of Customs, in which case the Crown would be responsible, depends upon a mere assumption. Why should not the place be broken into? Moreover, if the defendant and not the Crown were the bailee, the defendant would be liable no less if the goods were stolen by a servant of the Crown, e.g. the Collector of Customs, who, it is admitted, had sole control at night".

I can see no difference of substance between the practice of the Port referred to by Layard, C.J. and the practice which now prevails. Today the Port Cargo Corporation takes the place of landing companies and performs port services. But today, as in 1903, there is a Customs landing waiter in charge of a warehouse; the landing company (now the Corporation) has its servants in a warehouse to stack and move goods; its servants participate in the delivery of goods to consignees, but no goods can be delivered without the authority of the landing waiter; a warehouse is at night exclusively under the control of the Customs authorities.

It can be said today as was said in 1903 that "the Customs authorities could not make a charge for warehousing if there are not the actual warehousemen"; that the Corporation has no means of controlling or safeguarding the goods at night, and that goods can well be stolen at night by Customs officers themselves. According to the evidence in this case there is always on duty at each warehouse at least one Customs officer, and it is he who has effective custody and control of the goods lying in the warehouse; goods cannot be removed from the warehouse except under his authority, and his authority for delivery out of the warehouse is given (as it was in fact given in this case) only after some other Customs officer passes a Bill of Entry upon payment of duty by means of the endoresement "satisfied" being made thereon.

The essential point in my opinion is that goods are detained in a Customs warehouse solely because of the requirements of the Customs Ordinance that they be so detained until Customs and harbour dues are duly paid or secured. The Customs authorities owe a duty to the State, not only to recover these dues, but to ensure that goods are not taken out of the Customs warehouse unless these dues are paid. This duty cannot be duly performed if the Customs do not in fact have continuous and effective control of goods in the warehouses. The fact of this control, and the liability of the Customs for safe custody is recognised in the Customs Ordinance (now in section 108), although that liability has always been arbitrarily (and perhaps even unreasonably) limited.

The judgment in *Asana Marikar's* case has not been disapproved of at any time. On the contrary it was followed in *The Ceylon Wharfage Co. Ltd.* v. *Dada* (59 N.L.R. p. 110), and both the abovementioned decisions were followed with approval in the unreported case of *Cargo Boat Despatch Co. Ltd.* v. *Moosajees Ltd.* (S.C. 500/59 — S.C.M. of 6th July, 1964).

Counsel for the plaintiff has relied on the decision in the case of *Coonji Moosa and Co.* v. *The City Cargo Boat Co.* (1947, 49 N.L.R. p. 35). The judgment of Jayetilleke, J. in that case shows that he apparently misunderstood the reasons for the decision in *Asana Marikar* v. *Livera.* He appears to have thought that in the earlier case the goods were shown to have been lost after the Customs authorities had closed the warehouse and locked it. Indeed that was not the fact, for there was no evidence whatsoever to establish the time at which the package of umbrellas was removed from the warehouse, or could have been presumed to have been so removed. It is evident from the judgment of Layard, C.J. that he relied principally on the possibility of loss at a time when the warehouse was locked and that the existence of this possibility was a factor which in his opinion negatived an implied contract for safe custody by the Landing Company.

However, even if the judgment of Jayetilleke, J. be correct, the case before him was one in which there was in fact proof that the goods were actually stolen during the day. The judgment is no authority to the proposition submitted in the present case that the presumption of regularity justifies an inference that goods missing from a warehouse cannot be stolen during the night.

In the later case of *Alibhoy* v. *Ceylon Wharfage Co. Ltd.* (1954) 56 N.L.R. 470, Justice Gratiaen pointed out that if at any time during the period when goods are in a warehouse waiting delivery to the consignees, they are exclusively within the control of the Customs authorities, the carrier's responsibility is for the time being at an end, and that "unless the matter is regulated by special agreement the question as to who was in effective control of the goods at the time of their loss or deterioration is always the deciding factor". I find nothing in this statement which might support the proposition that goods missing from a warehouse can be presumed, in the absence of evidence to the contrary, to have been removed from the warehouse during the day.

Gratiaen, J. did however admit the possibility that goods in a warehouse can remain under the carrier's control as a bailee or custodian for hire, and that if so, the same duty of *exacta diligentia* is imposed on the carrier. This opinion, that Landing

Companies at the Port of Colombo may sometimes assume the obligations of a custodian for hire, was I think justified by practice which at sometimes did prevail in the Port. At one time it would appear that a warehouse might have been assigned exclusively for the deposit of goods landed by a particular Landing Company, and according to statements in some judgments of this Court, it would appear that in such a case the Landing Company would assume a responsibility to the Customs for the custody of goods and for the due payment of the duties thereon. In such a situation a Landing Company might in some cases have contracted with consignees to keep the goods in safe custody and thus assume the liability of a bailee. Again, in *Asana Marikar's case*, there was apparently evidence that a Landing Company did sometimes assume liability for safe custody of goods even while detained in a Queen's warehouse. But the reference to this matter in the judgment of Layard, C.J. shows that this liability was assumed only by *special agreement*. Gratiaen, J. also used the same expression in a similar context. But in the present case the plaintiff did not even attempt to prove any "special agreement" by which the Corporation undertook liability for care and custody even during the day. Indeed, having regard to the fact that the Port Cargo Corporation is a body established by Statute, I doubt whether the Corporation has power validly to undertake the liability of a custodian for hire.

Counsel for the plaintiff argued that the power conferred by section 5(1)(g) would authorise the Corporation to enter into such a contract. I am much inclined to the opinion that section 79 of the Act would prevent the Corporation from assuming by contract a liability more wide in respect of goods lodged in the Customs warehouse than the liability referred to in that section. While section 5(1)(g) confers on the Corporation a general power to enter into contracts, section 79 is a special provision which limits the liability of the Corporation for loss or damage to goods discharged from ships by the Corporation and thereafter deposited in a Government warehouse.

I must now refer to an alternative argument of Counsel for the defendant.

The learned Trial Judge observed that it is reasonable to infer that the machine needles had been removed from the case on shore rather than on the vessel. Counsel for the defendant sought to canvass this finding as the evidence was meagre. He submitted also that there is no proof that when these cases were despatched from Germany they contained needles. He relied in this connection on the letter P4 dated 18.12.62 addressed by the plaintiff to Delmege Forsyth & Co. Ltd. where it is stated that "the above two cases have been landed on 11.12.62 in D.Q. 2 Warehouse. *All the bands of the cases were intact*. But while the cases were removed for loading into the lorry wharf clerk found ammonia pouring out from the cases ..... and the cases are found to contain ammonia, empty gunny sacks and timber pieces instead".

It is noteworthy that no 'bad cargo sheet' has been produced in evidence and the trial Judge has made note of this fact. Therefore, it may safely be presumed that the cases were intact when they were warehoused. It may well be that the writer of the letter P4 was referring to the stage of warehousing and not to the stage of detection of the ammonia pouring out.

As for the submission that there is no proof that the cases did in fact contain needles, the documents, particularly, the invoice P7 appears to afford adequate proof on the balance of evidence. An objection had been taken to this document being marked in the absence of a representative of the exporter. This matter was considered by the District Judge and the objection was overruled. In the circumstances of this case we are unable to say he was wrong in doing so. Furthermore Counsel for the defendant in the District Court in the course of his address, referring to issue 2 and stated that "the Court will answer in the affirmative". At the least this statement shows that the question whether the cases contained machine needles was not seriously disputed at the trial.

Mr. Jayawardena has addressed us at length on this aspect of the case and submitted that even if there was such an admission it is open to this Court to answer this issue differently if the facts warrant it. We think it is now too late to entertain this submission.

For these reasons the appeal has to be allowed and the plaintiff's action dismissed. The plaintiff must pay to the defendant the costs of the action in the District Court, and one-half of the costs of this appeal.

Appeal allowed.

Wijayatilake, J.

I have had the privilege of perusing the judgment prepared by My Lord the Chief Justice. With great respect I am in entire agreement with it. I have little to add of any value, except to make the following observations:

The learned Trial Judge was of the view that "warehousing" includes the process of taking care of the cargo warehoused as well and that decisions of Court pertaining to the liability of private landing companies will not apply in the case of the Port Cargo Corporation after 1958. This appears to be based on a wrong appreciation of the function of warehousing. There is nothing to show that the Government in creating the Port Cargo Corporation undertook a greater responsibility than private landing companies. If it did it should have been set down directly in the Act.

Section 79 speaks of lodging or depositing in any such warehouse or other place of deposit as is provided or approved by the Government. Once the Port Cargo Corporation lodges or deposits in such place it would appear that their responsibility ends. It is also significant that the Corporation deposits or lodges in places as directed by Customs. The distinction between warehouse rent and handling charges too is relevant. See document P11.

It is in evidence that the loss of the needles had been reported to the Police but no evidence has been led to show what had transpired at any Inquiry held by the Police. If a charge of theft was framed against anyone it would show from whose *possession* the goods were alleged to have been taken. Vide section 366 of the Penal Code. In the instant case the evidence led in regard to the alleged theft of needles is nil and it would be a matter of conjecture as to when the goods were taken out of the cases. It may well be during the day or night. Even the available evidence has not been called to throw more light on the precise nature of the custody of the goods. The wharf clerk of the plaintiff's firm G. K. Sofalas has not been called. This is conspicuous omission. The defence too could have assisted Court by calling their storekeeper of the particular warehouse but he too has not been called. Thus it would appear that the two principal actors in this transaction are not before us.

Before I conclude I am constrained to make the observation that the present situation in the Port appears to be very unsatisfactory and the image of this Island will suffer irreparably by a continuance of the procedure now in vogue owing to the opportunity afforded for shifting responsibility when a loss occurs as in the instant case. While we are dealing with a case of needles and ammonia I might comment that the whole atmosphere of the Port is tainted with a cloud of suspicion and fraud. However, in the present state of the Law it would appear that the Courts are helpless to give relief except to draw attention to Section 79(2) of the Act which provides for an ex gratia payment in a fit case. In my view the instant case merits a consideration.

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

B. DODANWELA *v.* H. K. BANDIYA

S.C. 309/65(*F*) — *D.C. Kurunegala* 597/*L*

Argued and decided on: 27th September, 1968

Paddy Lands Act — Action for declaration of title and ejectment against cultivator — Plea by defendant that he is protected by provisions of Paddy Lands Act — What defence has to establish — Burden of Proof.

Plaintiff sued his cultivator (defendant) for declaration of title and ejectment in respect of a paddy field and the defendant pleaded that he could not be ejected by reason of the provisions of the Paddy Lands Act.

Held: That the burden lay on the defendant to satisfy the trial Judge that he did not employ hired labour for the work specified in paragraph (b) of the definition of 'cultivator' in Section 63 of the Act, and did not employ hired labour for at least two of the operations of work mentioned in paragraph (b) of the definition viz. for the operation of tending or watching the crop.

C. R. Gunaratne, for the plaintiff-appellant.

D. R. P. Goonetilleke, with *Chulpathmendra Dahanayake*, for the defendant-respondent.

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

The plaintiff sued the defendant for declaration of title and ejectment in respect of two lands specified in the schedule to the plaint. The defendant pleaded that the lands were paddy lands and that he was the cultivator of the lands as tenant under the plaintiff and that he could not be ejected by reason of the provisions of the Paddy Lands Act. The learned Judge was satisfied that the defendant did not himself cultivate land No. 2 and in respect of that land entered judgment for the plaintiff.

In the case of land No. 1 however the learned Judge has held in favour of the defendant. It would appear that the learned trial Judge based his decision upon a consideration of the question whether the defendant had worked or cultivated the field or in other words had been generally responsible for the cultivation. In regard to land No. 1, the Judge was satisfied that the defendant had passed that test.

The definition of 'cultivator' in Section 63 of the Paddy Lands Act refers however to a somewhat different matter, namely, the question whether the tenant by himself or by any member of his family, and without the employment of hired labour carries out the major part of the actual work of cultivation. A burden lay on the defendant in this case to satisfy the trial Judge that he did not employ hired labour for the work specified in paragraph (b) of the definition and that he did not employ hired labour for at least two of the operations of work mentioned in paragraph (b) of the definition. Far from giving evidence to such an effect, the defendant merely stated as follows:

> "I cultivated these fields myself. I got the villagers to help me at times, otherwise I employed labourers to cultivate them".

It seems to us that at the least the defendant made no attempt to prove the facts which the definition in the Act requires him to prove.

The appeal is allowed without costs. The decree is amended in order to provide that the defendant be ejected from land No. 1 Mahamuttetuwa and also from land No. 2 .The decree is further amended by substituting Rs. 300/- per annum for Rs. 60/- as the amount of the damages.

Wijayatilake, J.

I agree.

Appeal allowed.

Present: **Samerawickrame, J.**

K. A. JAYAWARDHENA *v.* R. THIRUCHELVAN

S.C. 1130/67 — *M.C. Colombo South No.* 77729/*A*

Argued on: 6th and 7th June, 1968
Decided on: 8th September, 1968

Holidays Act, No. 17 *of* 1965, *section* 2(*a*) — *Criminal Procedure Code, section* 339 — *Inconsistency between the two statutes regarding computation of time within which an appeal must be preferred — What is a* dies non? — *Are Sundays to be regarded as* dies non *since the Holidays Act*?

Held: (1) That with the enactment of section 2(a) of the Holidays Act No. 17 of 1965, the provision in section 339 of the Criminal Procedure Code for the exclusion of Sundays in computing time within which an appeal must be preferred ceased to be law.

Per **Samerawickreme, J.** "After the section was amended in 1924, there can be no doubt that the rational basis for the exclusion of Sundays was that Sunday being a *dies non*, the lodging of a petition of appeal with a Court on it was not available to an appellant. By reason of the enactment of Section 2(a) of the Holidays Act No. 17 of 1956, Sunday has ceased to be a *dies non* and a petition of appeal may be lodged with a Court on that day. The rational basis for the provision for excluding Sunday when computing the time within which an appeal may be filed has thus been removed. Should the

provision continue in force? In my view, it should not. This is a matter in which the maxim, *cessante ratione legis cessat ipsa lex* applies. The maxim has also been stated in the following way, "Reason is the soul of law and when the reason of any particular law ceases, so does the law itself" (See Broom's Legal Maxims, 10th Ed. p. 110)."

Cases referred to: *Appa Cutty* v. *Ayesha Umma*, 9 S.C.C. 121.
Georgina v. *Ensohamy*, 7 N.L.R. 129.
Gunawardene v. *Pedrick Singho*, 5 C.W.R. 310.
Kulantaivelpillai v. *Marikar*, 20 N.L.R. 471
Chalo Nona v. *Weerasinghe* (1967) 70 N.L.R. 46.

V. S. A. Pullenayagam, Senior Crown Counsel with *L. D. Guruswamy* for the complainant-appellant.

M. Somasunderam, with *S. Ponnambalam* and *V. Shanmuganathan*, for the accused-respondent.

Samerawickrame, J.

This is an appeal with the sanction of the Attorney-General against an order of acquittal of the accused-respondent on a charge under the Control of Prices Act. The order of the learned Magistrate was made on the 13th September, 1967, and the appeal has been filed on the 17th October, 1967. The first question that arises is whether the appeal has been filed in time. Section 338(2) provides that where the Attorney-General sanctions an appeal, the time within which the petition of appeal must be preferred shall be 28 days. Section 339 of the Criminal Procedure Code provides that in computing the time within which the appeal must be preferred, Sundays and public holidays should be excluded. Whether this appeal is in time or not depends on whether the provision in Section 339 for the exclusion of Sundays, has or has not been abrogated by reason of the enactment of Section 2(a) of the Holidays Act No. 17 of 1965. That Section is as follows:— "It is hereby declared that any custom or usage or written law whereby every Sunday — (a) has been a *dies non* in Ceylon shall cease to have the force and effect of law in Ceylon, and accordingly that no Sunday shall, by reason only of such custom or usage or law which had or purported to have had such force and effect, be or continue to be such a *dies non*:"

What a *dies non* is has been considered by a number of decisions of our Court. In *Appa Cutty* v. *Ayesha Umma* — 9 S.C.C. 121 — it was held that a charge of resisting an arrest of the person in execution made upon the Hadji festival day could not be maintained because that day was not available for the service or execution of civil process. In *Georgina* v. *Ensohamy* — 7 N.L.R. 129 — Wendt, J. said, "I suppose *dies non* is an elliptical form of the expression *dies non juridicus*, 'not a court day'. He held that the sale in execution held by the Fiscal on such a day was bad. In the case of *Gunawardene* v. *Pedrick Singho* — 5 C.W.R. 310 — it was held that the ordinary inference from the fact that a day is a *dies non* is that proceedings of Court ought not to be taken on that day but it does not make these proceedings void. That was an action to set aside an award made in arbitration proceedings on the ground that proceedings had been held without objection on a Sunday. In the case of *Kulantaivelpillai* v. *Marikar* — 20 N.L.R. 471 — Bertram, C.J. referred to the dictum of Wendt, J. that a *dies non* was merely a concise way of saying *dies non juridicus*. He said later, "The effect therefore, in my opinion, of the declaration of a day as a public holiday and a *dies non* by Ordinance No. 4 of 1886 is twofold. In the first place, it excuses judicial officers and their subordinate ministerial officers from the necessity of attending Court, or of performing any judicial or ministerial acts, on that day ; in the second place, it protects any member of the public from being forced to attend Court, or to attend any judicial proceedings held elsewhere than in Court, on that day. It does not, in my opinion, affect any judicial act or proceeding which may be validly done or taken in the absence of a party, and which consequently, does not involve his personal attendence. Further, it does not preclude a judicial officer, or any of his ministerial subordinates, from waiving his priveleges if he so decides, and from doing any act or taking part in any judicial proceeding on a day declared to be a holiday. There is nothing either in the Ordinance or in the principles laid down by Voet which declares null and void any judicial act which a judicial officer voluntarily elects to do, and which does not involve the compulsory attendance before him of any party affected.

Mr. Pullenayagam submitted that Section 339 of the Criminal Procedure Code does not provide that proceedings in Court should not be held on Sunday or that it is to be a *dies non*. It merely provides that in computing time within which an appeal may be preferred, Sundays should be excluded. The most that could be said was that it

had excluded Sundays because it had recognised that Sunday was a *dies non* by virtue of some other provision of law. He pointed out that at a time when Sunday was a *dies non* by reason of the Holidays Ordinance of 1886, Section 339(1) of the Code, as it originally stood, provided that in computing the time within which an appeal must be preferred, the day on which the judgment or order contained of was pronounced and all Sundays and public holidays shall be included. That provision was amended by Section 5 of the Ordinance No. 6 of 1924 by deleting the words "and all Sundays and public holidays" and by adding the words "but all Sundays and public holidays shall be excluded". Thus, at one time, though Sunday was a *dies non*, it was a day to be counted in the computation of time in terms of this Section. Section 339(1) as presently worded, did no more than perhaps recognise the fact that Sunday was a *dies non*. It could not, therefore, be said that it is a written law whereby Sunday had been a *dies non* in Ceylon within the meaning of Section 2 of the Holidays Act No. 17 of 1965. That Act, therefore, did not have the effect of abrogating any provision of Section 339 and causing it to cease to have the force and effect of law in Ceylon. It might well have been the intention of the Legislature that the provision of Section 339 of the Criminal Procedure Code should cease to have effect in so far as it provides that Sunday should be excluded in the computation of time and it might have been thought that Section 2(a) of the Holidays Act would bring about that result. The terms of the provisions of Section 2(a), however, were clear, and they did not have the effect of abrogating any part of the provisions of Section 339. He submitted that if the provisions of Section 2(a) of the Holidays Act had failed to give effect to the intention of the Legislature, it was not a matter which could be remedied by the Courts but one which required an amendment duly made according to law.

Mr. Pullenayagam's arguments are not without force and I was attracted by them but after careful consideration, I have arrived at a different view. The reason why Section 339 of the Criminal Procedure Code provided that Sundays should not be counted in computing the time within which an appeal might be filed is that Sunday being a *dies non*, the Magistrate's Court or District Court, with which the petition of appeal had to be lodged, would not ordinarily be open to receive it. The Legislature apparently considered that all the days to be counted in computing the time within which an appeal may be filed should be days on which the lodging of a petition of appeal in Court should be available to the appellant. It is true that the Section, as it originally stood, provided Sundays and public holidays should be included in computing the time, but the very fact that there was express provision to that effect shows that ordinarily only days on which a petition of appeal could be filed should be counted. After the section was amended in 1924, there can be no doubt that the rational basis for the exclusion of Sundays was that Sunday being a *dies non*, the lodging of a petition of appeal with a Court on it was not available to an appellant. By reason of the enactment of Section 2(a) of the Holidays Act No. 17 of 1965, Sunday has ceased to be a *dies non* and a petition of appeal may be lodged with a Court on that day. The rational basis for the provision for excluding Sunday when computing the time within which an appeal may be filed has thus been removed. Should the provision continue in force? In my view, it should not. This is a matter in which the maxim, *cessante ratione legis cessat ipsa lex*, applies. The maxim has also been stated in the following way, "Reason is the soul of law and when the reason for any particular law ceases, so does the law itself ("See Broon's Legal Maxims, 10th Ed. p. 110).

I think there is such inconsistency, if not repugnacy, between a later statute which provides that no Sunday should be a *dies non* and an earlier statute which excludes Sundays in the computation of time on the basis that all Sundays are *dies non*, that the effect of the later statute is impliedly to repeal, abrogate or make the earlier statute cease to be of force or effect to the extent that it provides for the exclusion of Sundays.

I am, therefore, of the view that with the enactment of Section 2(a) of Act No. 17 of 1965, the provision in Section 339 for the exclusion of Sundays in computing time ceased to be law. I am fortified in the view I have taken by the judgment of Tambiah, J. in *Chalo Nona* v. *Weerasinghe* — 70 N.L.R. 46 — in which he held that as Sunday is no more a *dies non*, Sundays could not be excluded in determining the time within which an appeal may be filed in terms of Section 754(2) of the Civil Procedure Code.

I, therefore, hold that this appeal has not been filed in time and I make order rejecting it.

Appeal rejected.

Present: **Alles, J.** (*President*), **Samerawickrame, J. and Weeramantry, J.**

WEERASOORIYA ARATCHIGE ALBERT SINGHO *alias* PIYASENA *v.* THE QUEEN

C.C.A. Appeal No. 95 *of* 1968 (*with Application No.* 143 *of* 1968)

Argued on: 26th January, 1969
Decided on: 10th February, 1969

S.C. No. 100/1968 — *M.C. Avissawella* No. 82550

Court of Criminal Appeal — Murder and attempted murder — Application by defence to cross-examine defence witness—Refusal incorrect — Words used in unusual sense — Meaning must be left to the jury — Possibility of lesser verdicts ought to have been left to the jury — Defence suggestion that appellant was not the assailant — Direction regarding failure of appellant to explain — Misdirection — When explanation necessary — Strong expressions of opinion by judge on demeanour and credibility and unfair cross-examination — Cumulative effect amounting to removal of questions of fact from jury — Evidence Ordinance, sections 154 *and* 155 *— Criminal Procedure Code, section* 245(*b*).

The appellant was convicted of the murder of G and the attempted murder of G's wife, K. who was also the only witness to the transaction for the prosecution. She stated that when bathing at the stream she heard her husband's cry and ran in the direction of the compound of the line room in which they lived and saw the appellant dealing two blows on him with an iron pipe. The appellant also attacked her after dealing another blow on the deceased. She saw a tapping knife in his waist. She had fallen down unconscious upon being attacked.

Another witness, S, stated that he saw the appellant coming in the direction of the Superintendent's bungalow having a tapping knife in his hand. When he questioned him why he was running the appellant stated, "One is finished, there is doubt about the other."

The defence suggested to K that she had a lover called K.D.S and it was he who was responsibe for the injuries on the deceased and K, and that she was giving false evidence to exonerate her lover and implicate the accused.

(1) In support of this suggestion, the defence sought to place evidence before the jury that when K was taken away from the scene she had said that she knew nothing. This evidence was sought to be led through a defence witness C who had stated in the Magistrate's Court that when he arrived on the scene he heard K say that she did not know what had happened when she was questioned by one L. A defence application to put this to C under sections 154 and 155 of the Evidence Ordinance was rejected on the ground that the trial judge could not see any substance in the submissions made.

Held: that the premature rejection of the application was wrong inasmuch as it was a proper application under section 154.

(2) There was only one fatal injury. The prosecution case was that the appellant had used two weapons on the deceased. K only saw the iron pipe being used. It was not clear in what circumstances the two weapons were used.

The trial Judge appeared to have been considerably influenced by the evidence of S as to the words uttered by the appellant after the transaction was over.

Held: That (*a*) these words may have indicated that the appellant was giving effect to his own observations of the injuries caused to the deceased and K by another;

(*b*) it was therefore a misdirection to tell the jury that the "only inference to be drawn from the words which the appellant used was the set purpose of finishing the deceased and K";

(*c*) it was the duty of the trial judge to place the alternative construction of the words before the jury and under section 245(b) of the Criminal Procedure Code it was the duty of the jury to determine the meaning of words used in an unusual sense;

(*d*) having regard to the above observations and the fact that the deceased had only one fatal injury the trial judge ought not to have withdrawn from the purview of the jury the possibility of a lesser verdict;

(*e*) considering the nature of the injuries on K, it was incumbent on the trial judge to direct the jury to consider the possibility of a lesser verdict on the charge of attempted murder as well.

(Followed: *The Queen v. Sethan*, (1966) 69 N.L.R. 117).

(3) The defence suggested to K that the appellant was not the assailant and had arrived on the scene to intervene in the quarrel between K.D.S. and the deceased. The trial Judge asked the jury why, if these were matters which he put as suggestions to the Crown, the appellant did not enter the witness box and offer his evidence. He added that it was because he was convinced that the evidence of fact to support this suggestion would have operated against him.

Held: That (*a*) there is no obligation on the intervenient in a quarrel between two persons to give an explanation how the participants received their injuries;

(*b*) the direction of the trial judge almost suggested that it was incumbent on the appellant to prove how the deceased and K came by their injuries;

(*c*) comment by a trial judge on the failure of an accused person to give evidence should be confined to those cases in which there are special circumstances which the accused only can explain and which therefore call for an explanation;

(*d*) in this case there were no such special circumstances.

Cases referred to: *The King* v. *Duraisamy*, (1942) 43 N.L.R. 241
The King v *Geekiyanage John Silva*, (1945) 46 N.L.R. 73.

(4) **Held further:**
That (*a*). the strong views expressed by the trial judge regarding questions of fact virtually deprived the jury of an opportunity to arrive at an independent view of the facts in spite of the general direction that all questions of fact were for the jury;

(*b*) it is undesirable for a trial judge to give expression in strong language to his personal views on the question of demeanour;

(*c*) the expressions of the judge in regard to the credibility of the witness K, the strong views of the judge unsupported by evidence that the defence sought unfairly to besmirch her character, the commendation of S's evidence as being consistent only with a murderous intention and the absence of a direction that it might be equivalent and equally consistent with the defence suggestion that the appellant was not the assailant, had the cumulative effect of removing from the consideration of the jury what were essentially questions of fact for their determination.

Referred to: L. G. O'Donnell, 12 Cr. A.R. 219 at 221.

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, *P. Sivaloganathan*, *Kosala Wijeyetileke*, *S. C. B. Walgampaya* and *B. Bodinagoda* (*assigned*) for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

Alles, J.

The appellant was convicted by the unanimous verdict of the jury of the murder of Maha Aratchige Gunadasa and the attempted murder of his wife A. D. Leelawathie alias Kusumawathie. On the latter count, he was sentenced to 15 years rigorous imprisonment.

According to the case for the prosecution, the appellant and the deceased Gunadasa were labourers employed on Handagala Estate occupying adjoining line rooms. The deceased was married to Leelawathie *alias* Kusumawathie (hereinafter called Kusumawathie) 6 months prior to the incident. According to Kusumawathie, about a month prior to the tragedy, the appellant had come to the line room of the deceased and attempted to take liberties with her in the absence of her husband. She informed her husband about this incident. This incident is suggested as being the motive for the attack on the deceased and his wife by the appellant. According to Kusumawathie, who was the only witness for the prosecution to the transaction, on the evening in question, she went to have a bath at the stream, leaving the accused and the deceased in the line room. When she was preparing to take her bath, she identified the voice of her husband crying out 'Budu Amme.' She ran in the direction of the cries to the compound of the line rooms and saw her husband lying face downwards and the accused dealing two blows on him with an iron pipe. When she questioned the appellant, he dealt another blow on the deceased and thereafter attacked her with the same weapon. She

also saw a tapping knife in the accused's waist. When she was struck, she fell down unconscious.

Another witness called Somapala says that when he was in the compound near the factory, he saw the appellant coming fast in the direction of the Superintendent's bungalow having a tapping knife in his hand. When he questioned the appellant why he was running the appellant told him 'One is finished, there is doubt about the other.' Sompala then went with the Superintendent to the place where the deceased and Kusumawathie lay fallen with injuries and they were thereafter despatched to the Hospital.

The defence suggested to Kusumawathie that she was having a lover called K. D. Somapala and that it was not the appellant who attacked the deceased but that it was this K. D. Somapala who was responsible for the injuries on the deceased and Kusumawathie and that the latter was giving false evidence to exonerate her lover and implicate the appellant. In support of this suggestion, the defence sought to place evidence before the jury that when Kusumawathie was taken away from the scene she said that she knew nothing. This evidence was sought to be led through the defence witness Chandradasa who had stated in the Magistrate's Court that when he arrived on the scene with the Superintendent of the Estate he heard Kusumawathie say that she did not know what happened when she was questioned by Leelawathie. Learned Counsel for the appellant substituted that had this evidence been placed before the jury they would have had serious doubts about the truth of Kusumawathie's evidence. This matter was not put to Chandradasa in view of the Judge's ruling to which reference is made below, but Counsel for the appellant at the trial, in the absence of the jury drew the attention of the trial Judge to sections 154 and 155 of the Evidence Act. The trial Judge then made the following observation.

> "If there is any point in the submissions made, I confess I cannot see any substance in them. Speaking for myself, I reject the application."

One must assume therefore that Counsel did make an application to cross-examine his witness and it would appear to us that the purpose of the application was to throw doubts on the truth of Kusumawathie's evidence. We think the learned trial Judge was in error when he prematurely refused to consider the application of the defence to cross-examine Chandradasa on his deposition in the Magistrate's Court. This was a proper application that the defence was entitled to make under section 154 of the Evidence Act.

There were other matters of substance raised by learned Counsel for the appellant. Firstly, it was submitted that the trial Judge withdraw from the consideration of the jury not only whether the appellant intended to cause injuries and the injuries so intended were sufficient in the ordinary course of nature to cause death, but also deprived the appellant of the possibility of being convicted for a lesser offence on both counts of the indictment.

The deceased had four external injuries — a stab wound which went through the right cheek into the cavity, a lacerated wound quarter inch deep over the right cheek, a contusion over the bridge of the nose causing a fracture of the nasal bone. Of these injuries, there was only one fatal injury corresponding to the injury to the head which caused a depressed fracture and laceration of the brain and which the Doctor described as a necessarily fatal injury. The stab wound was probably caused with a cutting instrument and the suggestion of the prosecution was that it was caused with the tapping knife which Kusumawathie noticed in the appellant's waist and which Sompala saw in the appellant's hand. On that basis, the appellant used two weapons on the deceased. Kusumawathie only saw the iron pipe being used and therefore the attack with the tapping knife must have been before Kusumawathie's arrival which the appellant thereafter concealed in the waist or used by him after Kusumawathie was injured and fell down. It is not clear in what circumstances the two weapons were used. The trial Judge appears to have been considerably influenced by the evidence of Sompala who gave evidence of the words uttered by the appellant after the transaction was over. In view of the defence suggestion that K. D. Sompala was the assailant, and that the appellant intervened in the quarrel between the deceased and K. D. Somapala, the words uttered may have indicated that the appellant was giving effect to his own observation of the injuries caused to the deceased and Kusumawathie by another. It was therefore a misdirection to tell the jury that the 'only inference to be drawn from the words which the appellant used was the set purpose of finishing the deceased and Kusumawathie. The alternative construction of the words was not placed before the jury. Under section 245(b) of the Criminal Procedure Code, it is the duty of the jury to determine

the meaning of words used in an unusual sense. A similar situation arose in *Queen* v. *Sethan* 69 N.L.R. 117, where a possible interpretation favourable to the defence was not placed for the consideration of the jury and the conviction set aside on the ground that the defence was not adequately put to the jury. Having regard to the above observations and the fact that the deceased had only one fatal injury we think that the trial Judge should not have withdrawn from the purview of the jury the possibility of a lesser verdict.

The words spoken to by Somapala, appear to have coloured the trial Judge's view in regard to the charge of attempted murder as well. Kusumawathie had five injuries which could have been caused with an iron pipe but although most of the injuries were on the head, none of them had caused any internal injuries and the Doctor expressed the view that they were not sufficient in the ordinary course of nature to cause death. There is no evidence that they were grievous injuries or why she was hospitalised. It was therefore incumbent on the trial Judge to direct the Jury to consider the possibility of a lesser verdict on the charge of attempted murder as well.

We might have chosen to reduce the offences to lesser offences had it not been for the fact that owing to other misdirections, we feel constrained to remit this case for a fresh trial.

Counsel for the appellant submitted that the observations of the trial Judge on the failure of the appellant to give evidence was not warranted in the circumstances of this case. We are inclined to agree. The defence suggested to Kusumawathie that the appellant was not the assailant and arrived on the scene to intervene in the quarrel between K. D. Somapala and the deceased. In this connection, the trial Judge directed the jury in the following terms:—

> "Therefore I am telling you, gentlemen of the jury, on a common sense angle, you will naturally ask yourselves the question, if these are matters which he put as suggestions to the Crown, why does he, the accused, not enter the witness box and offer his evidence? And because this is a matter of which he has had knowledge, he was an actual participant, the man who separated, but not at the correct time, after the foul deed was done that he had separated the parties, and I think I am right in saying that the fact that he has refrained from offering evidence to substantiate this suggestion is because he is convinced that the evidence of fact to support this suggestion which had he adduced before you would have operated against him."

It does not appear to us that there is an obligation on the intervenient in a quarrel between two persons to give an explanation how the participants in the quarrel received his or her injuries. The direction of the trial Judge almost suggests that it was incumbent on the appellant to prove how the deceased and Kusumawathie came by their injuries. Although the trial Judge has a discretion to comment on the failure of the accused to give evidence (*The King* v. *Duraisamy* 43 N.L.R. 241 and *The King* v. *Geekiyanage John Silva* 46 N.L.R. 73) such comment should only be confined to those cases in which there are special circumstances which the accused only can explain and which therefore call for an explanation from him. We are unable to say that in this case there was any special circumstance which required the appellant to give evidence.

There was also the complaint of the defence that in this there was a virtual withdrawal from the purview of the jury of their decision on questions of fact, particularly in regard to the credibility to be attached to the evidence of the main witness Kusumawathie and in a lesser degree to that of Sompala, and the nature of the criticism of the defence witness Chandradasa.

At a very early stage of the summing up, the trial Judge had taken a strong view of Kusumawahie's evidence and felt that the cross-examination was calculated to besmirch her character. Said he at pp. 52 to 54:

> "Learned counsel for the defence has sought to attack her evidence, to impeach her credibility and also at the same time to assail her moral character to despoil her reputation. You will have to consider, gentlemen, whether the suggestions made in that regard by learned counsel is of any substance whatsoever. It was suggested by learned counsel for the defence that 'his young woman Kusumawathie had a paramour in a man called Somapala, just a suggestion, and that that Sompala thereafter had at some time committed suicide, just a suggestion. There is not an iota of fact to support it. And as it was, as a parting shot if I may use that expression, learned counsel asked the last question in the cross-examination of her evidence. 'After your husband's death

you have got married?' And you know the way that she replied, and she said, 'Definitely, No'. Those are questions, gentlemen, put with a view to despoil her character. I am sorry questions were put. When questions like this are put, suggestions against the character of a woman, a young woman who has now lost her husband, one would expect these suggestions to be followed up by some kind of fact produced before you. After all a woman whether she may be in Colombo society or in a village, in a line-room of an estate, she is entitled to the protection of her reputation. I do not know how you feel in regard to that aspect of the matter, but as responsible men do you not think that suggestions of this kind have been put for the mere sake of putting them and to my mind it is most unfair by this poor woman."

Again in dealing with a question put to her by Counsel for the defence, he said:

"In regard to this matter too (that the deceased married Kusumawathie and came to live with her in the line room six months prior to the tragedy) you will remember, gentlemen, it has just struck me, learned counsel for the defence put a rather startling question. The question is this : (to the woman Kusumawathie) "You came here and had a nice time with Gunadasa and thereafter married him?' I really could not understand the meaning of this question. It almost bordered on obscenity, but such was the type of questions put to this woman in an endeavour to besmirch her character. You will realise therefore, gentlemen, to what depths the accused has gone, to what lengths he has gone to try and blackmail this woman."

In dealing with the evidence of the defence witness Chandradasa, he said:

Learned counsel did not call the accused, but called a man called Chandradasa. I cannot understand why he called him. He said he heard the cries of Leelawathie. At that time there was no Leelawathie. At a later stage when that car was brought to fetch these people to hospital there was a Leelawathie. He was asked about this elusive and phantom figure, Somapala, and he said he did not know. I was rather surprised when counsel for the defence chose to call this witness. One can attribute it to inexperience, but I think that even a law student would know that this kind of evidence would lead nowhere ..... In the particular facts of this case he has sought to make suggestions to the principal witnesses for the prosecution, that woman, Kusumawathie, and what has the defence suggested — that on this day Somapala, this phantom, Somapala, this imaginary lover, paramour of Kusumawathie, and Gunadasa were engaged in a fight in which Kusumawathie also joined, and this accused to save his neighbour, Gunadasa, from an attack by this unknown Somapala, who was there to attack him with this tapping knife and pipe, intervened and managed to disarm Somapala of the iron pipe and the tapping knife. Of course there is no evidence that in the process of disarming the man this accused had injuries. There is no evidence whatsoever. He acted as a good Samaritan and unfortunately by some ill luck, by some twist of fate he is in the dock. That is the suggestion made by the defence."

Although the trial Judge did direct in general terms that all questions of fact were for the jury and that they were not bound by any expression of opinion of the facts by him, learned Counsel for the appellant submitted that the Judge's experience of the facts was couched in such strong language that the jury were deprived from arriving at an independent view of the facts. There is some justification for this criticism. Counsel however went further and submitted that the Judge's observation on the facts was not a fair representation of the evidence led in the case.

On Kusumawathie's own evidence, she came to the scene after the deceased was attacked and she was therefore unable to state what transpired before she heard her husband's cry of distress. The existence of a K. D. Somapala was not such a fantastic one. Kusumawathie only stated that she was not aware that a person called Somapala committed suicide after the incident but admitted that she knew a Somapala who worked as a domestic servant under the Superintendent of the Estate. The witness Somapala was confronted with a statement made by him in the Magistrate's Court (which was proved as D2) that he knew a Somapala who committed suicide. It was therefore not quite correct to describe Somapala as an elusive, phantom figure, an imaginary lover, the paramour of Kusumawathie. Again when the Judge observed that 'to say that the last question put to Kusumawathie in cross-examination as being 'After your husband's death you have got married' it is a a mis-statement of fact. The question that was put was 'Did you get married' and the answer was a denial. We see no objection to Kusumawathie,

a young woman of 23 being asked whether she got married after her husband's death. Many a village lass whose husband dies prematurely seeks the protection of another partner to maintain and support her. We see nothing objectionable in the question being likely to despoil her character. Again in reference to the expression 'nice time' which the Judge thought bordered on obscenity, Kusumawathie in answer to the question admitted that the deceased brought her to the line room to have a nice time with him and ultimately did not want to leave him and married him. It was perhaps a marriage decided upon by the deceased and Kusumawathie after trial and experience.

The picture that was therefore sought to be portrayed by the trial Judge of Kusumawathie being a virtuous and much maligned woman, who was unfortunate to lose her husband and whose character was sought to be besmirched unfairly by the defence is not borne out by the evidence. Even if this was the case, it was essential in the interests of his client for Counsel to cross-examine her on relevant material in view of the suggestion of the defence. Since we propose to order a re-trial in this case we do not wish to elaborate on the possible circumstances in which the deceased and Kusumawathie received their injuries.

In regard to the evidence of the witness Somapala, the trial Judge directed the jury in the following terms:

"It was, I think, quite apparent that this boy, I do not know whether it is proper for me to say, that innocence is stamped on his face. If you think I am wrong it is for you to have me corrected, but that is my impression. May be I am expressing myself in rather strong terms, but in whatever terms I express my views you are entirely at liberty to disregard them if my views do not coincide with yours, but I cannot resist making this observation in view of the aspersions which were sought to be cast on this woman Kusumawathie."

The demeanour of a witness is a matter that should be left for the consideration of the jury and it is undesirable that a trial Judge should give expression in strong language to his personal views on the question of demeanour. For the trial Judge to say, in spite of some qualification, that 'innocence is stamped' on the face of the witness, is practically to invite the jury to accept his views on questions of fact.

We think that the expressions of the Judge in regard to the credibility to be attacked to Kusumawathie's evidence, the strong view of the Judge unsupported by evidence that the defence sought unfairly to besmirch her character, the commendation of Somapala's evidence as being consistent only with a murderous intention and the absence of a direction that it might be equivocal and equally consistent with the defence suggested that the appellant was not the assailant, had the cumulative effect of removing from the consideration of the jury what were essentially questions of fact for their determination. In the words of Lord Reading in *Leo George O'Donnell* 12 Cr. App. R. 219 at 321 it seems to us that the Judge in this case used 'in the course of his summing up such language as leads them (the jury) to think that he is directing them, that they must find the facts in the way which he indicates.'

In view, therefore, of these substantial misdirections both on the law and the facts, this conviction cannot be allowed to stand.

We were invited by Counsel for the appellant not to remit this case for a re-trial but we think that if we accede to this submission, we would be usurping the functions of the jury, who are entitled on a proper direction on Kusumawathie's evidence to accept the position that the appellant was responsible for the injuries inflicted on the deceased and herself. Under the proviso to section 5 of the Court of Criminal Appeal Ordinance, we are of opinion that there was evidence before the jury upon which the appellant might reasonably have been convicted. We therefore order a new trial on the same charges.

Conviction quashed and new trial ordered.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J.** (*President*), **Samerawickrame, J. & Weeramantry, J.**

JAYASINGHE MANACHCHIGE CHANDRADASA *v.* THE QUEEN

Appeal No. 2 *of* 1969 (*with application No.* 3 *of* 1969)
S. C. No. 50/'68 — *M.C. Tissamaharama No.* 57742
Argued on: February 25, 1969
Decided on: March 28, 1969

Court of Criminal Appeal — Comment by trial Judge in charge to Jury on accused's failure to give evidence — Scope of trial Judge's discretion to so comment — Proper approach to question — Can inference that such evidence would have been adverse be drawn — Applicability of Evidence of Ordinance, section 114(f).

The accused in this case did not give evidence but called as his witness his sister who gave evidence of an *alibi*. The learned trial Judge in his charge to the Jury commented on the accused's failure to give evidence and also said (i) that "the accused had sat dumb in the dock, (ii)that he had not had "the manly courage" to give evidence but had got his sister to substantiate his defence. He further invited the Jury to infer that he was withholding evidence as that evidence if led "would be adverse to his case."

Held: (1) That the circumstances of the case precluded the inference that the evidence which the accused withheld would have been adverse to his case. He had through his sister, led evidence of an *alibi* and it would be inapt to infer that he kept out of the witness box because the assertion of an *alibi* was inconsistent with the truth.

(2) That though it is a matter for the Judge's discretion whether he should comment on the fact that an accused has not given evidence, he should exercise great care in so doing.

(3) That in the present case, the terms in which the directions of the learned Judge on this point were made and his faulty formulation of the inference that might be drawn from the failure of the accused to give evidence may well have prevented the Jury from giving due consideration to the evidence of *alibi* led by the defence and from giving proper effect to it.

(4) That however, as there was in fact evidence upon which a Jury properly directed might reasonably have convicted, a re-trial should be ordered.

Cases referred to: *Hurry Churn Chuckerbutty and Another V. The Empress* I.L.R. 10 Cal. 140
Rex v. Cochrane
Seetin and Others v. *The Queen.* (1965) 68 N.L.R. 316.
Rex v. *Burdett,* (1820) 4 B & Ald. 95 at 120.
Waugh v. *Rex* (1950) A.C. 203.
The King v. *Duraisamy* (1941) 43 N.L.R. 241.
Chelliah v. *The Queen,* (1952) 54 N.L.R. 465.
Jayasena v. *The Queen,* (1953) 55 N.L.R. 514.

Per **Curiam:** "(*a*) The inference that evidence which an accused might have called but has withheld was unfavourable to him is so incompatible with the fundamental rule that an accused is free to elect whether he will, or will not, call evidence that it may be necessary to consider, in an appropriate case, whether it is an inference that should in any case be drawn. The proper effect to be given to the failure of an accused to offer evidence when a *prima facie* case has been made out by the prosecution and the accused is in a position to offer an innocent explanation appears to have been better set out in the dictum of Abbot, J. in *Rex* v. *Burdett,* (1820) 4 B & Ald. 90 at 120. "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction, but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends." "

(*b*) "An inference that the evidence which a party is able to place before court but, chooses to withold must be unfavourable to that party is one referred to at Section 114(f) of the Evidence Ordinance. It is a presumption of fact. One should have thought that such a presumption would not arise in a criminal case because of the fundamental rule that an accused is free to elect whether he will, or will not call evidence. It has been held that the presumption in section 114(f) is not one which may be drawn against an accused person because he is free to elect whether he will, or will not, call evidence, and an inference cannot be drawn against him by reason of his electing to take the one course rather than the other — vide *Hurry Churn Chuckerbutty and Anoher* v. *The Empress,* 10 Calcutta page 140. It has been suggested that it is not a principle of evidence but a rule of logic that such an inference might be drawn."

N. Balakrishnan (assigned), for the accused-appellant.

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

Samerawickrame, J.

The appellant appeals from a conviction of the offence of the attempted murder of one Charles by shooting him with a gun.

The prosecution relied on the evidence of Charles alone for proof of the facts. Charles stated that on the day in question he slept, as usual, on a bed in the verandah of his house. At about 3.45 a.m. he was awakened by the barking of his dog. He says he looked around and saw the accused firing at him. Charles sustained no injuries but there were pellet marks on the bed and on a sheet used by him.He also gave evidence of the fact that there had been some unpleasantness between the appellant and himself over an association between the appellant and a son of Charles. This evidence was led by the prosecution to prove motive on the part of the appellant for the shooting but it also shows that there was animosity on the part of Charles towards the appellant.

The appellant did not give evidence but he called as his witness his sister Jane Nona who gave evidence of an alibi.

In a Charge, which was otherwise quite unexceptionable the learned presiding judge made the following comments on the failure of the appellant to give evidence. He said:—

> "Now in this case the accused has not chosen to give evidence. He is perfectly entitled to remain in the dock and say not a word. But in this case you will find that the accused has sat dumb in the dock but has chosen to call a sister of him to give evidence"

He further said:—

> "You will have to ask, as I said, the question, the prisoner himself has had not the manly courage to come to the witness-box and say that he was elsewhere; he got his sister to substantiate, what is called an alibi defence".

Towards the end of his Charge, he finally said:—

> "That is even on the assumption that this evidence of the woman is true when she says that the accused was with her these ten days. Did not the accused have an opportunity to go out in the night and do the shooting and go back? That is where, gentlemen, you will ask yourselves the question. How is it that the accused did not enter the witness-box and give an explanation himself? Because if there is a matter for the accused to explain, if the evidence is of such a nature as to give cause for the accused to submit an explanation, to explain away certain factors which would operate against him, in such circumstances if the accused does not choose to make an explanation, you are rightly entitled to infer that he withholds evidence; because if that evidence was led by him that evidence would be adverse to his case."

There was not, in this case, a failure to call any evidence at all; the accused's sister gave evidence of an alibi. But, even if we assume that, as the appellant was a person who could have given the best evidence in regard to the fact that he was at his sister's house at the time of the shooting, his failure to testify was a matter for consideration, the point could have been made without stating that he 'sat dumb in the dock but has chosen to call a sister of his to give evidence, or that he 'has had not the manly courage to come to the witness-box and say that he was elsewhere.' The natural effect of such animadversions is to create antipathy towards the accused in the minds of the jury and cause them to reject the defence of alibi out of hand or, at the least, without due and proper consideration. An impartial and adequate consideration of his case by the judge of fact is the right of every accused. It is for that reason that this Court has laid it down that it is the duty of a trial judge to place a defence, however weak and insubstantial it may appear to be, fairly and adequately before the jury. We are unable to say that the learned trial judge has fulfilled this duty.

The inference which the learned trial judge suggested might be drawn from the failure of the accused to explain was that the evidence was withheld because it would be adverse to his case. The evidence the learned judge referred to was the evidence of the accused himself. It is not an appropriate inference to suggest in regard to the accused's own evidence but, this may be a matter of form. What the learned judge had in mind may be expressed thus, namely, that it might be inferred that the accused did not give evidence because he could not truthfully have given evidence that he was at his sister's house at the time of the shooting. The drawing of such an inference is however precluded by the circumstances of the case. The accused has, through his sister, led evidence of an alibi and it would be inapt to infer that he kept out of the witness-box because the assertion of an alibi was inconsistent with the truth. It may be

that the effect, if any, that could be given to his failure to testify, would be that a court should be less ready to consider that the evidence of alibi raised a reasonable doubt in regard to the prosecution case because the accused, who was the person who was in the best position to give evidence in regard to it, has failed to testify.

An inference that the evidence which a party is able to place before court but, chooses to withhold must be unfavourable to that party is one referred to at Section 114(f) of the Evidence Ordinance. It is a presumption of fact. One should have thought that such a presumption would not arise in a criminal case because of the fundamental rule that an accused is free to elect whether he will, or will not call evidence. It has been held that the presumption in section 114(f) is not one which may be drawn against an accused person because he is free to elect whether he will, or will not, call evidence, and an inference cannot be drawn against him by reason of his electing to take the one course rather than the other — vide *Hurry Churn Chuckker-Butty and Another* v. *The Empress*, 10 Calcutta, page 140. It has been suggested that it is not a principle of evidence but a rule of logic that such an inference might be drawn. This rule was first set out in the dictum of Lord Ellenborough in *Rex* v. *Cochrane:*—

> "No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but, nevertheless, if he refuses to do so, where a strong *prima facie* case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistent with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests."

This dictum has been applied in cases of circumstantial evidence as well as where the evidence is direct. In many cases, however, while it has been held that in the circumstances the failure of an accused to offer evidence was a matter to be taken into account, the inference to be drawn or the effect to be given to that fact has been set out in terms other than that contained in the dictum of Ellenborough, J. in a recent case, in *Seetin and Others* v. *The Queen*, 68 N.L.R. 316, in which this Court by a majority decision held that the failure of an accused was in the circumstances a matter that the judge had correctly directed the jury to consider, T. S. Fernando, J., who delivered the order of the Court considered the effect to be given to that fact and referred to a passage from Cross on Evidence which sets out the possible effect that may be given. Cross states:—

> "While a party's failure to testify is not to be treated as equivalent to an admission of the case against him it may add considerable weight to the latter."

Later, he states:—

> "As a general rule a party's failure to explain damning facts cannot convert insufficient into *prima facie* evidence, but it may cause *prima facie* evidence to become presumptive."

The inference that evidence which an accused might have called but has withhold was unfavourable to him is so incompatible with the fundamental rule that an accused is free to elect whether he will, or will not, call evidence that it may be necessary to consider, in an appropriate case, whether it is an inference that should in any case be drawn. The proper effect to be given to the failure of an accused to offer evidence when a *prima facie* case has been made out by the prosecution and the accused is in a position to offer an innocent explanation appears to have been better set out in the dictum of Abbott, J. in *Rex* v. *Burdett*, (1820) 4 B & Ald. 95 at 120.

> "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

In the present case, as indicated earlier, the circumstances of the case precluded the inference that the evidence which the accused withheld would have been adverse to his case.

It has been said that though it is a matter for the judge's discretion whether he should comment on the fact that an accused has not given evidence, yet the very fact that the prosecution is not permitted to comment on that fact shows how careful a judge should be in making such a comment — vide *Waugh* v. *Rex*, (1950) A.C. 203. Where a direction in a Charge on this point may have had the effect of misleading the jury this Court has interfered — vide *King* v. *Duraisamy*, 43 N.L.R. 24, *Chelliah* v. *The Queen*, 54 N.L.R. 465. and *Jayasena* v. *The Queen*, 55 N.L.R. 514. In the present case, the terms in which the directions of the learned judge on this point were made and the faulty formulation of the inference that might

be drawn from the failure of the accused to testify may well have prevented the jury from giving due consideration to the evidence of alibi led by the defence and from giving its proper effect to it. We are, therefore, of the view that this conviction cannot be allowed to stand. It appears to us, however, that there was, in this case, evidence upon which, a jury properly directed, might reasonably have convicted. We accordingly, set aside the conviction and sentence passed on the appellant and direct a new trial upon the same indictment.

Set aside and new trial Ordered.

Present: **de Kretser, J.**

H. K. JINADASA *v.* A. P. U. EDIRISURIYA, FOOD & PRICE CONTROL INSPECTOR

S.C. 75/1968 — *M.C. Matara* 36480

Argued on: 17th November, 1968
Decided on: 13th January, 1969

Price Control Act — Section 4 — Sale of Bombay Onions in excess of controlled price — Charge of selling in Main Street Deniyaya — Evidence led failed to establish the area within which it was an offence to sell above controlled price — Price Order requiring traders to ascertain prices chargeable by referring to Price Orders made from time to time for Municipal limits of Colombo — Does it render Price Orders bad? — Report by Food Control Inspector re Bombay Onions admitted without calling the Inspector — Is it admissible?—How far is such Inspector an expert?—Admisston by Conduct.

The accused was convicted of selling Bombay onions at No. 133, Main Street, Deniyaya above the controlled price fixed in Price Order P4, which in its schedule, column 2 specified the area Village Committee of Deniyaya as the area within which it was operative.

The only evidence to prove that No. 133, Main Street, Deniyaya was within the V.C. area of Deniyaya was that of a clerk of the Food Control Department, who said that No. 133 Main Street, Deniyaya falls within the Administrative District of Matara.

Held: (1) That the prosecution failed to prove that the sale took place in an area within which it was an offence to sell Bombay Onions at more than the controlled price.

(2) That the provision in the said Price Order P4 requiring traders to ascertain the price they could charge in their particular area by referring to Price Orders made from time to time for the Municipal limits of Colombo did not make the Price Order bad in law, as section 4 of the Control of Prices Act deals only with the right of the controller to fix a maximum price, and not with how it should be fixed.

(3) That the learned Magistrate erred in admitting "of consent" a report from the Inspector of Foods, (who was absent) in proof of the fact that the onions in question were Bombay Onions, as no admission by counsel in a criminal case can relieve the prosecution of its duty to satisfy the court by proper evidence.

(4) That Food Control Inspectors who stated that P1 contained Bombay Onions were competent to speak what variety of onions it contained, as they continually deal with such matters.

(5) That the evidence of the Inspector to the effect that the accused asked for Bombay Onions and the accused handed over to him the parcel of onions produced as P1 amounted to an admission of the accused by conduct.

Per **de Kretser, J.** "(*a*) One would imagine that the controller and his assistants in the Provinces could without much effort fix the maximum price for each area instead of demanding that a trader should have to check every now and then whether there has been a fresh Price Order for the Municipal limits of Colombo which would have its impact on his own prices. It is correct that those who choose to trade in Price Control commodities must keep themselves informed of the controlled prices as Sirimane J., pointed out in *Gunasekeram* v. *Mohamed* 67 N.L.R. 479; but that is no reason why avoidable inconvenience should not be eliminated by those responsible for the control of prices.'

(*b*) "As Cornish, J., pointed out in *Rangappa Govindan* v. *Emperor*, A.I.R. Madras 426 "It is an elementary rule that except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions which are evidential, are not permitted in a criminal trial, vide. Phipson on evidence 19."

* For Sinhala translation, see Sinhala section, Vol. 18 part 6, p 11.

(c) "Before I part with this appeal I regret to have to draw attention to the carelessness with which the type-written brief has been prepared. I find the most important part of the charge sheet omitted in the type-written copy. This is not the only case in which I have found laxity in the preparation of the type written brief, and I draw attention to it in the hope that I will not be compelled to deal with such lapses in the future."

Cases referred to: *Gnanasekaram* v. *Mohammed*, 67 N.L.R. 479.
Mitter v. *The State*, A.I.R. (37) 1950 Cal. 435
Rangappa Govindan v. *Emperor*, A.I.R. Madras, 426.
Fernando vs. *Sameena* S.C. 462/59 M.C. Tangalle No. 18236 S.C.M. 10-3-1960 (75 C.L.W. 37

Suriya Wickramasinghe, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for Attorney-General.

de Kretser, J.

In this case the Magistrate of Matara (Mr. L. A. Gunewardene) found the accused guilty of the charge laid against him that he had on 8.7.67 at No. 153 Main Street, Deniyaya, sold a pound of Bombay Onions the controlled price of which was -/28 cents for -/40 cents. The Magistrate sentenced the accused to 3 months R.I. and a fine of Rs. 1,000/- in default 3 months R.I. The accused has appealed.

The Price Order P4 specifies in its schedule column 2 the areas within which onions cannot be sold above the controlled price. It was therefore incumbent on the Prosecuting Officer to prove that No. 133 Main Street, Deniyaya, where the sale took place was within such an area. The only evidence that I find in respect to area is that of P. Wanigasekera, a clerk in the Food Control Department who says that premises No. 133 Main Street, Deniyaya, falls within the Administrative District of Matara. It is probably the acceptance of his evidence that makes the Magistrate say that "the prosecution has conclusively proved that the accused sold one pound of Bombay Onions to Senaratne for -/40 cents and that the sale was effected in Deniyaya which is in the *Revenue* District of Matara."

But column 2 of the schedule to the Order does not give either the Revenue District of Matara or the Administrative District of Matara as an area to which the Control Order applies. The only reference to Matara in this column is in Group I which has a reference to the Matara U.C. area; and the only reference to Deniyaya is in Group 6 which has a reference to the V.C. area of Deniyaya. There is no evidence that No. 133, Main Street, Deniyaya, is within the V.C. area of Deniyaya. The resulting position is that the prosecution has failed to prove that the sale took place in an area within which it was an offence to sell a pound of Bombay Onions at more than /-28 cents.

Counsel for the appellant also complained that the Price Order P4 did not comply with the provisions of section 4 of the Control of Prices Act Cap: 173 Vol: 6 L.E in that it did not fix a maximum price at which the article could be sold but required reference to another Price Order from time to time for that purpose. P4 fixed the maximum price at -/02 cents more than the price fixed from time to time for the sale of the commodity within the Municipal limits of Colombo.

The need to have a higher price fixed for an area outside the Municipal limits of Colombo would be due to allowance having to be made for costs of transport etc. but it is difficult to appreciate why outstation traders should be inconvenienced by having to refer to Price Orders made from *time to time* for the Municipal limits of Colombo to ascertain the price they could charge in their particular area. One would imagine that the controller and his assistants in the Provinces could without much effort fix the maximum price for each area instead of demanding that a trader should have to check every now and then whether there has been a fresh Price Order for the Municipal limits of Colombo which would have its impact on his own prices. It is correct that those who choose to trade in Price commodities must keep themselves informed of the controlled prices as Sirimane, J., pointed out in *Gnanasekeram* vs. *Mohammed*, 67 N.L.R. 479; but that is no reason why avoidable inconvenience should not be eliminated by those responsible for the control of prices.

Be that as it may, I am unable to hold that there has been an infringement of section 4 in the fixing of the maximum price as has been done in this instance. For section 4 deals only with the right of the Controller to fix a maximum price and not

with how it should be fixed. As matters stand a trader can undoubtedly work out what the maximum price is that applies to his area. It is undoubtedly inconvenient but it is within the law. It has already been held in *Gnanasekeram* v. *Mohammed* referred to above that a Price Order is not invalid even where it did not mention a particular figure or did not refer to a *particular* Price Order in Colombo.

The next matter urged by Counsel for the appellant was that there was no proof that these onions were Bombay Onions if a report P6 from the Inspector of Foods wrongly admitted in evidence was eliminated. The Magistrate had admitted this report "by consent". The prosecuting officer had moved for an adjournment of the trial as the Inspector of Food was that day in attendance before another Court. The Counsel for the Defence had said that that was not necessary as they accepted the correctness of the report and were not contesting that the onions were Bombay onions.

As Cornish, J., pointed out in *Rengappa Govindan* v. *Emperor*, A.I.R. Madras, 426 "It is an elementary rule that except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions which are evidential, are not permitted in a criminal trial, vide. Phipson on evidence 19."

In that case a postmortem report had been admitted by consent in evidence without the doctor being called. Cornish, J., following the case reported in 27 Calcutta 295 at page 300 said "A postmortem report proves nothing. It is not even evidence, and can only be used by the witness who conducted the postmortem as an aid to memory". Counsel also referred me to the case of *S.C. Mitter* vs. *The State*, A.I.R. (37) 1950 Cal. 435 where Das Gupta J., pointed out that the Law makes no provision for an admission by Counsel in a criminal case. No admission by Counsel can relieve the prosecution of the duty of satisfying the Court by proper evidence. It appears quite clear, therefore that the Magistrate erred in this case by admitting the report P6 as evidence; but that does not mean that in this case there is no evidence that the onions in question are Bombay onions, for there is the evidence of the Food & Price Control Inspectors Edirisuriya and Senaratne who are officers continually dealing with matters such as those and therefore competent to speak to what the onions were who say that these were Bombay onions. There is also the fact there is the conduct on the part of the accused which establishes an admission that the onions he sold were Bombay Onions for the evidence has been accepted that when Inspector Senaratne asked him for Bombay onions it was the parcel of onions produced as P1 that was given him. In a similar situation in S.C. 412/59 M.C. Tangalle No. 18236 S.C. Minutes 10.3.60,* where the commodity concerned was beef Sinnatamby, J., said " I think the best evidence [with regard to identity is the admission by the accused. Admission by conduct which in this case certainly does establish the article handed over was beef." In the result I am satisfied that in this case it is sufficiently established that the commodity in this question was Bombay onions. Counsel for the complainant also pointed out that the Magistrate had erred in fixing the default sentence if the fine was not paid and had also not entered the plea of the accused correctly in answer to the charge. In view of the fact that I am allowing the appeal in this case I do not think it necessary to say more than that I did not expect to find sloven work on the part of the Magistrate.

Before I part with this appeal I regret to have to draw attention to the carelessness with which the type-written brief has been prepared. I find the most important part of the charge sheet omitted in the type-written copy. This is not the only case in which I have found laxity in the preparation of the brief, and I draw attention to it in the hope that I will not be compelled to deal with such lapses in the future.

The appeal is allowed and the conviction and sentence set aside.

Appeal allowed.

* 75 C.L.W 37

Present: **Sirimane, J.**

M. H. M. HUSSEN *vs.* P. Y. DE SILVA

S. C. 38/68 — *M. C. Kalutara* 27489

Argued and decided on: 12th May, 1969.

Housing and Town Improvement Ordinance, (Cap. 268) Sections 5 and 13 — Conviction for erecting boundary wall without permission of Chairman of Urban Council — Evidence indicating erecting or repairing old one — Reference by prosecution witnesses to joining new wall to old wall — No sketch or plan— Unsatisfactory nature of prosecution evidence.

Continuing offence — Need to prove it again.

The accused was convicted of constructing a boundary wall without the approval of the Chairman of the Urban Council. There was evidence to the effect that the accused was repairing or re-erecting an old one. The evidence of the prosecution witnesses too referred to "joining the new wall to an old wall and to the existence of an old boundary wall on the northern side, without any indication that it was within or outside the premises. There was no sketch or plan to support the charge.

Held: (1) That in view of the unsatisfactory nature of the evidence the conviction should be set aside.

(2) That section 13 of the Housing & Town Improvement Ordinance should not be used in order to impose a fine on a person in anticipation of his continuing the offence.

(3) That the continuing of an offence after conviction is itself an offence and should be proved again before a person is held liable to pay the daily fine referred to in the Section.

Per **Sirimane, J.** "In cases of this kind it is always very desirable that there should be a sketch or plan which definitely depicts the offending structure."

Case referred to: *Cooray* v. *Peiris*, 65 N.L.R. p. 192

Dr. Colvin R. de Silva, with *Y. L. M. Mansoor and P. Tennekoon*, for the accused-appellant.

L. T. Andradi, with *N. S. A. Goonetilleke*, for the complainant-respondent.

Sirimane, J.

The accused was charged with constructing a boundary wall without the approval of the Chairman of the Urban Council, Beruwala in contravention of Section 5 of the Housing and Town Improvement Ordinance (Chapter 268). Counsel for the appellant urged that the evidence in the case indicated that the appellant was not constructing a new wall, but repairing or re-erecting an old one. He pointed out to some evidence given by the prosecution witnesses where they referred to joining the new wall to a portion of the old wall, and also that there was an old boundary wall on the northern side. It is not at all clear whether the old wall referred to by these witnesses was within or outside these premises. In cases of this kind it is always very desirable that there should be a sketch or plan which definitely depicts the offending structure. In view of the unsatisfactory nature of the evidence I think the conviction should be set aside and the case sent back for retrial.

I would like to refer to the sentence that has been imposed on the appellant. The learned Magistrate has imposed a fine of Rs. 100/- and "Rs. 25/- per day." Section 13 (which is the section under which the appellant was convicted) empowers the Court to impose a daily fine of Rs. 25/- for every day on which the offence is continued *after conviction*. That Section should not be used in order to impose a fine on a person in anticipation of his continuing the offence. As Abeyesundere, J. pointed out in *Cooray* v. *Peiris* (65 N.L.R. page 192) the continuing of an offence *after conviction* is in itself an offence, and should again be proved before a person is held liable to pay the daily fine referred to in the section.

I formally set aside the conviction and sentence and send the case back for a retrial before another Magistrate.

Set aside and sent back.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J. (President), Sirimane, J. and Weeramantry, J.**

THE QUEEN *vs.* KASTHURIARACHILAGE SIRISENA

Application No. 67 *of* 1968 — *S.C.* 83/67 *S.C. Polonnaruwa* 18133

Argued on: 29th and 30th October, 1968
Decided on: 30th October, 1968

Court of Criminal Appeal — Several accused indicted on counts of unlawful assembly, murder and grievous hurt—Towards close of prosecution counsel for defence stating in the presence of the Jury that he advised his client the 3rd accused to plead guilty of culpable homicide not amounting to murder—Trial proceeding without such plea — Conviction of only 3rd accused despite careful direction by trial Judge to Jury to ignore counsel's statement regarding 3rd accused's guilt—Whether re-trial should be ordered.

Five accused were tried on counts of unlawful assembly, murder and grievous hurt committed in the course of the same transaction. Towards the close of the prosecution case, following a remark by the learned trial Judge that there was no evidence of unlawful assembly, counsel for the defence made a statement in the presence of the Jury that he advised his client, the 3rd accused, to plead guilty to the offence of culpable homicide not amounting to murder and added that it had been his position from the beginning.

The trial was adjourned thereafter and on the next day, without the 3rd accused pleading guilty, the trial proceeded. The 3rd accused gave evidence denying the charges and the 5th accused admitted from the dock that he took responsibility for the assault which resulted in the death of the deceased.

Notwithstanding a careful direction by the trial Judge that the Jury should ignore the defence counsel's statement as to the plea of guilty of the 3rd accused, they found the 3rd accused guilty.

Held: That in the circumstances (*a*) it was difficult to exclude the possibility that in reaching that verdict the Jury did take into account Counsel's statement that his position all the time had been that the 3rd accused had been guilty of the offence of culpable homicide.

(*b*) it was not a proper case to exercise the discretion to order a new trial.

K. Kanag-Iswaran (assigned), for the accused-appellant.

E. R. de Fonseka, Crown Counsel, for the Attorney-General.

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

In this case, where several accused were charged on counts of unlawful assembly and of murder and grievous hurt committed in the course of the transaction, it was only the 3rd accused who was ultimately convicted on a charge of culpable homicide. This conviction by the jury was reached in the following circumstances. Towards the close of the prosecution case, the learned trial Judge remarked that there was no evidence of unlawful assembly and that "it is agreed that it was the 3rd accused who caused" the injuries on two persons. Immediately thereafter counsel for the defence made a statement in the presence of the jury that he had advised his client, the 3rd accused, to plead guilty to the offence of culpable homicide not amounting to murder and counsel further stated "that has been my position from the beginning."

The trial was adjourned for the day at that stage: but on the next day nothing further was done in pursuance of counsel's statement, obviously because the 3rd accused was not willing to plead guilty to the offence of culpable homicide not amounting to murder. The trial then proceeded and the 3rd accused himself gave evidence in his defence, denying that he had committed the assaults which were the subject of the charges. In addition the 5th accused made a statement from the dock in which he took responsibility for the assault which had resulted in the death of the person for whose death the jury ultimately held the 3rd accused responsible.

The learned trial Judge very carefully directed the jury that they should ignore the incident during which counsel made a statement as to a plea of guilt by the 3rd accused. The learned trial Judge also directed the jury that they should acquit

all the accused on the charges of unlawful assembly and that the only question remaining for their determination was whether the 3rd accused had been responsible for the death of the person whose death was subject to the charge of murder. The jury retired only for a few minutes, and we are quite unable to exclude the possibility that, in reaching their verdict against the 3rd accused, the jury did take into account counsel's statement that his position all the time had been that the 3rd accused had been guilty of the offence of culpable homicide. We have considered the submissions of counsel appearing for the Crown at the appeal as to the weight of the evidence of this case, but we do not think this is a proper case in which to excerise our discretion to order a new trial

The appeal is allowed and we direct that a verdict of acquittal be entered.

Appeal allowed.

Present: **de Kretser, J.**

D. C. KUMARASINGHE *vs.* THE FOOD & DRUGS INSPECTOR, RATNAPURA

S.C. 1030/68 — *M.C. Avissawella* 86186

Argued on: 20th January, 1969
Decided on: 1st March, 1969

Food and Drugs Act, (Cap. 216), *Sections* 56 (1) *(a) and* 57—*Sale of outdated drug—Purchase after scrutinising labels by purchaser—Can sale be said to be one to the prejudice of purchaser*?

The accused was convicted of selling to the prejudice of the purchaser a certain drug (Berin Vitamin B) in breach of Section 4(1) of the Food and Drugs Act (Cap. 216). The evidence of the purchaser was that when he asked the accused, whether he "could buy a bottle of Berin Vitamin B" the latter took the bottle from the shelf and gave it to him. Then although on scrutinising the label the purchaser found out that it was an outdated drug, he 'opted' to buy it after ascertaining the price.

Held: That in the circumstances it could not be said that the sale was one to the prejudice of the purchaser.

Per **de Kretser, J.** "It has long been clear that if the seller of an article brings duly and sufficiently to the purchaser's knowledge before the sale is affected, the fact that the article sold is not of the quality of the article he demands, the sale is not to the prejudice of the purchaser within the meaning of this section" says Bell in his commentary on this section of the Food & Drugs Act."

Ralph de Silva, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

de Kretser, J.

The Magistrate of Avissawella (Mr J. D. Aseerwathan) convicted the accused of the charge that in breach of section 4(1) of the Food and Drugs Act (Cap. 216) he had sold to the prejudice of the purchaser a drug (Berin B1 Ansurin Hydrochloride B.P.) which was not of the quality of the drug demanded by the purchaser and that he was therefore guilty of an offence under section 56(1)(a) punishable under section 57 of Cap. 216. The Magistrate sentenced him to pay a fine of Rs 250/- in default four weeks' simple imprisonment and the accused has appealed.

The circumstances under which the sale took place are given by the Inspector as follows: "On 18th February, 1968 I walked into the premises No. 137 Garnet Stores Eheliyagoda and I met the accused at the Drug Sales Counter. I asked him whether I could buy a bottle of Berin Vitamin B. He took the bottle of Vitamin B1 Berin from the shelf and gave it to me. I scrutinised the label and found out that it was an out-dated drug. The date stamp on the label said 'Use before August 1965'. Then I asked him the price of the drug and he told me it was Rs 2.20. Then I *opted* to buy this."

It appears to me from this evidence that the accused gave the Inspector the bottle for the purpose of allowing the Inspector to decide whether it was what he wanted. The Inspector examined it, asked for the price, and thereafter to use his own word "*opted*" to buy it.

The question arises whether it can be said in those circumstances that this was a sale to the prejudice of the purchaser. In my opinion it is not. "It has long been clear that if the seller of an article brings duly and sufficiently to the purchaser's knowledge before the sale is affected, the fact that the article sold is not of the quality of the article he demands the sale is not to the prejudice of the purchaser within the meaning of this section" says Bell in his commentary on this section of the Food & Drugs Act.

That knowledge can come to the purchaser in consequence of what happens at the time of purchase and in the instant case it is clear that when the bottle was handed over to the would-be purchaser for scrutiny a perusal of the label would bring and did bring to his notice what was required by the law to be placed on the label for that very purpose — in terms of regulation 16 para B — the date from which the preparation should no longer be used. If thereafter he *opted* to purchase the drug then obviously he did so of choice and cannot claim prejudice. In the instant case it is clear the Inspector bought the outdated drug for the purposes of filing a prosecution — but if one regards the matter not from the position of "a skilled purchaser like the Inspector but an ordinary person purchasing the article without any special knowledge" there would have been in my view no difference in the course of business at this particular shop. It appears to me therefore that the conviction entered in this case must be set aside. The appeal is allowed.

Appeal allowed.

Present: **de Kretser, J.**

P. A. S. JAYAWARDENA, FOOD & PRICE CONTROL INSPECTOR

v.

KADIRVELU THIRUNAVUKARASU

S.C. 876/'68—*M. C. Kegalle No.* 69062

Argued on: 16th and 19th December, 1968.
Decided on: 21st January, 1969.

Control of Prices Act — Conviction on a charge of selling a box of matches containing 50 *sticks above controlled price — Relevant Price Order fixing prices of boxes of matches containing varying number of sticks at different prices — Maximum number of sticks at fifty and maximum price five cents — Submission on behalf of accused that Price Order bad as it conflicts with Regulations made under the Manufacture of Matches Ordinance* (*Cap.* 170) — *Regulations* 42, 43, 44 (*Vol.* 3, *Subsidiary Legislation*).

The accused was convicted of selling a box of matches containing 50 sticks for six cents when the controlle d price for it was five cents. The relevant Price Order *inter alia* fixed the price for boxes of matches containing

not less than 50
not less than 40
not less than 30
not less than 20
not less than 10

at five cents, four cents, three cents, two cents, and one cent respectively.

It was submitted on behalf of the accused that this Price Order was bad in law in that it conflicts with regulations 43 and 44 made under Section 10(1) of the Manufacture of Matches Ordinance (Cap. 170). Rule 43 forbids the sale by any person to another of any matches manufactured in Ceylon unless there is securely fixed to every box so sold a Government banderol issued by the Director.

Rule 44 reads "the banderol must be so fixed as to prevent the box from being opened in the ordinary way without first breaking the banderol.." Further, Section 12 of the said Ordinance makes it an offence to sell a box with a broken banderol.

Regulation 42 enacts that no more than 50 match sticks shall be packed in any box sold or offered for sale.

There is nothing on the banderol or the label affixed on each box to show the number of sticks in each of them.

Held: That the said Price Order under which the accused was charged and convicted is manifestly unreasonable because it requires a trader to fix his price in accordance with the number of sticks in the box which he cannot know with certainty except by breaking the banderol. It goes beyond the authority given to the Controller of Prices by Section 4 of the Control of Prices Act.

P. Nagendran, with *Wilson Fernando*, for the accused-appellant.

Priyantha Perera, Crown Counsel, for the Attorney-General.

de Kretser, J.

The Magistrate of Kegalle (Mr Illayperuma) sentenced the accused in this case to one month's R.I. and a fine of Rs 250/- in default six months' R.I. when he found the accused guilty of the charge laid against him, namely, that he had sold a box of matches containing 50 sticks for -/06 cents when the controlled price for such a box is -/05 cents. The fact that the accused sold the box in question for -/06 cents is not contested, and the point taken before the Magistrate is the same point that is taken in appeal, namely that the relevant price order is bad in law.

The relevant Price Order found in G.G. No. 14459 of 23rd July, 1965 fixed the price of matches as follows:—

Rs 328/- as the maximum price above which a case of matches shall not be sold in Ceylon, ex factory.

Rs 338/- as the maximum wholesale price for a case

Rs 360/- as the maximum retail price for a case.

It also fixed the price for boxes of matches as follows:

Box of matches containing not less than 50 sticks—o5 cents
—do— not less than 40 sticks—o4 cents
—do— not less than 30 sticks—o3 cents
—do— not less than 20 sticks—o2 cents
—do— not less than 10 sticks—01 cent

It will be observed that under this Price Order a box of matches containing less than 10 matches was not price controlled; that the maximum price Rs 328/- ex factory could apply to any case of matches irrespective of the number of sticks in each match-box making up the case; that the wholesale price could be Rs 338/- for a case quite irrespective of the price paid ex factory for it and quite irrespective of the number of matches in each box that was found in the case.

Counsel's submission is that this Price Order is bad in law in that it conflicts with the regulations made under section 10(1) of the Manufacture of Matches Ordinance Cap. 170 of Vol 6 of the L.E., which are "as valid and effectual once approval has been duly Gazetted as if they were enacted in the Ordinance itself." These regulations are found in Vol. 3 of the Subsidiary Legislation of 1956 and were made and duly Gazetted in 1938/1941. Those relevant to this Order are Nos. 43 and 44. No. 43(1) forbids the sale by *any* person to another of any matches manufactured in Ceylon unless there is securely fixed to every box of matches so sold a Government banderol issued by the Director. 43(2) extends the prohibition to sale by licensed manufacturers. Reg. 44 provided for the manufacturer affixing the banderol and sets out the manner it is to be affixed, and the portion relevant to this Order reads: "The banderol must be so fixed as to prevent the box from being opened in the ordinary way without first breaking the banderol." To sell a box with a broken banderol is an offence punishable under section 12 of Cap. 170. Reg. 42 enacts that no more than 50 match-sticks shall be packed in any box sold or offered for sale. It follows then that it is open to a manufacturer to pack them for example in boxes containing 40 sticks or 30 sticks etc., if he so pleases, and he is the only person who would know the number of sticks each box contains. There is no provision for either the banderol, or the label which has to be affixed on each box in terms of Reg. 53(1) or both to show the number of sticks in the box to which they are affixed. How then, is the retail dealer in these circumstances to fix his selling price? While it may be possible to ascertain from the manufacturer or the wholesaler how many sticks the boxes in a case offered for sale contain, there can also be times when this information cannot be obtained or may not be vouchsafed. The reasonableness of a Price Order can always be checked by its application to an extreme case. The law enacts that a trader must sell his box of matches with the banderol intact. To make a Price Order that requires him to fix his price in

accordance with the number of sticks in the box which he cannot know with certainty except by breaking the banderol is manifestly unreasonable; and in my opinion goes beyond the authority given to the Controller of Prices by section 4 of Cap. 173 of vol. 6 of the L.E. The Price Order being invalid, I allow the appeal of the accused. The conviction and sentence are set aside.

Set aside.

IN THE COURT OF CRIMINAL APPEAL

Present: **Sirimane, J.** (*President*), **Samerawickreme, J. and Weeramantry, J.**

THE QUEEN *v.* HERATH MUDIYANSELAGE HEEN BANDA

S.C. No. 118/68 — *M.C. Polonnaruwa No.* 1930
Appeal No. 1 *of* 1969 — *Application No.* 2 *of* 1969

Argued and decided on: 13th March, 1969
Reasons delivered on: 19th March, 1969.

Evidence Ordinance, section 27 — *Portion of statement made by accused led in evidence— Trial by jury — Duty of trial Judge to explain to jury effect of admission of such statement — Proper inference to be drawn — Failure to explain is non-direction amounting to a misdirection.*

Held: (1) That when part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more.

(2) That the failure to explain to the Jury the inference which they may properly draw from a fact discovered in consequence of a statement made by an accused person, is a non-direction amounting to a mis-direction.

Case referred to: *Queen* v. *Krishna Pillai*, S.C. 19/68 — M.C. Mallakam 2577.

L. F. Ekanayake (assigned), for the accused-appellant.

V. S. A. Pullenayagam, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Attorney-General.

Sirimane, J.

According to the case for the prosecution, the witness Perera, a game ranger, together with the deceased, one Razaak, and two other game watchers were on patrol in the jungle at Polatuwela in the Polonnaruwa district on the night of 10.10.67. About 9.15 p.m. they noticed a torch being flashed at a distance of about a hundred yards, and advanced within thirty to forty yards of that light, when it was suddenly switched off. Perera then flashed his own torch, and says that he saw a man who had covered his head with a cloth pointing a gun towards them. He (Perera) immediately switched off his torch, when a shot rang out which injured the deceased and caused his death.

Razaak gave somewhat similar evidence, and both of them purported to have identified the appellant as the man with the gun, though they admitted that they had only a glimpse of him.

In their statements to the Police made next day, neither of them had mentioned the name of the appellant, or that they had known or seen the assailant before that date. It was established in cross-examination that Razaak had seen the appellant several times before this, and knew the village in which the appellant lived. The witness Perera had, in the course of an inquiry held earlier into the alleged shooting of an elephant questioned the appellant in his office. The defence marked as D3, a part of a statement made by Perera to the Magistrate where he had said, "I had not seen the person who fired before that day."

It could be seen, therefore, that the evidence of identification was, to say the least, unreliable.

The prosecution also led evidence to show that in the course of their investigations the police found a gun P1 in the hollow of a tree. The owner of this gun was unknown. They also led in evidence part of a statement made by the appellant to the police where he is alleged to have stated, "I can point out the tree in which I placed the empty cartridge" in consequence of which the police found the empty cartridge P2. The Government Analyst expressed the opinion that P2 could have been fired from the gun P1.

In the *Queen* vs. *Krishna Pillai* (S.C. 19/68 — M.C. Mallakam 2577) H. N. G. Fernando, C.J. pointed out the dangers inherent in a statement of this nature, admitted under section 27 of the Evidence Ordinance. Unless cautioned, juries are prone to attach undue importance to such statements, and are too ready to infer that the person on whose statement some fact was discovered, had also in that statement confessed to the commission of the crime. It was pointed out in that case that the trial Judge should clearly warn the jury that the law prohibits such an inference.

In his summing up, the learned Commissioner referred to the fact that a cartridge was found on the appellant's statement, — but he said nothing more.

The prejudice caused to the appellant as a result of this non-direction became apparent when the jury returned after deliberating for nineteen minutes. When asked whether they were agreed upon their verdict, the Foreman wanted to know whether the single cartridge traced was found on a statement made to the police by the accused. The learned Commissioner answered the question in the affirmative. Once again he failed to explain to the jury that the finding of the cartridge had very little, if any, evidentiary value. In a space of two minutes after this, the jury returned a verdict against the appellant on the capital charge.

It is fairly clear that the jury must have been in doubt in regard to the direct evidence of identification referred to earlier, and that it was the finding of the cartridge on a statement made by the appellant that tipped the scales against him.

When, part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance as was done in this case, it is the duty of the trial Judge to explain to the jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more.

The failure to explain to the jury the inference that they may properly draw from the discovery of the cartridge, was a non-direction, which, in our view, amounts to a mis-direction. Had the jury been properly directed on this point, it is impossible to say that they would have brought in a verdict against the appellant.

Having regard to the nature of the other evidence in the case, we did not think it was fair to place the appellant in jeopardy a second time. We, therefore, quashed the conviction and sentence and acquitted the appellant.

Accused acquitted.

Present: **Wijayatilake, J.**

CEYLON STEEL CORPORATION ATURUGIRIYA

v.

THE NATIONAL EMPLOYEES' UNION, COLOMBO

S.C. 64/68 — *L.T.* 7/27994

Argued on: 28th and 30th of March, 1969
Decided on: 30th March, 1969.

Labour Tribunals — Duty of Tribunal to assess all evidence led before it — Erroneous assumption that no evidence led on certain point — Whether question of law — No just and equitable order possible — Industrial Disputes Act, section 36(4).

Held: (1) That where a Labour Tribunal has erroneously taken the view that there was no evidence at all on a certain point when in fact there was, this would amount to a question of law.

(2) That an order based on such an erroneous view was not a just and equitable order as the evidence that has been led has to be assessed. Such order should, therefore, not be permitted to stand.

Cases referred to: *Ceylon Transport Board* v. *Ceylon Transport Workers' Union* (1968) LXXV C.L.W. 33
Mahawithane v. *Commissioner of Inland Revenue* (1962) 64 N.L.R. 217
Ceylon Workers' Congress v. *The Superintendent, Kallebokke Estate* (1962) 63 N.L.R. 536
Griffiths v. *Harrison (Watford) Ltd.* (1962) 1 A.E.R. 909.

N. Satyendra, for the employer-appellant.

M. Amerasingham, for the applicant-respondent.

Wijayatilake, J.

This is an appeal from an order of the President of the Labour Tribunal reinstating one S. Sinnadurai a watcher of the Ceylon Steel Corporation, Athurugiriya whose services had been terminated on the 22nd of May 1966, the grounds for termination being that he had deliberately damaged a boundary fence of the Ceylon Steel Corporation and obstructed the employees of the Corporation in the performance of their lawful duties. The security officer who has gone to the scene had noticed that there was a gap in the barbed wire fence near about Sinnathurai's house and it was suspected that Sinnathurai was responsible for this. On the 5th of April 1966 the security officer had sent two labourers to repair the fence. These two labourers had reported to him that they had been obstructed by Sinnathurai. About two strands of barbed wire were broken and one of them was held up and tied to the upper barbed wire and the other one was tied to the barbed wire at the bottom to enable a person to go through this gap. The learned President after a very long inquiry and in a very exhaustive judgment dealt with the matter in the manner of a civil claim for a convenient way of necessity and he has made order that the workman be reinstated from services. He has observed that he is unable to agree that the dismissal from service of the workmen was entirely justified. The finding of the learned President is more in the nature of an award by an arbitrator.

Learned Counsel for the appellant submits that on a perusal of the judgment it would appear that there is a grave misdirection in view of the learned President's observation that there is no specific evidence with regard to the question whether the workman was in fact responsible for the damage caused to the fence and as to whether he physically attempted to obstruct the person who had come to repair the fence. Mr Satyendra has referred me to the judgment of Tennekoon, J., 75 C.L.W. page 33 where he has dealt with Section 36(4). It would appear from the section that a Labour Tribunal shall not be bound by any of the provisions of the Evidence Ordinance. On a perusal of the instant judgment it would appear that the learned President has erroneously taken the view that there was in fact no evidence at all with regard to the damage to the fence or the alleged obstruction. Although the Labour Tribunal is expected to make a just and equitable order, it would neither be just nor equitable for a tribunal to go on the assumption that no evidence has been led when such evidence has been recorded. As to whether the evidence is good, bad or indifferent is another matter. In the first instance the evidence that has been led has to be assessed and it is only then the President has to make a just and equitable order. But in the instant case it is clear that the learned President has failed to appreciate the fact that there was evidence in regard to the damage caused to the fence and the alleged obstruction by this workman. So that, in my opinion, Mr Satyendra is justified in questioning the finding as it is a serious omission and the question now before me would amount to a question of law.

Mr Amerasingham very strenuously submits that it is quite apparent that the learned President has not taken this evidence into consideration because it is hearsay and that on the evidence which he has relied on, he was justified in coming to the conclusion that this workman should be re-instated. He has referred me to the judgment of Lord Denning in (1962) 1 A.E.R. 909, 64 N.L.R., 220 and 63 N.L.R. 536. However, I am inclined to agree with Mr Satyendra that the order of the learned President cannot stand owing to the omission referred to.

In these circumstances I would quash the order of the learned President and send the case back for an inquiry *de novo* before another President. The costs will abide the result of the fresh inquiry.

Set aside and sent back.

Present: **Sirimane, J. and de Kretser, J.**

JOHN PERERA *v.* MATHUPALI*

S.C. 164/'67 — *D.C. Colombo* 6613/*D*

Argued on: 30th November, 1968
Reasons delivered on: 14th December, 1968

Divorce — Malicious desertion — Uncontradicted evidence of plaintiff that defendant committed adultery in 1949 *and thereafter lived with that man — Now, child born by him — Also that during long period of plaintiff's illness a woman now, his mistress with* 3 *children by him looked after him,—Delay in bringing action explained — Discretion to withhold granting divorce — Should it be exercised in plaintiff's favour? — Civil Procedure Code, Section* 602.

This is an appeal from an order dismissing an action for divorce filed by the husband against his wife on the ground of malicious desertion. According to the uncontradicted evidence of the plaintiff parties were married on 7/7/1943; the defendant committed adultery in 1949 and thereafter continued to live with that man, by whom she has a child; the delay in filing this action was due to illness, several transfers to various places in the course of his employment, to lack of funds, inability to ascertain whereabouts of the defendant; he was disabled for about 1 1/2 years, during which period another woman looked after him and by her he has now three children; he filed this case as there was no future for his children.

Held: (1) That, in the circumstances it is apparent that the marriage has completely broken down and the discretion vested in the court under the proviso to section 602 of the Civil Procedure Code should be exercised in favour of the plaintiff-appellant.

(2) That in the interests of the children, the woman who lives with him and also in the interests of the defendant and her child, a decree *nisi* should be entered granting the plaintiff a divorce from his wife.

Per **de Kretser, J.** "It is an incontrovertible fact that this marriage is at an end, and toconvert to Unholy Deadlock what was once and is no longer Holy Wedlock by refusing to exercise a discretion vested in a judge, so far from safeguarding the sanctity of marriage appears to me to make a mockery of it and is not in the public interest, for I think one must pay some heed to the change in the attitude of the society we live in regard to the sanctions of honest matrimony"." "

Cases referred to: *Abraham* v. *Alwis*, (1941) 42 N.L.R. 373
Seneviratne v. *Panis Hamy*, (1927) 29 N.L.R. 97
Becker v. *Becker*, (1966) 1 W.L.R. 423.
Lawry v. *Lawry*, (1967) 1 W.L.R. 789.
Apted v. *Apted & Bliss*. 46 T.L.R. 456; 143 L.T. 353; (1930) P. 246

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

S. A. Marikar, for the defendant-respondent.

Sirimane, J.

This was an action for divorce filed by the plaintiff husband against his wife on the ground of malicious desertion. His evidence, which was uncontradicted, shows that the parties were married on 7th July, 1943 and that in April 1949, the defendant committed adultery, and thereafter continued to live with that man, by whom she has a child. The learned District Judge was clearly wrong in answering the issue relating to malicious desertion against the plaintiff-appellant.

The plaintiff gave his excuses for delaying to file his action, e.g., illness, several transfers to various places in the course of his employment, lack of funds and his inability to ascertain the whereabouts of the defendant. This evidence, as I said, was uncontradicted.

It also transpired in the course of his evidence that he had been injured in a motor-car accident and was disabled for about one and a half years. During that period, another woman had looked after him and he had taken her as his mistress. He has three children by her now.

It is quite clear from these facts that this marriage is quite dead now.

The plaintiff lives with a woman whom he cannot marry and has three children, who are

* For Sinhala translation, see Sinhala section, Vol. 18 part 8, p 15.

illegitimate. The defendant too lives with a man who can only be her paramour, and has a child who is illegitimate. The plaintiff said in cross-examination that he filed this divorce case as there was no future for his children in the present state of affairs.

The proviso to Section 602 of the Civil Procedure Code enacts that the Court shall not be bound to pronounce a decree for divorce if it finds that the plaintiff himself has been guilty of adultery, or of unreasonable delay in coming to Court, or cruelty towards the other party, or if he has wilfully separated himself or wilfully neglected the other party which led to that party committing adultery.

In *Abraham* v. *Alwis* 42 N.L.R. 373, this Court held that it should not interfere with the discretion exercised by a trial Judge under Section 602 of the Civil Procedure Code unless it feels that the discretion has not been properly exercised. The Learned District Judge in that case relied strongly on the words of Garvin, J. in *Seneviratne* v. *Panis Hamy* (29 N.L.R. 97) where he said, "He who seeks to be released from matrimonial tie must himself be free from matrimonial offence. This rule can only be relaxed in exceptional cases and where the relief prayed may be granted without prejudice to the interests of public morality". Mosely, J. in that case referred to four circumstances which should be taken into consideration in excercising the discretion under Section 602. They are:—

(*a*) the position of the children to whose interests it was that they should have a home with the sanctions of decency, and so far as may be, of the law

(*b*) the position of the woman with whom the petitioner was living, for it was clearly desirable in her interests that she should be lawfully married

(*c*) the case of the respondent as to whom there was no prospect that refusal of relief would have the effect of reconciling her with the petitioner and

(*d*) the case of the petitioner, in whose interests it was that he should be able to marry and live respectably.

In *Becker* v. *Becker* (1966)1 Weekly Law Reporter 423, the parties were married in 1935 in Poland. They separated in 1939 when the husband was called up for service in the Polish Army. After the war, he wrote to his wife to join him in Italy and later in England but she refused to do so. He filed a petition for divorce in 1965. The petition was dismissed on the ground of unreasonable delay in presenting it. In appeal, the order was reversed and it was held that delay in desertion cases was not, on the face of it, to be regarded as a reason for refusing a decree; that as the marriage was dead as it could be and a reason for divorce had been given, the husband's delay in presenting the petition should not be regarded as a bar. In that case, the husband petitioner had also committed adultery. Lord Denning, M.R., said "There is the further question of the discretion statement. This man has over the years had associations with more than one woman. In view of the long separation from his wife, I do not think it should be taken too much against him — at all events not to the extent of refusing a decree."

In *Lawry* v. *Lawry* (1967) 1 W.L.R. 789, the husband filed a petition for divorce in 1965. (The parties were married in 1928). The facts proved were that the husband had deserted his wife in 1946. In 1956 he returned to his matrimonial home "in order to keep his eye on the youngest child". But though he and his wife lived under the same roof, they lived separate lives. The separation was by mutual consent. Between 1953 and 1956, the wife was guilty of cruelty. (She frustrated the efforts of her husband to sleep during the day by working noisily after he had been on duty at night.) The husband had formed an adulterous association which continued from 1961 to 1964. He sued for a divorce on the ground of cruelty and desertion and asked the Court to exercise its discretion in his favour. The wife counter-sued for a judicial separation. The President granted the husband's petition and dismissed the wife's claim. The decision was upheld in appeal and Willmer, L.J. referring to the President's order, said at page 791 "He had to balance the consideration of respect for the sanctity of marriage (which is of particular importance in the present case in view of the wife's conscientious objections to divorce) against the public interest which is involved in the question whether it is right to keep in being a marriage which has so obviously and so hopelessly and completely broken down",

On the facts of this case, it is apparent that this marriage too has completely broken down and with due regard to the sanctity of marriage, there is hardly a reason why the marriage tie should continue.

In the circumstances of this case, I think that the discretion should have been exercised in favour of the plaintiff-appellant, in the interests of the children, the women who lives with him, and also in the interests of the defendant and her child. The order of the learned District Judge is set aside and I direct that a decree *nisi* be entered granting the plaintiff a divorce from the defendant.

de Kretser, J.

The facts are set out in the judgment of Sirimane, J., which I have had the advantage of perusing and with which I agree. It is open to us to interfere in a case such as the present one if we feel that the discretion vested in the court of first instance has not been properly exercised, and of course the fact that this court would have given a different judgment if it was the trial court is no reason to interfere with a properly used discretion of a trial judge. In the instant case the trial judge (Mr Corbett Jayewardene) does not appear to have considered whether this was not a case in which he should exercise the discretion vested in him despite the long delay in coming to court and the admitted offence on the part of the plaintiff. He has not considered why these things happened, before he held that owing to them he was unwilling to exercise his discretion in favour of the plaintiff. It appears to me, therefore, that the door is wide open for me to consider whether this is not a fit case for the exercise of the discretion.

In regard to delay the facts given by the plaintiff are not contradicted and in the situation the plaintiff found himself in 1949 the reasons appear genuine and adequate. It was not until 1957 that he committed matrimonial offence and the circumstances under which he took a mistress are frankly admitted, and in the circumstances he found himself in, quite understandable.

The President in the case of *Apted* v. *Apted and Bliss*, 1930—46 TLR 456, pointed out that "in every exercise of discretion the interests of the community at large in maintaining the sanctions of honest matrimony is a governing consideration". And undoubtedly it should be for the sanctity of the marriage tie and public morals must be safe-guarded. But one must also, I think, be careful to see that the attempt to safeguard does not in fact cause further damage to them.

It is an incontrovertible fact that this marriage is at an end, and to convert to Unholy Deadlock what was once and is no longer Holy Wedlock by refusing to exercise a discretion vested in a judge so far from safeguarding the sanctity of marriage appears to me to make a mockery of it and is not in the public interest, for I think one must pay some heed to the change in the attitude of the society we live in regard to the "sanctions of honest matrimony". In the days when the Civil Procedure Code was enacted — section 602 is in fact based on section 31 of the Matrimonial Causes Act of 1857 — the man and woman who "lived in sin" because they could not obtain freedom to marry, because they had matrimonial offences to their discredit were social lepers. Today, that is not the case, and that is largely due to the sympathy felt towards those who are unable to regularise such unions whether due to antiquated divorce law or the too stringent exercise of a discretion vested in a divorce judge. It appears to me that when a court is satisfied that the marriage between the parties is truly at an end it should exercise its discretion with a view to rehabilitate and not to punish. The exercise of discretion in a manner that would tend to regularise union in the interests of the parties and the innocent children born to them is in the public interest and in my opinion a correct use of the discretion vested in a judge. To so exercise it when one views the matter in its proper perspective does no damage to the sanctity of marriage and in fact enhances respect for the law.

I agree with the order made by Sirimane, J., in regard to this appeal.

Appeal allowed.

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

K. M. R. H. KEKULANDARA *v.* T. B. MOLAGODA

S.C. 301/66 (*F*) — *D.C. Kegalle* 15263/*L*

Argued on: 11th and 12th September, 1968
Decided on: 27th September, 1968

Kandyan Law — Revocation of gift of immovable property — Intention as expressed in the deed of gift — Kandyan Law Declaration and Amendment Ordinance (1939) *section* 4(1).

A deed of gift was executed prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance, 1939, the donor and donee both being subject to Kandyan Law.

The deed contained *inter alia*, the terms that the donors **"do hereby transfer, set over and assure by way of gift unto the said donee, his heirs executors administrators and assigns the said several premises ..... and all the estate, right title and interest claim and demand whatsoever of us the said donors into upon or out of the said premises hereby gifted and assigned ..... unto the said donee his aforewritten for ever."**

The donor thereafter revoked the donation by a subsequent deed. The right of the donor to revoke the donation was questioned.

Held: (1) that as the deed of gift was executed prior to the enactment of the Kandyan Law Declaration Amendment Ordinance, section 4(1) of the Ordinance enabled the donation to be revoked in so far as such revocation did not prejudice to a greater extent than the rights which would have accrued to the donee, had the donor purported to exercise his right of revocation before the enactment of the Ordinance. Hence the Kandyan law prevailing prior to the enactment of the Ordinance would be applicable in determining the donor's ability to revoke such a donation.

(2) that where all the provisions of a deed taken together show that there has been an effective renunciation of the donor's rights, the donation is irrevocable. The formula "*the donor shall possess for ever*" stated by itself and without more, does not constitute an effective renunciation of the donor's rights to revoke a gift. The words "for ever" in such a context merely manifest an intention to rest the donee with the full dominion.

Per **H. N .G. Fernando, C.J.** "It seems to me however that in considering whether a donor has expressed an intention that he will not revoke his donation, the Court must search for some language equivalent in meaning to 'I will not revoke this deed', and that words such as 'I will not raise any dispute against this donation' are more nearly equivalent to the exact formula than any such language as 'I give it to the donee for ever' ."

Cases distinguished: *Kiri Menika* vs. *Cau Rala* (1858) 3 Lorenz Appeal Reps. 76.
Dharmalingam vs. *Kumarihamy*, 27 N.L.R. 8.

Cases referred to: *Kumarihamy* vs. *de Silva* 9 N.L.R. 202 and 12 N.L.R. 74 (F.B.)
Ukku Banda vs. *Paulis Singho* 27 N.L.R. 449.
Gunadasa vs. *Appuhamy* 36 N.L.R. 122.
Molligoda Unambuwe Ratemahatmaya vs. *Sinna Tamby*, 7 S.C.C. 118

H. V. Perera Q.C. with *C. R. Guneratne* and *T. B. Dissanayake*, for the plaintiff-appellant

H. W. Jayewardene, Q.C., with *S. S. Basnayake* and *Ananda Paranavitane*, for the defendant-respondent.

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

The plaintiff sued the defendant for a declaration of title to two lands conveyed to the plaintiff by one Senaratne Banda on Deed No. 829 of 27th April, 1961. Senaratne Banda himself had acquired the two lands from one Bandara Menike by a deed of 20th November 1956, P3.

The defendant, who is a son of one M. B. Mollegoda, claimed that Bandara Menike had by a deed of Gift of 7th August 1935, P1, donated these lands to her deceased father. Bandara Menike by deed P2 of 20th November, 1956 purported to revoke the donation which she had made to the defendant's deceased father by P1. It was agreed between the parties at the commencement of the

trial that if the donation P1 was irrevocable the plaintiffs will have no title, and on the other hand that, if P1 is held to have been revocable, the plaintiff will have title to the lands by virtue of the deeds P2 and P3. The learned District Judge has held against the plaintiff that P1 was not revocable. This appeal is against that finding.

The only provision in P1 upon which the trial Judge relied is the clause in which the Donors recite that they "do hereby transfer set over and assure by way of Gift unto the said Donee his heirs executors administrators and assigns the said several premises ..... and all the estate right title interest claim and demand whatsoever of us the said Donors into upon or out of the said premises hereby gifted and assigned and each of them and every part thereof which are of the value of Rupees One Thousand (Rs 1,000/-) unto the said donee his aforewritten *for ever*." The construction which the learned Judge placed on this clause is made clear in the following passage from his judgment:—

> "In my view these words show that the Donors surrendered every right or demand that they had over the premises gifted to the Donee for ever. To my mind these words clearly show that the Donors surrendered all their rights including their right of revocation".

The admissions of the parties at the commencement of the trial establish that both Bandara Menike and her son the Donee on P1 were persons subject to the Kandyan Law. The law relating to the revocation of a deed of donation by such a person is the subject of statutory provision in the Kandyan Law Declaration and Amendment Ordinance, Cap. 59. Section 4 of that Ordinance provides 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."

Section 5 of the Ordinance provides that it shall not be lawful for a donor to cancel or revoke gifts of a specified description made *after the commencement of the Ordinance*, and sub-section (2) Section 5 makes it clear that these limitations on revocability do not affect gifts made *before* the commencement of the Ordinance. Accordingly Section 4(1) is the relevant provision applicable in the case of the gift P1, which was made before 1st January, 1939.

The substantive provision in Section 4(1) declares the right of a donor, without any fetter or limitation, to revoke a gift made before 1st January 1939, but the proviso to this sub-section does impose a limitation, namely that a revocation must not prejudice any right title or interest of *certain persons* to a greater extent than it might have been prejudiced under the law applicable before 1st January, 1939. Counsel for the plaintiff in the present appeal has argued that the protection intended by the proviso is only for persons other than a donee himself. It turns out however that the plaintiff must in any event succeed in this appeal, even if the proviso was intended to protect a donee. I shall therefore assume for the purpose of this case that the revocation of a gift made before 1st January, 1939 will be effective against every person, including a donee, whose right title or interest accrued before 1st January 1939, only to the same extent as it would have been effective under the law prevailing before 1939.

A very early case on the subject of the revocation of a Kandyan deed of Gift is that of *Kiri Menika* v. *Cau Rala* (1858, 3 Lorensz Appeal Reports, p. 76). According to the report the deed in this case gave certain lands to the donee "to be possessed finally as paraveni property". But it appears that the report of this case is incorrect or incomplete, in that it did not fully set out the terms of the deed then under consideration. This matter is made clear in the judgment of Justice Wood Renton in the case of *Kumarihamy* v. *de Silva* (9 N.L.R. 202 at 214). The learned Judge there said that he had looked at the text of the record itself of the 1858 case, and he specified the relevant provisions of the deed, which were:—

(1) It transferred the lands to the donee "to hold finally in paraveni".

(2) It provided further that in future "I myself (the donor) or any one else who may descend from me or any person or persons who may receive administrations (sic) over my estates from this day shall do or say no dispute", and

(3) It had a clause that the donee may dispose of the property according to pleasure.

The brief judgment as reported in *Lorensz*, stated that "the donor having renounced on the face of the deed her right to revoke the Supreme Court considers the deed irrevocable". The judgment in this case was one of a Full Bench and is therefore binding on me. Having regard to the brief terms of the judgment, it is unsafe to think that the Court, in holding that the donor had renounced her right to revoke, relied particularly only *on any one* of the provisions of the deed which I have cited above. The only safe inference in my opinion is that the Court relied on all the provisions taken together. The 1858 decision is thus not authority for the proposition that words such as "the donee shall possess for ever" constitute by themselves a renunciation of the right of revocation.

The case of *Kumarihamy* v. *de Silva* was heard in review by the Full Court, whose judgments are reported at 12 N.L.R. p. 74. Justice Wendt in his judgment in review adds nothing of interest to what he had stated in his judgment after the original hearing (9 N.L.R. 202 at 207). In that judgment he reproduced in its entirety the provisions of the deed which he ultimately held to be a provision against revocation. Those provisions (vide page 208) were substantially similar to the provisions of the deed in the earlier 1858 case, in that they recited that the donor or his heirs etc. shall not raise any dispute whatsoever against this donation, and that the donee and her heirs shall according to pleasure hold and possess for ever.

Middleton, J.'s judgment in the hearing in review does not deal with the form of words necessary to constitute an effective renunciation of the right to revoke a gift, and Hutchinson, C.J. also appears to have reached without difficulty the conclusion that the language of the particular deed effected a renunciation. More consideration however was given to this matter by Wood Renton, J., who only participated in the original hearing. Having cited the provisions of the particular deed, he stated as follows:—

> "Taken by themselves, the cases of *Kiri Menika* v. *Cau Rala* and *Heneya* v. *Rana* constitute clear and binding authority in favour of the irrevocability of the deed now in question. Here, as there a pecuniary consideration is disclosed; and in all three cases the terms of the debarring clause are substantially identical".

As to the question therefore of the language which can be properly held to be an effective renunciation of the right of revocation, the judgments in the case of *Kumarihamy* v. *de Silva* fairly establish in my opinion that, just as in the 1858 case of *Kiri Menike* v *Cau Rala*, the Court relied on *all the provisions* of the deed for the conclusion that there had been an effective renunciation.

In *Dharmalingam* v. *Kumarihamy* (27 N.L.R. p. 8), the head note of the report correctly reads as follows:—

> "Where a Kandyan deed of gift contained a clause, which gave the donee the right to deal with the property gifted as "to will and pleasure" coupled with a promise not to "raise or utter any dispute whatever", *held* that the gift was revocable".

But in this case Schneider, J., in referring to the 1858 case of *Kiri Menika* v. *Cau Rala*, appears to have relied on the report in *Lorensz* as to the provisions of the deed in the 1858 case, and to have thought therefore that in the 1858 case the Full Bench had held that the words "to be possessed finally as paraveni property" constituted a renunciation of the right of revocation. But I have already pointed out that in fact (as stated later by Wood Renton, J.) the deed in the 1858 case contained three provisions, and not merely the single provision "that the donee shall possess for ever".

Perhaps also because of this incorrect impression in his mind concerning the 1858 case, Schneider, J. in *Dharmalingam* v. *Kumarihamy* (27 N.L.R. p. 8 at p. 13) said that "in Tikiri Kumarihamy's case the pregnant words were that the donee shall 'hold and possess for ever'." But Schneider, J.

himself thought fit, when setting out the relevant portions of the deed which he was actually considering, to quote also the provision that the donor and his heirs etc. have hereby promised not to raise or enter any dispute whatsoever against the gift. In these circumstances I am unable to agree that the judgment of Schnider, J. is acceptable authority for the proposition that the formula "the donee shall possess for ever" constitutes, by itself and without more, an effective renunciation of the right of revocation.

The case of *Ukku Banda* v. *Paulis Singho*, 27 N.L.R. p. 449, is not of much assistance upon the question I am now considering, because there the terms of the deed were that the land was given "as a gift absolute and irrevocable", language which placed beyond doubt the intention to renounce the right of revocation.

A judgment of 1878 which is reported in 7 S.C.C. p. 118 *Molligoda Unambuwe Ratemahatmaya* vs. *Sinna Tamby* held that a gift, which included an undertaking by the donor not to raise any dispute and a provision that the donee and the heirs etc. shall possess doing whatsoever they please, was revocable, the Court not being disposed to infer a renunciation from what was viewed as only words of further assurance. Counsel for the defendant in the present case has relied on this judgment for the argument that in the 1858 case the effective words of renunciation were "the donee shall possess for ever", and that (as Schneider, J. stated) these words would be the pregnant words of renunciation. It seems to me however that in considering whether a donor has expressed an intention that he will not revoke his donation, the Court must search for some language equivalent in meaning to "I will not revoke this deed", and that words as such "I will not raise any dispute against this donation" are more nearly equivalent to the exact formula than any such language as "I give it to the donee for ever". A donor who states that he will not raise any dispute against his donation might fairly be said to be making a promise that he will not interfere with the title of his donee, and in my opinion he would commit a breach of that promise if he does interfere with the title by revoking the donation.

I would therefore respectfully agree with Garvin J. when he said in the case of *Gunadasa* v. *Appuhamy* (36 N.L.R. 122) that the words "for ever" make no difference to the meaning of a clause in a gift and that such words merely manifest an intention to vest the donee with full dominion. The decision of Garvin, J. that giving property to the donee "for ever" is not an expression of renunciation of the power to revoke, does not in my opinion conflict with any of the earlier decisions which were cited to us.

Counsel for the defendant also invited us to take the view that, in considering whether a donor has sufficiently expressed a renunciation of the right to revoke, a distinction should be made between conditional and unconditional gifts. He argued that in many of the cases the question of renunciation has been decided with reference to deeds which were conditional on the affording of succour and assistance by the donee, and that even if the words "gift to the donee for ever" may be held to be insufficient in such deeds, the same language should nevertheless be considered sufficient in the case of unconditional gifts made purely out of love and affection. I find nothing in the past judgments of this Court to justify any such distinction. A donor must be presumed to be aware of his legal right to revoke a donation, irrespective of whether the donation is made with or without expectation of succour and assistance from the donee. In a case where there is such an expectation, it seems proper to attribute to a fair-minded donor an intention that he will not revoke the donation unless his expectation proves to have been optimistic. But where a gift is made purely out of love and affection, that is, entirely for the benefit of the donee, it is more reasonable to attribute to the donor the intention that his legal right of revocation will be unfettered. In this sense, a donation made purely out of love and affection contains far less of the element of contractual obligation than does the conditional donation. If then a renunciation of the right of

revocation is to be more readily inferred in one case rather than in the other the Courts should in my opinion reach that inference more readily in the case of the conditional gift, where the element of contractual obligation is more evidently present than in a case where a gift is unconditional. A distinction between cases of the two different classes, even if justifiable, would thus be unfavourable to the defendant in this case.

I hold for these reasons that the deed P2 was a valid revocation of the donation P1.

As I have earlier indicated, the District Judge was invited to decide this case purely upon admissions made by Counsel on behalf of the parties. In consequence, the need to prove the title of the plaintiff was over-looked. The decree under appeal is set aside *pro forma* and the record is returned to the District Court, when the plaintiff will be given an opportunity to prove his title on the assumption that the donation P1 of 1935 was validly revoked by P2 of 1956. If the title is proved to the satisfaction of the District Judge, he will enter decree in favour of the plaintiff in terms of settlement recorded in Court on 29.4.1966; if not, he will again dismiss the plaintiff's action with costs. The plaintiff will be entitled to the costs of this appeal.

Wijayatilake, J.

I agree.

Set aside and sent back.

Present: **Sirimane, J. and Samerawickreme, J.**

M. ATHAMBAWA *v.* I. P. BEE BEE

S. C. 274/66 (*F*) — *D. C. Batticaloa* 4868/*M*

Argued on: 4th and 6th May, 1969.
Decided on: 17th May, 1969.

Debt Conciliation Ordinance (*Cap.* 81), *Sections* 14(1), 17(*e*), 24(2)(*c*), 26(1) 56 and 64 — *Meaning of 'Debtor' in Ordinance as amended by Act No.* 5 *of* 1959—*Action on promissory note—Order staying proceedings on the ground that court had no jurisdiction as the matter was pending before Debt Conciliation Board—Argument in appeal that matter pending before Board was a separate mortgage debt on an application under Section* 14(1) — *Can a debtor make an application under Section* 14(1) *for settlement of an unsecured debt*? — *Circumstances in which unsecured debts can be reviewed by the Board.*

The plaintiff sued defendant on a promissory note. The learned District Judge made order staying proceedings as he took the view that the matter was pending before the Debt Conciliation Board and therefore under section 56 of the Debt Conciliation Ordinance he had no jurisdiction.

In appeal it was contended on behalf of the plaintiff that the matter pending before the Board was a debt in respect of a mortgage bond on an application made under Section 14(1) of the said Ordinance. The disclosure of this unsecured debt as a particular required by Section 17(e) did not have the effect of making it "a matter pending before the Board." Hence the learned District Judge was wrong in taking the view he did.

Held: (1) That the learned District Judge erred in the view he had taken in dismissing this action.

(2) That a debtor could not under Section 14(1) of the Ordinance make an application to the Board for the settlement of an unsecured debt owed to a secured creditor.

(3) That unsecured debts can be reviewed by the Board only in certain circumstances, e.g. under section 24(2)(c) and section 26(1).

C. Ranganathan, Q.C. with *A. R. Mansoor*, for the plaintiff-appellant.

S. Sharvananda, for the defendant-respondent.

Sirimane, J.

The plaintiff filed this action against the defendant by way of summary procedure, for the recovery of a sum of Rs 1,500/- and interest due to him on a promissory note.

The learned District Judge made order staying proceedings as he was of the view that this matter was pending before the Debt Conciliation Board, and in accordance with the provisions of section 56 of the Debt Conciliation Ordinance (Cap. 81) he had no jurisdiction to entertain the action.

Section 14(1) of that Ordinance enables a debtor to,

> "make an applicaton to the Board to effect a settlement of the *debts* owed by him to all his *secured creditors* or anyone or more of them."

For the purposes of this case, it is sufficient to note that the term "debtor" in the Ordinance as amended by Ordinance No. 5 of 1959 means a person

> "who has created a mortgage or charge over any immovable property or any part thereof..."

Though the term "debt", according to section 64, "includes all liabilities owing to a creditor in cash or kind secured or unsecured ....." I am of the view that in the context of section 14(1) the words "*debts* owed by him to his *secured creditors* ....." refer only to secured debts.

I am unable to accept the argument that a debtor could, under section 14(1) make an application to the Board for the settlement of an unsecured debt owed to a secured creditor.

In this case the defendant also owed another debt to the plaintiff on a mortgage bond. The defendant could undoubtedly make an application to the Board in respect of that debt, as in fact he has done. When such an application is made, section 17(c) requires that the debtor should also furnish "particulars of all debts due by the applicant to unsecured creditors ....." This information is obviously needed to assist the Board in making a just and equitable order in respect of the secured debt. The disclosure (as in this case) under section 17(e) of an unsecured debt due to the same creditor does not have the effect of making that unsecured debt, "a matter pending before the Board." The learned District Judge, in my opinion, was wrong in taking the view that he had no jusrisdiction to entertain an action in respect of the unsecured debt.

Unsecured debts can be reviewed by the Board only in certain instances, e.g. under section 24(2)(c), where an application has been made by a creditor, and the debtor desires that the Board should attempt to effect a settlement between him and *all* his creditors whether secured or unsecured. The debtor in such a case must make a written request. Or again, under section 26(1), if after the examination of an applicant, the Board itself is of opinion that it is desirable to attempt to effect a settlement between a debtor and *all* his creditors, whether secured or unsecured, a certain procedure has to be followed. But the unsecured debt in the present case was not considered under those provisions.

The appeal is allowed, and the order of the District Judge staying proceedings is set aside.

The case is sent back to the District Court for further hearing in compliance with the provisions of Chapter 53 of the Civil Procedure Code.

The appellant is entitled to costs of this appeal.

Samerawickreme, J.

I agree.

Appeal allowed.

Present: **Weeramantry, J.**

CEYLON TRANSPORT BOARD *vs.* W. A. D. GUNASINGHE

S.C. No. 133/67 — *Labour Tribunal Case No.* 7/28002

Argued on: 26th July, 1968
Decided on: 30th October, 1968

Labour Tribunals — Duty to act judicially — Ratio decidendi in United Engineering Workers' Union v. Devanayagam — Need for proper findings of fact before an order that is just and equitable can be made — Such Tribunal precluded from travelling outside the evidence led before it — Industrial Disputes Act, section 31C and rules 20, 21, 25 of the Regulations — Appeal — Question of law — Findings of fact unsupported by evidence — Whether error of law — Duty to consider admissions of applicant proved before Tribunal — Whether strict proof of documents required in inquiry before Labour Tribunal.

Held: (1) That where in an inquiry before the Labour Tribunal, the employer (respondent-appellant) had proved admissions of the charges against him by the workman (applicant-respondent) whose services had been terminated, such admissions constituted evidence before the Tribunal which it was under a duty to consider. In the absence of any evidence by the workman to the contrary, the employer was entitled to rely on such evidence.

(2) That a Labour Tribunal is under a duty to act judicially. In arriving at findings of fact such a Tribunal is as closely bound to the evidence adduced before it and completely dependent thereon as any Court of law. This is a necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by statute of making such orders as they consider to be just and equitable.

(3) That this duty to act judicially becomes clear when one considers that the Labour Tribunal is required to give both parties a full opportunity of stating their cases, a notice of the full statement of the opposite party and a notice of time and place of hearing and inasmuch as the Tribunal is impressed with the duty to hear evidence and its orders are made subject to a right of appeal to the Supreme Court on matters of law.

Distinguished: *United Engineering Workers' Union* v. *Devanayagam* (1967) 69 N.L.R. 289; LXXII C.L.W. 35

Followed: *Ceylon Transport Board* v. *Ceylon Transport Workers' Union* (1968) LXXV C.L.W. 33.

Referred to: *Inland Revenue* v. *Fraser* 24 Tax Cases 498.
Edwards, Inspector of Taxes v. *Bairstow and Another* (1955) 3 A.E.R. 48
Tennekoon v. *The Principal Collector of Customs* (1959) LIX C.L.W. 36; 61 N.L.R. 232.
Omer v. *Caspersz* (1963) 65 N.L.R. 494.
Rola Company (Aust.) Pty. Ltd. v. *The Commonwealth* (1944) 69 Commonwealth L.R. 203.
Robinson v. *Minister of Town and Country Planning* (1947) 1 A.E.R. 851; (1947) K.B. 702; 177 L.T. 375
Liversidge v *Anderson* (1941) 3 A.E.R. 338; (1942) A.C. 206; 166 L.T. 1.

N. Satyendra, for the employer-appellant.

Nimal Senanayake, with *Miss P. Abeyratne* and *Sam Silva*, for the applicant-respondent.

Weeramantry, J.

The President of the Labour Tribunal has ordered the reinstatement of the respondent upon the basis of certain findings of fact which the appellant contends are so wholly untenable that no reasonable Tribunal could arrive at such a finding. On this basis the appellant invites the interference of this Court, submitting that the material before the President pointed only in the direction of the respondent's dismissal having been fully justified.

The respondent, a bus conductor employed under the appellant, was on the 17th of November, 1965 working on a bus plying between Colombo and Kurunegala. It would appear that when the bus was on its way from Colombo to Kurunegala, officers of the Flying Squad boarded the bus at Tulhiriya.

They found a passenger who had boarded the bus at Pasyala to whom a ticket imprinted "Stage 1" had been issued. Such a ticket could not properly have been issued to a passenger who had

boarded the bus at this stage of the journey. Moreover the value of the ticket was Rs 1/65 although according to the passenger he had paid only a sum of /95 cents to the conductor. This ticket was marked R2 at the hearing before the President.

The officers of the Flying Squad also found another passenger who claimed to have boarded the bus at Nittambuwa who said he had paid Rs 1/05 to the conductor as his fare but had received a ticket with the fare indicated thereon as -/05 cts. This ticket was marked R6.

The Flying Squad also detected that the collections of the respondent were in excess of the sums he should have received to the extent of Rs 8/82. The regulations of the appellant required collections to be kept distinct from the private money of conductors, but the respondent claimed that the excess represented his private money.

On 4th January 1966, a Charge Sheet, R8, was served on the respondent requiring him to show cause why he should not be dismissed. Four charges were set out therein, the first of which charged the respondent with obtaining a sum of Rs 1/05 from a passenger who travelled from Nittambuwa to Kurunegala and issuing him with a -/05 cts ticket with fraudulent intention. The second charge was in respect of having obtained a sum of -/95 cts from a passenger bound from Nittambuwa to Kurunegala and having issued him with a ticket for Rs 1/65 which had in fact been issued at the outset of the journey. The third charge was on the basis that the respondent had deliberately defrauded the appellant Board of a sum of Re 1/- which should have accrued to it and the fourth was on the basis of failure by the respondent in the correct performance of his duty.

Thereafter a domestic inquiry was held by an Inquiring Officer of the appellant Board and at this inquiry, the proceedings of which have been marked R, the respondent was asked whether he was guilty or not guilty. In answer the respondent stated that he pleaded guilty and that he desired in mitigation the circumstances in which he came to issue the tickets.

The Inquiring Officer, who himself has had former judicial experience as the President of a village Tribunal, warned the respondent that his plea of guilt might render him liable to dismissal, but the respondent still maintained his plea of guilt. He proceeded to state that, accepting the warning and realising the gravity of the plea of guilt, he was nevertheless reiterating his plea of guilt in the hope that any punishment meted out to him would be of such a nature as to give him a change of making good in the future.

His explanation in mitigation was that at Pettah about five passengers boarded the bus and asked for five Rs 1/65 tickets and that whilst reeling out these five tickets an additional ticket of the same value was also reeled out. As he could not issue any other ticket without tearing this off, he removed this from the machine and kept it in his possession until at Pasyala a passenger who boarded the bus asked for a ticket to Kurunegala to the value of -/95 cts. He therefore issued the extra ticket which he had in his hand to this passenger and received -/95 cts from him, honestly thinking that he was not committing any offence.

In regard to the other ticket his position was that he could not remember whether he had collected Rs 1/05 from the passenger who had boarded the bus at Nittambuwa.

In his statement the respondent went on to say that he had admitted his faults to the officers of the Flying Squad.

The excess sum of Rs 8/82 that was found with his collections he still maintained was his private money and not moneys collected from any passengers.

As I have observed earlier, the entirety of this statement as well as of the other proceedings before the Inquiring Officer was put in evidence before the President who therefore had before him material showing that both before the officers of the Flying Squad and before the Inquiring Officer the respondent had admitted his guilt.

At the hearing before the President the appellant called an officer of the Flying Squad who spoke to the matters to which I have already referred, and also the Inquiring Officer, who produced the record of the proceedings. The Inquiring Officer stated that having found the respondent guilty of the charges, he had recommended suspension for a period of six months.

The respondent did not himself gave any evidence nor was any witness called on his behalf.

The President in the course of his order has observed that there was no evidence before him

to show at what point the passenger who had paid /-95 cts had boarded the bus. He observed that the Flying Squad officer had stated that he had got this information from the passenger but that the passenger himself had not been called to give evidence. In these circumstances, the President took the view that the charge relating to the issue of that ticket had not been proved.

In regard to the other charge, that of collecting Rs 1/05 on a ticket for -/05 cts, the Flying Squad officer had been unable to read the number of the ticket or show that it had been issued from the ticket machine which had been used by the conductor. On this basis, the President held that there was no evidence to show that this ticket had been issued by this conductor.

In regard to the excess cash found to be with the conductor the President took the view although there was evidence that conductors were expected to keep their private money separate from their collections, this evidence by itself did not show that the conductor had defrauded the appellant of any amount.

In this view of the matter, and observing also that there had been no admission of the charges before him, the President held that the appellant had failed in the burden of justifying that the appellant had failed in the burden of justifying the dismissal, and he ordered reinstatement of the respondent.

I do not think the approach of the President to the material placed before him was correct.

At an inquiry such as that which the President was conducting, the admission of the respondent was a circumstance on which the appellant was entitled to rely in the absence of any evidence by the respondent to the contrary. It was not open to the President to disregard that admission, for an admission by a party, no less than evidence offered against him by his adversary, is evidence before the Tribunal, which the Tribunal is under a duty to consider. It was wrong, therefore, for the President to take the view that there was no evidence before him in support of the charges, nor was it correct for him to rest his order on the technicality that there had been no admission of the charges *before him*. Such an attitude which may perhaps have been appropriate in a criminal trial, was, as Tennekoon, J. has observed in *Ceylon Transport Board* v. *Ceylon Transport Workers' Union*, S.C. 134/67/LT 7/28632. (1968) 75 C.L.W. 33, wholly inappropriate to an inquiry before a Labour Tribunal. Indeed the applicability of such an approach even to a criminal trial is strictly limited to confessions obtained in certain defined circumstances outside which admissions are evidence which a criminal court is under a duty to consider. In the present case all such circumstances as would be required to justify exclusion of such evidence even at a criminal trial were completely absent. In fact, the admission was made before an officer with judicial experience who had given due warning to the respondent of the consequences of the admission which he proposed to make — a circumstance the President should not have failed to consider before deciding to ignore the admission.

The conclusion of the President is thus clearly unsustainable, for the material placed before him could lead to no other conclusion than that the respondent was guilty of the charges against him. There was a total absence before the President of any evidentiary material on which a contrary finding could be based.

The question then arises whether, inasmuch as the decision of the President which is now assailed turns on his findings on questions of fact, the procedure of an appeal to this Court is available to the appellant.

Where a statute makes an appeal available only in respect of questions of law, the Appellate Court is not without jurisdiction to interfere where the conclusion reached on the evidence is so clearly erroneous that no person properly instructed in the law and acting judicially could nave reached that particular determination, *Edwards, Inspector of Taxes* v. *Bairstow and another*, (1955). 3 All E.R. 48. It is true that Courts will be more ready to find errors of law in erroneous inferences from facts than in erroneous findings of primary fact, but it has been repeatedly held that a Tribunal which has made a finding of primary fact that is wholly unsupported by evidenee has erred in point of law, de Smith, *Judicial Review of Administrative Action*, pp. 86-7.

The statement of this principle has perhaps achieved its clearest expression at the hands of Lord Normand who in *Inland Revenue* v. *Fraser*, (1942), 24 Tax Cases, 498. observed: "In cases where it is competent for a tribunal to make findings of fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears ..... *that the tribunal has made a finding for which there is no evidence or*

which is inconsistent with the evidence and contradictory of it."

In the present case the Tribunal would, for the reasons I have stated, appear to have made a finding for which there is no evidence — a finding which is both inconsistent with the evidence and contradictory of it. The restriction of this Court's right to review questions of law would not appear therefore to prevent it from examining and interfering with the order based on such a finding if the Tribunal was under a duty to act judicially.

The question whether Labour Tribunal are under a duty to act judicially is then the only matter remaining.

It appears to me that the decision in the case of *United Engineering Workers' Union* v. *Devanayagam* (1967), 69 N.L.R. 289 must not be thought to mean that Labour Tribunals do not and are not required to act judicially. It must be emphasised that the question whether a particular functionary is under a duty to act judicially is different and distinct from the question whether he holds judicial office. Some dicta in the majority judgment in *United Engineering Workers' Union* v. *Devanayagam* (1967) 69 N.L.R. 289 would appear to be indicative of the view that the President of a Labour Tribunal even when hearing an application under section 31B(1) is not acting judicially, but what the Privy Council in fact decided therein was that Presidents of Labour Tribunals do not hold judicial office. In my view this latter is the true *ratio decidendi* of this case and any attempt to read more into this decision than this underlying principle may well have repercussions which their Lordships did not intend.

Though we are thus bound to the view that such functionaries are not judicial officers, we are, with the greatest respect, not bound to consider such officers as being freed of the duty to act judicially — for it is manifest that the duty to act judicially is not exclusively confined to those who hold judicial office. This is a view which this Court has expressed on more than one occasion, *Tennekoon* v. *The Principal Collector of Customs*, (1959) 61 N.L.R. 232, *Omer* v. *Caspersz*, (1963) 65 N.L.R. 494. "Judicial power and power in the exercise of which there is a duty to act judicially are two different things." *Rola Company (Aust.) Pty. Ltd.* v. *The Commonwealth* (1944), 69 Commonwealth L.R. at 203.

In deciding whether Labour Tribunals are required to act judicially we are fourtnate in having for our guidance a particular set of requirements in accordance with which such Tribunals function. An examination of that large body of decided cases dealing with the tests for determining whether a body is under a duty to act judicially hence becomes largely academic and it does not become necessary to examine in detail the nice distinctions drawn therein.

Section 31C(1) states that it shall be the duty of the Tribunal to make all such inquiries into the application and to hear all such evidence as the Tribunal may consider necessary and *thereafter* to make such order as may appear to the Tribunal to be just and equitable.

The Tribunal has in this case considered it necessary to hear certain evidence and has in fact heard it. Its duty does not end when the evidence so considered necessary is in fact heard. The duty of hearing evidence must necessarily carry with it the duty of considering such evidence for the duty to hear is meaningless without the duty to consider. The present case reveals quite clearly a total omission by the Tribunal to consider evidence which has been placed before it and it cannot be said that the Tribunal has been acting in accordance with the duties laid down for it by statute.

The rules made for regulating the procedure to be observed before these Tribunals are also strongly indicative of the judicial nature of their functions. For example parties are required to submit to the Tribunal statements setting out in full their respective cases in regard to the matters in dispute, one copy of each statement being required to be sent to the other party (Rule 20). So also Rule 21 enables the Tribunal by written notice to call upon the parties to transmit statements setting out in full their respective cases in regard to the matters in dispute. Rule 25 requires every person considered likely to be affected by a dispute to be informed by written notice of the date, time and place of hearing.

The provision of a right to appeal to this Court is also an important factor which appears to mark off such Tribunals from those which are purely administrative. Were they not under a duty to act judicially, appeals to this Court would be meaningless and unworkable except in cases of clear violation of statute — and few such can be visualised when a Tribunal is empowered to make

an order which is 'just and equitable'. This important factor alone is sufficient to distinguish the two cases of *Robinson* v. *Minister of Town and Country Planning* (1947) 1 All E.R. 185 and *Liversidge* v. *Anderson* (1941) 3 All E.R. 338 which were relied on by the appellant. The Minister in making the decision in both these cases was not making his decision subject to a right of appeal to any Court. Assuming he was acting *bona fide* the Minister was in those cases the sole judge of the matters which he decided.

Inasmuch, then, as the Tribunal is required to give both parties a full opportunity of stating their cases, a notice of the full statement of the opposite party, and a notice of time and place of hearing and inasmuch as the Tribunal is impressed with the duty to hear evidence and its orders are made subject to a right of appeal to this Court on matters of law, it would appear to be largely academic to go further afield in quest of other indicia of the duty to act judicially.

It is said on behalf of the respondent that the terms of section 31 C (1) impose on the Tribunal the duty of making all such inquiries into the application and hearing all such evidence as the Tribunal may consider necessary, and that the Tribunal is therefore not limited to the evidence which may be led before it. I do not agree that this provision enables the Tribunal to make inquiries outside the inquiry which it is conducting with notice to and in the presence of parties.

Section 31C(2) lays down the procedure for an "inquiry" before a Tribunal and in so laying down this procedure makes no distinction between "inquiries into the application" and "hearing all such evidence". The procedure so laid down would thus appear to govern both aspects referred to in section 31 C (1), namely "inquiries" and "evidence", and both these aspects alike would appear to be subject to such requirements as that the inquiry should be conducted with notice to and in the presence of parties. There would thus appear to be no place in the scheme of our legislation for inquiries conducted without notice to and in the absence of the parties. Similar provisions in regard to Industrial Courts appear in section 42(1) and (2) where again although the Court may make inquiries and hear evidence, no distinction is drawn, so far as concerns procedure, between inquiries and evidence. No analogy may therefore be drawn upon the basis of section 31C(1) between the case of Labour Tribunals and cases such as *Robinson* v. *Minister of Town and Country Planning* (1947) 1 All E.R. 851, and *Liversidge* v. *Anderson* (1941) 3 All E.R. 338 where the Minister was empowered to make his own inquiries and was not even under a duty to reveal the nature and sources of the information on which he acted.

Having regard to all these matters it becomes clear that the decision in *United Engineering Workers' Union* v. *Devanayagam* (1967) 69 N.L.R. 289 does not free labour Tribunals from the duty to act judicially. This case should not therefore be viewed, as it sometimes tends to be viewed as granting to Labour Tribunals a free charter to act in disregard of the evidence placed before them. They are, in arriving at their findings of fact, as closely bound to the evidence adduced before them and as completely dependent thereon as Court of law. Findings of fact which do not harmonise with the evidence underlying them lack all claims to validity, whatever be the Tribunal which makes them.

Proper findings of fact are a necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by statute of making such orders as they consider to be just and equitable. Where there is no such proper finding of fact the order that ensues would not be one which is just and equitable upon the evidence placed before the Tribunal, for justice and equity cannot be administered in a particular case apart from its own particular facts. I am strengthened in the conclusion I have formed by a perusal of the judgment already referred to, of my brother Tennekoon, *Ceylon Transport Board* v. *Ceylon Transport Workers' Union*, S.C. 134/67/LT 7/28632; (1968) 75 C.L.W. 33, who has observed that it is only after the ascertainment of the facts upon a judicial approach to the evidence that a Labour Tribunal can pass on to the next stage of making an order that is fair and equitable having regard to the facts so found.

A point has been made on behalf of the appellant that the proceedings before the domestic Tribunal have not been properly marked in evidence and that the inquiring officer did not identify these documents or the signature of the applicant thereon. This submission seems to me to be without merit for it assumes a strictness, in the proof of documents which is wholly foreign to the functions and objects of Labour Tribunals. In the spirit in which the inquiries of these Tribunals should be conducted there is little scope for reliance on such legal technicalities.

I take the view therefore that there is in this case a right of appeal from the order of the Labour Tribunal to this Court, and in the exercise of this Court's powers in appeal I set aside the order of the President and direct that the application be inquired into afresh by another Tribunal. The appellant will be entitled to the costs of this appeal.

Appeal allowed.

Privy Council Appeal No. 30 *of* 1968

Present: **Lord Hodson, Lord Guest, Lord Pearce, Lord Pearson, and Lord Diplock**

RAJAH RATNAGOPAL *v.* THE ATTORNEY-GENERAL

From
THE SUPREME COURT OF CEYLON

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

Delivered on: 30th June, 1969

Commission of Inquiry — Contracts — Warrant of appointment — Scope of inquiry left to Commissioner's discretion — Refusal to be sworn or affirmed by witness — Certificate to Supreme Court — Conviction for contempt of Commission — Appointment ultra vires the Act — Conviction bad — Courts Ordinance (*Cap.* 6) *Section* 47 *—Commissions of Inquiry Act* (*Cap.* 393), *sections* 2(1), 7, 10, 11, 12.

By a warrant published in the Ceylon Government Gazette of 22nd October 1965, Mr E. G. Wikramanayake, Q.C. was appointed Commissioner under Section 2 of the Commissions of Inquiry Act (Cap. 393) to inquire into and report on abuses in connection with certain tenders made to or contracts entered into by contractors between 1st June, 1957 and 31st July, 1965. He was appointed for the purpose of:-

"(1) Inquiring into, and reporting on, whether, during the period commencing on the first day of June 1957, and ending on the thirty-first day of July, 1965, all or any of the following acts or things, hereafter referred to as 'abuses', occurred, directly or indirectly, in relation to, or in connection with, all such tenders (including quotations or other offers by whatsoever name or description called) made by persons or bodies of persons (other than any local authority or Government department), hereafter referred to as 'contractors', for the performance of contracts for the construction of buildings or any other works (including contracts for the supply of services or equipment in connection with such first-mentioned contracts), by whatsoever name or designation called, for or on behalf of any Government department, and all such contracts of the description hereinbefore referred to given to contractors, whether in consequence of the making of tenders or otherwise, as you the said Commissioner may in your absolute discretion deem to be, by reason of their implications financial or otherwise, to or on the Government, of sufficient importance in the public welfare to warrant such inquiry and report (hereafter referred to as 'relevant tenders' and 'relevant contracts', respectively:"

There followed an enumeration in very general terms of "relevant tenders" and "relevant contracts".

Paragraph 2 of the warrant of appointment (so far as relevant) continued as follows:

"(2) making such recommendations as you the said Commissioner deems necessary as a result of the inquiry to prevent the recurrence of such abuses in the future, and, in particular, with regard to the law, practice and procedure relating to the custody, receipt, scrutiny or disposal of tenders for the performance of contracts with Government departments, the giving or performance of such contracts, and the supervision of the performance of such contracts."

Following upon this there are two paragraphs in the following terms:

"And I do hereby direct you, the said Commissioner, to recommend to me the action that should be taken against the persons, if any, whom you have found to be guilty of any such abuses:

And I do hereby authorise and appoint you, the said Commissioner, to hold all such inquiries and make all such investigations into the aforesaid and other like matters as may appear to you to be necessary, and require you to transmit to me, with as little delay as possible, a report thereon under your hands:"

The Commissioner summoned the appellant to attend as a witness and the appellant appeared at the proceedings on 8th January, 1968.

Before the proceedings commenced the appellant placed before the Commissioner an affidavit in which he alleged that he had no confidence in the Commissioner for the reasons stated therein.

The appellant also stated that he was not residing in Ceylon having surrendered his passport and become registered as a British citizen.

The Commissioner directed the appellant to be sworn or affirmed. The appellant then stated that he would not proceed further with the proceedings. He again declined to take the oath or affirmation, when requested to do so.

The Commissioner then issued a Certificate, in term of Section 12(2) of the Commissions of Inquiry Act, to the effect, *inter alia*, that in his view the appellant was guilty of contempt of Court.

The Supreme Court issued a Rule on the appellant under Section 47 of the Courts Ordinance, and found him guilty of the offence of contempt committed against or in disrespect of the Commissioner.

Held: (1) The appointment of the Commissioner was *ultra vires* of the Commissions of Inquiry Act and could not stand inasmuch as:—

(*a*) The scope of the inquiry was left entirely to the Commissioner's discretion, and in effect he was empowered to inquire into whether during the period in question any abuses occurred in relation to such tenders and such contracts as the Commissioner should in his absolute discretion deem to be of sufficient importance to warrant an inquiry and report;

(*b*) Under Section 2 of the Act, the matters to be inquired into must be one in respect of which an inquiry will "in the opinion of the Governor-General" be in the interests of the public welfare, whereas under the warrant, the Commissioner was given the power to select such matters. The power of selection had been delegated to the Commissioner.

(*c*) The validity of the appointment of the Commissioner could not be tested by the result of the inquiry, and the decision had to be based on the terms of the actual warrant of appointment.

(*d*) If the ambit of the inquiry was not limited to any particular matter but was at large, there would be no limit to the questions which a witness might be obliged to answer, whereas Section 12(1)(b) of the Act which provides the safeguard against irrelevant questions deals with questions touching the matter to be inquired into by the Commissioner.

(2) The conviction for contempt should therefore be set aside.

Sir Dingle Foot, Q.C. with *E. Cotran* for the appellant.

E. F. N. Gratiaen Q.C. with *M. P. Solomon* and *H. L.de Silva* (Crown Counsel) for the respondent.

Lord Guest

This is an appeal by special leave against a conviction for contempt of Court by a judgment of the Supreme Court of Ceylon, whereby the appellant was fined 1,000 rupees or in default was sentenced to one month's imprisonment.

The matter arises out of a warrant published in the Ceylon Government Gazette of 22nd October, 1965 whereby Mr E. G. Wikramanayake, Q.C., was appointed Commissioner under section 2 of the Commissions of Inquiry Act (Cap. 393) to inquire into and report on abuses in connection with certain tenders made to or contracts entered into by contractors between 1st June, 1957 and 31st July, 1965.

Section 2(1) of the Commissions of Inquiry Act is in the following terms:

"(1) Whenever it appears to the Governor-General to be necessary that an inquiry should be held and information obtained as to —

(*a*) the administration of any department of Government or of any public or local authority or institution; or

(*b*) the conduct of any member of the public service; or

(*c*) any matter in respect of which an inquiry will in his opinion be in the interests of the public safety or welfare,

the Governor-General may, by warrant under the Public Seal of the Island, appoint a Commission of Inquiry consisting of one or more members to inquire into and report upon such administration, conduct or matter."

The warrant was addressed by the Governor-General to the Commissioner and appointed him for the purpose of —

"(1) Inquiring into,and reporting on, whether, during the period commencing on the first day of June, 1957, and ending on the thirty-first day of July, 1965,

all or any of the following acts or things, hereafter referred to as 'abuses', occurred, directly or indirectly, in relation to, or in connection with, all such tenders (including quotations or other offers by whatsoever name or descriptions called) made by persons or bodies of persons (other than any local authority or Government department) hereafter referred to as 'contractors', for the performance of contracts for the construction of buildings or any other works (including contracts for the supply of services or equipment in connection with such first-mentioned contracts), by whatsoever name or designation called, for or on behalf of any Government department, and all such contracts of the description hereinbefore referred to given to contractors, whether in consequence of the making of tenders or otherwise, as you the said Commissioner may in your absolute discretion deem to be, by reason of their implications, financial or otherwise, to or on the Government, of sufficient importance in the public welfare to warrant such inquiry and report (hereafter referred to as 'relevant tenders' and 'relevant contracts', respectively:"

There followed an enumeration in very general terms of "relevant tenders" and "relevant contracts".

Paragraph 2 (so far as relevant) continues as follows:

"(2) making such recommendations as you the said Commissioner, deems necessary as a result of the inquiry, to prevent the recurrence of such abuses in the future, and, in particular, with regard to the law, practice and procedure relating to the custody, receipt, scrutiny or disposal of tenders for the performance of contracts with Government departments, the giving or performance of such contracts, and the supervision of the performance of such contracts:"

Following upon this there are two paragraphs in the following terms:

"And I do hereby direct you, the said Commissioner, to recommend to me the action that should be taken against the persons, if any, whom you have found to be guilty of any such abuses:

And I do hereby authorise and appoint you, the said Commissioner, to hold all such inquiries and make all such investigations into the aforesaid and other like matters as may appear to you to be necessary, and require you to transmit to me, with as little delay as possible, a report thereon under your hands:"

By section 7 of the Commissions of Inquiry Act the Commissioner has power *inter alia* to require the evidence of any witness to be given on oath or affirmation and —

"to summon any person residing in Ceylon to attend any meeting of the commission to give evidence."

By section 10 it is provided —

"Every offence of contempt committed against or in disrespect of the authority of a commission appointed under this Act shall be punishable by the Supreme Court or any Judge thereof under Section 47 of the Courts Ordinance as though it were an offence of contempt committed against or in disrespect of the authority of that court."

Section 11 contains provision regarding service of summonses.

Section 12 provides —

"(1) If any person upon whom a summons is served under this Act —

(*a*) fails without cause, which in the opinion of the commission is reasonable, to appear before the commision at the time and place mentioned in the summons: or

(*b*) refuses to be sworn or, having been duly sworn, refuses or fails without cause, which in the opinion of the commission is reasonable, to answer any question put to him touching the matters directed to be inquired into by the commission:

.....

such person shall be guilty of the offence of contempt against or in disrespect of the authority of the commission."

Sub section 2 of section 12 is in the following terms:

"(2) Where a commission determines that a person has committed any offence of contempt (referred to in subsection (1)) against or in disrespect of its authority, the commission may cause its secretary to transmit to the Supreme Court a certificate setting out such determination; every such certificate shall be signed by the chairman of the commission, or where the commission consists of only one person by that person.

(3) In any proceedings for the punishment of an offence of contempt which the Supreme Court may think fit to take cognizance of as provided in section 10, any documents purporting to be a certificate signed and transmitted to the court under subsection (2) shall —

(*a*) be received in evidence, and be deemed to be such a certificate without further proof unless the contrary is proved; and

(*b*) be conclusive evidence that the determination set out in the certificate was made by the commission and of the facts stated in the determination."

By section 47 of the Courts Ordinance it is provided that the Supreme Court has power to

take cognisance of and try in a summary manner any offence of contempt committed against or in disrespect of the authority of itself or any other Court.

The Commissioner commenced the inquiry proceedings on 2nd September, 1967. After a number of witnesses had given evidence on oath, the appellant after being duly summoned to attend as a witness appeared at the proceedings on 8th January, 1968. Before the proceedings commenced the appellant placed before the Commissioner an affidavit in which he alleged that he had no confidence in the Commissioner because the Commissioner was associated either as a shareholder or a director in a number of companies with which the company (in which the appellant's wife was the chief shareholder and of which he (the appellant) was Overseas Representative) would be in business competition. The appellant also stated that he was not residing in Ceylon having surrendered his passport and become registered as a British citizen. After making certain observations regarding the allegations contained in the appellant's affidavit the Commissioner directed the appellant to be sworn or take an affirmation. The appellant then said that he would not proceed further with the proceedings. He was again called upon by the Commissioner to take the oath or affirmation and to testify. The appellant again declined.

On 16th January, 1968 the Commissioner issued a certificate in terms of section 12(2) of the Commissions of Inquiry Act in which the Commissioner after narrating the facts as above stated:

> "When directed to be sworn or affirmed, he refused to proceed any further and refused either to be sworn or to give evidence. In doing so, he has been guilty in my view of contempt of this Commission."

The matter then proceeded by means of a Rule under Section 47 of the Courts Ordinance directing the appellant to show cause.

The judgment of the Supreme Court was given on 9th April, 1968 and the relevant order was issued on 15th April, 1968 in which it was adjudged that the appellant was guilty of the offence of contempt committed against and in respect of the Commissioner.

Three points were taken by the appellant before their Lordships. A point regarding service of the summons was excluded when special leave to appeal was granted. It was argued, firstly, that the appointment of the Commissioner was *ultra vires* of the Act; secondly, that the appellant was not residing in Ceylon at the relevant time and that the Commissioner accordingly had no jurisdiction to summon him to attend as a witness, and thirdly, that the appellant had reasonable cause to refuse to give evidence on the ground that the Commissioner in view of his conflict of interest might be biased against the appellant.

The main question which arises accordingly is whether the appointment of the Commissioner in terms of the warrant was *ultra vires* and invalid having regard to the powers of the Governor-General under section 2 of the Commissions of Inquiry Act. Under that section he is empowered if it appears to him to be necessary that an inquiry should be held and information obtained as to any matter in respect of which an inquiry would in his opinion be in the interests of the public safety or welfare to appoint a Commission of Inquiry into and report upon the matter. When the appointment of the Commissioner is examined it will be found that the scope of the inquiry is left entirely to the Commissioner's discretion. In effect he is empowered to inquire into whether during the period in question any abuses occurred in relation to such tenders and such contracts as the Commissioner should in his absolute discretion deem to be by reason of their implications financial or otherwise on the Government of sufficient importance in the public welfare to warrant an inquiry and report. Under the terms of the warrant the Commissioner is being entrusted with deciding what tenders and what contracts require to be inquired into. Under section 2 of the Act the matter to be inquired into must be one in respect of which an inquiry will "in the opinion of the Governor-General" be in the interests of the public welfare. Under the warrant the Commissioner is given the power of selecting the matters which he will inquire into and report upon whereas the selection is by the Act imposed on the Governor-General. The scope of the inquiry instead of being limited by the Governor-General, as in terms of the Act it should be, is to be decided by the Commissioner. Thus the power of selection is by the Gazette delegated to the Commissioner. On behalf of the respondent it was submitted that in the nature of such an inquiry into a great number of different transactions there must in the necessity of things be a roving inquiry by the Commissioner at the initial stage in order to decide which matters require investigation and report and that it would be impracticable to remit all the contracts and all the tenders to the Commissioner at the outset. It was suggested that when the Commissioner had

made this preliminary investigation it might be open to the Governor-General to appoint the same or another Commissioner to inquire into specified matters. This argument is reflected in the point taken by the Chief Justice in his judgment where he suggested that if the terms of reference had been drafted in such a form that the inquiry was to be into all tenders and contracts and if the Commissioner reported that he had inquired into certain selected matters the report would not be rendered invalid because the Commissioner had decided not to report in the certain other matters. But the answer to this point is that the Commission did not take this form and that the validity of the appointment of the Commissioner cannot be tested by the result of the inquiry. It may be that another form of reference might by different means have achieved the same end. But their Lordships' attention must be confined to the terms of the actual warrant of appointment.

The importance of construing section 2 of the Commissions of Inquiry Act quite strictly is illustrated when section 12(1)(*b*) is considered. In that section the safeguard provided to a witness against being required to answer irrelevant questions is to be tested by whether the question touches the matter directed to be inquired into by the Commissioner. If the ambit of the inquiry is not limited to any particular matter but is at large, then there would be no limit to the questions which a witness might be obliged to answer.

Their Lordships have reached the conclusion that for these reasons the appointment of the Commissioner was *ultra vires* of the Act and cannot stand. It follows that the conviction for contempt by the Supreme Court must be set aside.

Such a decision renders unnecessary an examination of the remaining points taken by the appellant, but as they were forcefully argued their Lordships propose quite shortly to state their views.

The appellant argued that as he was not "residing in Ceylon" on the relevant date he was not amenable to the jurisdiction of the Commissioner under section 7 of the Act. The Supreme Court have carefully examined the facts in relation to the appellant's visits to Ceylon and their Lordships agree with the view of the Supreme Court that no intention of permanently residing in Ceylon is necessary in order that the appellant may fall within the terms of the section. They do not propose to elaborate further on the necessary requirements of residence. There was clearly material in the facts as narrated by the Supreme Court upon which they could hold that the appellant was residing in Ceylon at the relevant time. If the point had been alive, their Lordships do not consider that any reasons had been shown why they should interfere with the Supreme Court's judgment.

The last matter related to the allegation of bias or interest made against the Commissioner. This arose in relation to the appellant's refusal to be sworn under the power given to the Commissioner by section 7(*b*) of the Act. The appellant submitted that he had reasonable cause to refuse to take part in the proceedings on the ground of the Commissioner's interest and possible bias and he was therefore not guilty of contempt of Court. As can be seen from the certificate by the Commissioner which by section 12(3)(*b*) of the Act is conclusive evidence of the facts therein stated, his refusal was to being sworn. The offence in relation to such a refusal is under section 12(1)(*b*) absolute. No question of reasonable cause arises in regard to this refusal. If however the refusal be considered as a refusal to answer a question, this refusal to answer a question may well not be justified by an allegation of bias or interest on the part of the Commissioner. It is the Commissioner's duty to require a witness to answer a question touching the matter directed to be inquired into by the Commissioner. Whether his refusal is without reasonable cause relates to the form of the question. It is unlikely that the section would impose on the Commissioner the duty of deciding whether he is a suitable person to require the witness to answer a question. He is appointed as Commissioner by the Governor-General and his authority to require a witness to answer a question derives from section 12. But quite apart from these technical considerations their Lordships agree with the views expressed by the Supreme Court that the allegations of bias and interest are vague and unsubstantial and quite insufficient to justify the appellant's refusal to take part in the proceedings. If therefore this latter point had been open their Lordships would have agreed with the judgment of the Supreme Court.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and that the Decree of the Supreme Court by which the appellant was adjudged guilty of contempt and was punished accordingly should be set aside. There will be no order as to the costs of the appeal.

Appeal allowed.

Present: **Samerawickrame, J. and Tennekoon, J.**

A. PREMARATNE & ANOTHER *v.* W. PODI FERNANDO

S.C. 166/64(*F*) — *D.C. Ratnapura No.* 4197

Argued on: 15th and 18th February, 1967
Decided on: 14th December, 1967

Fideicommissum — Gift of 1/3 *share of land to C subject to condition if C dies without children and without alienating it, the share should devolve on Donor's two sons W. and P. by* 3rd *wife Porlentina, subject to donee's wife's S's life-interest—Gift of balance* 2/3 *share to said* 3rd *wife subject to fideicommissum in favour of W and P—Deaths of C in* 1928 *issueless, of S in* 1928 *and of W and P intestate and issueless in* 1925 *— Gift by* 3rd *wife, Porlentina by P4 of* 1937 *to plaintiff and another —Could Porlentina have transferred rights to the land as the conditions of the fideicommissum were still pending— Could W and P have transmitted their expectations of the fideicommissum as they predeceased the donee*?

R the original owner of certain lands was married thrice. By his 1st wife he had a son C. to whom he gifted by P1 of 1919, 1/3 share of the land subject to the condition that if C died without children and without alienating his share, his wife S should during her life-time possess it without selling mortgaging or alienating it and on her death the said share would devolve on R's two sons by 3rd wife Porlentina, viz. W & P. The balance 2/3 share was gifted to Porlentina, viz (3rd wife) subject to a fideicommissum in favour of her two children, the said W & P.

C died issueless in 1928, S (his wife) died in 1952 and W & P died in 1925 intestate and issueless. Porlentina by deed No. 3205 of 1937 (P4) gifted the said lands to V and the plaintiff. V devised his 1/2 share by last will to his son subject to life interest of the plaintiff.

Plaintiff instituted action for declaration of title to 1/2 share and for declaration that she was entitled to possess the balance 1/2 share against the 1st and 2nd defendant's (husband and wife) who claimed rights from one of the four children of R's second marriage stating that when W & P predeceased the fiduciaries in the said gift P1, the *fideicommisum* failed and the land reverted to R (original owner) and therefore the 2nd defendant was entitled to possess.

The learned District Judge gave judgment for the plaintiff. In appeal it was contended *inter alia* on behalf of the defendants appellants.

(*a*) that W & P were not fideicommissaries who could transmit that expectations of the *fideicommissum* as they had predeceased C and the conditions were still pending.

(*b*) that the plaintiff has no claim as the deed by Porlentina in favour of plaintiff's predecessor was executed in 1937 before title to the property had vested in Porlentina as the conditions of the *fideicommisum* were still pending and that the principle of *rei traditae et venditae* would not operate here.

(*c*) that upon a gift of the property itself the spes or expectation of *fideicommissum* would not pass to the donee.

Held: (1) That W & P were *fideicommissaries* notwithstanding the fact that conditions on which they were to be vested with rights under the *fideicommissum* were still pending, as the *fideicommissum* had been created by deed and not by last will.

(2) That the words in P4, the gift by Porlentina viz. "together with all the rights title and interest whatsoever therein and thereto of me the aforesaid donor" are sufficient to pass the expectation of the *fideicommissum* to the donee.

Cases referred to: *Mohamed Bhai* v. *Silva*, (1911) 14 N.L.R. 193 F.B.
Kanapathipillai v. *Vethanayagam*, (1963) 66 N.L.R. 49.

H. W. Jayawardene, Q.C., with *C. R. Gunaratne*, and *L. C. Seneviratne*, for the defendant-appellants.

Miss Maureen Seneviratne, with *Miss A. P. Abeyratne*, for the plaintiff-respondent.

Samerawickrame, J.

The plaintiff-respondent instituted this action for a declaration of title to half share of the lands set out in the schedule to the plaint and for declaration that she was entitled to possess the balance half share of the said lands.

The said lands had been originally owned by one Rathuganitha Gurunnanse. It would appear that Rathuganitha Gurunnanse had been married three times. By his first marriage, he had a son called N. K. Cooray alias Kiriganitha. By his second marriage to one Laisa, he had four children, Podinona, Jane Nona, Missie Nona and Baba Nona. The 2nd defendant is a daughter of Baba Nona and the 1st defendant is her husband. His third marriage was to one Porlentina Fernando and by that marriage he had two sons named Wijesena and Piyadasa. By deed of gift No. 9601 dated 17th March, 1919(P1), Rathuganitha Gurunnanse gifted one-third share of his interests to his son N. K. Cooray and two-thirds share to Porlentina Fernando. The said one-third share was gifted to the said N. K. Cooray alias Kiriganitha, subject to the condition that on his death, his legitimate children would become entitled to the said one-third share and that if he died without children and without alienating the property, his wife Sophia de Silva would be entitled to possess it during her lifetime without selling, mortgaging or alienating it, and on her death the said one-third share would devolve on the donor's two children, Wijesena and Piyadasa. The two-third share gifted was subject to the condition that Porlentina should not sell, mortgage or alienate and that on her death, it should devolve on Wijesena and Piyadasa.

In regard to the one-third share which had been gifted to N. K. Cooray, plaintiff states that N. K. Cooray died in the year 1928, without issue and without having alienated the said share and that the said one-third share was possessed by Sophia de Silva, his wife, who died in the year 1952. They state that though Wijesena and Piyadasa had died intestate and issueless in the year 1925 and thus pre-deceased both N. K. Cooray and Sophia de Silva, they had transmitted the expectation of the *fidei commissum* to their mother Porlentina, who was their heir. Similarly, in regard to the two-third share, plaintiff states that though Wijesena and Piyadasa predeceased Porlentina, upon their death, Porlentina became entitled to the property as they transmitted to her their expectation of the *fidei commissum*.

They state that Porlentina, by deed No. 3208 dated 16th July, 1937, gifted the said lands to G. T. Vidyalankara and the plaintiff. The said Vidyalankara, by his Last Will dated 15th March, 1959, (P5), bequeathed his half share of the said lands to his son G. D. Vidyalankara, subject to the life interest of the plaintiff. The plaintiff thus claims to be entitled absolutely to half share of the land and to be entitled to possess the balance half share. The plaintiff also pleaded the judgment and decree in D. C. Ratnapura No. 7977 as being *res judicata* in regard to the title put forward by her.

The defendants filed answer stating that as Wijesena and Piyadasa had predeceased the fiduciaries under the provisions in the deed of gift P1, the *fidei commissum* failed and the land reverted to the original owner Rathuganitha Gurunnanse. The 2nd defendants, as the grandchild of the said Rathuganitha Gurunnanse, claimed to be an heir and to possess on behalf of herself and the other heirs.

The learned Judge held that title devolved on the plaintiff-respondent as pleaded by her and that the judgment in D.C. Ratnapura No. 7977 was *res judicata* in regard to the contests. The defendants-appellants have appealed from the said order.

Mr H. W. Jayewardene, Q.C., appearing for the defendants-appellants, submitted in regard to *res judicata*, that the order of the learned Judge could not be sustained for the following reasons:—

(*a*) that the finding made in D.C. Ratnapura No. 7977, which is relied upon by the plaintiff-respondent, is one in respect of a pure question of law and such a finding, if it was erroneous, is not *res judicata* in respect of a subject matter other than the subject matter of the case in which that finding was made. The land which was the subject matter of D.C. Ratnapura No. 7977 is not the subject matter of this action but the title is the same.

(*b*) that at the time when D.C. Ratnapura No. 7977 was decided, both Porlentina and Sophia de Silva were alive and that the question that arises in this action is the matter of the devolution after the deaths of Porlentina and Sophia de Silva and that these questions obviously did not arise for determination in the previous action.

In regard to the one-third share gifted by Rathuganitha Gurunnanse to N. K. Cooray, Mr Jayewardene submitted that Wijesena and Piyadasa were not *fidei commissaries* who could transmit their expectations of the *fidei commissum* in that they had predeceased N. K. Cooray and it was only if N. K. Cooray died without children and without alienating, that there was any further *fidei commissum*. I am of the view that Wijesena and Piyadasa were *fidei commissaries*, though the gift over upon the *fidei commissum* in their favour was conditioned to operate *inter-alia* upon the condition or event that N. K. Cooray died without children and without having alienated the one-third share gifted to him. As the *fidei commissum* had been created by his deed and not by a Last Will, they transmitted their expectation of the *fidei commissum* to their mother and sole heir, Porlentina Fernando — vide *Mohamed Bhai* v. *Silva*, 14 N.L.R. 193 F.B.

Mr Jayewardene further submitted that in regard to both one-third share as well as the two-third share, the plaintiff has no claim for the reason that the deed by Porlentina in favour of the plaintiff's predecessor was executed in the year 1937 before title to the property had vested in Porlentina under the *fidei commissa* and while the conditions of the *fidei commissa* were still pending and the fiduciaries were still possessed of their rights. He submitted that the exception *rei venditae et traditae*, would not operate in this matter as it does not apply in the case of gifts, vide *Kanapathipillai* v. *Vethanayagam*, 66 N.L.R. 49. He further submitted that upon a gift of the property itself, the spes or expectation of *fidei commissum* would not pass to the donee. The words in the deed of gift No. 3208 (P4), "together with all the rights, title and interest whatsoever therein and thereto of me the aforesaid donor" appear to me wide enough to pass the expectation of the *fidei commissum* to the donee.

I am, therefore, of the view that the plaintiff-respondent has established title to a half share of the lands and premises and a right to possess the balance half share of the said lands. In view of the finding that I have made in respect of title, it is unnecessary to consider the question whether the plaintiff-respondent was entitled to rely upon the finding in D.C. Ratnapura No. 7977 as *res judicata*.

The order of the learned District Judge is affirmed and the appeal is dismissed with costs.

Tennekoon, J.

I agree.

Appeal dismissed.

Present: **Sirimane, J. and Samerawickrame, J.**

GARLIS SINGHO *vs.* GEEGER SINGHO & OTHERS

S.C. 142/67 (*Inty*) — *D.C. Kalutara* — *P*/1046

Argued and decided on: 5th May, 1969

Deed, construction of — Conditional transfer by co-owners — Re-purchase of property by these vendors—Second conditional transfer by them — Re-transfer again without specifying shares— Can there be a change in the extent of their rights?

Held: That when the property which is conveyed on a conditional transfer is purchased back by the vendors the deed in their favour must be construed to mean that the property was returned to them in the same proportions in which they held at the date of the conditional transfer, unless there is something to indicate to the contrary.

F. W. Obeysekera, for the 1st defendant-appellant.

Upali de Z. Gunawardene, with *Asoka de Z. Gunawardene*, for the respondent.

* For Sinhala translation, see Sinhala section, Vol. 18 part 10, p 19.

Sirimane, J.

It is common ground that one Gettohamy inherited a half share of the rights of her husband Hendrick Appu, and that the balance half share passed to Hendrick Appu's seven children. The widow and the seven children on deed P2 of 1955 which is a conditional transfer, transferred their rights to one Meelis Singho. The property was redeemed, and the widow and the seven children bought back the property from Meelis Singho on deed P3 of 1957.

That deed P3 does not set out the proportions in which the property was re-transferred.

When the property which is conveyed on a conditional transfer, is purchased back by the vendors, the deed in their favour must be construed to mean that the property was returned to them in the same proportions in which they held it at the time they executed the conditional transfer; unless there is something in the deed of re-transfer which shows that the property was being returned in proportions different to those they were entitled to at the time of their conditional transfer.

Thereafter on deed P4 the widow and the children gave another conditional transfer to Thomas Perera and Richard Perera. On deed P5 of 1959, they once again redeemed the property. The property was sold back to the original vendors without specifying any particular proportions, and we think that the deed P5 should be construed to mean that the property was returned back to Gettohamy and her children in the same proportions to which they were entitled when they transferred it, on P4.

Thereafter, Gettohamy on deed P6 of 1959 transferred her *half share* to the first defendant who is one of her children. This is a clear indication, that there had been no change in the extent of the rights of herself and her children.

In deed P4 there was a condition that if any one or more of the vendors should redeem the property, the vendees on that deed (P4) were entitled to re-transfer the property only to those who actually made the payments. But, in this case, the retransfer was made to *all* the vendors and there is no indication that any one of them got more rights than they were originally entitled to.

We are of the view that on deed P5 Gettohamy got back the rights she was entitled to, viz. a half share of her husband's property, and the children were entitled to the balance half share in equal shares. The Interlocutory Decree should be amended on this basis. The first defendant-appellant is entitled to the costs of this appeal.

Samerawickrame, J.

I agree.

Decree amended.

Present: **de Kretser, J.**

PRICE CONTROL INSPECTOR, NUWARA ELIYA *vs.* S. T. VEERAPUTHRAN

S.C. 357 — *M.C. Nuwara Eliya No.* 35155

Argued on: 15th July, 1968
Decided on: 19th July, 1968

Price Control Act — Sale of Bombay onions and gram dhal above maximum controlled price — Both offences joined in one charge — Conviction — Illegality of charge — Criminal Procedure Code, section 178.

Where an accused person was convicted on a charge of selling one pound of Bombay onions and 8 1/2 ounces of gram dhal for one rupee, when the maximum controlled price he could have charged for both commodities was 59 9/16 cents.

Held: (1) That the sale of each of these commodities above the controlled amounted to a distinct offence and therefore the joinder of these offences in one charge rendered it illegal.

(2) That the accused is entitled to an acquittal despite the false defence he has attempted in this case.

A. H. C. de Silva, Q.C., with *P. Nagendran*, for the accused-appellant.

Lalith Rodrigo, Crown Counsel for Attorney-General.

*For Sinhala translation, see Sinhala section, Vol. 18 part 10, p. 20

de Kretser, J.

The accused was convicted by the Magistrate of Nuwara Eliya (Mr J. B. C. Swaris) on a charge that he had sold one pound of Bombay onions and 8 1/2 ounces of gram dhal for Rs. 1.00 when the maximum controlled price for both these commodities that he could have charged was 59 9/16 cents. The accused has appealed. The facts as found by the Magistrate are not contested.

Mr A. H. C. de Silva, Q.C. appearing for the accused submits that the charge is illegal in that it is not framed in accordance with the relevant provisions of law, and that the accused has been grossly prejudiced in his defence.

Bombay onions are a price controlled commodity. The controlled price is 25 cents a pound. A person who sells above the controlled price commits a distinct offence.

Gram dhal is a price controlled commodity. The controlled price is 57 cents a pound. A person who sells above the controlled price commits a distinct offence.

The evidence is that the accused was asked by the decoy for a pound of Bombay onions and a half pound of gram dhal. The decoy made no inquiry as to the price of either. It will be seen that when he was charged Rs 1.00 for both items, the accused could have been committing an offence in regard to both it is equally possible that he was committing an offence only in regard to one or the other. The one thing certain is that he could not have been selling both commodities at the controlled price. Be that as it may, section 178 of the Criminal Procedure Code is perfectly clear in its terms, namely that for every distinct offence of which a person is accused there shall be a separate charge, and if the prosecution in consequence of the folly of officers who direct raids, places itself in the position of not being able to prove that the accused committed a distinct offence it should not vex a person by preferring an illegal charge. The fact that an Accused has given a false defence has no bearing on the matter.

The appeal is allowed and the accused is acquitted.

Accused acquitted.

Present: **H. N. G. Fernando, C.J., and Pandita-Gunawardena, J.**

HAWPE LIYANAGE ORDIRIS *v.* HAWPE LIYANAGE ANDRAYAS*

S.C. 164/67 (*Inty*) — *D.C. Matara* 4857/*P*

Argued on: 15th December, 1968
Decided on: 23rd June, 1969

Paddy Lands Act, sections 3 *and* 63 — *Interests of a tenant cultivator — Is he entitled to get his right specified in a Partition decree? — Partition Act of* 1951, *section* 48.

The defendant, who owned a paddy field in equal half shares with his brother the plaintiff was the "tenant cultivator" of the brother's half share.

The plaintiff instituted this action to partition the said field and the question arose as to whether the defendant's right or interest as tenant of the plaintiff's share can be specified in the partition decree as being an encumbrance affecting the share and the lot to be allotted to the plaintiff.

Held: (1) That the interest of a "tenant cultivator" may properly be specified in a partition decree.

(2) That the phrase "or any interest whatsoever howsoever arising" in the definition of "encumbrance" in section 48 of the Partition Act amply confirms this conclusion.

Case referred to: *Hendrick Appuhamy* v. *John Appuhamy* (1966) 69 N.L.R. 29

H. Rodrigo with *Asoka Abeysinghe*, for the defendant-appellant.

W. D. Gunasekera, for the plaintiff-respondent.

*For Sinhala translation, see Sinhala section, Vol. 18, Part 11 p. 21

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

Section 3 of the Paddy Lands Act of 1958 declares that a person who is the cultivator of any paddy land let to him under any oral or written agreement is the "tenant cultivator" of that paddy land. The definition in section 63 of the Act of the word "cultivator" is such that every tenant of a paddy land is not necessarily a "tenant cultivator". In the present case, however, there is no doubt that the defendant, who owned a paddy field in equal half shares with his brother the plaintiff, was the "tenant cultivator" of the brother's half share.

In this action, which the plaintiff instituted for the partition of the paddy field, the defendant asserted that he was the "tenant cultivator" of the plaintiff's half share; and the question which arises is whether the defendant's right or interest as tenant of the plaintiff's share can be specified in the partition decree as being on encumbrance affecting the share and the lot to be allotted to the plaintiff in the interlocutory and final decrees respectively.

The answer to this question seems perfectly simple. If the defendant was the lessee of his brother's half share under a notarial lease the term of which has not expired, then clearly that lease is an encumbrance for which the defendant could secure protection by having the lease specified in the decree. By reason of the Paddy Lands Act, the defendant, even if he was the tenant under an oral agreement, was a perpetual tenant enjoying rights of tenancy limited only by the Act itself; his rights are thus even more fundamental than those of a lessee under a notarial lease, and he should be entitled to the same protection as section 48 of the Partition Act allows to such a lessee. The phrase "or any interest whatsoever howsoever arising", in the definition of "encumbrance" in section 48 amply confirms the conclusion that the interest of a "tenant cultivator" may properly be specified in a partition decree.

I have hesitated to act upon this conclusion only because of a fear that this conclusion may have the consequence that the failure of a "tenant cultivator" to assert his right in a partition action might extinguish that right. If such a consequence is possible, an unscrupulous landlord might resort to a partition action in the hope of defeating the objects of the Paddy Lands Act.

There are, however, observations in the judgment in *Hendrick Appuhamy* v. *John Appuhamy* (69 N.L.R. 29) tending to the opinion that the fear which I entertain may be unreal. In any event, even if the true position be that a tenant cultivator's right may be extinguished by his failure to assert his right in a partition action, that is an evil which can be averted by some appropriate amendment of the law.

For the reasons stated the appeal is allowed with costs. The judgment of the District Judge is varied, in the paragraph allotting shares, by inserting, after the words "plaintiff to — 1/2:", the words "subject to the rights of the defendant as tenant-cultivator of the plaintiff's 1/2 share". This additional matter will no doubt be specified when the Interlocutory and Final Decree are prepared.

Pandita-Gunawardena, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J.** (*President*), **Samerawickrema, J. and Weeramantry, J.**

THE QUEEN *v.* J. M. HERATH BANDA

Appeal No. 90 *of* 1968 *with Application No.* 137 *of* 1968
S.C. 177/68 — *M.C. Kurunegala* 51291

Argued on: 10th February, 1969
Decided on: 12th March, 1969

Court of Criminal Appeal — Murder — Prosecution version conflicting with defence version — Non-direction on circumstances supporting defence version — Duty of trial judge to refer to important and significant points — Grave and sudden provocation — Verdict of culpable homicide not amounting to murder substituted.

The appellant was convicted of the murder of one R. The prosecution version was that the appellant caused the fatal injuries on the deceased with a club. The deceased had not only club injuries but also an incised injury on her face which according to the doctor could have been caused by a sharp cutting instrument.

The appellant's version was that the deceased approached him with a katty and tried to assault him whereupon he hit her several times with the fence stick with which he was making holes to fix a fence. The incised injury supported his version that the deceased had a katty in her hand and had cut herself with it while struggling with the appellant. The prosecution version, unlike the defence version, did not account for the reason why the assault took place or for the incised injury. A katty was found near the body.

Held: (1) That although a trial judge is not required to mention to the jury every item of evidence which might favour the defence, yet where as in this case the only matter in dispute at a trial is whether a mitigatory defence is made out, it is the duty of the trial judge to direct the jury to consider important and significant points which can serve to test the credibility of prosecution evidence.

(2) That in this case the trial judge had failed to direct the jury on the matters which afforded some independant corroboration of the appellant's version.

(3) That the Court could not say that the jury in this case would have rejected the defence of grave and sudden provocation if they had received an adequate direction as to the significance of the evidence referred to above.

E. R. S. R. Coomaraswamy, with *S. C. B. Walgampaya*, and *J. E. Ivan Perera* (assigned), for the accused-appellant.

V. S. A. Pullenayagam, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Crown.

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

The appellant was convicted by an unanimous verdict of the Jury of the murder of one Ranmenika.

It was established at the trial that relations between the appellant and the family of the deceased had been quite friendly for many years, except for one matter. The deceased and her family had been accustomed to use a path across the appellant's land for access to their own land. The appellant had recently arranged for a different foot-path, along one side of his land, as an alternative to that which crossed his land, but the

deceased's family continued to use the old path and to take carts across the appellant's land. In the result, according to the appellant, damage was sometimes caused to his vegetable plants, because this old path was unfenced and stray cattle used to enter his land.

The appellant's version of the incident which led to the death of the deceased was that on the day in question he decided to fence that side of his land at which the old path commenced, and that he had with him a heavy stick with a pointed end for making holes into which to fix fence-sticks. At this stage, he said, the deceased approached with a katty in hand and tried to assault him; he thereupon hit her several times with the stick, and the deceased fell injured on the ground. A katty was later found about one foot away from her body.

The only prosecution eye-witness was the deceased's daughter. This girl said that her mother had left home for a bath. Sometime later, the girl heard her mother crying out that she was being assaulted and asking for something to help her. The girl then ran home and brought a katty, but before she could use it, her mother was assaulted and fell injured. The girl herself threw away the katty and left the scene.

There were many points in this evidence which might have led the Jury to prefer the appellant's version that the deceased had commenced a fight with katty in hand. Besides club injuries, the deceased had an incised injury on her face about 3 inches in length, which the doctor said was probably caused by a sharp-cutting instrument. This injury supported the version that the deceased had a katty in her hand, and had cut herself with it while struggling with the appellant. The only attempt which Crown Counsel made to explain this injury was by asking the doctor this question:—

"*Q:* Could that injury have been caused if the deceased fell on the sharp edge of this katta (shown a kattɛ)?

A: Yes."

Actually, even the answer to this question favours the defence, for it admitted the possibility that the katty had cut the deceased's face when she fell to the ground with katty in hand. Again, the girl's evidence that she threw a katty away *after* the deceased fell excludes the possibility that the deceased fell on a katty brought to the scene by the girl.

The appellant had the advantage that his version included a statement of the circumstances which led to his assault on the deceased, namely that the deceased opposed his attempt to fence the old path and tried to use a katty in order to threaten him. The girl's version, on the other hand, did not account in any way for the reason why the assault took place. The admitted existence of a dispute concerning the use of the old foot-path by the deceased's family rendered it quite probable that the incident occurred in the manner spoken to by the appellant.

The learned Commissioner did not in his summing-up direct the Jury that the matters just mentioned afforded some independant corroboration of the appellant's version. We agree with learned Counsel for the Crown that a trial Judge is not required to mention to the Jury every item of evidence which might favour the defence. But when, as in this case, the only matter in dispute at a trial is whether a mitigatory defence is made out, it is the duty of the trial Judge to direct the Jury to consider important and significant points which can serve to test the credibility of prosecution evidence. We are quite unable to say that the Jury in this case would have rejected the defence of grave and sudden provocation if they had been given an adequate direction as to the significance of the evidence referred to in this judgment.

For these reasons, we set aside the verdict and sentence, and substitute a verdict of culpable homicide not amounting to murder, imposing on the appellant a sentence of seven years rigorous imprisonment.

Set aside.

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

THE EASTERN STAR LINES LIMITED (IN VOLUNTARY LIQUIDATION BY ITS LIQUIDATOR C. U. SENANAYAKE) *v.* THE DEUTSCHE BANK OF HAMBURG

S.C. 178/66 (*Inty*) *D.C. Colombo* 52654/*M*

Argued on: 6th, 12th, 13th, 24th and 25th, May, 1969
Decided on: 25th July, 1969

Civil Procedure Code, sections 102 *and* 103—*Inspection of documents — Grounds upon which inspection may be resisted — That documents relate solely to the case of party the resisting inspection — That documents are covered by legal professional privilege — That documents are protected by section* 131 *of the Evidence Ordinance — That the documents are privileged because they may tend to incriminate the party—Whether attorney can swear affidavit claiming protection— Section* 181 *of Civil Procedure Code, does it apply to affidavits made under section* 102 *— Can Court inspect documents in possession of party for which privilege from inspection is claimed.*

The plaintiff Company were shipowners who had entered into a freight agreement for the carriage of railway sleepers. Certain letters of credit had been opened with the defendant Bank in favour of the plaintiff Company in connection with this agreement. The plaintiff alleged that these letters of credit had been wrongfully transferred by the defendant in favour of a third party, and sued the defendant for damages on several causes of action. Prior to the action the plaintiff wrote letter marked X1 in the proceedings to the defendant in which after stating that some of its files in connection with the letters of credit were missing, and that letters written by a former Director of the plaintiff authorizing the transfer of the letters of credit only *purported* to authorize the transfer, it called for copies of all correspondence in the possession of the defendant with all parties connected with the letters of credit.

After action was instituted the plaintiff's application for discovery of documents under section 102 Civil Procedure Code was allowed. Thereafter the plaintiff applied to inspect the documents so discovered. The defendant, in an affidavit made under section 102(2) by its Attorney in Ceylon, objected to inspection on the grounds that certain documents related solely to its own case; that certain documents were protected by legal professional privilege; that certain documents were protected by section 131 of the Evidence Ordinance and that certain documents were protected by the privilege against self-incrimination. The plaintiff maintained *inter alia* that the attorney had no capacity to swear the affidavit on behalf of the defendant, and that the affidavit did not satisfy the requirement of section 181 of the Civil Procedure Code.

Held: (1) (Following *Nandawathie de Silva* v. *Yasawathie de Silva* 58 N.L.R. 100) That our law on the question of protection from inspection follows the procedure and practice of England.

(2) That an affidavit made under section 102(2) of the Civil Procedure Code had to satisfy the requirement of section 181 of the same Code.

(3) That on the facts of the case the affidavit did comply with section 181 of the Civil Procedure Code.

(4) That an affidavit, once made by a person competent to make it, is conclusive in regard to the possession, and relevancy of the documents described in it, and as to the privilege set up. Once privilege is claimed, "inspection will only be ordered where the Court is reasonably certain from the affidavit of documents itself or from the nature of the case, or of the documents in question, or from admissions made by the party in his pleadings or in any other affidavit that he has erroneously represented or misconceived the nature or effect of the documents in question". None of these exceptional circumstances were present in this case.

(5) That the Attorney, personally having claimed the privilege that the documents related solely to the case of the defendant with a due sense of responsibility, the privilege applied and should be upheld.

(6) That the plea of legal professional privilege also applied in regard to the documents in regard to which it was claimed. The terms of the letter X1 were such a that after its receipt the defendant would reasonably have anticipated litigation with the plaintiff. The plea that the documents were correspondence in connection with legal advice sought by the defendant at the instance of their legal advisers in Germany, in connection with litigation that was then anticipated and was in contemplation and was accordingly privileged, was valid.

(7) That there was insufficient material to hold that the plea that some of the documents might tend to incriminate the defendant was made out. This plea accordingly failed.

(8) That section 131 of the Evidence Ordinance did not protect the documents in regard to which protection under that sections was claimed. The fact that certain documents in the possession of the Bank of Ceylon were protected did not mean that copies of those documents in the hands of the defendant were protected.

(9) That the Courts in Ceylon have no power to inspect documents for which privilege for inspection is claimed to decide on the validity of the claim for privilege. The statutory rule which empowers the English Courts to exercise this power is no part of our law, nor does the Civil Procedure Code give the Court any such power.

Followed: *Nandawathie de Silva v. Yasawathie de Silva*, (1956) 58 N.L.R. 97.
Cases referred to: *Watson v. Cammel Laird and Co.* (1959) I W.L.R. 702.
General Accident Fire and Life Insurance Co. v. Goldberg (1912) T.P.D. 494.
Westinghouse v. Midland Railway Co. 48 Law Times 98;462

Walter Jayawardene, Q.C., with *R. A. Kannangara*, *Desmond Fernando*, *N. S. A. Goonetilleke* and *C. A Amerasinghe*, for the plaintiff-appellant.

S. Nadesan, Q.C., with *S. J. Kadirgamar*, Q.C., and *S. S. Basnayake*, for the defendant-respondent.

Alles, J.

This is an appeal from the order of the learned Additional District Judge of Colombo upholding the objections of the defendant Bank to permit an inspection of documents by the plaintiff Company, discovery of which had previously been allowed by the District Court. In order to appreciate the merits of the present appeal it is necessary to briefly recount the steps in the litigation up to the stage when the objections to the inspection were made.

The plaintiff Company, (hereafter referred to as the plaintiff) which has now gone into voluntary liquidation, carried on a business as ship owners, charterers and carriers. Two of its Directors were a German called H. C. Stelzer and one K. Adamally. Certain persons carrying on business in Pakistan under the name of 'Marsh & Co.', as charterers, entered into a freight agreement with the plaintiff on 9th January 1958 whereby the plaintiff agreed to carry a certain tonnage of railway sleepers from Burma to Karachchi and Chittagong at certain specified rates. Marsh & Co. also agreed to open letter of credit for the entire freight amounting to £ 92,268 6s 9d in favour of the plaintiff to be paid by two Railway companies in Pakistan, for whom the sleepers were intended, with the defendant Bank (hereafter referred to as the defendant) at Hamburg. In terms of this agreement two letters of credit were opened with the defendant in favour of the plaintiff by two Banks in Pakistan on 29th March and 6th May 1958, which benefits were communicated to and accepted by the plaintiff in Colombo. The plaintiff alleges that, on 31st March 1958 Stelzer acted fraudulently and in collusion with Adamally, Marsh & Co., and a certain firm by the name of 'Augustus Bolton' carrying on business in Hamburg and that Stelzer, purporting to act on behalf of the plaintiff, wrongfully and without the authority of the plaintiff entered into an agreement with, 'Augustus Bolton' whereby it was agreed that 'Augustus Bolton' would supply the tonnage required to carry out the obligations of the plaintiff under the original agreement of 9th January 1958. Consequently letters of credit for freight were to be opened by 'Marsh & Co.' with the defendant in favour of 'Augustus Bolton.' The plaintiff submitted that the effect of the agreement of 31st March, 1958 was an unauthorised transfer by Stelzer, in collusion with Adamally, Marsh & Co., and 'Augustus Bolton' of the original beneficial freight contract and letters of credit belonging to the plaintiff, to 'Augustus Bolton' without any consideration whatsoever, for the mutual benefit and advantage of Stelzer, Adamally, Marsh & Co., and 'Augustus Bolton.' The plaintiff further submitted that Stelzer acting in collusion with 'Augustus Bolton', purported to grant authority by two letters dated 18th April, 1958 and 19th May, 1959 on behalf of the plaintiff to the defendant to transfer all the plaintiff's rights under the said letters of credit to 'Augustus Bolton'; that the defendant in pursuance of the said purported authority of Stelzer, without obtaining permission or authority from the plaintiff wrongfully and unlawfully transferred the letters of credit to 'Augustus Bolton' on 26th May, 1958 and 27th October, 1958 and in consequence failed and neglected to pay the plaintiff at Colombo the amount of the said letters of credit.

In the course of this inquiry the defendant produced letter X 1 dated 21st June 1960, signed by the Acting Chairman of the plaintiff Company, and sent to the defendant at Hamburg, in which the plaintiff detailed the correspondence that existed up to that time between themselves and the defendant in regard to the two letters of credit. In the course of X 1 the plaintiff informed the defendant that some of the files in connection with the letters of credit were missing and could not be traced; that Stelzer forwarded letters dated 18th April, 1958 and 19th May, 1958 signed by him *purporting* to be irrevocable authority from the plaintiff to the defendant to transfer all the rights of the plaintiff under the credits to Bolton with singatures on the purported letters of transfer verified and approved by the Bank of Ceylon; that the defendant regarded the authority as proper and valid and that on the assurance of these letters of authority the transfer of the credits were made to Bolton. The letter also called for correspondence between the plaintiff and the defendant, the defendant and Bolton, the defendant and the Pakistani Banks, the defendant and Marsh & Co., the defendant and the Bank of Ceylon and 'any other correspondence throwing light on the subject matter of the two credits.' X 1 also inquires whether any sanction was obtained from the Government of Ceylon for transfer of the above mentioned credits to Bolton. The correspondence called for in X1 in almost identical with the documents in respect of which inspection is sought by the plaintiff in this case.

The matter to which I have drawn attention in X1 are relevant to consider some of the objections raised by the defendant to the inspection of certain documents. Counsel for the defendant submitted that from X1 the defendant had reason to believe that litigation in which they might be involved was contemplated by the plaintiff and that the plaintiff was seeking to obtain information from the defendant in regard to a possible claim against themselves.

The present action against the defendant was instituted on 28th March, 1961 about nine months after X1 was written. In their plaint, the plaintiff alleged that the transfer of the two letters of credit was an unauthorised transfer by Stelzer in collusion with Marsh & Co., Adamally and 'Augustus Bolton'; that the said transfers were wrongful and unlawful and caused loss and damage to the plaintiff amounting to Rs 1,230, 243/30, which the defendant failed and neglected to pay the plaintiff. In the alternative, the plaintiff averred that the purported transfers constituted an infringement of Exchange Control Regulation in Ceylon and was therefore void and illegal.

On 1st April, 1962 summons was served on the defendant and the Proctor moved for a date to file proxy and Power of Attorney and Mr John Wilson, Proctor of Colombo was appointed Attorney of the defendant on 25th April, 1962. The Power of Attorney was filed on 28th September, 1962 and on 12th November, 1962 the proctor for the plaintiff moved under section 102 of the Civil Procedure Code for discovery of documents and this motion was allowed. The defendant filed answer on 28th November, 1962 and in that answer averred, *inter alia*, that the plaintiff was estopped from denying that Stelzer was at all material times the Managing Director and the Chief Executive Officer of the plaintiff; that the Bank acted on the faith of the representation that Stelzer was at all material times the Managing Director and Chief Executive Officer; and as such, entitled to act on behalf of the Company. The plaintiff's application for discovery was inquired into by the Court and the order of the Court allowing the application was delivered on 18th, January, 1965 on which date Mr John Wilson, the Attorney of the defendant was present in Court. Thereafter the present application for inspection was fixed for inquiry. On 29th March, 1965 Mr Wilson, as Attorney, moved for time till 28th May, 1965 to file affidavit and on the same date Counsel for the defendant stated that 'such of those documents as are available in Ceylon at the moment will be made available in terms of the order of the Court to the plaintiff on or before 2nd April 1965'. He also added 'that steps are being taken by his proctor to have the other documents also referred to in the plaintiffs' application made available to the plaintiff and that of consent time may be given till 10th May, 1965'. Mr Wilson's first affidavit was filed on 1st April, 1965 and listed 124 documents and the second, which was filed on 10th May, 1965, listed 89 documents. Mr Wilson also raised certain objections to the inspection of documents and also stated his grounds. Counsel for the appellant submitted that the affidavits of Mr Wilson were not acceptable to Court and should have been rejected. While conceding that Mr Wilson had the status to act for the defendant under a General Power of Attorney in terms of section 25(b) of the Civil Procedure Code, it was his contention that he did not have the capacity to so act, because in his submission at the time he filed his first affidavit he did not have the whole of the case before

him and therefore could not have sworn to the matters of belief referred to in his affidavit of 1st April. If Mr Wilson's capacity was questioned by the plaintiff it is not clear why no objection to his capacity to swear the affidavit was not taken when the application for discovery was made. Much was made by Mr Jayawardene of counsel's statement on 29th March, to support his submission that Mr Wilson was only the mouthpiece of the defendant's lawyers and had not been completely briefed in regard to the defendant's case on 1st April, 1965. I find it difficult to agree with counsel's submission in regard to this matter. Mr Wilson was appointed Attorney in 1962, after the plaint and answer were filed, and was therefore presumably aware of the nature of the contest between the plaintiff and the defendant. I must assume that Mr Wilson was conscious of the observations of the Chief Justice in *Nandawathie de Silva* vs. *Yasawathie de Silva* 58 NLR 100, on which both counsel relied, "that a very serious responsibility is imposed on the legal advisers of a party who has been noticed to produce documents for inspection" and that "what is contemplated by the English procedure is that the advisers will carefully peruse all the documents with a view to forming an honest opinion as to their possible relevancy both to their client's case as well as that of his opponent and that his client will not be advised to swear an affidavit in the terms stated unless the documents in question do not even tend to support the opponent's case. The adviser must bear in mind the fact that the Court will be bound by the assertions in the affidavit unless it is apparent from the description of the documents that the assertions are erroneous or misconceived". In this instance, Mr Wilson was not only the legal adviser of the defendant but also its duly appointed Attorney in Ceylon since 1962 and it is not unlikely that when he swore the affidavits in question he was conscious of the serious nature of the assertions contained therein. Although it would not be unreasonable for counsel to draw the inference from counsel's statement that Mr Wilson did not have all the documents in his possession at the time he swore the first affidavit, I find it difficult to come to a conclusion that this was so in fact. The litigation commenced in 1961 and Mr Wilson was appointed Attorney in 1962. It is inconceivable that soon after 1961 the defendant Bank in Germany did not transmit to their lawyers in Ceylon all documents pertaining to their litigation. It may be that some of the documents were returned to Germany in the course of the three years, after Mr Wilson was appointed Attorney and this was it that prompted counsel to state that steps are being taken by his proctor to have the other documents available to the plaintiff in due course. The documents referred to in the second affidavit consist of correspondence between the defendant and third parties. It was also urged by Mr Jayawardene that there was intrinsic evidence in the first affidavit to establish the fact that on the face of it, it should have been rejected and he drew attention to Paragraph 7 of the affidavit which stated that documents 18 and 19 *inter alia* are documents that are solely and exclusively evidence of the case for the defendant. The plaintiff has produced P1 and P2 which are the same documents as 18 and 19 and it was conceded by both counsel that these documents can apply to the plaintiff's case as well. This however does not necessarily mean that the affidavit on the face of it is irregular because the assertions in the affidavit, being statements of opinion based on reasonable belief (Vide section 181 of the Code), Mr Wilson may have honestly believed that they only related to the defendant's case. Mr Nadesan however conceded that the plaintiff was entitled to inspection of these two documents — a gratuitous concession since the documents are already in the possession of the plaintiff. I am unable to agree with Mr Nadesan's contention that section 181 of the Code has no application to an affidavit submitted under section 102. In the absence of anything to the contrary, one must assume that in all interlocutory application the provisions of section 181 must be complied with. There is nothing in the pleadings which would indicate that Mr Wilson did not have the capacity to swear the two affidavits in question. In this case having regard to the provisions of Section 102, which requires the objections and the grounds of objection to be stated, the nature of the personal knowledge of the deponent would, to a large extent, depend on his honest assessment of the contents of the documents in his possession and his personal knowledge of the contents of the affidavits would necessarily be confined to such limits. I am satisfied that Mr Wilson had both the status and the capacity to swear the two affidavits in question. Once the capacity of the party swearing the affidavit is acknowledged, a heavy burden rests on the party challenging the assertions in the affidavit to rebut such assertions on the ground that they are erroneous or misconceived. In *Nandawathie de Silva* v. *Yasawathie de Silva* (supra) it has been assumed in the course of the argument that the object of the provisions of the Civil Procedure Code in regard to discovery, production and inspection of documents was to introduce the

practice and procedure in England. Although there is no provision in our Code of Civil Procedure for the introduction of the Rules and Orders of the Supreme Court, the learned Chief Justice has, after an analysis of sections 102 to 109 of the Code indicated that our procedure is similar to that prevailing in England. One might also refer to the corresponding Orders of the Indian Code of Civil Procedure (Order XI — Rules 12 to 18) which contain provisions very similar to the sections of our Code. Both in England and in India the conclusive nature of the affidavit is recognised. In India the affidavit is conclusive both on the question of possession and privilege .(Vide Sarkar — 8th Ed. Vol. I p. 1353). In England the conclusiveness of the affidavit extends to relevancy as well (Hailsham — Vol. 12, Section 44 p. 30). Since therefore our procedure is based on the practice and procedure prevalent in England it might be urged that the affidavit would be conclusive as regards possession, privilege and relevancy. In the present case -Mr Wilson has asserted in his affidavits 'that to the best of his belief and after proper examination most of the documents in the first affidavit and all the documents in the second affidavit relate exclusively to the defendant's own case and contain nothing supporting or tending to support the case of the plaintiff. He also maintains that some of the documents in the first affidavit are privileged as being within the doctrine of legal professional privilege or as tending to incriminate the defendant. According to Hailsham:

> "Inspection will only be ordered where the Court is reasonably certain from the affidavit of documents itself or from the nature of the case or of the documents in question or from admissions made by the party in his pleadings or in any other affidavit that he has erroneously represented or misconceived the nature or effect of the documents in question" (Vol 12, S.44)

Such an inspection was available in the case of documents 18 and 19 to which reference has already been made. An examination of the documents which were or have been in the possession of the Attorney and enumerated in the two affidavits reveal that the documents in regard to which privilege is claimed consists of correspondence which may be grouped as follows:—

(*a*) Correspondence between the defendant and 'Agustus Bolton';

(*b*) Correspondence between the defendant and the Banks in Pakistan and the Chase Manhattan Bank in Washington;

(*c*) Correspondence between the defendant and the Pakistan Embassy at Washington;

(*d*) Correspondence between the defendant and the Bank of Ceylon; and

(*e*) Correspondence between the defendant and the plaintiff.

The cause of action against the defendant is that the defendant, without obtaining permission or authority from the plaintiff wrongfully and unlawfully and/or negligently and/or in breach of contractual or fiduciary duties, transferred the letters of credit to 'Augustus Bolton'. Nowhere is it alleged in the plaint that 'Augustus Bolton' or the Banks in Pakistan or the Pakistan Embassy in Washington were responsible or induced the defendant to act in this wrongful or negligent manner. The correspondence under the headings (a), (b) and (c) above cannot, therefore, support the plaintiff's case.

In regard to the correspondence between the defendant Bank and the Bank of Ceylon (documents 115 to 124 in the first affidavit), the Attorney objected to inspection of documents 120 to 124 on the ground that in the connected case which the plaintiff instituted against the Bank of Ceylon these documents were held to be privileged and consequently the Attorney claimed the same privilege in the present action. Mr Nadesan conceded that the Attorney's ground in regard to this objection was misconceived and that Section 131 of the Evidence Act had no application to these documents. I agree with Mr Jayewardene's submission that the fact that documents in the possession of the Bank of Ceylon were privileged, did not mean that documents in the possession of the defendant Bank were similarly privileged. This submission of Counsel is supported by the observations of Lord Evershed, Master of the Rolls in the decision of the Court of Appeal in *Watson* v. *Cammell Laird and Co.* (1959) 1 W.L.R. 702. The Attorney however claimed privilege for these documents on the doctrine of professional privilege, inasmuch as they were letters written by the defendant to the Bank of Ceylon and replies from the Bank of Ceylon to the defendant in connection with legal advice that was sought by the defendant at the instance of their legal advisers in Germany for information from the

Bank of Ceylon in connection with litigation which was then anticipated and was in contemplation (Paras 11, 12, and 13 of the 1 st affidavit). Documents 115, 117 and 119 relate to correspondence that existed between the defendant and the Bank of Ceylon before the alleged commission of the wrongful acts of the defendant in 1958 and cannot relate to the plaintiff's case. In regard to documents 116, 118 and 120 to 124 which related to correspondence in 1959 and 1960, it was the submission of counsel that they were clearly privileged as professional communications in connection with litigation that was anticipated and contemplated. I have already drawn attention to possible support of this view in dealing with the contents of X1. I agree with the observations of the learned trial Judge in X1 that plaintiff was in effect stating that Stelzer had no authority to write to the defendant purporting to give instructions in regard to the transfer of the letters of credit, and that the Bank when it received X1 would have alerted itself and sought the advice of lawyers. The conclusion is irresistible that when the correspondence was in progress between the defendant and the Bank of Ceylon in 1960 what was contemplated by the plaintiff was not an inquiry into a claim in connection with the letters of credit but litigation which any prudent person had reason to anticipate and which anticipation was justified by the trend of later events. In this connection the decision in *General Accident Fire and Life Insurance Co* v. *Goldberg* (1912) TPD 494 relied upon by counsel for the appellant can be distinguished. In that case Wessels, J. held that the report must be obtained for the purpose of submission to the legal adviser and for no other purpose and it was not privileged merely because afterwards the persons who obtained the report found it desirable or necessary to submit it to their legal advisers'. Having regard to the view of the facts, which has been accepted by the trial Judge, with which we are in agreement, the correspondence between the two Banks was initiated for the purpose of obtaining information for the use of the legal advisers of the defendant Bank with a view to possible litigation and consequently the correspondence was privileged and the plaintiff was not entitled to seek inspection.

There remains the fifth group in regard to the correspondence between the plaintiff and the defendant. It was agreed by counsel for the plaintiff at the inquiry before the trial Judge that he was not asking for inspection of any of these documents except documents 72 and 75. Document 72 was a letter from the defendant to the plaintiff, the original of which should have been with the plaintiff and 75 was a cable from the plaintiff to the defendant the contents of which must have been known to the plaintiff. In any event, at the argument before us, counsel for the plaintiff-appellant did not press his application for the inspection of these two documents.

Learned counsel for the appellant submitted that according to English Law (Order 31, Rule 19A (2)) the Court may inspect any document in regard to which inspection was sought to consider the validity of the claim. In the absence of any special procedure our law for the inspection of documents by the Court, I am doubtful whether this procedure adopted in England can be extended to our law. Section 110 of the Code permits a Court to examine its own records but there is no provision by which the Court can compel a party to submit documents in respect of which inspection is sought, for the examination of the Court. Mr Jayawardene submitted that the documents in respect of which inspection was successfully resisted in the case instituted by the plaintiff against the Bank of Ceylon should be inspected by this Court or the trial Court to consider the validity of the claim but we do not propose to accede to counsel's request. Order 31-Rule 19A(2) was introduced into the English procedure before the Civil Procedure Code was enacted in 1889 but our Code did not choose to introduce inspection by the Court at the time and I agree with Mr Nadesan that in the absence of such a provision it is no part of our law. The cases cited by Counsel for the appellant in which the English courts have exercised their powers under Rule 19A(2) have therefore no application to the present case.

There remains for consideration the other ground of objection to the inspection of some of the documents — the production and inspection of certain documents are privileged because they may tend (if the allegations in para 14 of the plaint are well founded) to criminate the defendant inasmuch as the alleged breach by the defendant of the Exchange Control Regulations may amount to the commission of an offence. Counsel for the plaintiff submitted that this was a groundless fear since the defendant Bank was outside the jurisdiction of our Courts and the averment in the plaint only alleged that the transfer of the letters of credit were void and illegal and constituted an infringement of the Exchange Control Regulations and does not suggest the commission of an offence. Mr Nadesan on the other hand submitted that the Attorney lay himself open to a prosecution in Ceylon and that the basis of liability would be an

allegation of a conspiracy between the defendant and some party resident in Ceylon. It is extremely doubtful whether the Attorney can be held criminally liable for a contravention of any regulation by the defendant at a time when the Attorney had no dealings whatsoever with the defendant and there is no evidence of any conspiracy between the defendant and some other party in Ceylon. I am therefore inclined to agree with Mr Jayawardene's submission that the Attorney's reason for refusing inspection on this ground is misconceived. According to Hailsham (Vol 12, Para 70) when the punishment feared is from a foreign court, the court must have materials before it so that it is satisfied that there is a reasonable likelihood of prosecution in the foreign country concerned. It does not appear to me that the averment in the plaint is sufficient to apprehend a reasonable ground of proseuction. In this connection Mr Jayawardene cited the case of *Westinghouse* v. *Midland Railway Co.* 48 Law Times 98, where the plaintiff brought an action to restrain the defendant Co. from using certain 'brake apparatus of which the plaintiff was the inventor. When the plaintiff made a claim for an infringement of his patent, the defendant Co. entered into a correspondence with certain third for advice in regard to the merits of the plaintiff's claim. The defendant Co. objected to the inspection of the correspondence on the ground that they were privileged communications. The Court was of opinion that the plaintiff's claim contained in his letter did not amount to a threat of litigation and therefore the correspondence could not be treated as privileged. The view of Bacon V.C. in the Chancery Division was upheld by the Court of Appeal (48 L.T. 462). In the instant case there was no threat of a prosecution in the averments contained in the plaint and the affidavit is inadequate on this issue to maintain that the documents are privileged for the reason that they may tend to criminate the defendant. I do not think therefore, that it can fairly be said that any statements in X1 tend to criminate the defendant. This ground of objection is however only of academic interest as the documents concerned, in my view, are privileged for the other reasons set out in the judgment.

We are therefore of the opinion that the Attorney, who had the status and the capacity to swear the affidavits, was justified in objecting to the inspection of the documents stated therein and that the learned trial Judge was correct in upholding the objections of the defendant. The appeal is dismissed with costs.

Pandita-Gunawardene, J.

I have had the advantage of perusing the judgment of my brother Alles and I am in agreement that the appeal should be dismissed with costs.

I am of the view that on a consideration of document "X 1" — letter of 21.6.60 written by plaintiff to the defendant, the defendant was justified in concluding that it contained a threat of litigation. The test to be applied in considering whether the letter contains a threat of litigation has been well-stated by Bacon V.C. in the case of *Westinghouse* v. *Midland Railway Company*, 48 Law Times Reports 98 (cited by counsel for the plaintiff).

It is unnecessary to detail the facts of that case, but that part of the judgment which I propose to reproduce may be helpful to a proper appreciation of the problem. Bacon V.C. said (ibid at page 100):

> "Well, that brings me, in this case, to the plaintiff's letter of the 22nd April, 1879. I cannot read that letter as containing anything like a threat of litigation. It is a statement that the plaintiff's patent has been infringed, as the writer says, by somebody else, and it appeals to the defendant company, and invites them to conduct an investigation to see whether that complaint is well founded or not. The writer exonerates the company from any inclination to interfere with his rights, or to do anything not perfectly lawful, and the letter asks them to make the investigation and to do what is right upon it. The writer says, moreover, 'not only have I no desire to open litigation, but I have no desire to hamper or impede your operations, for, if it should turn out to be ever so right, I am quite ready to give you a licence.' That is the fair construction to be put upon the letter; the words signify very little unless you can extract from them something similar to this: "*I have a complaint to make, and, if it is well founded, I will hold you answerable to satisfy that complaint.*"

(The judgment in appeal reported at page 462 of the same volume did not produce a different result).

Applying this test I am inclined to the view that document "X1" contained a threat of litigation.

Appeal dismissed.

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

THE COCONUT RESEARCH BOARD OF LUNUWILA *v.* N. R. SUBRAMANIAM *et al.*

S.C. Application No. 85/68 — *L.T.* 16766

Argued on: 1st June, 1969
Decided on: 23rd June, 1969

Industrial Disputes Act, section 49— *Coconut Research Ordinance* (*Cap.* 440) — *Employee of Coconut Research Board seeking relief under Industrial Disputes Act — Contention of Board that it is entitled to claim privileges available to Crown employees on the basis that it performed functions and duties traditionally performed by the Crown or the Government—Is such contention valid—Interpretation Ordinance* (*Cap.* 2) *section* 3.

In a dispute regarding the right of an employee of the Coconut Research Board to seek relief under the provisions of the Industrial Disputes Act, it was contended on behalf of the Board that as it performed functions and duties traditionally performed by the Crown or the Government and as such was in *consimili casu* with a servant or agent of the Crown and therefore entitled to the privileges claimed by the Crown or Government under section 49 of the Industrial Disputes Act. Section 49 made the other provisions of the Act inapplicable to the Crown or Government in its capacity as employer or to a workman in the employ of the Crown or Government.

Held: That the contention must fail and that the Board would be amenable to the jurisdiction of a Labour Tribunal in terms of the Industrial Act.

Distinguished: *Mersey Docks and Harbour Board Trust v. Cameron* (1865) 11 H.L.C. 443; 12 L.T. 643
Pfizer Corporation v. Ministry of Health (1965) A.C. 512 (HL)

Cases referred to: *Ceylon Tea Propaganda Board v. Commissioner of Inland Revenue* (1963) 67 N.L.R. 1.
Ceylon Bank Employees' Union v. Yatawara (1962) 64 N.L.R. 49.
Air Ceylon Limited v. Rasanayagam (1968) 71 N.L.R. 271.

Walter Jayawardene, Q.C, with *Lakshman Kadirgamar* and *V. Kandasamy,* for the petitioner.

N. Satyendra, for the 2nd respondent.

H. L. de Silva, Crown Counsel for the Attorney-General, on notice.

Weeramantry, J.

In this application the petitioner contests the right of the second respondent, one of its employees, to invoke the provisions of the Industrial Disputes Act. It is the petitioner's contention that it performs functions and duties which have traditionally been performed by the Crown or the Government and that it is therefore entitled to claim as against its employees the privileges available to the Crown in respect of Crown employees.

The petitioner is a body corporate established and incorporated under the provisions of the Coconut Research Ordinance (Cap. 440), for the purpose of establishing and maintaining a coconut research institute and otherwise managing, conducting and furthering scientific research in respect of coconuts and problems connected with the coconut industry. In particular the Board is concerned with the growth and cultivation of coconut palms, the prevention and cure of diseases and pests and the utilisation and marketing of the products of the coconut palm.

Though dependent on Government funds, the Board has full power and authority generally to govern, direct and decide on all matters connected with the apointment of its officers and servants, the administration of its affairs and the accomplishment of its objects and purposes (Section 4(7).) There is also express provision in the Ordinance that any such officers or servants when appointed shall for the purposes of discipline and otherwise be subject to the control and supervision of the Chairman of the Board (Section 4, proviso).

Dependence on the Crown for funds does not of course have the effect, by itself, of making a Corporation a Government institution or a Goverment undertaking (*Ceylon Tea Propaganda Board v. Commissioner of Inland Revenue* (1963) 67

N.L.R. 1) nor does Government control necessarily render a Corporation a servant or agent of the Crown, (*Ceylon Bank Employees' Union v. Yatawara* (1962) 64 N.L.R 49). Furthermore, as this Court recently decided in *Air Ceylon Ltd v. Rasanayagam*, (1968) 71 N.L.R. p. 271, provisions in an Act creating a corporation which show Governmental contributions of capital, Governmental control of appointments and Governmental rights to the surplus remaining out of nett receipts does not have the effect that in law the Crown or the Government is the employer of persons employed on the staff of such Corporations.

Having regard to these principles Mr Jayewardene for the petitioner rightly stated that he was not submitting that his client was a servant or an agent of the Crown, and conceded that the second respondent employee was an employee of the petitioner and not of the Government. His position however was that his client performed functions and duties traditionally performed by the Crown or the Government and as such was in *consimili casu* with a servant or agent of the Crown and entitled to claim the privileges of Crown servants or agents.

Reliance was placed, in support of this contention on the *Mersey Docks and Harbour Board Trust v. Cameron*—(1865) 11 H.L.C. 443, where Blackburn, J. recognised that a Corporation not subject to control by the Crown or by a Minister, and whose revenues were not Crown revenues, could claim Crown privilege on the ground that it was performing a public duty. Blackburn, J. observed at p. 501-2: "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign might be considered in *consimili casu*."

No detailed inquiries are necessary for an appreciation of the manifest distinction between the cases of the Mersey Docks and Harbour Board Trustees and the Coconut Research Board, for applying the tests formulated in that judgment itself, the functions performed by the former were public purposes which by the constitution of Great Britain fell within the province of Government and were committed to the Sovereign. On the other hand the functions performed by the Coconut Research Board cannot be said to be of a kind which by the constitution of this country fall within the province of Government and are committed to the Crown. The constitution of this country is written and neither under the constitution nor under any of the other laws of this country can any provision be pointed out which makes coconut research a function of duty of the Government or commits such matters to the Crown.

Mr Jayewardene contended that agriculture has traditionally been a Governmental function and duty in this country, and that scientific research pertaining to a major crop is likewise a Governmental function or duty. There is no material before us on which we can arrive at the conclusion that "the management conduct and furthering of scientific reasearch in respect of coconuts and problems connected with the coconut industry" (to borrow the words of the Statute itself) has traditionally been a function of the Government of this county. The Coconut Research Ordinance goes as far back as the year 1928 and we are unable to say that the functions for which the Board was set up had been traditionally performed by the Government prior to this date. Even if we were in a position to arrive at this conclusion, the tests set out in the *Mersey Docks* case would still remain unsatisfied, for this function could not under our laws be described as one committed to the Government.

It is of importance also to note that what was contemplated in the *Mersey Docks* case was not the question of the employer-employee relationship but the question of Crown privilege in regard to liability to rates of premises occupied by such an agency for the purposes of the Government.

Learned Crown Counsel appearing as *amicus curiae* referred us to a number of cases in which Crown privilege was successfully claimed by statutory bodies which, though not strictly servants of the Crown, were considered as being *in consimili casu*. All these cases likewise turned out to be cases of a claim of privilege vis-a-vis the State or the public, as for example in matters of taxation, rating and patent rights. We have not been referred to any decision dealing with a claim of privilege in regard to the employer-employee relationship subsisting between such Boards and their employees.

It is hence unnecessary to refer in detail to the various cases cited or to the tests therein pro-

pounded for determining the question whether such an agency may claim Crown privilege. We may however make reference to the case of *Pfizer Corporation v. Ministry of Health* 1965, A.C. 512 (HL) where it was held that the supply of drugs to National Health Service Hospitals for administration to out-patients and in-patients was a use for the services of the Crown and was accordingly within the authority conferred by section 46(1) of the Patents Act of 1949 granted to a Government Department to use and exercise a patented invention for the services of the Crown. The speeches in this case are of interest for the observations they contain in relation to the changed nature of "services of the Crown" in the present age. Lord Reid observed at p. 533 that "although in Victorian times the armed services the Navy and the Army the Civil Service, the foreign colonial and consular services, the Post Office and perhaps some others comprised the services of the Crown," today there are many newer services, such as hospital service, which are nevertheless services of the Crown. So also Lord Evershed pointed out at p. 543 that "there is not and cannot be in this day and age a true antithesis between the services of the Crown in the sense of services related to the functions of Government as such and services of the Crown in the sense of the provision of facilities commanded and defined by Act of Parliament for the general public benefit."

This view still does not avail the applicant in the present case, for the Hospital Boards and Committees which administered these hospitals were manifestly discharging duties laid upon the Minister by statute. The National Health Services Act of 1946 placed upon the Minister, in specific terms, a statutory obligation to promote the establishment of a comprehensive health service designed to secure improvement in the physical and mental health of the people, and the Boards and Committees were discharging these duties committed by statute to the Minister. No such statute placed upon any section or Department of the Government of this country at any time the specific function of conducting scientific research in respect of coconuts, and government did not therefore stand charged or committed with such a duty.

Section 49 of the Industrial Disputes Act provides that nothing in the Act shall apply to or in relation to the Crown or the Government in its capacity as employer or to or in relation to a workman in the employment of the Crown or the Government. In *Air Ceylon Ltd v. Rasanayagam* (supra) this Court has already held that a Corporation depending on and controlled by the Government was nevertheless the employer of persons in its services within the meaning of the definition of "employer" in the Industrial Disputes Act and that such Governmental control did not bring such a corporation within the scope of the exemption provided by section 49. Mr Jayawardene has failed to satisfy us that there is any distinction between the corporation there under consideration and the Coconut Research Board, and the cases to which we have been referred only serve to confirm this court in the view taken in that case. Moreover we see no merit in the contention that this view in any manner affects the rights of the Crown which are protected by section 3 of the Interpretation Ordinance, for what we are here considering are admittedly not the rights of the Crown or of a Crown agent or servant.

For these reasons we are of the view that the contention that Crown privilege may be claimed by the Coconut Research Board as a Crown agent must fail, and that the Board would be amenable to the jurisdiction of a Labour Tribunal in terms of the Industrial Disputes Act.

Another ground of attack upon the order of the Tribunal was that the application by the second respondent was out of time. This ground was not however pressed by Mr Jayawardene as it rested on a very technical view of the nature of the amendment to the original application.

For the reasons set out the petition fails and is dismissed with costs payable to the second respondent which we fix at Rs 315.

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

I agree.

Application dismissed.

Present: **Sirimane, J. and Weeramantry, J.**

THE COMMISSIONER OF INLAND REVENUE, COLOMBO *vs.* A. S. NAVARATNARAJAH*

S.C. No. 1/68 — *Income Tax No.* BRA/343

Argued on: 27th June, 1969
Decided on: 15th July, 1969

Income Tax Ordinance — Relief under Section 18(1)(e) *— Support of dependants by assessee in educational establishments — Dependants living away from the educational establishments — Is assessee entitled to relief? — Construction of the words "maintained ..... in ..... an educational establishment."*

The assessee claimed relief under section 18(1)(e) of the Income Tax Ordinance in respect of three dependants (two brothers and a sister) whom he supported during the relevant years of assessment as students in different educational institutions in Colombo while residing at addresses outside such institutions. The assessee was a public servant who during the relevant period held office under the Government at Puttalam and Galle.

Section 18(1)(e) aforesaid offers relief in respect of two categories of persons, namely, those who throughout the year preceding the year of assessment either (*a*) lived with the assessee and were maintained by him or (*b*) were maintained by him in any sanatorium asylum or educational establishment. The category relevant to this case is (b).

On a case stated for the opinion of the Supreme Court under section 78(1) of the Income Tax Ordinance the Crown contended that inasmuch as the said dependants resided at places away from the respective institutions where they received their education, they did not satisfy the condition of being "maintained ..... in ..... an educational establishment."

Held: (1) That the word "maintained" in section 18(1)(e) of the Income Tax Ordinance is used in relation to educational establishments in the sense of being supported therein rather than in the sense of living and being supported therein.

(2) That therefore, the assessee was qualified for the relief asked for.

Per **Weeramantry, J.** "The Legislature's attitude of assistance and approval to assessees pursuing this laudable course could scarcely have been negatived by the circumstance, of little or no materiality in this context, that the dependant had his physical residence apart from his place of education."

Mervyn Fernando, Crown Counsel for the appellant.

S. Ambalavanar, with *K. Nadarajah* and *W. H. Perera*, for the respondent.

Weeramantry.

This is a case stated for our opinion under the provisions of section 78(1) of the Income Tax Ordinance, and involves the construction of section 18(1)(e) of that Ordinance. The relevant years of assessment are 1958/59, 1959/60, 1960/61, 1961/62 and 1962/63 and the dependants in respect of whom relief is claimed are two brothers and a sister of the assessee.

These dependants admittedly lived apart from the assessee who during these years held office in the service of Government and was stationed at Puttalam and at Galle. One of the brothers, a medical student, lived at Cotta Road till he completed his medical education in September, 1958. The other brother lived in the ancestral home at Jaffna, where he had his schooling, but lived later in Colombo at premises in Davidson Road rented out by the assessee, and continued his education at Pembroke Academy. The sister likewise had her early education at Jaffna but later came to Colombo and lived at the same address at Davidson Road, and was a student at Navalar Hall. All these persons were, during the period of their education, supported by the assessee.

Section 18(1)(e) offers relief in respect of two categories of persons, namely, those who throughout the year preceding the year of assessment either (*a*) lived with the assessee and were maintained by him, or (*b*) were maintained by him in any sanatorium, asylum or educational establishment. The problem confronting us arises under the second head of relief insamuch as the dependants concerned did not live with the assessee.

*For Sinhala translation, see Sinhala section, Vol. 18 part 12, p. 23

It is submitted for the Crown that since these three dependants resided at a place away from the educational establishment where they received their education, they failed to satisfy the condition of being "maintained ..... in ..... an educational establishment". It is emphasized that the word 'in' conveys the idea of residence within the educational establishment in question. Further, the expression "educational establishment", occurring as it does in the context of the words sanatorium and asylum, should, according to the Crown, be construed to mean a residential educational establishment in accordance with the rule *noscitur a sociis*, on the footing that an essential characteristic of sanatoria and asylums is their residential nature.

The assessee on the other hand maintains that residence at the educational establishment is not a requisite and that what the second limb contemplates is support at the educational establishment rather than physical residence therein.

I have not been able to trace in the English statutes, nor have counsel been able to refer me to, any provision corresponding to that we are now considering. There is indeed a provision in respect of child relief corresponding to section 18(1)(d) of our Ordinance (Section 212(1) and (2) of the Income Tax Act, 1952). This provision entitles a parent to relief in respect of a child receiving full time instruction at a university, college, school or other educational establishment. On reliefs for educational expenses incurred on dependants, however, the English law would appear to afford us no guidance, and we must approach this question as one of first impression.

The provision we are here construing is one which relieves the tax payer and there would appear to be authority that in such cases neither the tax payer nor the Crown is entitled to the benefit of a doubt in matters of construction (Wheatcroft, The Law of Income Tax, Surtax & Profits Tax, p. 1037). I have not, therefore, in reaching the conclusions set out herein, invoked the usual principle that in the construction of taxing statutes, that interpretation most beneficial to the subject should, in cases of doubt, be adopted. (Maxwell, Interpretation of Statutes 11th Ed. p. 278).

It will be observed that the two alternative heads of relief both contain the word "maintained". In the first limb the requisites for the grant of relief are (*a*) living with the assessee, and (*b*) being maintained by him. In the second limb, the requisite is maintenance in an educational establishment. Since the word "maintained" occurs at two points in the same sentence it would be reasonable to give this expression the same meaning at both places. When the word is first used it is used in a sense which does not include the element of physical residence, for physical residence is made a specific additional condition. When therefore the word "maintained" is repeated in the second limb of this provision it is presumably used in a similar sense, that is a sense which does not include the aspect of physical residence. The word "maintained" would thus appear to be used in relation to educational establishments in the sense of being supported therein rather than in the sense of living and being supported therein.

The word "maintain" when used in the sense of sustenance by providing necessities of life such as food, clothing and shelter does perhaps carry the implication that the place of maintenance is synonymous with the place of residence. When, in this sense, it is said of a person that he is maintained at a particular place, it would invariably mean also that he lives at the place mentioned. However the word "maintain" is also used in the sense of supporting a person in a particular state, or, as the Oxford Dictionary puts it, of 'paying for, the keeping up of' or 'bearing the expenses of'. In this sense one speaks of maintaining a student at a University or a young advocate at the bar. In such uses of the word the notion of physical residence at the place of support is not by any means a necessary implication.

It is true the problem we are faced with would have been easier of solution had the word used been "at" rather than "in" an educational establishment, but the word "in" by itself is not sufficient, having regard to the reasons I have mentioned, to carry the implication that what the Legislature contemplated was the element of physical residence.

The argument of the Crown based on the rule *noscitur a sociis* does not commend itself to me, for it can scarcely be said that an essential characteristic of the words sanatorium and asylum is a residential element implicit therein. In modern times it is by no means inconceivable that outdoor treatment may be accorded to patients at such institutions; and rather than any supposed requirement of residence, their common feature seems to be that they accord to the persons under their care the type of attention which each such establishment is specially equipped to provide.

It is necessary finally to have regard also to the principles underlying the grant of relief under section 18 (1)(e). When the Legislature carved out this area of relief it was basically attempting to relieve assessees who were assisting their dependants to obtain an education. The precondition for relief was assistance to a dependant in the form of enabling him to pursue a course of studies at an educational establishment. The Legislature's attitude of assistance and approval to assessees pursuing this laudable course could scarcely have been negatived by the circumstance, of little or no materiality in this context, that the dependant had his physical residence apart from his place of education.

To take an illustration that readily comes to mind, it may well be that owing to pressure upon the residential facilities of an educational institution such as the University of Ceylon, some students, being unable to find a place in a hall of residence, are obliged to live away from the campus. Or again, while an educational establishment such as the University of Ceylon at Peradeniya has residential facilities, another similar institution, such as a University at Colombo, may have none. An assessee having two dependants in such institutions, one of whom is in residence and the other is not, would then find himself in the position of being entitled to claim tax relief in respect of one though not of the other, merely for the fortuitous reason of the latter's residence away from the campus. Indeed it may well be more expensive to support a dependant at a place away from an educational institution, particularly in a case such as the present where the appellant has had to rent out premises for his dependants as his official duties compel his residence away from Colombo.

In the absence of compelling words in the provision we are considering, binding us to an interpretation which has so little to commend it, we would hesitate to construe this clause as the Crown suggests, and thereby lose sight of its essential purpose. Had the Legislature desired to make physical residence at the educational establishment a precondition of relief, it could quite easily have so stated, as indeed it has done in the parallel provision contained in section 18(1)(e).

For all these reasons I am of the view that the assessee qualifies for the relief provided in section 18(1)(e) in respect of the two brothers and the sister who were his dependants.

I, therefore, answer in the affirmative the question of law which has been stated for our opinion. The years for which relief is available in respect of each dependant will be separately determined in accordance with the facts of each case.

The respondent will have the costs of this reference, fixed at Rs. 315/-.

Sirimane, J.

I agree.

Appeal dismissed with costs.

Present: **Wijayatilake, J.**

M. K. SENEVIRATNE *v.* K. PODI MENIKE*

S.C. 885/68 — *M.C. Kandy* 49411

Argued on: 28th April, 1969
Decided on: 3rd July, 1969

Maintenance, application for — Absence of applicant on date of inquiry — Dismissal of application — Has Magistrate jurisdiction to re-open proceedings?

Where an application for maintenance in respect of a child is dismissed for default of appearance of the applicant on the date of inquiry,

Held: That, in the absence of any statutory provision to the contrary, it is the imperative duty of a Magistrate to give a hearing to the applicant, if she wishes to show cause and reopen proceedings in a fit case provided the application to reopen is made within a reasonable time.

*For Sinhala translation, see Sinhala section, Vol. 18, Part 13 p. 26

Cases referred to: *Anna Perera* vs. *Emaliano Nonis* and *Justina* vs. *Arman* 12 N.L.R. 263.
Rabhoor Umma vs. *Coos Karnv* 12 N.L.R. 97.
Beebee vs. *Mahmood* 23 N.L.R. 123.
Jeerishamy vs. *Davith Sinno* 23 N.L.R. 466
Seethie vs. *Mudalihamy*, 40 N.L.R. 39; 3 C.L.J. 83
Piyaratana Unnanse vs. *Wahereke Sonuttara Unnanse* 51 N.L.R. 313 at 316

Mark Fernando, for the defendant-appellant.

S. Kanagaratnam, for the applicant-respondent.

Wijayatilake, J.

The question raised in this appeal is in regard to the jurisdiction of a Magistrate to re-open proceedings in a case filed under the Maintenance Ordinance.

The applicant filed an application for maintenance in respect of the child Chandralatha Menika born to her on 6.8.66. She alleges that the defendant is the father of this child. The defendant denied paternity and the case proceeded to inquiry on 15.9.66, 3.5.67 and 4.6.67 before Mr. Douglas Wijayaratne. It would appear that the applicant has been subjected to a lengthy cross-examination — the type-script being 24 pages.

Thereafter as this Magisrtate was going on transfer, of consent, the case had been fixed for inquiry *de novo* before his successor. When this matter came up for inquiry before Mr. D. E. Dharmasekera on 26.8.67 the applicant was absent and the defendant was present. The applicant was not represented by Counsel, and the learned Magistrate had dismissed the application on 7.9.67. The applicant had filed affidavit and two medical certificates and moved to have the order dismissing her application vacated. The Magistrate noticed the defendant and after inquiry delivered his order on 12.3.68 vacating his earlier order and allowed the applicant to re-open proceedings. The present appeal is from this order.

Mr Mark Fernando, learned counsel for the appellant submits that once the Magistrate dismissed the application he became *functus officio* and thereafter he had no jurisdiction to re-open proceedings. He submits that unlike in a civil suit governed by the Civil Procedure Code where there is provision under section 84 and in a criminal action governed by the Criminal Procedure Code where there is provision under section 194 — in an action for maintenance there is no provision for re-opening proceedings. He has relied on a series of judgments of this Court which I propose to discuss. In the case of *Anna Perera* v. *Emaliano Nonis* and *Justina* v. *Arman* 12 N.L.R. 263 the question arose with regard to the applicability of section 194 of the Criminal Procedure Code to Maintenance proceedings. It was held that only those sections of the Criminal Procedure Code, which are expressly incorporated in the Maintenance Ordinance, are applicable and that section 194 is not one of them. It was also held that where an application for maintenance has been struck out without an inquiry into the merits, the applicant has no right of appeal under section 17 of the Maintenance Ordinance but she may make a fresh application, provided the time limit prescribed in the Ordinance has not expired. The judgment of Wendt, J. in *Sabhoor Umma* v. *Coos Karnv* 12 N.L.R. 97 was disapproved. See also the judgment of Shaw, J. in *Beebee* v. *Mahmood* 23 N.L.R. 123 and the judgment of Ennis, J. in *Jeerishamy* vs. *Davith Sinno* 23 N.L.R. 466 which adopted the principle set out in the cases reported in 12 N.L.R. 263. Mr. Fernando has also referred me to the judgment of Abraham, C.J., in *Seethie* vs. *Mudalihamy* 40 N.L.R. 39 but it would appear that it was decided on the basis that the case was decided on the merits as the applicant had admitted that she had no witnesses to support the claim. A subsequent application made by the same applicant came up for consideration in the case of *Seethi* vs. *Mudalihamy* 3 C.L.J. 83 where Moseley , J. adopted the finding of Abrahams, C.J. Counsel for the appellant has also relied on the case of *Piyaratna Unnanse* vs. *Wahereke Sonuttara Unnanse* 51 N.L.R. 313 at 316 on the scope of section 189 of the Civil Procedure Code. I do not think this has any application to the situation which has arisen in this case.

As Wood Renton, J. observed in the case reported in 12 N.L.R. 263 the policy of the Maintenance Ordinance is that applications for maintenance should not be disposed of otherwise than upon an adjudication on the merits. In the instant case the applicant has pursued her application

zealously and she had appeared in Court on as many as 12 occasions. Unfortunately on the day in question she had been prevented by the after effects of an attack of typhoid fever from attending Court and she has called medical evidence to show that she was warded in Hospital and she had been discharged only 3 days before the Inquiry date. Some of the witnesses she had summoned for this date were present in Court.

Counsel for appellant submits that, if at all, after her application was dimissed she had only a right to file a fresh application provided it was not time barred. The prescriptive period being one year from the birth of the child and the Court having taken such a long period to dispose of this application she would have been shut out from pursuing a fresh application.

There is no provision in the Maintenance Ordinance to meet a case such as this. In my view in the absence of any statutory provision it is incumbent on this Court to make an order which will promote the ends of justice and not defeat them. I do not think the judgments relied on by Mr. Fernando stand in the way of much a course being adopted. In both the Criminal Procedure Code and Civil Procedure Code there is provision for a situation such as this. Surely, in an application for maintenance where the Court procedure has contributed to the long delay in its disposal some relief should be given to the applicant. As Mr. Kanagaratnam learned Counsel for the applicant submitted if this applicant is shut out from shewing cause of her absence from Court, this Court will be acting contrary to all principles of natural Justice.

I am inclined to agree. I can conceive of several situations such as this. For instance, if this woman was prevented from being present at the inquiry owing to an accident on her way to the Courts would the Magistrate be powerless to give her a hearing as to her absence and if the facts so warrant re-open proceedings, when there is no statutory provision preventing him doing so? Let me give another illustration. For instance, if this woman owing to a bus break down or the derailment of a train got late to attend Court and by that time the Magistrate had dismissed her application, would the Magistrate be precluded from re-opening proceedings? Numerous illustrations can be given to show that it would be quite contrary to all principles of Natural Justice to deprive a Magistrate of this right. I do not think it correct for us to conjure up hurdles when the Legislature has not thought it fit to introduce them.

In my opinion it is the imperative duty of a Magistrate to give a hearing to a party who wishes to shew cause and re-open proceedings in a fit case if such application to re-open proceedings is made within reasonable time — in all the circumstances.

I see no reason whatever to interfere with the Order of the learned Magistrate. I would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

Present: **Sirimane, J. and Weeramantry, J.**

T. MEERAMOHIDEEN *v.* PATHUMMA

S.C. 178/67 — *D.C. Batticaloa* 42/*P*

Argued on: 25th June, 1969
Reasons delivered on: 1st July, 1969

Co-owners — Prescription — Whether a co-owner has lost his rights as a result of prescriptive possession depends on facts of each case — Stranger purchasing entirety of co-owned property — In what circumstances can he acquire prescriptive title?

Civil Procedure Code, section 187*—Judgment — Reasons for decision necessary— Need to assess the oral evidence.*

Held: (1) That the question whether a co-owner has lost his rights as a result of prescriptive possession by another is a question of fact depending on the facts of each case.

(2) That where a stranger having purchased the entirety of a co-owned land possesses it in a manner inconsistent with the rights of any other co-owner, he can acquire prescriptive title to the land by such possession for a period of over ten years.

Per **Sirimane, J.**—"A trial Judge should assess the oral evidence and bring his mind to bear on the facts relevant to the dispute and give reasons for his decision of the dispute as required by section 187 of the Civil Procedure Code. A mere recital of the evidence, at the end of which the phrase "I accept the evidence of the plaintiff (or the defendant)" is really not a judgment within the meaning of the Code."

Followed : *Fernando* v. *Podinona*, (1955) 56 N.L.R. 491

C. Ranganathan, Q.C., with *A. Sivagurunathan*, for the defendant-appellants.

H. W. Jayawardene, Q.C, with *V. Arulambalam* and *G. S. Samaraweera*, for the plaintiff-respondent.

Sirimane, J.

This is an action for the partition of a piece of land, 16 perches in extent, depicted in plan X.

It is common ground that it originally belonged to one Pichche Umma, who on deed P1 of 1889, gifted it as a dowry to her daughter Mariampillai and her son-in-law, Ahamadu Lebbe.

There was one child by that union named Hadji Mohamadu. On the death of Mariampillai, her husband Ahamadu Lebbe had left this village and settled down in another village a couple of miles away and contracted a second marriage with a woman of that village named Asiath Umma. He had three children by his second marriage, and since the eldest was 72 years of age at the time he gave evidence at the trial in 1967, it is clear that Ahamadu Lebbe had left this village in about 1895. Thereafter he never possessed this land or claimed any rights in it.

One gathers from the evidence that it was Hadji Mohamadu, the only son by the first marriage, who actually possessed this piece of land and that is most probable as this was really a property which his mother received as dowry and his father had left the village and taken up residence elsewhere. He was, of course, only a co-owner in law together with his father but it was he who actually possessed the land for nearly 45 years until 1937. In that year, on deed P4, he sold the *entirety* to a complete stranger named Thambi Marikar, who entered the land *as sole owner*.

The evidence is overwhelming that Thambi Marikar possessed the entirety as his own. Ahamadu Lebbe had died and his children by the second bed never posssessed or claimed rights in this land at that time. Thambi Marikar demolished the old house and put up a new one. He built a boutique and sank a well, took the entire produce and paid the taxes to the Town Council in the character of sole owner. On mortgage bond D8 of 1943, he mortgaged the entirety and redeemed the mortgage in 1949.

Whether a co-owner has lost his rights as a result of prescriptive possession by another is question of fact depending on the facts of each case.

Where a stranger having purchased the entirety of a co-owned land possesses it in a manner inconsistent with the rights of any other co-owner, he can acquire prescriptive title to the land by such possesion for a period of over 10 years. I respectfully agree with the decision in *Fernando v. Podi Nona*, (56 NLR at 491) on this point.

Thambi Marikar in 1956 transferred a half share to his son, the first defendant and the other half share to his wife, the second defendant.

The plaintiff owned the land immediately to the south of the corpus in plan X. In 1958, the first and second defendants alleged that the plaintiff had encroached on their land (i.e. the corpus sought to be partitioned) and filed CR Case No 607/L against the plaintiff on 3.7.1958. They set out title to the entirety of the land. The plaintiff who was the only defendant in that case, filed answer on 3.11.1958 where she said that she was unaware of the title of the present first and second defendants. (That case was ultimately settled on an order made after an inspection by the Judge who found an encroachment). After filing answer, the plaintiff's brother had sought out the children

of Ahamadu Lebbe by his second bed and purchased undivided shares from them on 1.6.1959. These shares were transferred to the plaintiff on 4.10.1959 and the answer in Case 607/L amended on 10.11.1959.

This brief recital of facts is sufficient to show that Thambi Marikar had acquired prescriptive title to the land and that the plaintiff's purchase was a purely speculative one. The trial Judge had granted a decree for partition to the plaintiff on the footing that Ahamadu Lebbe's rights had devolved on his children by the second bed as well, and that they were still co-owners in 1959. It is against this order that the first and second defendants have appealed.

Our attention was drawn by counsel for the plaintiff-respondent to the evidence of Saibo Lebbe, a child of the second bed of Ahamadu Lebbe, who gave evidence for the plaintiff. Having admitted that he never had possession of the land and that Thambi Marikar possessed the entirety, he said at the very end of his evidence in re-examination that Thambi Marikar had told him at that time, meaning 1937, that he (Thambi Marikar) would buy his shares later; and also to the following question and answer in examination in chief:-

Q Did Thambi Marikar, while he lived, recognise you as a co-owner?

A Yes.

It was urged that the trial Judge had accepted the evidence led on behalf of the plaintiff.

This is the type of evidence that one comes across so often in our Courts from a vendor who has to justify a sale and evidence which has to be very critically examined when the other facts and circumstances strongly point to the contrary. I do not think however that it is correct to say that the trial Judge had really accepted this bit of evidence. In a judgment which is unsatisfactory in many respects, the Judge has failed to deal with the real matter in issue between the parties, as he should have done. The judgment runs into eight pages, the first seven of which contain a mere recital of the evidence led for the plaintiff and for the defendant, without any comment. He then says,

> "On the pedigree, it is quite clear that the plaintiff and others referred to, are only entitled to shares in this land. In fact, Thambi Marikar could have succeeded only to 131/266 shares in this land and nothing more."

Nobody denied that *on the pedigree* Hadji Mohamadu, the vendor to Thambi Marikar, was only a co-owner. But the question was whether the stranger who had purchased the entirety, had prescribed against the other co-owners. In regard to Thambi Marikar's possession, the Judge says:-

> "But it must also be borne in mind that Thambi Marikar had made extensive improvements to the land *in the honest belief that he was the sole owner of the property.*"

If he had accepted the evidence of Saibo Lebbe referred to above, he could not have reached the conclusion that Thambi Marikar honestly believed that he was the sole owner.

A trial Judge should assess the oral evidence and bring his mind to bear on the facts relevant to the dispute and give reasons for his decision of the dispute as required by section 187 of the Civil Procedure Code. A mere recital of the evidence, at the end of which the phrase "I accept the evidence of the plaintiff (or the defendant)" is really not a judgment within the meaning of the Code.

As stated earlier, I think it is quite clear that the plaintiff's brother's purchase on 1.6.1959 from persons who had lost their rights long years ago and the subsequent transfer of those rights to the plaintiff on 4.10.1959, were acts done merely for the purpose of contesting the case filed against the plaintiff by the first and second defendants for encroaching on their land.

The judgment and decree are set aside and the plaintiff's action is dismissed with costs, here and below.

Weeramantry, J.
I agree.

Appeal Allowed.

Present: **Wijayatilake, J.**

ELUVAITHEEVU NORTH CO-OPERATIVE CREDIT SOCIETY

v.

M. NALLALINGAM, CHIEF CLERK OF THE COURT OF REQUESTS, KAYTS

S.C. No. 94/67 — *C.R. No.* 8708

Argued on: 30th September, 1968
Decided on: 7th February, 1969

Co-operative Societies Ordinance (*Cap.* 124), *Section* 33 — *Stamp Ordinance* (*Cap.* 247), *Sections* 2, 8 — *Award by Arbitrator under Co-operative Societies Ordinance — Documents filed in Court by Co-operative Society to enforce Award — Are these documents liable to Stamp duty — Rule* 38(13) *of the Co-operative Societies Rules of* 1950.

After an Award of an Arbitrator under the Co-operative Societies Ordinance had been filed in the Court of Requests for enforcement in accordance with Rule 38(13) of the Co-operative Societies Rules of 1950, the learned Commissioner of Requests held, after inquiry, that the documents filed in Court were liable to Stamp Duty. The following were the documents.

Letter of Appointment
Award
Petition
Application for execution of Writ
Notice

It was submitted in appeal on behalf of the Society that Section 33 of the Co-operative Societies Ordinance exempted it from Stamp duty. Learned Crown Counsel on the other hand submitted that the documents referred to were neither "instruments" within the meaning of that section nor executed *by or on behalf* of the Society as required by that Section.

Held: (1) That none of those documents were liable to stamp duty.

(2) That the word "instruments" in section 33 of the Co-operative Societies Ordinance was wide enough to cover the word "documents" and that these documents had been executed on behalf of the Society within the meaning of this Section.

Per **Wijayatilake, J.** "In my opinion a statute such as the Stamp Ordinance should be strictly construed. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the Statute clearly imposes the obligation. Vide Maxwell on Interpretation of Statutes — 11th ed. p. 278. The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the Enactment and the object the legislature has in view."

Cases referred to: *Pinikahane Kahaduwa Co-operative Society Ltd.* v. *Herath* 59 N.L.R. 145.
Kandy Co-operative Urban Bank v. *Senanayake* 39 N.L.R. 352.
Fernando v. *Pieris* 39 N.L.R. 526.
Don Cornelis Appuhamy v. *Kiribanda* XII C.L.W. 166.

Authorities cited: Maxwell — *Interpretation of Statutes* 11th ed. 51, 278.

S. Sharvananda, with *P. Thuriappah*, for the appellant.

K. M. M. B. Kulatunga, Crown Counsel, for the respondent.

Wijayatilake, J.

The Appellant Society has been registered under the Co-operative Societies Ordinance, Chapter 124 as amended by Act No 21 of 1949. The business of the said Society includes granting of loans to its members. Two members of this Society namely T. Krisnapillai and K. Sivalingam had stood surety to V. Vadivelu, another member, who had obtained a loan of Rs 200/- at 10 per cent interest from this Society. They had failed to repay this loan and the Committee of the Society had in accordance with Section 53(1) of the Co-

operative Societies Ordinance and the Rules framed thereunder referred the dispute to the Assistant Commissioner of Co-operative Development for decision; who had in turn referred the matter to A. Tharmarajah for arbitration in pursuance of the powers conferred on him under Section 2(2) of the said Ordinance read with Order of the Minister appearing in Government Gazette No 10, 115 of 30.6.1953. The Arbitrator having inquired into the dispute in accordance with Rule 38(1) of the Co-operative Societies Rules had made his Award as required by Rule 38(9) and ordered the three members referred to above to pay the Society the sum of Rs 246/50 and interest. There was no appeal from this Award. The said Society by its representative. C. Thambo — Executor of Awards filed a petition before the Commissioner of Requests, Kayts, praying for an Order Nisi to the effect that the said Award be enforced in the same manner as a Decree of Court in accordance with Rule 38(13) of the Co-operative Societies Rules of 1950 and the Civil Procedure Code. The Award was accordingly made a Rule of Court and Order Nisi was issued against the three respondents. Order Nisi was served only on T. Krishnapillai, the 2nd respondent and he had stated in Court that he had no cause to show why writ should not issue against him. At this stage the learned Commissioner had observed that the Award and the other proceedings had not been stamped and he had directed the Chief Clerk, to report on the amount of deficiency of Stamp Duty. The Chief Clerk had filed his report shewing the deficiencies as follows:

Letter of Appointment	Rs.	1.00
Award	Rs.	1.00
Petition	Rs.	1.00
Application for execution of Writ	Rs.	1.00
Notice	Rs.	1.00
		5.00

The Society has raised objections and the learned Commissioner after Inquiry had ruled that all these documents are liable to Stamp Duty as reported by the Chief Clerk. The present Appeal is from this order.

Mr Sharvananda, learned Counsel for the appellant submits that the appellant being a registered Society Section 33 of the Co-operative Societies Ordinance exempts it from stamp duty. Section 33 provides as follows:

"Every registered society shall be exempt from —

(*a*) the stamp duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society, or by an officer, or member, and relating to the business of such society, or any class of such instruments are respectively chargeable; or

(*b*) any fee payable under the law of registration for the time being in force.

He submits that the word 'instrument' in this Ordinance includes the word 'document'. He has referred to the word 'documents' in Section 2 of the Stamp Ordinance, Chapter 247, to show that this word is synonymous with the word 'instruments' and it does not have a connotation distinct from it. He submits that it is clear that it is mere surplusage. Sections 4 and 8(1) & (2) too have been referred to in support of this submission.

Mr Kulatunga, learned Crown Counsel submits that the documents referred to are not 'instruments' within the meaning of this section and that they are not executed *by or on behalf* of the Appellant society. He has dealt with the procedure relating to an Award of Court being made a decree of Court and he submits that the documents occuring in this context are clearly not 'instruments' executed by or on behalf of the Society. He relies on the Divisional Bench cases of *Pinikahana Kahaduwa Co-operative Society Ltd v. Herath* 59 NLR 145 and *Kandy Co-operative Urban Bank v. Senanayake* 39 NLR 352 and Sections 91, 224 & 225 of the Civil Procedure Code and Rule 38 of the Co-operative Societies Rules 1950 Chapter 124, and exemption F(2) appearing at page 755 of the Stamp Ordinance. He submits that any exemption should be expressly stated and he has drawn my attention to the Land Acquisition Ordinance, Chapter 460 and also the Requisitioning of Land Ordinance, Chapter 462 and Resumption of Crown Land Ordinance, Chapter 455. He has also referred me to Sections 39(1) 41 and 43 of the Stamp Ordinance and to the Cases of *Fernando v Pieris* 39 NLR 526 and, *Don Cornelis Appuhamy v. Kiribanda* 12 CLW 166.,

Mr Sharvananda has further submitted that a registered Co-operative Society is virtually a body founded and fostered by the Government and therefore it would be contrary to the objects of both the Co-operative Societies Ordinance and the Stamp Ordinance to make these documents liable to duty.

In my opinion a statute such as the Stamp Ordinance should be strictly construed. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the Statute clearly imposed the obligation. Vide Maxwell on *Interpretation of Statutes* — 11th ed p. 278. The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the Enactment and the object the legislature has in view. Vide — Maxwell page 51. In my view the word 'instruments' in Section 33 of the Co-operative Societies Ordinance is wide enough to cover the word 'documents'. An instrument is a formal document especially of a legal character. In the instant case the documents in question have come into being in pursuance of a dispute which had arisen between the society and some of its members and the procedure adopted is recognised by our Law. In the circumstances it would be highly artificial and hyper-technical to hold that these 'documents' are not 'instruments' as contemplated in Section 33 and that they have not been executed on behalf of the appellant society.

I would accordingly set aside the order of the learned Commissioner and hold none of these documents are liable to Stamp Duty. The petitioner had made the Chief Clerk of the Court of Requests, Kayts respondent to this Appeal. In the circumstances I make no order as to costs.

Appeal allowed.

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

THAHIR *v.* SHAFI

Application for a Mandate in the nature of a Writ of Certiorari and/or Mandamus on A. M. Shafi (Quazi) Quazi Court, Ratnapura and another

S.C. 403/1968

Argued and decided on: 7th December, 1968

Muslim Marriage and Divorce Ordinance, Section 64(1) *Enforcement Order under— Duty of Qua zi inquiry after notice to respondent before making order.*

Held: That before an enforcement order under Section 64(1) of the Muslim Marriage and Divorce Ordinance issues, a Quasi should notice the respondent and inquire into any objections he may raise.

M. S. M. Nazeem, for the petitioner.

Sirimane, J.

The first respondent (a Quazi) has issued an enforcement order to the Magistrate of Avissawella on 3.8.68, to recover a sum of Rs 1,050/- from the petitioner, as arrears of maintenance due to his daughter at Rs 12.50 per month from 3.6.61 to 7.6.68. No inquiry had been held by the first respondent, and no notice given to the petitioner, before the order was made.

There is some *prima facie* evidence, which indicates that the sum of Rs 1,050/- is incorrect. In July 1968, the second respondent had moved for enhancement of maintenance for her daughter and the amount was enhanced from Rs 12.50 to Rs 25/- There was no complaint by her that there were any arrears of maintenance from 1961 onwards. Before an enforcement order under Section 64(1) of the Muslim Marriage and Divorce Ordinance issues a Quazi should notice the respondent and inquire into any objections he may raise.

The order of 3.8.68 is quashed and the first respondent is directed to hold an inquiry after notice to the petitioner, before an enforcement order is issued.

Pandita-Gunawardene, J.

I agree.

Order quashed.

END OF VOLUME LXXVI

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දයකමීල මුලදීම ගෙවිවොත් – කාණ්ඩයකට (ඉංග්‍රීසි වාතීාත් සමග) රු. 17/50 පසුගිය කාණ්ඩයක මිල රු. 20/00.
පිටපත් ලබාගත හැක්කේ නොා: 50/3, සිරිපා පාර, හැවලොක් ටවුම—කොළඹ 5.

පාර්ශ්ව කාරයින්ගේ නාම

අපරාධ නඩු සංවිධාන සංග්‍රහය

අපරාධ නඩු විධාන සංග්‍රහය — 347 සහ 357 වගන්ති — ප්‍රාථමික නඩු විභාගයෙන් පසු දෙන ලද, චෝදිතයන් නිදහස් කර හැරීමේ නියෝගය නැවත සලකා බැලීමට කළ ඉල්ලීම — ශ්‍රේෂ්ඨාධිකරණයේ පරිශෝධන බලතල — ප්‍රාථමික නඩු විභාග සම්බන්ධයෙන් නීතිපතිතුමාගේ බලතල හා කාර්යයන්

තීන්දුව: (1) ප්‍රාථමික නඩු විභාගයෙකින් පසු චෝදිතයන් නිදහස්කර හැරීමේ නියෝගයන් ඇතුළුව මහේස්ත්‍රාත් වරයකු විසින් දෙන ලද ඕනෑම නියෝගයක් අභිමතානුකූලව පරිශෝධනය කිරීමේ බලතල කිසිදු සැකයක් නැතිව ශ්‍රේෂ්ඨාධිකරණයට ඇත.

(2) මෙම බලතල භාවිතා කරනු ලබන්නේ නම් කළ යුත්තේ එසේ නොකිරීමෙන් නියත අසාධාරණයක් සිදුවිය හැකි ඉතාම අති විශේෂ වූ නඩුවලදීය.

පූසාරි කෝවින්දන් වෙලු එ. රාමසාමිගේ පුත්‍රයා සහ තවත් අයෙක් 2

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අධිකරණ බලය

නඩත්තුවක පැමිණිලිකාරිය නොපැමිණි නිසා නිෂ්ප්‍රභා වූ නඩුවක් නැවත ඇසීමට මහේස්ත්‍රාත්වරයාට බලය තිබෙද?

ඇප පිට මුදා හැරීම යටතේ බලනු 1

අර්ථ නිරූපණය කිරීම

ඔප්පුවක අර්ථ නිරූපණය කිරීම — හවුල් අයිතිකරුවන් විසින් දෙන ලද පොරොන්දු සින්නක්කරයක් — විකුණුම්කරුවන් විසින් එම දේපොළ ආපසු මිල දී ගැනීම — ඔවුන් විසින්ම දුන් දෙවන පොරොන්දු සින්නක්කරයක් —ඔවුන්ගේ කොටස් වෙන් වශයෙන් සඳහන් නොකොට එයම ආපසු පැවරීම — ඔවුන්ගේ අයිතිවාසිකම් ප්‍රමාණයේ වෙනස්වීමක් සිදුවිය හැකිද යන්න.

තීන්දුව: පොරොන්දු සින්නක්කර ඔප්පුවකින් පවරා දෙන ලද දේපොළක් විකුණුම්කරුවන් විසින් ආපසු මිලට ගත් කලක, එහි කොටස් ප්‍රමාණයේ වෙනස්වීමක් ගැන සඳහනක් නොමැති නම්, විකුණුම්කරුවන්ගේ වාසියට ලියැවෙන ඔප්පුවේද එම දේපොළ ආපසු දෙන ලද්දේ ඔවුන් විසින් සින්නක්කර පොරොන්දු ඔප්පුව ලියන අවස්ථාවේ තිබූ කොටස්වල අයිතිවාසිකම් සහිතව යයි එසේ පෙරළා පැවැරීමේ ඔප්පුවටද අර්ථ නිරූපණය කළ යුතුයි.

ගාර්ලිස් සිඤ්ඤෝ එ. ගිගර් සිඤ්ඤෝ සහ තවත් අය ... 19

ආදායම් බදු පණත

ආදායම් බදු ආඥා පනතේ 18(1) (ඊ) උප වගන්තිය යටතේ සහන — තක්සේරුවන්නා විසින් අධ්‍යාපන ආයතනයක ඉගෙන ගන්නා යැපෙන්නන්ට ආධාර කිරීම — අධ්‍යාපන ආයතනයෙන් බැහැරව පදිංචි වී සිට අධ්‍යාපනය ලබන යැපෙන්නන් වෙනුවෙන් තක්සේරුවන්නාට සහන හිමිවේද? — අධ්‍යාපන ආයතනයක් තුල නඩත්තු කිරීම යන්නෙහි අර්ථ විවරණය.

ආදායම් බදු ආඥා පනතේ 18(1) (ඊ) යන වගන්තිය යටතේ තක්සේරු වන්නා තමාගෙන් යැපෙන සහෝදරයන් දෙදෙනකු සහ සහෝදරියක වෙනුවෙන් සහන ඉල්ලා සිටියේය. ඉදාල තක්සේරු වර්ෂයන්හි ඉහත සඳහන් යැපෙන්නෝ අධ්‍යාපන ආයතනයෙන් බාහිර ව පදිංචි වී සිට අධ්‍යාපනය ලැබූ අතර තක්සේරු වන්නා විසින් නඩත්තු කරනු ලැබූහ. රජයේ සේවකයකු වන තක්සේරු වන්නා ඉදාල කාල පරිච්ඡේදයෙහි ගාල්ල හා පුත්තලම යන නගරවල නතරව සිටියේය.

18(1) (ඊ) යන උප-වගන්තිය යටතේ දෙවර්ගයක පුද්ගලයන් වෙනුවෙන් සහන ලබාගත හැක. එනම්: (ඒ) තක්සේරු වර්ෂයට පෙර අවුරුද්ද පුරා තක්සේරු වන්නා සමඟ ජීවත්වෙමින් ඔහු විසින් නඩත්තු කරනු ලැබූ හෝ (බී) සුබාගාරයක, රක්ෂස්ථානයක හෝ අධ්‍යාපන ආයතනයක නඩත්තු කරනු ලැබූ අය වෙනුවෙනි. මෙම නඩුව මෙයින් යැපෙන්නන් සම්බන්ධව (බී) වර්ගයට අයත් වන්නකි. ආදායම් බදු පනතේ 78(1) යන වගන්තිය යටතේ ශ්‍රේෂ්ඨාධිකරණයේ උපදෙස් සඳහා යොමු කර ඇති නඩුවක ඉහත කී යැපෙන්නන් අධ්‍යාපන ආයතනයෙන් බැහැරව සිට අධ්‍යාපනය ලැබූ හෙයින් ''අධ්‍යාපන ආයතනයක් තුළ නඩත්තු කරනු ලැබූ'' යන අර්ථය ඔවුන් වෙනුවෙන් යෙදිය නොහැකි බවට රජය වෙනුවෙන් පෙනී සිටි අධිනීතිඥවරු තර්ක කළහ.

තීන්දුව: ආදායම් බදු ආඥා පනතේ 18(1) (ඊ) යන උප වගන්තියේ 'නඩත්තු' (Maintained) යන වචනය අධ්‍යාපන ආයතනයක් සම්බන්ධයෙන් යෙදීමෙදී අධ්‍යාපන ආයතනයක් තුළ නතරකරනු ලැබූ යන අර්ථයට වඩා එහි ඉගෙනීමට ආධාර කළ යන අර්ථයෙහි යෙදේ. එම නිසා තක්සේරු වන්නාට එකී සහනය හිමිවිය යුතුය.

විරමන්ත්‍රී විනිශ්චයකාරතුමා: ''මෙබඳු ප්‍රශංසනීය කටයුත්තක නිරතව එය කරගෙන යන තක්සේරු වන්නකුට ඒ සඳහා ආධාර කිරීම සහ අනුකූලතාවය දැක්වීම මැනැවැයි ව්‍යවස්ථාදායක මණ්ඩලය විසින් සලකා ගනු ලැබීම, මෙවැනි කරුණකින් එනම් යැපෙන්නකුගේ නියම කායික පදිංචිය අධ්‍යාපන ආයතනයෙන් බැහැරය කියා නිෂේධ තත්වයකට පැමිණවීම ඉතාම දුෂ්කර කාර්යයක් වනු ඇත.''

දේශීය ආදායම් බදු කොමසාරිස් එ. ඒ. ඇස්. නවරත්නරාජා 23

ඇප පිට මුදා හැරීම

ඇප පිට මුදා හැරීමට කළ ආයාචනයක් — 1966 යේ අංක 18 දරණ හිංසාකාරී ආයුධ පනත යටතේ හා මිනිමැරීමට තැත් කිරීමේ අපරාධවලට චෝදනා ලැබූ දෙදෙනකුගේ ආයාචනයක් — හිංසාකාරී ආයුධ පනතේ 10 වන වගන්තිය අධිකරණ ආඥා පනතේ 31 වන ඡේදය කෙරෙහි කෙතරම් දුරට බලපෑමක් ඇතිකර ඇත්ද? — ශ්‍රේෂ්ඨාධිකරණයේ ඇප පිට මුදාහැරීමේ බලතල කෙරෙහි කිසිම බලපෑමක් ඇති නොකරයි.

තීන්දුව: (1) ඇප පිළිබඳ ඇති පැනවීම් කෙරෙහි 1966 අංක 18 දරණ හිංසාකාරී ආයුධ පනතේ 10 වැනි වගන්තිය නිසා අධිකරණ ආඥා පනතේ 31 වැනි ඡේදයේ ඇති බලතල වලට කිසිම හානියක් නැත.

ඔප්පු

හවුල් අයිතිකරුවන් විසින් දෙන ලද පොරොන්දු සින්නක්කරයක්.

කුඹුරු පණත

කුඹුරු පනත, 3 වන හා 63 වන වගන්ති — අද ගොවියකුගේ අයිතිවාසිකම් — බෙදුම් නඩු තීන්දුවක තමාගේ අයිතිවාසිකම් විශේෂ කොට සඳහන් කරවා ගැනීමට ඔහුට අයිතියක් තිබේද?—1951 බෙදුම් නඩු ආඥා පනතේ 48 වන ඡේදය.

තමාගේ සොහොයුරා වන පැමිණිලිකරු හා සමග කුඹුරක දෙකෙන් පංගුවක අයිතිකරුවූ වගඋත්තරකරු එකී සොහොයුරාගේ කොටස පිළිබඳව අද ගොවියා ද වූයේය.

යථෝක්ත කුඹුර වෙන්කර ගැනීම සඳහා පැමිණිලිකරු මෙම නඩුව පැවරිය. පැමිණිලිකරුගේ කොටසේ අද ගොවියා වශයෙන් වගඋත්තරකරුට ඇති අයිතිවාසිකම් පැමිණිලිකරුට බෙදා වෙන් කළ යුතු ඉඩම් කොටසේ අයිතියට බල පාන අවතිරයක් ලෙස සලකා බෙදුම් නඩු තීන්දුවේ එය විශේෂ කොට සඳහන් කරවා ගත හැකි ද යන ප්‍රශ්නය මේ නඩුවේ දී පැන නැගින.

තීන්දුව: (1) අද ගොවියකුගේ අයිතිවාසිකම් යථා පරිදි බෙදුම් නඩු තීන්දුවක විශේෂ කොට සඳහන් කළ හැකිය.

(2) "මොන යම් ආකාරයකින් හෝ පැන නගින කුමන අයිතිවාසිකමක් හෝ" යැයි බෙදුම් නඩු ආඥා පනතේ 48 වන ඡේදයේ 'අවතිරය' යන්න විවරණය කරමින් දැක්වෙන පාඨය මෙම තීරණය පුළුල් ලෙස තහවුරු කරයි.

බෙදුම් නඩු ආඥා පණත

48 වෙනි ඡේදය

මිලපාලන පණත

මිල පාලන පනත — පාලන මිලට වැඩියෙන් පාන් ගෙඩියක් විකුණුවේ යයි චෝදනාවක් — එම චෝදනා පත්‍රයේ පාන් විශේෂය එනම්, සුදු පාන්, පරළු පාන් ආදී වශයෙන් විස්තරව සඳහන් විය යුතුද?

තීන්දුව: චෝදනා පත්‍රයේ පාන් විශේෂය එනම්: පරළු පාන්, සැන්ඩ්විච් පාන් ආදී වශයෙන් විස්තර සඳහන් නොකිරීම පාන් ගෙඩියක් පාලන මිලට වැඩි ගණනකට වික්කේ යයි චෝදනා පිට චෝදනා ලැබුවකු වරදකරු කිරීමට බාධාවක් නොවේ.

පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා: "පොදු ආහාර ද්‍රව්‍යයක් වශයෙන් පාන්, කාලාන්තරයක් තිස්සේ ප්‍රකටව තිබෙන්නකි. මිනිසකු පාන් රාත්තලක් ඉල්ලූ විට ඔහු බලාපොරොත්තු වන්නේ කිමෙක් ද යන්න තේරුම් ගැනීම එතරම් අමාරු හෝ ගුඪ හෝ නොවේ. එය දුඹුරු පාන් හෝ "ළා රතු" පාන් හෝ වෙන විශේෂ පාන් වර්ගයක් හෝ නොව සුදු පාවින් යුත්, පොදුවේ දන්නා පාන්ය. වෙන ඕනෑම පාන් වර්ගයක්, නියම වශයෙන්, විසිතුරු කළ වර්ගයක් වනු ඇතැයි මම අපේක්ෂා කරමි; විසිතුරු කළ යන්නෙහි තේරුම සාමාන්‍ය දෙයින් බැහැරට යාමයි."

මිල පාලන පණත — 4 වන ඡේදය — පාලන මිලට වැඩි මිලකට බොම්බායි ලූණු විකිණීම — දෙනියායේ කෙලින් විදියේ විකුණන ලදැයි චෝදනා එල්ලවීම — පාලන මිලට වැඩි මූදලකට විකිණීම දඬුවම් ලැබිය හැකි වරදක් වන ප්‍රදේශය තහවුරු කිරීමට අපොහොසත් වීම — එක් එක් අවස්ථාවල කොළඹ මහා නගර සභා ප්‍රදේශයේ විකිණීම් පාලනය කෙරෙන පාලන නියෝග බලා ද්‍රව්‍යයක පාලන මිල සොයා දැන ගැනීමට වෙළෙඳුන්ට සිදුවීම — මේ නිසා පාලන නියෝග අයථා නියෝග බවට පෙරළේද යන්න — ආහාර පාලන පරීක්ෂකයකු විසින් බොම්බයි ලූණු ගැන දුන් රපෝර්තුවක් පරීක්ෂකයා නොකැඳවා සාක්ෂියක් ලෙස පිළිගැනීම — එය පිළිගත හැකි සාක්ෂියක් ද යන්න — එබදු පරීක්ෂකයකු කෙතරම් දුරට විශේෂඥයකු ලෙස ගැනේද යන්න.

උප-ලේඛනයේ දෙවන තීරුවේ දෙනියායේ ගම්සභා ප්‍රදේශයේ බල පවත්වන බව සඳහන්ව ඇති, පී4 දමා ලකුණු කරන ලද මිල පාලන නියෝගයේ නියමිත පාලන මිලට වැඩි මිලකට දෙනියායේ කෙලින් විදියේ අංක 133 දරණ ස්ථානයේ බොම්බායි ලූණු විකිණීම ගැන චෝදිතයා වරදකරු විය.

දෙනියායේ කෙලින් විදියේ අංක 133 දරණ ස්ථානය දෙනියායේ ගම්සභා ප්‍රදේශය තුළ පවත්නා බව ඔප්පු කිරීමට තිබූ එකම සාක්ෂිය දෙනියායේ කෙලින් විදියේ අංක 133 දරණ ස්ථානය මාතර පරිපාලන කොට්ඨාශය තුළට ඇතුලත් වේ යයි ආහාර පාලක දෙපාර්තමේන්තුවේ ලිපිකරුවකු කී සාක්ෂිය පමණකි.

තීන්දුව: (1) පාලන මිලට වැඩි මිලකට බොම්බායි ලූණු විකිණීම වරදක් ලෙස ගැණෙන ප්‍රදේශයක මෙම විකිණීම කළ බව ඔප්පු කිරීමට පැමිණිලි පක්ෂයට නොහැකි විය.

(2) මිල පාලන පණතේ 4 වන ඡේදයෙන් ආහාර පාලකයාට වැඩිම මිල නියම කිරීමට ඇති අයිතිවාසිකම ගැන මිස, එය නියම කළ යුත්තේ කෙසේ ද යන්න ගැන පැණ වූවක් නොවන නිසා වෙළෙඳුන්ට කිසියම් නියමිත ප්‍රදේශයක තමාගේ ද්‍රව්‍යවලට අයකළ හැකි මිල ගණන ඒ ඒ අවස්ථානුකූලව කොළඹ නගර සභා ප්‍රදේශයේ බලපාන මිල පාලන නියෝග වලින් සොයා දැන ගත යුතුය යන පැණවීම ඇතුලත් වන පී4 දමා ලකුණු කරන ලද නියෝග නීතිය අනුව සලකන විට අයථා නියෝගයක් නොවේ.

(3) අපරාධ නඩුවක නීතිවේදියකු විසින් කරන ලද පිළිගැනීමක් නිසා පැමිණිලි පක්ෂය විසින් උසාවිය සැඟීමට පත් කිරීමට යුදසූ යාක්ෂි ඉදිරිපත් කිරීමම තමන් පිට පැවරෙන කාර්ය භාරයෙන් එම පක්ෂය නොමිදෙන බැවින් ප්‍රශ්නයට භාජන වී ඇති ලුණු බොම්බයි ලුණු බව ඔප්පු කිරීම පිණිස "කැමැත්ත පිට" යයි කියමින් එවකට එහි නොසිටි ආහාර පරීක්ෂකවරයකුගේ වාර්තාවක් උගත් මහේස්ත්‍රාත්වරයා යාක්ෂියක් වශයෙන් පිළිගැනීම යදොස් ක්‍රියාවකි.

එච්. කේ. ජිනදාස එ. ඒ. ෂි. යූ. එදිරිසූරිය, ආහාර සහ මිල පාලන පරීක්ෂක 5

මුද්දර ආඥා පනත

මුද්දර ආඥා පනත (පරිච්ඡේද 247) 31, 33 සහ 55 යන ඡේද — (පරණ ආඥා පනතේ 26, 27 සහ 57 ඡේද) — 1947 දී ලියැවුණු පැවැරීමේ ගිවිසුම් ඔප්පුවක මුද්දර ගාස්තු අඩුකම — එය ගෙවීමට බැඳී ඇත්තේ කවුද? දීමනාකරු ද? — ගැණුම්කරු ද? — එක් අතෙකින් 26 සහ 27 (දැන් 31 සහ 33) යන ඡේදවල ඝට්ටනයක්, අනික් අතින් 1956 අංක 19 දරණ සංශෝධන ආඥා පනතට පෙර පැවැති 51 වන ඡේදය හා ගැටීමක් — එය අතීතයට ද බලපවත්වමින් ක්‍රියා කරයි ද? — වැසියන් වෙත බදු බර පටවන ආඥා පනත්වල භාෂාව පැහැදිලිව තිබීමේ අවශ්‍යතාවය.

මෙය වෙළෙඳ ව්‍යාපාරයක් පැවරීම සඳහා 1947 දී ලියැවුනු ඔප්පුවක හිඟ මුද්දර ගාස්තු වශයෙන් රු: 3,307/- ක් අයකර ගැනීම සඳහා දේශීය ආදායම් බදු කොමසාරිස් වරයා විසින් කරන ලද ඉල්ලීමකි. මෙම මුදල උසාවියකින් නියම වූ දඩ මුදලක් මෙන් අය කර නොගත යුත්තේ ඇයි ද යන්නට සැහෙන හේතු දැක්වීමට ගැනුම්කරු වන පෙත්සම්කරු අසමත් වී ඇතැයි තීරණය කළ උගත් මහේස්ත්‍රාත්වරයා එම මුදල ගෙවා දමන ලෙසත්, නො එසේ නම් හය මාසයක් බරපතල වැඩ ඇති සිරදඬුවමක් විඳින ලෙසත් පෙත්සම්කරුට නියම කළේය.

මෙම නියෝගය පුනරීක්ෂණය කරන ලෙස පෙත්සම්කරු ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලුම් කර සිටී.

තීන්දුව: (1) මුද්දර ආඥා පනතට 55(3) වැනි ඡේදය එකතු කළ වර්ෂ 1956 අංක 15 දරණ සංශෝධන ආඥා පනත අතීතයට බලපවත්වන සේ ක්‍රියාත්මක නොවේ. මේ නිසා එච්. ඒ. ද සිල්වා විනිශ්චයකාරතුමා විසින් ගැබෙල් එ. මුද්දර කොමසාරිස් 54 (න.නි.වා. 231) යන නඩුවේ දී ප්‍රකාශ වුනු මූල ධර්මය මේ නඩුවට ගැලපේ. එනම් සාමාන්‍ය වශයෙන් බලපවත්වන 51 වැනි (දැන් 55) මුද්දර ආඥා පනතේ ඡේදය එම ආඥාපණතේ 26 හා 27 (දැන් 31 හා 33) වැනි ඡේදවල අඩංගු විශේෂ ව්‍යවස්ථාවන් පාලනය නොකරන වගයි.

(2) එම නිසා මුද්දර ආඥා පනතේ 31 වන වගන්තිය යටතේ මුද්දර ගාස්තු ගෙවිය යුතු වන්නේ පැවැරුම් ලාභියා විසිනි. පවරන්නා වන පෙත්සම්කරු එම මුදල ගෙවීමට බැඳී නැත.

ඩී. රත්නසේකර එ. දේශීය ආදායම් බදු කොමසාරිස්, කොළඹ 7

දික්කසාද

දික්කසාදයක් — ද්වේෂ සහගත ලෙස අත්හැර යාම — වගඋත්තරකාරිය 1949 දී අනාචාරයේ හැසිරී එම මිනිසා සමඟ ඉන්පසු ජීවත් වූ බවට පැමිණිලිකරු දී ඇති අනභියෝගික සාක්ෂිය — දැන් ඇයට ඔහු ගෙන් දරුවෙකි — පැමිණිලිකරු රෝගාතුරව සිටි කාලය තුළ ගැහැනියක් ඔහුව රැක බලාගත් අතර ඇය ඔහුගේ අනියම් බිරිය වී දරුවන් තිදෙනෙක් ලැබීම — නඩු පැවරීමට පමාවීම ගැන හේතු දක්වා පැහැදිලි කිරීම — දික්කසාදයක් නොදී සිටීමේ උසාවියට ඇති අභිමතය — එය පැමිණිලිකරුගේ වාසියට පාවිච්චි කළ යුතු ද? — සිවිල් නීති විධිවිධාන සංග්‍රහයේ 602 වැනි වගන්තිය.

මේ වූ කලී භාර්යාවට විරුද්ධව ද්වේෂ සහගත අත්හැර යාමේ හේතුව උඩ ස්වාමිපුරුෂයා විසින් ගෙනෙන ලද දික්කසාද නඩුවක් ඉවත දමමින් දෙන ලද තීන්දුවකින් කරන ලද අභියාචනයකි. පැමිණිලිකරුගේ අනභියෝගික සාක්ෂිය අනුව දෙපාර්ශ්වය අතර විවාහය සිදුවූයේ 1943 ජූලි මස 7 වැනි දිනය. වගඋත්තරකාරිය 1949 දී අනාචාරයේ හැසුරුනු අතර, ඒ මිනිසා සමඟ ඉන්පසු ද ජීවත් වෙමින් දරුවකු ලැබුවා ය. මේ නඩුව පැවරීමේ දී පමාවක් ඇතිවූයේ රෝගාතුරවීම, රාජකාරී යේදී තැනින් තැනට ස්ථාන මාරු රාශියක් ලැබීම, මීල මුදල් හිඟකම, වගඋත්තරකාරිය සිටින්නේ කොහිදැයි සොයා දැන ගැනීමට නොහැකිවීම යනාදී හේතූන් නිසාය. පැමිණිලිකරු අවුරුදු එකහමාරක් පමණ කාලයක් තුල ඔත්පලව සිටි අතර එම කාලයේ දී වෙනත් ගැහැණියක් ඔහු සොයා බලා ගත්තා ය. ඇගෙන් ඔහුට දරුවෝ තිදෙනෙක් සිටිති. ඔහු මේ නඩුව පැවරුවේ මෙම දරුවන්ට අනාගතයක් නොමැති හෙයිනි.

තීන්දුව: (1) මේ කරුණු අනුව මෙම විවාහය සම්පූර්ණයෙන් ම බිඳී ගොස් ඇති බව පැහැදිලි වන අතර, සිවිල් නීති විධිවිධාන සංග්‍රහයේ 602 වැනි වගන්තියේ අතුරු විධානය යටතේ උසාවිය වෙත පැවරී ඇති අභිමතය පැමිණිලිකාර ඇපැල්කරුට පක්ෂව පාවිච්චි කළ යුතුයි.

(2) දරුවන්ගේ මෙන් ම ඔවුන් සමඟ ජීවත්වන ගැහැණියගේ ද යහපත සඳහා මෙන් ම වගඋත්තරකාරියගේ සහ ඇගේ දරුවාගේ ද යහපත සඳහාත් පැමිණිලිකරුට ඔහුගේ භාර්යාව ගෙන් දික්කසාදයක් දෙමින් නයිසයි ආඥාවක් නිකුත් කළ යුතුය.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා: "මේ විවාහය අභාවයට පත් වී ඇති එකක් බව අභියෝග කළ නොහැකි කරුණකි. විනිශ්චයකරුවකු කෙරෙහි (පිරිනැමී) ඇති අභිමතය පාවිච්චි කිරීමට ප්‍රතික්ෂේප කිරීමෙන් කලෙක පරිශුද්ධවූත් තවදුරටත් පරිශුද්ධ නොවන්නාවූත් විවාහ බන්ධනයක් අපරිශුද්ධ වධ බන්ධනයක් බවට පත් කිරීම විවාහයේ ගෞරවනීයත්වය ආරක්ෂා කිරීමක් නොව, එය සමව්වලයට භාජනය කිරීමක් යැයි මට හැඟේ. එය පොදු මහජන ශුභ සිද්ධියට ද අදාල නොවේ. මක්නිසාද යත් කෙනකු 'අවංක විවාහ බන්ධනයක ගෞරවනීයත්වය' ගැන සිතීමේදී අප ජීවත් වන සමාජය දෙස බලන ආකාරය ගැන ද කල්පනා කළ යුතුයැයි මට සිතෙන හෙයිනි."

එච්. ජෝන් පෙරේරා එ. එච්. මාතුපාලි 15

නඩත්තු නඩු

නඩත්තු නඩුවක් — විමසීම දිනයේදී ඉල්ලුම්කරු නොපැමිණීම — ඉල්ලීම නිෂ්ප්‍රභා කිරීම — ඉන්පසු එම නඩුව නැවත ඇසීමට මහේස්ත්‍රාත් තුමාට අධිකරණ බලය තිබේ ද?

තීන්දුව: නඩත්තු නඩුවක ඉල්ලුම්කරු නඩු විභාග දිනයෙහි ඉදිරිපත් නොවීමෙන් එය නිෂ්ප්‍රභා වූ විට සෑහෙන කාලයක් ඇතුලත, ඇගේ නොපැමිණීමට හේතු ඉදිරිපත් කර නැවත නඩුව ගෙන යාමට ඉල්ලුම් කළොත් සුදුසු අවස්ථාවල නඩුව නැවත ඇසීමට තහනම් පැනවීමක් නොමැති හෙයින් එය ඇසීම මහේස්ත්‍රාත්තුමාගේ අවශ්‍ය යුතුකමකි.

කේ. ඇම්. සෙනෙවිරත්න එ. කේ. පොඩිමැණිකේ ... 26

සිවිල් නඩු විධාන සංග්‍රහය

602 ඡේදය

දික්කසාද ගිරිභය යටතේ බලනු 15

හිංසාකාරී ආයුධ පණත

ඇප පිට මුදහැරීම යටතේ බලනු 1

ගරු වීරමන්ත්‍රී, විනිශ්චයකාරතුමා ඉදිරිපිට

ඔගස්ටින් පෙරේරා එ. ඇටෝනි ජනරාල් තුමා

ඉල්ලුම් පත්‍ර අංකය 166/1968 — මහෙස්ත්‍රාත් උසාවිය අංක 20978

විවාදකර තීන්දු කළ දිනය: 1968, ජූනි 20 වැනි දා

ඇප පිට මුදා හැරීමට කළ ආයාචනයක් — 1966 යේ අංක 18 දරණ හිංසාකාරී ආයුධ පනත යටතේ හා මිනීමැරීමට නැත් කිරීමේ අපරාධවලට චෝදනා ලැබූ දෙදෙනකුගේ ආයාචනයක් — හිංසාකාරී ආයුධ පනතේ 10 වන වගන්තිය අධිකරණ ආඥා පනතේ 31 වන ඡේදය කෙරෙහි කෙතරම් දුරට බලපෑමක් ඇතිකර ඇත්ද? — ශ්‍රේෂ්ඨාධිකරණයේ ඇප පිට මුදාහැරීමේ බලතල කෙරෙහි කිසිම බලපෑමක් ඇති නොකරයි.

තීන්දුව: (1) ඇප පිළිබඳ පැනවී ඇති පැනවීම් කෙරෙහි 1966 අංක 18 දරණ හිංසාකාරී ආයුධ පනතේ 10 වෙනි වගන්තිය නිසා අධිකරණ ආඥා පනතේ 31වන ඡේදයේ ඇති බලතලවලට කිසිම හානියක් නැත.

(2) එම නිසා හිංසාකාරී ආයුධ පනතේ චෝදනා ලැබූ කෙනකු ඇප පිට මුදාහැරීමට කරන ආයාචනයක් පිළිබඳව ද අධිකරණ ආඥා පනතේ 31 වන ඡේදයේ පැනවීම්වලට අනුව ශ්‍රේෂ්ඨාධිකරණය වෙත එළඹෙන වෙනත් ආයාචනා ලෙස සැලකිය යුතුයි.

ඇස්. ඩී. පර්සි වැලෙන්ටයින්, පෙත්සම්කරුවන් වෙනුවෙන්.

ඇල්. ඩී. ගුරුස්වාමි (රජයේ අධිනීතිඥ), නීතිපතිවරයා වෙනුවෙන්.

වීරමන්ත්‍රී විනිශ්චයකාරතුමා:

මෙය වර්ෂ 1966 අංක 18 දරණ හිංසාකාරී ආයුධ පනත යටතේ චෝදනා එල්ල කරන ලද නැනැත්තන් දෙදෙනකු විසින් ඉදිරිපත් කරන ලද අභියාචනයෙකි. මෙම චෝදිතයන් දෙදෙනාට විරුද්ධව මිනීමැරීමට නැත් කිරීමේ චෝදනාවක් ද එල්ල වී තිබේ.

මෙම ඉල්ලීම හිංසාකාරී ආයුධ පනතේ 10වන ඡේදයට අනුව කරන ලද ඉල්ලීමක් මිස, අධිකරණ ආඥා පනතේ 31 වන ඡේදය යටතේ කරන ලද ඉල්ලීමක් නොවන ලෙස සැලකිය යුතුයැයි උගත් රජයේ අධිනීතිඥවරයා කරුණු සැළකරයි. හිංසාකාරී ආයුධ පනතේ 10වන වගන්තියෙන් අධිකරණ ආඥා පනතේ 31වන ඡේදයේ සඳහන් පරිදි ඇප පිළිබඳව පැනවී ඇති පැනවීම් වලට කිසිම බලපෑවැත්වීමක් නොකෙරී ඇති සේ මට පෙනියේ. හිංසාකාරී ආයුධ පනතේ 10වන ඡේදයේ පැනවීම්වලින් කෙරෙන්නේ එම පනතේ පැනවීම්වලට අනුව චෝදනාවන් යමෙකුට විරුද්ධව ඉදිරිපත් කළ විට, ශ්‍රේෂ්ඨාධිකරණයට හැර වෙන කිසිම අධිකරණයකට එම චෝදිතයා ඇප පිට මුදා හැරිය නොහැකි බව මිස, අධිකරණ ආඥා පනතේ 31 වන ඡේදයේ පැනවීම්වලට අනුව සාමාන්‍ය ලෙස දිය හැකි නියෝගයකින් බැහැරව කටයුතු කිරීමක් කළ යුතුය යන්න පැනවීම නොවේ. එම නිසා අධිකරණ ආඥා පනතේ 31වන ඡේදයේ පැනවීම්වලට අනුව ශ්‍රේෂ්ඨාධිකරණය වෙත එළඹෙන අනිත් ආයාචනා ලෙස, මේ කරුණද සළකා බැලිය යුතුයි.

චෝදිතයා ඇප පිට මුදා හැරියොත් ඒ නිසා සමාදානය කඩවීමේ බරපතල අනතුරක් ඇතැයි යන හේතුවෙන් රජයේ අධිනීතිඥවරයා මෙම ඉල්ලීමට විරුද්ධ වේ. මීගමු පොලිසියේ මධ්‍යස්ථානය භාර පරීක්ෂකවරයා විසින් ඉදිරිපත් කොට ඇති දිවුරුම් පෙත්සමකින් මෙම තත්වය තහවුරු කෙරේ. එම දිවුරුම් පෙත්සමෙහි සඳහන්ව ඇත්තේ මෙම නඩුවේ කරුණු ගැන සළකා බැලීමේ දී මෙම පෙත්සම්කරුවන් ඇප පිට මුදා හැරි-

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංගයෙහි 76 වෙනි කාණ්ඩයෙහි 19 වෙනි පිට බලනු.

යොත් පැමිණිලි පක්ෂයේ සාක්ෂිකරුවන්ට සාක්ෂි දීමට බාධක ඇතිවේ යැයි සැක කිරීමට ඔහුට යුක්ති යුක්ත හේතු තිබෙන බවය. පෙත්සම්කරුවන් සහ තුවාල ලත් අය අතර දැනට ප්‍රශ්නයට භාජනය වී ඇති සිද්ධියට පෙරාතුව වුව ද සතුරුකම් තිබූ බවත්, පෙත්සම්කරුවන් කෙරෙහි සැළකිල්ලක් දක්වන අය තමාට තර්ජනය කළ බවට සිද්ධියෙන් පසු තුවාල ලැබූ අයගේ මව විසින් පැමිණිලි කළ බව දිවිරුම් පෙත්සමේ වැඩිදුරටත් සඳහන් වේ. මෙයට පිටුවහල දීමට පොලීසියට කරන ලද පැමිණිලි දෙකක් ද උසාවියට ඉදිරිපත් කොට තිබේ. ඉන් එකකින් චෝදිතයාගේ මව පැමිණිලිකරුගේ මව වන ජොසපින්ගේ දුවට බැණ වැදුන බව පෙනී යන අතර, අනික් පැමිණිල්ලෙන් ජොසපින් කියා සිටියේ ජේමිස් නමැත්තකු ඇයට අත් බෝම්බ ගසන බව කියමින් තර්ජනය කරන බවකි.

තුවාල ලත් අය සහ පෙත්සම්කරුවන් එක'ටෙක යාබද ඉඩම්වල පදිංචිව සිටින බවද සිතා බැලිය යුතු එක් කරුණකි. චෝදිතයාගේ උගත් අධිනිතිඥවරයා චෝදිතයාගේ පවුල දැන් එම භූමි භාගයෙන් පිට වී ඇතැයි කියනත්, පැමිණිලිකරුගේ ඉඩමට යාබදව ඇති ඉඩමට ඇප පිට මුදාහැරියොත් චෝදිතයාට පැමිණිය හැකි යැයි යන්න සිතීමට සෑම අවකාශයක්ම තිබේ.

සියලුම කරුණු පිඩුකොට ගත් කල දෙපාර්ශ්වය අතර ඇති සිත් වේදනාත්මක භැගීම් නිසාත්, ඔවුන් යාබද ඉඩම්වල පදිංචි වී සිටීම නිසාත් මෙහි චෝදනාව අත් බෝම්බ ගැසීමක් පිළිබඳව නිසාත්, ඒ හේතුවෙන් අන්‍යෝන්‍ය යාබද පදිංචිය ඉතාම සැලකිය යුතු ලෙස කල්පනාවට ගතයුතු නිසාත් චෝදිතයන් ඇප පිට නිදහස් කිරීම අවදානම් දෙයක් ලෙස මම කලපනා කරමි. මෙවැනි අපරාධවලින් කෙරෙන අනතුරු ඉතාම විශාල බැවිනුත්, ඒවා කිරීම ඉතාම පහසු බැවිනුත් ඒ සඳහා පියවර ගැනීමට විශේෂ නීති-රීති පැනවීමට අවශ්‍ය විය.

කරුණු මෙසේ හෙයින් ඇප ඉල්ලීමට ඉඩ නොදීම සුදුසු යැයි මම කල්පනා කරමි. එබැවින් එම ඉල්ලීම ප්‍රතික්ෂේප වේ.

ඇප දීම ප්‍රතික්ෂේප කරන ලදී.

ගරු විරමන්ත්‍රි, විනිශ්චයකාරතුමා ඉදිරිපිටදී

පූසාරි කෝවින්දන් වේලු එ. (රාමසාමිගේ පුත්‍රයා) සහ තවත් අයෙක්

ශ්‍රේෂ්ඨාධිකරණ අංක 125/68 — කුරුණෑගල ම.ළ. අංක 51908

තර්ක කළේ: 1968 මාර්තු 17 වැනි දින
නිණ්ඩු කළේ: 1968 අප්‍රෙල් 10 වැනි දින

අපරාධ නඩු විධාන සංග්‍රහය — 347 සහ 357 වගන්ති — ප්‍රාථමික නඩු විභාගයෙන් පසු දෙන ලද, චෝදිතයන් නිදහස් කර හැරීමේ නියෝගය නැවත සලකා බැලීමට කළ ඉල්ලීම — ශ්‍රේෂ්ඨාධිකරණයේ පරිශෝධන බලතල — ප්‍රාථමික නඩු විභාග සම්බන්ධයෙන් නීතිපතිතුමාගේ බලතල හා කාර්යයන්.

නිණ්ඩුව: (1) ප්‍රාථමික නඩු විභාගයෙකින් පසු චෝදිතයන් නිදහස්කර හැරීමේ නියෝගයන් ඇතුළුව මහේස්ත්‍රාත්වරයකු විසින් දෙන ලද ඕනෑම නියෝගයක් අභිමතානුකූලව පරිශෝධනය කිරීමේ බලතල කිසිදු සැකයක් නැතිව ශ්‍රේෂ්ඨාධිකරණයට ඇත.

(2) මෙම බලතල භාවිතා කරනු ලබන්නේ නම් කළ යුත්තේ එසේ නොකිරීමෙන් නියත අසාධාරණයක් සිදුවියහැකි ඉතාම අති විශේෂ වූ නඩුවලදීය.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 20 වෙනි පිට බලනු.

(3) අපරාධ නඩු විධාන සංග්‍රහයේ වගන්ති 388 සහ 391 යටතේ නීතිපතිතුමාගේ බලතල හා කාර්යයන් සලකා බලන කල්හි ඒවා කෙරෙහි කිසි විටෙක ශ්‍රේෂ්ඨාධිකරණයෙහි බලතල යෙදීමට ඉල්ලීමක් කිරීමට අවශ්‍යතාවයක් ඇති නොවිය යුතුයි.

ඇන්. බාලක්‍රිෂ්නන් පෙත්සම්කරු වෙනුවෙන්

වීරමන්ත්‍රී විනිශ්චයකාරතුමා:

විත්තිකරුවන් දෙදෙනකු නිදහස් කරමින් මහේස්ත්‍රාත්වරයකු විසින් දෙන ලද තීන්දුවක් පුනරීක්ෂණය කිරීමට මෙම උසාවියට ඇරයුම් කරන මේ ඉල්ලීම ඉතාමත් අසාමාන්‍ය එකකි.

විත්තිකරුවන් නිදහස් කරමින් දී ඇති තීන්දුව ඉවත් කොට ඔවුන්ට විරුද්ධව නඩුව ශ්‍රේෂ්ඨාධිකරණය වෙත ඉදිරිපත් කිරීමට නියෝග කරන ලෙස ඉල්ලුම්කරු ඉල්ලා සිටී.

පෙත්සමේ ඒ බව විශේෂයෙන් සඳහන් කොට නැතත් මෙම නිදහස් කිරීම සම්බන්ධයෙන් ඇටෝර්නි-ජනරාල් වරයාට කරුණු ඉදිරිපත් කරන ලද බවත්, මේ ඉල්ලීම ඔහු ප්‍රතික්ෂේප කරන ලද බවත් මට බාලක්‍රිෂ්ණන් මහතාගෙන් දැනගන්නට ලැබිණ.

පුනරීක්ෂණය කිරීමට මේ උසාවියට බලතල ඇති බවත්, මේ උසාවිය මගින් නඩු විභාගයේ වාර්තාව ඉහළට ගෙන්වා ගැනීමෙන් හෝ වෙනත් විධියකින් හෝ යම් කාරණයක් මේ උසාවියේ සැලකිල්ලට පාත්‍ර වූ විට එකී බලතල පාවිච්චි කරනු ලබන බවටත් සැකයක් නැත. මේ වගට අපරාධ විධිවිධාන සංග්‍රහයේ 357 වැනි වගන්තියේ ප්‍රකාශිත විධිවිධාන අඩංගු වේ. 347 වැනි වගන්තිය හා එක් කොට කියැවීමේ දී මෙම උසාවියට අභියාචනයක දී මෙන්ම පුනරීක්ෂණයක දී ද මෙම උසාවියෙන් සහනයක් බලාපොරොත්තුවෙන් ඉදිරිපත් කොට ඇති පහළ උසාවියක නඩු තීන්දුවක් වෙනස් කිරීමට හෝ ඊට වෙනස් තීන්දුවක් දීමට හෝ මෙම උසාවියට බලය ලබා දෙයි.

එහෙත් මෙකී විධිවිධාන මහේස්ත්‍රාත්වරයකු විසින් විත්තිකරුවකු නිදහස් කරමින් දෙන ලද තීන්දුවක් ඉවත් කොට එකී විත්තිකරු මෙම උසාවිය වෙත ඉදිරිපත් කරන ලෙස මහේස්ත්‍රාත්වරයාට නියෝග කිරීමට මෙම උසාවියට බලය ගෙන දේ ද?

නඩුවක් මෙම උසාවියට පැමිණීම වගකීම අපරාධ විධිවිධාන සංග්‍රහයේ 163 වැනි වගන්තියෙන් මහේස්ත්‍රාත් වරයකු වෙත පැවරෙන්නේ විත්තිකරුවන් නඩු විභාගයක් සඳහා ඉදිරිපත් කිරීමට තරම් සෑහෙන සාක්ෂි ඇතැයි ඔහුට හැඟී ගියහොතිනි. විත්තිකරුවකු නඩු විභාගයක් සඳහා මෙම උසාවියට ඉදිරිපත් කිරීමට සෑහෙන තරම් සාක්ෂි නොමැති විට ඔහු නිදහස් කිරීම ද මේ අන්දමට ම 162 වැනි වගන්තියෙන් ඔහුගේ යුතුකමක් බවට පත් කෙරෙයි.

ඉහත සඳහන් වගන්තිය යටතේ මහේස්ත්‍රාත්වරයකු විත්තිකරුවකු නිදහස් කළ විට එම තීන්දුව පුනරීක්ෂණය කළ හැකි එකම බලවතා නොවූවත් ඊට වඩාත්ම සුදුස්සා වන්නේ ඇටෝර්නි-ජනරාල්වරයායි. 391 වැනි වගන්තිය යටතේ එවැනි විත්තිකරුවකු නඩු විභාගය සඳහා තමා නම් කරන උසාවියට ඉදිරිපත් කිරීමට හෝ කැවත නඩු විභාගය ආරම්භ කොට ඒ සම්බන්ධයෙන් අවශ්‍ය යැයි පෙනී යන උපදෙස් දීමට හෝ ඔහුට හැකිය. මෙයට හාත්පසින්ම වෙනස් තත්වයක් පැන නැගි විට—එනම් නඩුව ඉහළට තැබීමට තරම් සෑහෙන සාක්ෂි නැතැයි හැඟුනු විට 388 වැනි වගන්තියෙන් ඇටෝර්නි-ජනරාල්වරයාට නඩුව ඉහළට තැබීමේ තීන්දුව නිෂ්ප්‍රභා කිරීමේ බලය ඇති බව ද සැලකිය යුතුයි.

න්‍යායික වශයෙන් මහේස්ත්‍රාත්වරයකුගේ නඩුවක් ඉහළට තැබීමේ නියෝගයක් පුනරීක්ෂණය කිරීමේ බලය මේ උසාවියට ඇතත්, එසේ කිරීමේ දී මෙම උසාවිය අඩුවෙන්ම කියතහොත් තවත් බලවතකුට එනම්, ඇටෝර්නි-ජනරාල්වරයාට ද සමගාමී අධිකරණ බලයක් ඇති සීමාවකට පිවිසෙයි.

එවැනි තත්වයක් මධ්‍යයේ පැන නගින දුෂ්කරතා රජු එ. නූර්දීන්, (1910) 13 න.නී.වා. 115 නම් නඩුවේ දී

පැහැදිලිවම පෙනී ගියේය. මේහි දී එවැනි තත්වයක් මධ්‍යයේ මෙම උසාවියෙන් කෙරෙන නියෝගයක් ඊට පසු නඩු විභාගයේ ඕනෑම අවස්ථාවක දී ඇටෝර්නි-ජනරාල්වරයා පැමිණිල්ල ඉවත්කර ගැනීමෙන් නිෂ්ඵල වී යන හැකි බව ඇටෝර්නි-ජනරාල්වරයා පෙන්වා දුන්නේය.

රජු එ. නූර්දීන් නඩුවේ දී පෙන්වා දුන් පරිදි නිදහස් කිරීමේ නියෝගයක් ද ඇතුළුව ඕනෑම නඩු තීන්දුවක් සිය අභිමතය පරිදි පුනරීක්ෂණය කිරීමට නිසැකවම මෙම උසාවිය සතු බලය මේ නිසා පාවිච්චි කරනහොත් කළ යුතු වන්නේ ඉතාමත් අසාමාන්‍ය අවස්ථාවලදීය. එනමි එසේ නොකළහොත් පැහැදිලිවම යුක්තිය ඉෂ්ට නොවීමක් සිදුවිය හැකි කල්හිය. මේ සම්බන්ධයෙන් ඇටෝර්නි-ජනරාල්වරයා සතු බලතල ගැන සලකා බලන විට එකී බලතල ක්‍රියාවේ යෙදෙ වූ විට යුක්තිය ඉෂ්ට නොවීම පැන නොනගින බවට සැකයක් නැත්තේය. මේ නිසා නිදහස් කිරීමේ හෝ නඩු විභාගය ඉහළට නැඹීමේ හෝ නියෝගයක් කෙරෙහි අප්‍රසාදයට පත් වැසියකුට ප්‍රතිකර්මයක් නැත්තේ නොවේ. මේ නිසා මේ උසාවියට එකී බලතල පාවිච්චි කිරීමට ඇරයුම් කිරීමේ අවශ්‍යතාවය කිසි විටෙක පැන නැගිය යුතු නැත. එහෙත් එම බලතල මෙම උසාවිය සතුව පවතින බවට ප්‍රශ්නයක් නැත. නොයෙක් විට ඒ බව ආධාරයෙන්ම පිළිගැනී ඇත. රජු එ. නූර්දීන්; ඇටෝර්නි-ජනරාල් එ. කනගරත්නම්, 52 න.නි.වා. 121. (125 වෙනි පිටේ.)

මහේස්ත්‍රාත්වරයකු නඩු විභාගයක් ඉහළට නැඹීමට අදාල නීතිමය විධිවිධානවල සීමාව සලකා බැලීමේ අවස්ථාව විනිශ්චය මණ්ඩලයකට ලැබුනු මෑත කාලයේ නඩුවක් වූ ඇටෝර්නි-ජනරාල් එ. දොන් සිරිසේන හෙවත් මයිකල් බාස් සහ තවත් අයෙක් යන නඩුව ගැන ද (ශ්‍රේ.අ. 327/67—ශ්‍රේ.අ. 27.1.68) *සඳහන් කරනු කැමැත්තෙමි. 161(2) වන වගන්තිය යටතේ විත්තිකරුවකු නිදහස් කරමින් මහේස්ත්‍රාත්වරයකු තීන්දුවක් දුන් විට, 391 වන වගන්තිය යටතේ නඩුව ඉහළට නැඹීමට ඇටෝර්නි-ජනරාල්වරයාට බලය ඇති බව එම නඩුවේ දී තීන්දු විය. එවැනි නියෝගයක් පිළිපැදීමට මහේස්ත්‍රාත්වරයකු ප්‍රතික්ෂේප කිරීම නීති විරෝධී බව එම නඩුවේ දී තීරණය විය. අර්ධ අධිකරණමය යැයි හැඳින් වී ඇති ඇටෝර්නි-ජනරාල්වරයා සතු මෙම බලතල සම්ප්‍රදායානුකූලව අපේ අපරාධ අධිකරණ විධිවිධාන පරිපාටියෙහි කොටසක්ව පවතින බවත්, ඇටෝර්නි-ජනරාල්වරයා සතු අභිමතානුසාරී බලතල 16 වන පරිච්ඡේදය යටතේ ඇරඹෙන අපරාධ නඩු විභාග සිය අභිමතය අනුව තමා තීරණය කරන ආකාරයකින් සමාප්ත කිරීමට ඇටෝර්නි-ජනරාල්වරයා සතු ව්‍යවස්ථාපිත බලතල නිසා ක්‍රියාකාරී බලයක් වන බව ද තවදුරටත් සඳහන් කළ යුතුය. මෙම අභිමතානුසාරී බලතල පාවිච්චි කිරීමේ සීමාව තුළට ඇතුළු වීම ඉතාමත්ම බරපතල හේතුවක් නිසා මිස මේ උසාවිය විසින් කළ යුත්තක් නොවේ. දැනට අප ඉදිරියේ ඇති මෙම නඩුවේ දී එබඳු වූ කිසිම කරුණක් පෙන්වා දී නැති අතර, මහේස්ත්‍රාත්වරයා චිත්තිකරු කරමින් තීන්දුව දී ඇත්තේ ඉතා ප්‍රබල හේතූන් සහිතව බව ද සඳහන් කරමි.

මේ අනුව මෙම ඉල්ලීම ප්‍රතික්ෂේප කරනු ලැබේ.

මට පෙනී ගිය අන්දමට මෙම උසාවියේ බලතල කිසි විටෙක නොවූ විරූ අන්දමින් පාවිච්චි කිරීම සඳහා කරන ලද ඉල්ලීමක් සලකා බැලීමේ දී මගේ විශේෂ ආරාධනය පිළිගෙන, අපරාධ නීතිය සම්බන්ධයෙන් තමන් සතු දැනීමේ හා පළපුරුද්දේ වාසිය ලබා ගැනීමේ අවස්ථාව මට ලබා දුන් ආචාර්ය කොල්වින් ආර්. ද සිල්වා සහ ඇම්. ඇම්. කුමාරකුලසිංහම් යන අධිනීතිඥ මහත්වරුන් මට දුන් සහාය ගැන ද කෘතඥතා පූර්වකව අවසාන වශයෙන් සඳහන් කළ යුතුව තිබේ.

ඉල්ලීම ප්‍රතික්ෂේප කරන ලදි.

(සිංහල පරිවර්තනය අධිනීතිඥ චුල්පත්මෙන්ඩ්‍ර දහනායක විසිනි.)

* ස. ල. නි. 74 වෙනි කාණ්ඩය 1 වෙනි පිට

ගරු පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා ඉදිරිපිට

ආර්. ජී. ගුණසිංහ එ. ජී. බී. සටිගමන, පොලිස් පරීක්ෂක අජානායක

ශ්‍රේෂ්ඨාධිකරණ අංකය 1007/68 — ම.ළ. කෑගල්ල 71369

විවාද කළේ: 1968 දෙසැම්බර් 2, 9 සහ 30 වැනි දිනවල
තීන්දු කළේ: 1969 පෙබරවාරි 22 වැනි දින

මිල පාලන පනත — පාලන මිලට වැඩියෙන් පාන් ගෙඩියක් විකුණුවෙයියි චෝදනාවක් — එම චෝදනා පත්‍රයේ පාන් විශේෂය එනම්, සුදු පාන්, පරළු පාන් ආදි වශයෙන් විස්තර ව සඳහන් විය යුතු ද?

තීන්දුව: චෝදනා පත්‍රයේ පාන් විශේෂය එනම්: පරළු පාන්, සැන්ඩ්විච් පාන් ආදි වශයෙන් විස්තර සඳහන් නොකිරීම පාන් ගෙඩියක් පාලන මිලට වැඩි ගණනකට වික්කේ යයි චෝදනා පිට චෝදනා ලැබුවකු වරදකරු කිරීමට බාධාවක් නොවේ.

පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා: "පොදු ආහාර ද්‍රව්‍යයක් වශයෙන් පාන් කාලාන්තරයක් තිස්සේ ප්‍රකටව තිබෙන්නකි. මිනිසකු පාන් රාත්තලක් ඉල්ලූ විට ඔහු බලාපොරොත්තු වන්නේ කිමෙක් ද යන්න තේරුම් ගැනීම එතරම් අමාරු හෝ ගුඪ හෝ නොවේ. එය දුඹුරු පාන් හෝ "ළා රතු" පාන් හෝ වෙන විශේෂ පාන් වර්ගයක් හෝ නොව සුදු පාටින් යුත්, පොදුවේ දන්නා පාන්ය. වෙන ඕනෑම පාන් වර්ගයක්, නියම වශයෙන්, විසිතුරු කළ වර්ගයක් වනු ඇතැයි මම අපේක්ෂා කරමි; විසිතුරු කළ යන්නෙහි තේරුම සාමාන්‍ය දෙයින් බැහැරට යාමයි."

වී. කුමාරස්වාමි මහතා, ටී. පී. අමරසිංහ මහතා සහ ඇස්. ඇම්. සේනාරත්න මෙනෙවිය ද සමග, චිත්තිකාර ඇපැල්කරු වෙනුවෙන්.

රජයේ නීතිඥ එස්. ඩබ්ලියු. බී. වඩුගොඩපිටිය මහතා ඇටෝර්නි-ජනරාල් වෙනුවෙන්.

පණ්ඩිත ගුණවර්ධන විනිශ්චයකාරතුමා

කෑගල්ලේ ගෙවිලිපිටියේ තේ කඩකාරයකු වන ඇපැල්කරු, 27.11.67 හා 14776/10 දරන ලංකාණ්ඩුවේ ගැසට් පත්‍රයේ පළ වූ අංක කේ.ඊ. 125 දරන ආහාර මිල නියෝගය කඩ කරමින් උපරිම පාලන මිල වන සත 36 ඉක්මවා අවුන්ස 16ක පාන් ගෙඩියක් සත 37කට විකිණීම ගැන චෝදිතව දඬුවම් නියමව සිටී. රු. 50/-ක දඩයකට හෝ දඩය නොගෙවූවහොත් මාසපතළ වැඩ සහිත දෙසතියක සිර දඬුවමකට අතිරේකව, හේ මාසපතල වැඩ සහිතව සති හතරක හිර දඬුවමකට ද නියම වී සිටියි.

ඇපැල්කරු වෙනුවෙන් පෙනී සිටි උගත් නීතිඥ විරයා, මහේස්ත්‍රාත්තුමාගේ කරුණු පිළිබඳ තීරණය ගැන තදින් තර්කකොට නැත. ඔහු භේතු දෙකක් මත, වරදකරු කිරීම ගැන විරුද්ධවෙයි.

ඇපැල්කරු විසින් කඩ කරන ලදැයි කියන කේ.ඊ. 125 දරන පාලන මිල නියෝගය, කැගලු පාලන දිස්ත්‍රික්කයට අයුවන පෙදෙස තුළ එවැනි නියෝගයක් කිරීමට නියෝජ්‍ය ආහාර මිල පාලකට බලය නැති බැවින් වලංගු නොවන බව තර්ක කොට, ඇත. පාලන දිස්ත්‍රික්ක පනත (L. E. C. vi වෙළුමේ 392 පරිච්ඡේදය) නියමින සීමා සහිතව පාලන දිස්ත්‍රික්ක පිහිටුවීය. මෙම පනත මගින් කැගල්ල දිස්ත්‍රික්කය පිහිටුවා සීමා නියම කොට තිබේ. පනතේ පළමු වැනි උපලේඛනයේ 20 වැනි අංකය බලන්න.

මිල පාලන පනතේ 3(2) වැනි ඡේදය (L.E.C. vi වැනි වෙළුමේ 173 වැනි පරිච්ඡේදය) එම පනතේ 4 වැනි ඡේදය ද සමග තම පත්වීම බලපවත්වන ප්‍රදේශය තුළ ක්‍රියාත්මක වන පරිදි මිල ගණන් දක්වා සහ විකිණීමේ කොන්දේසි නියම කොට තම පත්වීම බල පවත්වන ප්‍රදේශය තුළ නියෝග පැනවීමට නියෝජ්‍ය පාලකට බලය දෙයි. K.E. 125 දරන මිල නියෝගය පනවා ඇත්තේ කැගල්ල දිස්ත්‍රික්කයේ නියෝජ්‍ය මිල පාලක (ආහාර) ස්ටැන්ලි මාරලන්ද විසිනි. සාක්කිවලින් පළ වන්නේ ගෙවිලිපිටිය කැගල්ල පාලන දිස්ත්‍රික්කය

* ඉ ග්‍රිසි පිටපත ඉංග්‍රිසි අංගයෙහි 76 වෙනි කාණ්ඩයෙහි 22 වෙනි පිට බලනු.

තුළ පිහිටි බවය. උගත් නීතිඥවරයාගේ මෙම තර්කයේ හරයක් නැති අතර, එම නිසා එය අසාර්ථක විය යුතුය.

උගත් නීතිඥවරයා විසින් ඉදිරිපත් කැරුණු ඇපැලේ දෙවැනි හේතුව නම් කේ.ඊ. 125 දරන මිල නියෝගයේ පාලන නියෝගයට යටත් කැරුණු විශේෂිත පාන් වර්ගය නියමිත වශයෙන් දක්වා නොතිබීම නිසා, එය අපැහැදිලි හා වලංගු නොවේ යන්නයි. දුඹුරු පාන්, සැන්ඩ්විච් පාන් සහ සුදු පාන් වැනි නොයෙක් පාන් වර්ග ඇති අතර තිරිඟුවලින් සෑදූ පාන් සහ පිටියෙන් තැනූ පාන් ද ඇති බව කියා සිටින ලදී. මේ තත්ත්වය යටතේ, නියෝගයේ සඳහන් පාන් විශේෂිත කොට දැක්විය යුතුයයි කියැවිණ. මෙම තර්කය කුසලතාවෙන් නොතොරය.

චේම්බර්ස් විසිවැනි සියවස ශබ්ද කෝෂය (1954 නැවත මුද්‍රණය) 'පාන්' යන වචනයට දෙන අර්ථය ''පිටියෙන් තැනූ ආහාරය හෝ පෝරණුවෙන් පිළිස්සූ කෑම: ආහාර'' යන්නයි. නීති සංග්‍රහයේ viii වැනි වෙළුමේ පාන් යන ශීර්ෂය යටතේ ආඥා පනතක් වෙයි (217 පරිච්ඡේදය). එය, පාන් විකිණීම විධිමත් කිරීම සහ විකිණීම පිණිස තබන පාන් බාල කිරීම වැළක්වීම ද සඳහා වූ ආඥා පනතකි. පාන් විකිණීම සහ පාන් ගෙඩි වල බර ලකුණු කිරීම පිළිබඳව සඳහන් කැරෙන 2 වැනි ඡේදයේ දැක්වෙන්නේ මෙසේය:

2(1) පාන් පුළුස්සන්නකු හෝ පාන් වෙළෙන්දකු හෝ විසිතුරු කළ පාන් හෝ රෝල් හැර කිසියම් පාන් වර්ගයක් කිරුම් බරට හා ඇවර්ඩුපොයිස් බර රාත්තල් කාලේ, රාත්තල් බාගයේ, රාත්තලේ, රාත්තල් දෙකේ හා රාත්තල් තුනේ පාන් ගෙඩි වශයෙන් හා විනා කිසිම පාන් වර්ගයක් නොවිකිණිය යුතුයි.

(2) මින් මතුවට දැක්වෙන නිර්දේශයනට යටත්ව, පාන් ගෙඩියේ බර, පාන් පිළිස්සීමේ දී කරන සලකුණක් මඟින් පාන් ගෙඩිය මත හෝ පාන් ගෙඩිය වටා එතූ නැතහොත් එය වැසූ පටියක හෝ දවටනයක පැහැදිලිව ලකුණු කොට නැත්නම් පාන් පුළුස්සන්නකු හෝ පාන් විකුණන්නකු කිසියම් පාන් ගෙඩියක් විකිණීම හෝ එවැනි පාන් ගෙඩියක් විකිණීමට තැබීම හෝ නොකළ යුතුයි.

මෙම අනු ඡේදයේ මේ ඉහතින් දැක්වුණු විධිවිධාන වල කිසිවක් මේවාට බල නොපැවැත්වේ:

(අ) විසිතුරු කළ පාන් හෝ රෝල් හෝ බරින් රාත්තල් භාගයට අඩු ඕනෑම පාන් ගෙඩියක්; හෝ

(ආ) .....

මෙම ආඥා පනතේ කිසිදු තැනෙක පාන් යන්න තේරුම් කොට නැතත් පාන්, විසිතුරු කළ පාන් සහ රෝල් යන මේවායේ වෙනස දක්වා තිබේ.

උගත් නීතිඥවරයා, පාන් යනු කිමෙක්ද? යන ප්‍රශ්නය ඉදිරිපත් කෙළේය. පොදු ආහාර ද්‍රව්‍යයක් වශයෙන් පාන් කාලාන්තරයක් තිස්සේ ප්‍රකටව තිබෙන්නකි. මිනියකු පාන් රාත්තලක් ඉල්ලූ විට ඔහු බලාපොරොත්තු වන්නේ කිමෙක් ද යන්න තේරුම් ගැනීම එතරම් අමාරු හෝ ගුඪ හෝ නොවේ. එය දුඹුරු පාන් හෝ ''ළා රතු'' පාන් හෝ වෙන විශේෂ පාන් වර්ගයක් හෝ නොව, සුදු පාටින් යුත්, පොදුවේ දන්නා පාන්ය. වෙන ඕනෑම පාන් වර්ගයක්, නියම වශයෙන්, විසිතුරු කළ වර්ගයක් වනු ඇතැයි මම අපේක්ෂා කරමි. විසිතුරු කළ යන්නෙහි තේරුම සාමාන්‍ය දෙයින් බැහැරට යාමය.

මේ අනුව, ඇපැල්කරු වරදකරු කිරීම නිවරද යයි මම සැහීමට පත්වෙමි. ඇපැල නිෂ්ප්‍රභා කෙරෙයි.

ඇපැල නිෂ්ප්‍රභා කරන ලදී.

(සිංහල පරිවර්තනය කුමාරදාස ජයසේකර විසිනි.)

ගරු විජයතිලක ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා ඉදිරිපිට

ඩී. රත්නසේකර එ. දේශීය ආදායම් කොමසාරිස්, කොළඹ*

ශ්‍රේෂ්ඨාධිකරණ පුනරීක්ෂණ ඉල්ලීම ගෙ. අ. 525/1968 දකුණු කොළඹ මහේස්ත්‍රාත් උසාවිය අංක 88223/බී

විවාද කළේ: 1968 නොවැම්බර් 21 වැනිදා
තීන්දුව දෙන ලද්දේ: 1969 ජනවාරි 15 වැනිදා

මුද්දර ආඥා පනත (පරිච්ඡේද 247) 31, 33 සහ 55 යන ඡේද — (පරණ ආඥා පනතේ 26, 27 සහ 57 ඡේද) — 1947 දී ලියැවුනු පැවැරීමේ ගිවිසුම් ඔප්පුවක මුද්දර ගාස්තු අඩුකම—එය ගෙවීමට බැඳී ඇත්තේ කවුද? දීමනාකරු ද? — ගැනුම්කරු ද? — එක් අතෙකින් 26 සහ 27 (දැන් 31 සහ 33) යන ඡේදවල සවිටනයත්, අනික් අතින් 1956 අංක 19 දරණ සංශෝධන ආඥා පනතට පෙර පැවැති 51 වන ඡේදය හා ගැටීමක් — එය අතීතයට ද බලපවත්වමින් ක්‍රියා කරයි ද? — වැසියන් වෙත බදු බර පටවන ආඥා පනත්වල භාෂාව පැහැදිලි ව තිබීමේ අවශ්‍යතාවය —

මෙය වෙළෙඳ ව්‍යාපාරයක් පැවරීම සඳහා 1947 දී ලියැවුනු ඔප්පුවක හිඟ මුද්දර ගාස්තු වශයෙන් රු: 3,307/- ක් අයකර ගැනීම සඳහා දේශීය ආදායම් බදු කොමසාරිස්වරයා විසින් කරන ලද ඉල්ලීමකි. මෙම මුදල උසාවියකින් නියම වූ දඩ මුදලක් මෙන් අයකර නොගත යුත්තේ ඇයි ද යන්නට සැහෙන හේතු දැක්වීමට ගැනුම්කරු වන පෙත්සම්කරු අසමත් වී ඇතැයි තීරණය කළ උගත් මහේස්ත්‍රාත්වරයා එම මුදල ගෙවා දමන ලෙසත්, නො එසේ නම් හය මාසයක් බරපතල වැඩඇති සිරදඬුවම් විඳින ලෙසත් පෙත්සම්කරුට නියම කළේය.

මෙම නියෝගය පුනරීක්ෂණය කරන ලෙස පෙත්සම්කරු ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලුම් කර සිටී.

තීන්දුව: (1) මුද්දර ආඥා පනතේ 55(3)වැනි ඡේදය එකතු කළ 1956 අංක 15 දරණ සංශෝධන ආඥා පනත අතීතයට බලපවත්වන සේ ක්‍රියාත්මක නොවේ. මේ නිසා එව්.ඒ. ද සිල්වා විනිශ්චයකාරතුමා විසින් ගැබෙල් එ. මුද්දර කොමසාරිස් 54 (න.නි.වා. 231) යන නඩුවේ දී ප්‍රකාශවුනු මූල ධර්මය මේ නඩුවට ගැලපේ. එනම් සාමාන්‍ය වශයෙන් බලපවත්වන 51 වැනි (දැන් 55) මුද්දර ආඥා පනතේ ඡේදය එම ආඥාපණතේ 26 හා 27 (දැන් 31 හා 33) වැනි ඡේදවල අඩංගු විශේෂ ව්‍යවස්ථාවන් පාලනය නොකරන වගයි.

(2) ඒ නිසා මුද්දර ආඥා පනතේ 31 වන වගන්තිය යටතේ මුද්දර ගාස්තු ගෙවිය යුතු වන්නේ පැවරුම් ලාභියා විසිනි. පවරන්නා වන පෙත්සම්කරු එම මුදල ගෙවීමට බැඳී නැත.

අවධානය යොමු කළ නඩු: ගේබල් එ. මුද්දර කොමසාරිස්, 54 න.නි.වා. 231.
මර්සි ඩොක් සහ වරාය මණ්ඩල භාරකරුවන් එ. කැමරන්, 11 එව්.එල්.සි 443
පූර්ණ චාන්ද් එ. මන්මොතු නාත් 1928 ස.ඉ.වා. (රාජාධිකරණය) 38.
කේප් බ්‍රෙන්ඩි සින්ඩිකේට් එ. දේශීය ආදායම් කොමසාරිස්, 1921. කේ.බී.ඩී. 403
සීමාසහිත රෝයල් කෝට් ඩර්බි පෝසිලේන් සමාගම එ. රේමන්ඩ් රසල් 1949 2 කේ.බී.ඩී. 417
සීමාසහිත ඩිමොන්ඩ් ඉන්වෙස්ට්මන්ට් සමාගම එ. කේටස් එව්.එල්. 1928 ඇ.උ. 143 155
දේශීය ආදායම් කොමසාරිස් එ. සීමාසහිත ඩෝඩල් ඩ'මැහොනි සමාගම, 1952 ඇ.උ. 401, 426
සංස්ථාපිත කැමිල් සහ හෙන්රි පදනම එ. දේශීය ආදායම් කොමසාරිස් (1954) 1 චාන්සරි 671.
කර්ක්නස් එ. සීමාසහිත ජෝන් හඩ්සන් සහ සමාගම, එව්.ඇල්. 1955 ඇ.උ. 696, 710

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 32 වෙනි පිට බලනු.

විජයතිලක විනිශ්චයකාරතුමා: "මෙම කාරණය පිළිබඳව ක්‍රියා කිරීමේ දී යටත් වැසියාට නියම කරන සියලුම අයකිරීම් පැහැදිලි හා ද්වාර්ථ නොවන භාෂාවෙන් තිබිය යුතුය යන්න හොඳින් පිළිගත් නීතියක් බව මතක තබා ගැනීම මැනවි. ව්‍යවස්ථාවේ භාෂාව පැහැදිලිවම නියම නො කරන්නේ නම් එහි සඳහන් බද්දට වැසියා යටත් නොකළ මනා ය."

ඇම්. අමරසිංහම් මහතා, ඩබ්ලිව්. එච්. පෙරේරා මහතා සමග පෙත්සම්කරු වෙනුවෙන්.

රජයේ නීතිඥ ඇස්. සිවරාසා මහතා, නීතිපතිවරයා වෙනුවෙන්.

විජයතිලක විනිශ්චයකාරතුමා:

මෙය මුද්දර ආඥා පනතේ 'ඒ' උප-ලේඛනයේ 1 වැනි කොටස යටතේ අය විය යුතු මුද්දර ගාස්තු ඌනත්වයක් වන රු. 3,307 ක්, ප්‍රසිද්ධ නොතාරිස් එස්. එච්. ඊ. නිඩමන් විසින් 1.4.47 දින සහතික කරන ලද අංක 280 දරන පැවරීමේ ගිවිසුමක් සම්බන්ධයෙන් පෙත්සම්කරුගෙන් අයකර ගැනීම සඳහා දේශීය ආදායම් කොමසාරිස්වරයා විසින් ඉදිරිපත් කරන ලද ඉල්ලීමකි. ඉහත කී ඔප්පුවෙන් මෙම පෙත්සම්කරු තමා විසින් "වැලන්ටෝ හයිජිනික් වයින්" සමාගම යන නාම චිලාසය හා ව්‍යාපාර ආයතනය යටතේ පවත්වාගෙන යන ලද ව්‍යාපාරය, "සීමාසහිත වැලැන්ටෝ හයිජිනික් වයින්" සමාගම යන්නට මාරු කිරීමට එකඟ විය.

මෙම මුදල උසාවියකින් නියම කරන ලද දඩයක් වශයෙන් අය නොකර ගත යුත්තේ මන්දැයි යන්නට සැහෙන හේතු දැක්වීමට පෙත්සම්කරු අපොහොසත් වී ඇතැයි උගත් මහේස්ත්‍රාත්වරයා තීරණය කර තිබේ. ඒ අනුව ඔහු, ඉහත කී මුදල, දඩ මුදලක් වශයෙන් සලකා, අයකර ගැනීමට හෝ එය නොගෙවුවහොත් භය මයක හිර දඬුවමක් දීමටත් නියම කොට ඇත.

මුද්දර ගාස්තු ඌනතාව ගෙවිය යුත්තේ පවරන්නා විසින් නොව, පැවරුම් ලාභියා විසිනැයි පෙත්සම්කරුගේ උගත් නීතිඥවරයා කියයි. කවර අයුරකින් හෝ ඌනතාව ගෙවීමට පෙත්සම්කරු පෞද්ගලිකව බැඳී නැතැයි ද, හිර දඬුවමක් නියම කිරීම නීතිවිරෝධී යයි ද හේ තවදුරටත් කියා සිටී. මෙ වැනි ම අවස්ථාවකට සම්බන්ධ ගේබල් එ. මුද්දර කොමසාරිස්, 54 නව නීති වාර්තා 231, නඩුවේ එච්. ඒ. ද සිල්වා විනිශ්චයකාරතුමා දුන් නඩු තීන්දුව හේ ඉදිරිපත් කරයි. එම නඩුවේ දී පහත දැක්වෙන අයුරු තීරණය විය:

"ප්‍රතිවිරුද්ධ ගිවිසුමක් නොමැති විට දී, මුද්දර ආඥා පනතේ 26(ඒ) ඡේදය (දැනට 31 වැනි ඡේදය); 27 වැනි ඡේදයේ (දැනට 33 වැනි ඡේදය) නිර්දේශ කොට ඇති නියම සින්නක්කරයක දී මෙන් සින්නක්කර කොට පවරා දීමේ ගිවිසුමක දී ද, ලැබුම්කරු හෙවත් පැවරුම් ලාභියා මුද්දර ගාස්තු ගෙවීමට යටත් කර යි. සාමාන්‍ය වගන්තියක් වන මුද්දර ආඥා පනතේ 51 වැනි ඡේදය (දැනට 55 වැනි ඡේදය) 26(ඒ) සහ 27 වැනි ඡේදවල (දැනට 31 සහ 33 යන ඡේද) අඩංගු නියමිත පැනවීම් පාලනය නොකර යි."

ද සිල්වා විනිශ්චයකාරතුමා එක් අතෙකින් 26 (ඒ) සහ 27 යන ඡේද අතර අනෙක් අතට 51 වැනි ඡේදයේත් පවතින බව කියන සටහන සලකා බලා, මුද්දර ගාස්තු ගෙවීමට බැඳී සිටීම පිළිබඳ ව නියමිත නිර්දේශයක් අඩංගු 26 හා 27 වැනි ඡේද, 51 වැනි ඡේදය අබිබවා සිටී යන තීරණයට එළඹ ඇත. මෙම තීන්දුවෙන් පසු 1952 නොවැම්බර් මාසයේ දී 1956 අංක 18 දරන ආඥා පනතින් 51 වැනි ඡේදය සංශෝධනය කර ඇති බව සැලකිය යුත්තකි. මෙම සංශෝධනය 55 වැනි ඡේදයේ 3 වැනි අනු-ඡේදය වශයෙන් දකින්නට ලැබේ. "55(3) — (1) සහ (2) යන අනු-ඡේදවලට විධිවිධාන, එවැනි ගාස්තු අයකර ගතයුතු ලියැවිල්ලක් සම්බන්ධයෙන් මුද්දර ගාස්තු ගෙවිය යුතු පුද්ගලයා හෝ පුද්ගලයන් සහ ඒවා ගෙවිය යුතු කොටස් නියමිත කරන, මෙම ආඥා පනතේ සඳහන් වෙන්ත් කිසියම් නිර්දේශයක අඩංගු කිසිවකට පටහැනි නොවී බලපවත්වනු ඇත."

පෙත්සම්කරුගේ නීතිඥවරයා, සංශෝධන කෙටුම්පත් පනතට අයත් නීති බලපෑම් පිළිබඳ ප්‍රකාශයක් 3 වැනි වගන්තිය කෙරෙහි මගේ විශේෂ අවධානය යොමු කොට තිබේ. එහි මෙසේ දැක්වෙයි: ප්‍රධාන ප්‍රඥප්තියේ 51 වැනි ඡේදයේ (1) වැනි හා (2) වැනි අනු-ඡේදවල විධිවිධාන, ලංකාව තුළ ලියැවිල්ලක් කළ හැම පුද්ගලයකු ම මත හා ලංකාවෙන් බැහැර දී ලියැවිල්ලක් කළ ලංකාවේ සිටින හැම පුද්ගලයකු ම මත ද එවැනි ලියැවිල්ලක් සඳහා අයවිය යුතු කිසියම් මුද්දර ගාස්තුවක් සහ එවැනි ගාස්තුවක් නො ගෙවීම නිසා ගෙවිය යුතු කිසියම් දඩ මුදලක් ද, ගෙවීමට බල කරයි. මෙම විධිවිධාන, කිසියම් ලියැවිල්ලක් සම්බන්ධයෙන් මුද්දර ගාස්තු ගෙවිය යුතු පුද්ගලයා, හෝ ගෙවිය යුතු පුද්ගලයින් හා ඔවුන් එසේ ගෙවිය යුතු කොටස් පැහැදිලි කරන වෙනත් විධිවිධාන (නිදසුන් වශයෙන් 26(ඒ) හා 27 යන ඡේද) හා ගැටෙයි. කෙටුම්පත් පනතේ 3 වැනි වගන්තියේ බලපෑම මෙසේ ය:

"(අ) ඉහත සඳහන් 51 වැනි ඡේදයේ (1) හා (2) යන අනු-ඡේද, එම අනු-ඡේද හා ගැටෙන ඉහත සඳහන් වෙනත් විධිවිධාන නිබියදීත් බලපවත්වනු ඇත....."

තවද එම සංශෝධනය, 26 වැනි හා 27 වැනි ඡේද විසින් ඇති කරන ලද නියත චෝදනාව පිළිබඳ දුෂ්කරතාව ඉවත් කිරීමට බලාපොරොත්තු වන අතර, එය අනිතයට බල නොපවත්වන බව මැනැවින් පැහැදිලි යයි හේ කියා සිටී. ප්‍රශ්නයට අදාල ඔප්පුව 1.4.47 වැනි දින ලියා පදිංචි කර ඇති අතර, සංශෝධනයෙන් ආණ්ඩුවට කිසිදු පලක් නොවේ. මෙහි දී පෙත්සම්කරුගේ නීතිඥයා **මර්සි ඩොක් සහ වරාය මණ්ඩල භාරකරුවන් එ. කැමරන්** (මර්සේ ඩොක් ඇන්ඩ හාබර් බෝඩ් ට්‍රස්ටීස් එ. කැමරන්) 11 එච්.එල්.සී. 443 නඩුවේ තීන්දුව කෙරෙහි විශ්වාසය තබයි. සිල්වා විනිශ්චයකාරතුමා විසින් මෙම ඡේද පිළිබඳව කරන ලද අර්ථ නිරූපනය, සංශෝධනය මගින් පිළිගෙන ඇත.

උගත් රජයේ නීතිඥවරයා, බලවත් තර්කයක් මගින් සිල්වා විනිශ්චයකාරතුමාගේ නඩු තීන්දුවේ නිරවද්‍යතාව ප්‍රශ්න කිරීමට උත්සාහයක් දරා ඇති අතර, මෙම ඡේද වලට වෙනස් අර්ථ නිරූපණයක් දෙන ලෙස මෙම උසාවියෙන් ඉල්ලා සිටී. අදාල සංශෝධනවල ඉතිහාසය දැක් වූ ඔහු, 6. 9. 29 වැනි දින අංක 7731 දරන රජයේ ගැසට් පත්‍රයේ පළ වූ ආඥා පනතේ කෙටුම්පත සහ 1930 අංක 18 දරන සංශෝධන ආඥා පනතට පෙර එවකට සිටි නීතිපති ඊ. සෙන්ට් ජේ. ජැක්සන් මහතාගේ නිරීක්ෂණයන් ද කෙරෙහි මගේ අවධානය යොමු කොට ඇත. දැනට ඇති 55 වැනි ඡේදයේ 3 වැනි අනු ඡේදය ඉදිරිපත් කළ 1956 අංක 15 දරන සංශෝධන පනත, නීතිය බලපෑමේ ප්‍රකාශය ද සමග කියැ වූ විට එය සිල්වා විනිශ්චයකාර තුමාගේ නඩු තීන්දුවේ බල පෑම ඉවත් කොට ඇති බව ද, හේ කියා සිටී. හේ පහත දැක්වෙන නඩු කෙරෙහි විශ්වාසය තබයි.

1. **පූර්ණචාන්ද් එ. මන්මොතුනාත්** 1928 එච්. එල්. සී. වා. (රාජාධිකරණය 38 පිටුව)

2. **කේප් බ්‍රැන්ඩි සින්ඩිකේට් එ. දේශීය ආදායම් කොමසාරිස්** 1921.2 කේ.බී.ඩී.වා. 403.

3. **සීමාසහිත රෝයල් කෝට් ඩර්බි පෝසිලේන් සමාගම එ. රේමන්ඩ් රසල් 1949.2. කේ.බී.ඩී.වා. 417**

4. **සීමාසහිත ඩිමොන්ඩ් ඉන්වෙස්ට්මන්ට් සමාගම එ. බෙට්ස් එච්. එල්. 1928 ඒ.සී.වා. 143, 155 පිටුව.**

5. **දේශීය ආදායම් කොමසාරිස් එ. සීමාසහිත ඩෝඩල් ඩ'මැහොනි සමාගම 1952 ඒ.සී.වා. 401, 426 පිටුව.**

6. **සංස්ථාපිත කැමිල් සහ හෙන්රි පදනම එ. දේශීය කොමසාරිස්** (1954) 1 ඩාන්සරි වා. 672.

7. **කර්කන්ස් එ. සීමාසහිත ජෝන් හඩසන් සහ සමාගම** එච්. එල්. 1955 ඒ.සී.වා. 696, 710 පිටුව.

කලින් නීති සම්පාදනයේ ද්‍වයර්ථයක් නිබේ නම් ඊළඟ නීති සම්පාදනයෙන් නියම අර්ථ නිරූපණය දිය හැකියයි ද තදින් ම කියා සිටින රජයේ නීතිඥවරයා, ඒ අනුව, දැනට පවතින 55(3) වැනි ඡේදය ඇති කළ 1956 අංක 15 දරන සංශෝධිත පනතට සැලැකිල්ල දක්වමින් එම අදාල ඡේදයන්හි අර්ථ නිරූපනය කරන ලෙස මෙම උසාවියෙන් ඉල්ලා සිටී. මුද්දර ගාස්තු ගෙවීමට යටත් විය යුත්තේ කවුරුදැයි යනු 55(1) ඡේදය පැහැදිලිව පළ කරන බව ද, ද සිල්වා විනිශ්චයකාරතුමාගේ නඩු තීන්දුව වැරදි යයි ද හේ කියා සිටී. මෙම නඩු තීන්දුව 51(3) (දැනට 55(4)) වැනි ඡේදය නොසලකා හැර ඇතැ යි ද අදාල ඡේද අතර ගැටුමක් ඇතැයි යන වැරදි පදනමක් මත පිහිටා ඇතැයි ද හේ පෙන්වා දෙයි. ව්‍යවස්ථාදායක අංශය 1956 අංක 18 දරන පනතින් මෙම නඩු තීන්දුවේ බලපැවැත්වීම පැහැදිලි ලෙස අවලංගු කොට ඇතැයි ද එම නිසා දැන් නිබෙන 55(3) ඡේදය මා ඉදිරියේ ඇති කරුණු කෙරෙහි බලපවත්වන්නේ යයි ද හේ කියා සිටී. මෙම කාරණය පිළිබඳව ක්‍රියා කිරීමේ දී යටත් වැසියාට නියම කරන සියලුම බැඳීම් පැහැදිලි හා ද්‍වයර්ථ නොවන භාෂාවෙන් තිබිය යුතුය යන්න හොඳින් පිළිගත් නීතියක් බව සිත තබා ගැනීම මැනවි. ව්‍යවස්ථාවේ භාෂාව පැහැදිලිවම, බදු ගෙවීම් නියම නොකරන්නේ නම් එය ගෙවීමට යටත් වැසියාගෙන් එය අය කිරීම නො කළ යුතු ය. සාධාරණ සැකයක් ඇති නැත, යටත් වැසියාට සෑම වාසියක් ම ගෙන දෙන සේ අර්ථ නිරූපණයක් පිළිගත යුතුය. එය එසේනම්, බදු අයකර ගැනීමට යෝග්‍ය ගනුදෙනුවක් ඇතිවූවිට එය පැහැදිලි වචන වලින් ප්‍රකාශ කිරීමට ඉඩ තිබූ නමුත් එසේ ව්‍යවස්ථාදායක අංශය විසින් නොකළේ නම් යොද ඇති වචන බදු අය කළ යුතුය යි යන අදහසට නැඹුරුව අර්ථ නිරූපනය කිරීම නො සෑහේ. **මැක්ස්වෙල්ගේ ව්‍යවස්ථා අර්ථ නිරූපනය 11 වැනි මුද්‍රණය 278 වැනි පිටුව බලන්න.**

ව්‍යවස්ථාවක් අනිතයට බලපැවැත්විය යුතු බවට අර්ථ නිරූපනයක් යම් පනතක වගන්තිවලින් පැහැදිලිවම පෙනී යන්නේ නම් හෝ අවශ්‍ය හා පැහැදිලි ලෙස හැහෙන්නේ නම් මෙහා විනා අනිතයට බලපවත්වන අන්දමින් කිසිදු ව්‍යවස්ථාවක අර්ථ නිරූපණය නො කළ යුතුය යන්න අප විසින් පිළිගැනුණු මූලික ඉංග්‍රීසි නීතියකි.

කිසියම් ව්‍යවස්ථාවකට, එහි භාෂාව, අවශ්‍ය යයි දක්වන තරමට වැඩියෙන් අතීතයට බලපැවැත්වෙන සේ අර්ථ නිරූපණයක් නො දිය යුතු ය. බද්දක් අවලංගු කිරීම වැනි, යහපතක් සලසන ව්‍යවස්ථාවක පවා, එය අවලංගු කරන්නට පෙර එයට බැඳී සිටියවුන් මුදා හැරීම සඳහා ආපසු බලපැවැත්වෙන සේ අර්ථ නිරූපිත නො විය යුතු ය. **මැක්ස්වෙල් ගේ ව්‍යවස්ථා අර්ථ නිරූපනය 11 වැනි මුද්‍රණය 206–212 පිටු බලන්න.** අර්ථ නිරූපන ආඥා පනතේ 6(3) වැනි ඡේදය, කිසියම් ලිඛිත නීතියක්, කලින් පැවැති ලිඛිත නීතියක් සහමුලින් හෝ කොටසක් වශයෙන් හෝ අවලංගු කරන්නේ නම්, එම් අවලංගු කිරීම, ඒ බවට ප්‍රකාශිත විධිවිධානයක් නොතිබිය දී, අවලංගු වූ ලිඛිත නීතිය යටතේ නිසි පරිදි කරන ලද හෝ විඳින ලද හෝ කිසිවක් කෙරෙහි බල නො පැ යුතු අතර, එසේ බලපාන ලදැයි නො සැලකිය යුතු බව ද, නිර්දේශ කරයි.

මගේ මතය අනුව, 55(3) ඡේදය ඇති කළ 1956 අංක 15 දරන සංශෝධන පනත, එහි වගන්තිවල අර්ථ නිරූපනයක දී, අතීතයට බලනොපවත්වන අතර, හැඟවීමෙන් පවා එය එසේ යයි කිසිවකුට සැලකිය නො හැකි ය.

සිවරාසා මහතා කියා සිටි පරිදි 55(3) වැනි ඡේදය, ද සිල්වා විනිශ්චයකාරතුමා අදාල විධිවිධානයන්ට දුන් අර්ථයේ ව්‍යවස්ථාදායක ප්‍රකාශයක් ද යන ප්‍රශ්නය පැන නගී. අවලංගු කිරීමේ වගන්තියෙකින් නොරව, කලින් තුබූ ව්‍යවස්ථාවක පැන වූ විධිවිධාන අවලංගු කිරීමට ව්‍යවස්ථාවක විස්තර වාක්‍යය පමණක් හෝ සැහුන ද කලින් පැන වූ සජාන පනතක ඇතැම් වචනවලට ව්‍යවස්ථාදායක අංශය එක්තරා අර්ථයක් දුන්නේ යයි පසුව පැන වූ පනතකින් සොයා ගත් විට, එය එහි අර්ථයේ ව්‍යවස්ථාදායක ප්‍රකාශයක් ලෙස ගැනේ. **මැක්ස්වෙල්ගේ ව්‍යවස්ථා අර්ථ නිරූපණය 305 පිටුව** බලන්න. මගේ මතය අනුව, ප්‍රශ්නයට අදාල ඔප්පුව සංශෝධන පනතට පෙර ලියා අත්සන් කරන ලද හෙයින් ව්‍යවස්ථාදායක ප්‍රකාශය ආපසු බල නො පැවැත්වීම නිසා, මෙම ප්‍රඥප්තිය වුව ද ආණ්ඩුවට එතරම් ප්‍රයෝජනවත් නො වේ. නීති පැනවීම ව්‍යවස්ථාදායක අංශයේ කාර්යය වන අතර අර්ථ නිරූපණය උසාවියේ කටයුත්තය. සිල්වා විනිශ්චයකාරතුමා තීන්දුව දුන් නඩුවේ 27.11.52 දා සිට, එතුමා සුව්‍යක්ත අර්ථ නිරූපණයක් දී ඇති අතර ව්‍යවස්ථාදායක අංශය, එම නඩුවට අදාල ඔප්පුවට දෙන ලද අර්ථ නිරූපණය සීමා කිරීමට මැදහත් වුණේ නැත. තව ද, නීත්‍යානුකූල වලංගුව පිළිබඳ ප්‍රකාශය, අදාල ඡේද අතර ගැටුමක් ඇති බව පැහැදිලිවම, පිළිගනී. එය ද සිල්වා විනිශ්චයකාරතුමා ගේ නඩු තීන්දුව ප්‍රශ්නයට භාජන නො කරයි. මෙම තත්ත්වය යටතේ, 55(3) ඡේදය අතීතයට බලපවත්වන ලෙස, 1.4.1947 වැනි දින ලියා අත්සන් කරන ලද, ප්‍රශ්නයට අදාල ඔප්පුව පිළිබඳව යෙදීම නිවරද යයි මම නො සිතමි.

ද සිල්වා විනිශ්චයකාරතුමා විසින් දෙන ලද අර්ථ නිරූපණය වැරැදි යයි ද ව්‍යවස්ථාදායක අංශය එසේ ප්‍රකාශයට පත් කොට ඇතැයි ද සිවරාසා මහතා පිළිගනී. ව්‍යවස්ථාදායක අංශය මේ තරම් දුර ගොස් ඇතැ යි මම නො සිතමි. එය, අධිකරණ අර්ථ නිරූපණයේ නිරවද්‍යතාව එහෙමකට ප්‍රශ්න කොට නැත. එය කැර ඇත්තේ ඡේදවල ගැටුම ඉවත් කිරීම හා එහි අරමුණ දැක්වීම පමණෙකි. මෙම අරමුණ, සංශෝධනයට පෙර ඡේදයන්හි පෙන්වා දීමට කෙටුම්පත්කරු අපොහොසත් වී තිබේ.

සාමාන්‍ය වගන්තියක් වන 51 වැනි ඡේදය (දැනට 55 වැනි ඡේදය), 26 හා 27 වැනි ඡේදවල (දැනට 31 හා 33 යන ඡේද) අඩංගු විශේෂිත පැනවීම් පාලනය නොකරන්නේය යන ද සිල්වා විනිශ්චයකාර තුමා විසින් දක්වන ලද ප්‍රඥප්තියට මම, මහත් ඓශ්වරයෙන් එකඟවෙමි. මෙයට වෙනස් මතයක් ගැනීමට නීත්‍යානුකූල හේතුවක් මට නො පෙනෙන අතර මෙම නඩුවේ දී මතු වී ඇති අරගලය පිළිබඳව ක්‍රියා කිරීමේ දී ද මම එය පිළිගනිමි. මේ අනුව, මුද්දර ගාස්තු ගෙවීමට බැඳී සිටින්නේ පැවැරුම් ලාභියා බව ද, පවරන්නා නො වන බව ද මම තීරණය කරමි.

මගේ ඉහත සඳහන් තීරණය අනුව පෙත්සම්කරු පෞද්ගලිකව බැඳී සිටී ද යන ප්‍රශ්නය මතු නො වේ.

මම, උගත් මහේස්ත්‍රාත්වරයාගේ නියෝගය නිෂ්ප්‍රභා කරමින්, ඉහත කී ඔප්පුව සඳහා දීමනාකරුගෙන් ගාස්තුව අය කර ගැනීමට දේශීය ආදායම් කොමසාරිස්ව අයිතියක් නැති බව තීරණය කරමි.

නියෝගය නිෂ්ප්‍රභා කරන ලදී.

සිංහල පරිවර්තනය: කුමාරදාස ජයසේකර විසිනි.

ගරු ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා ඉදිරිපිට

එච්. කේ. ජිනදාස එ. ඒ. පී. යූ. එදිරිසූරිය, ආහාර සහ මිල පාලන පරීක්ෂක*

ශ්‍රේ. අ. අංකය 75/1968 — මාතර මහේස්ත්‍රාත් උසාවියේ අංක 36480

වාද කළේ: 1968 නොවැම්බර් 17 වැනිද
තීන්දු කළ දිනය: 1969 ජනවාරි 13 වැනිදා

මිල පාලන පණත — 4 වන ඡේදය — පාලන මිලට වැඩි මිලකට බොම්බයි ලූණු විකිණීම — දෙනියායේ කෙලින් විදියේ විකුණන ලදැයි චෝදනා එල්ලවීම — පාලන මිලට වැඩි මුදලකට විකිණීම දඩුවම් ලැබිය හැකි වරදක් වන ප්‍රදේශය තහවුරු කිරීමට සාක්ෂි අපොහොසත් වීම — එක් එක් අවස්ථාවල කොළඹ මහා නගර සභා ප්‍රදේශයේ විකිණීම පාලනය කෙරෙන පාලන නියෝග බලා ද්‍රව්‍යයක පාලන මිල සොයා දැන ගැනීමට වෙළෙඳුන්ට සිදුවීම — මේ නිසා පාලන නියෝග අයථා නියෝග බවට පෙරළේද යන්න — ආහාර පාලන පරීක්ෂකයකු විසින් බොම්බයි ලූණු ගැන දුන් රපෝර්තුවක් පරීක්ෂකයා නොකැඳවා සාක්ෂියක් ලෙස පිළිගැනීම — එය පිළිගතහැකි සාක්ෂියක් ද යන්න — එබඳු පරීක්ෂකයකු කෙතරම් දුරට විශේෂඥයකු ලෙස ගැනේ ද යන්න.

උප-ලේඛනයේ දෙවන තීරුවේ දෙනියායේ ගම් සභා ප්‍රදේශයේ බල පවත්වන බව සඳහන්ව ඇති, පී4 දමා ලකුණු කරන ලද මිල පාලන නියෝගයේ නියමිත පාලන මිලට වැඩි මිලකට දෙනියායේ කෙලින් විදියේ අංක 133 දරණ ස්ථානයේ බොම්බායි ලූණු විකිණීම ගැන චෝදිතයා වරදකරු විය.

දෙනියායේ කෙලින් විදියේ අංක 133 දරණ ස්ථානය දෙනියායේ ගම් සභා ප්‍රදේශය තුළ පවත්නා බව ඔප්පු කිරීමට තිබූ එකම සාක්ෂිය දෙනියායේ කෙලින් විදියේ අංක 133 දරණ ස්ථානය මාතර පරිපාලන කොට්ඨාශය තුළට ඇතුළත් වේ යයි ආහාර පාලක දෙපාර්තමේන්තුවේ ලිපිකරුවකු කී සාක්ෂිය පමණකි.

තීන්දුව: (1) පාලන මිලට වැඩි මිලකට බොම්බායි ලූණු විකිණීම වරදක් ලෙස ගැණෙන ප්‍රදේශයක මෙම විකිණීම කළ බව ඔප්පු කිරීමට පැමිණිලි පක්ෂයට නොහැකි විය.

(2) මිල පාලන පණතේ 4 වන ඡේදයෙන් ආහාර පාලකයාට වැඩිම මිල නියම කිරීමට ඇති අයිතිවාසිකම ගැන මිස එය නියම කළ යුත්තේ කෙසේ ද යන්න ගැන පැණ වූවක් නොවන නිසා වෙළෙඳුන්ට කිසියම් නියමිත ප්‍රදේශයක තමාගේ ද්‍රව්‍යවලට අයකළ හැකි මිල ගණන ඒ ඒ අවස්ථානුකූලව කොළඹ නගර සභා ප්‍රදේශයේ බලපාන මිල පාලන නියෝගවලින් සොයා දැන ගත යුතුය යන පැණවීම ඇතුළත් වන පී4 දමා සලකුණු කරන ලද නියෝග නීතිය අනුව සලකන විට අයථා නියෝගයක් නොවේ.

(3) අපරාධ නඩුවක නීතිවේදියකු විසින් කරන ලද පිළිගැනීමක් නිසා පැමිණිලි පක්ෂය විසින් උසාවිය සැහීමට පත්කිරීමට සුදුසු සාක්ෂි ඉදිරිපත් කිරීමම තමන් පිට පැවරෙන කාර්ය භාරයෙන් එම පක්ෂය නොමිදෙන බැවින් ප්‍රශ්නයට භාජන වී ඇති ලූණු බොම්බයි ලූණු බව ඔප්පු කිරීම පිණිස "කැමැත්ත පිට" යයි කියමින් එවකට එහි නොසිටි ආහාර පරීක්ෂක වරයෙකුගේ වාර්තාවක් උගත් මහේස්ත්‍රාත්වරයා සාක්ෂියක් ලෙස පිළිගැනීම සදොස් ක්‍රියාවකි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංග යෙහි 76 වෙනි කාණ්ඩයෙහි 55 වෙනි පිට බලනු.

(4) එබඳු කරුණු ගැන අනවරතයෙන්ම නිරත වන නිසා පී1 දමා සලකුණු කරන ලද පාර්සලයෙහි ඇතුළත් දෙය බොම්බයි ලූණු යයි කී ආහාර පරීක්ෂකවරු එහි ඇත්තේ කිනම් වර්ගයක ලූණු දැයි කියා පෑමට සුදුසු කමක් ඇති අය වෙති.

(5) පරීක්ෂකවරයා බොම්බයි ලූණු ඉල්ලූ විට චෝදිතයා පී1 දමා සලකුණු කරන ලද ලූණු පාර්සලය අතට දුන් බව කියන පරීක්ෂකවරයාගේ සාක්ෂියෙන් චෝදිතයා තමාගේ ක්‍රියාපටිපාටියෙන් ඒවා බොම්බයි ලූණු යයි පිළිගත්බව පැහැදිලි වේ.

සූරියා වික්‍රමසිංහ මහත්මිය, චෝදිත-ඇපැල්කරු වෙනුවෙන්.

රජයේ අධිනීතිඥ ටිරොන් ප්‍රනාන්දු මහතා, ඇටෝර්නි-ජනරාල්වරයා වෙනුවෙන්.

ද ක්‍රෙටසර් විනිශ්චයකාරතුමා:

රාත්තලක පාලන මිළ ශත 28 ක්ව තිබියදී චෝදිතයා දෙණියායේ කෙලින් වීදියේ අංක 133 දරණ ස්ථානයේදී 67.7.8 වැනි දින බොම්බයි ලූනු රාත්තලක් ශත 40 ට විකුණන ලදැයි කියමින් ඔහුට විරුද්ධව ඉදිරිපත් කර තිබූ චෝදනාවලට මාතර මහේස්ත්‍රාත්වරයා (ඇල්. ඒ. ගුණවර්ධන මහතා) ඔහු වරදකරු බවට මේ නඩුවේදී තීරණය කොට තිබේ. ඒ අනුව මහේස්ත්‍රාත්වරයා ඔහුට බරපතල වැඩ ඇතිව මාස 3 ක සිර දඬුවමක් සහ නොගෙවිමොත් තව මාස තුනක බරපතල වැඩ ඇතිව සිර දඬුවමක් සහිත රු: 1,000 ක මුදලක් දඩ ගසන ලදී. මේ නියෝගයට විරුද්ධව චෝදිතයා විසින් අභියාචනයක් ඉදිරිපත් කරන ලදී.

මෙම නඩුවේ පී4 දමා සළකුණු කොට ඉදිරිපත් කරන ලද මිල පාලන නියෝගයේ අඩංගු උප-ලේඛනයේ දෙවන තීරුවේ පාලන මිලට වැඩියෙන් ලූනු විකිණිය නොහැකි ප්‍රදේශ මොනවා දැයි සඳහන් වී ඇත. මේ නිසා දෙණියායේ කෙලින් වීදියේ අංක 133 දරණ ස්ථානය එනම් මෙම විකිණීම සිදුවූ තැන එම ප්‍රදේශයට ඇතුලත් තැනක් යැයි ඔප්පු කිරීමේ වගකීම මෙහි පැමිණිල්ල මෙහෙයවන නිලධාරියා පිට පැවරේ. නමුත් මෙම ප්‍රදේශය පිළිබඳව කියැවී ඇති සාක්ෂිය ආහාර පාලක දෙපාර්තමේන්තුවේ ලිපිකරුවකු වන පී. වනිගසේකරගේ සාක්ෂිය පමණකි. ඔහු කියා ඇත්තේ දෙණියායේ කෙලින් වීදියේ අංක 133 දරණ තැන මාතර පරිපාලන ප්‍රදේශ සීමාවට ඇතුලත්ව ඇති බවකි. මෙහි පැමිණිලි පක්ෂය විසින් චෝදිතයා සේනාරත්න නමැත්තකුට බොම්බයි ලූනු රාත්තලක් ශත 40 කට විකුණන ලද බවත්, එම විකිණීම කර තිබෙන්නේ මාතර ආදායම් ප්‍රදේශයට අඩංගු දෙණියායේ බවත් තීරණාත්මකව ඔප්පු කර තිබෙයැයි මහේස්ත්‍රාත්වරයාට කීමට සිදුවූයේ මොහුගේ සාක්ෂිය පිළිගැනීම නිසා විය හැක.

නමුත් මිළ නියෝගයේ උප-ලේඛණයෙහි 2 වන තීරුව එම පාලන නියෝගය බලපවත්වන ප්‍රදේශය මාතර ආදායම් ප්‍රදේශය හෝ එසේ නැතහොත් මාතර පරිපාලන ප්‍රදේශය බව හෝ සඳහන් නොකරයි. මෙම තීරුවේ මාතර නගරය ගැන සඳහන් ව ඇත්තේ පළමු වන කොටසේ මාතර නගර සභා ප්‍රදේශ ගැන සඳහන් වන තැන පමණක් වන අතර එහි දෙණියාය ගැන සඳහන් වන්නේ 6 වන කොටසේ දෙණියායේ ගම්සභා ප්‍රදේශය ගැන සඳහන් වී ඇති තැන්හි පමණකි. දෙණියායේ කෙලින් වීදියේ අංක 133 දරණ ස්ථානය දෙණියායේ ගම්සභා ප්‍රදේශයට අන්තර්ගතවන බව කියන සාක්ෂියක් මෙහි විද්‍යමාන නොවේ. මේ කරුණු අනුව ඇතිවන තත්වයෙහි ප්‍රතිඵලය වන්නේ මෙම ලූනු විකිණීම කෙරී ඇත්තේ බොම්බයි ලූනු රාත්තල ශත 28 කට වඩා විකිණීම දඬුවම් ලැබිය හැකි ප්‍රදේශයක සිදු වී තිබේ යැයි ඔප්පු කිරීමට පැමිණිලි පක්ෂය අපොහොසත්වීමය.

ඉහත කී පී4 දමා සලකුණු කර ඇති නියෝගය නීති ග්‍රන්ථ මාලාවේ 6 වන ග්‍රන්ථයේ 173 වැනි පරිච්ඡේදයේ ඇති මිළ පාලන ආඥා පණතේ 4 වන ඡේදයට අනුකූල නොවේයැයි ඇපැල්කරුගේ නීතිවේදියා පැමිණිලිකර සිටියි. ඔහු කියා සිටින්නේ මෙම ද්‍රව්‍යය විකිණිය හැකි වැඩිම මිළ එම පණතින් නියමිතව නැති අතර එම මිළ කුමක්දැයි දැනගැනීම සඳහා ඒ ඒ අවස්ථාවලදී වෙනත් මිළ පාලන නියෝගයක සටහන් වී ඇති දෙය බැලිය යුතුය යන්නයි. පී4 දමා ඇති නියෝගයෙහි සඳහන්ව

ඇත්තේ කොළඹ මහ නගර සභායතන ප්‍රදේශයයි. මෙම ද්‍රව්‍යය ඒ ඒ අවස්ථාවලදී විකිණිය හැකි නියමිත මිළට වඩා ශත 2 ක් වැඩි මිළ එහි ඉතාම ඉහළ මිළ වියයුතු බවය.

කොළඹ මහ නගර සභායතන ප්‍රදේශයකින් පිට ප්‍රදේශයකට වැඩි මුදලක් ඉහළම මිළ වශයෙන් නියම කිරීමට අවශ්‍ය වන්නේ ද්‍රව්‍ය ගෙන යාමේදී ඇතිවන වියදම සඳහා යම් අතිරේක මුදලක් ගැනීම සඳහා අවකාශ තිබිය යුතු නිසායි. නමුත් ඒ ඒ අවස්ථාවලදී කොළඹ මහ නගර සභායතන ප්‍රදේශයෙහි එම ප්‍රදේශයට නියමිත මුදල සලකා බලා තමා වාසය කරන ප්‍රදේශයෙහි ඒ ඒ ද්‍රව්‍යයෙහි නියම මිළ යෙදීමට ඇත ප්‍රදේශවල වසන වෙළෙන්දන්ට සිදුවන නිසා එම අපහසුතාවය ඔවුන් පිටට පවරන්නේ මන්දැයි තේරුම් ගැනීම අපහසුයි. කොළඹ නගර සභායතන ප්‍රදේශයෙහි තමාගේ බඩුවල මිළ කෙරෙහි බලපාන අලුත් නියෝගයක් පැනවී තිබෙදැයි නිතර නිතර සෝදිසි කිරීමට බාහිර වෙළෙඳුන්ට සිදු නොකර අනෙක් පළාත්වල කටයුතු කරන මිළ පාලක වරු සහ ඔවුන්ගේ සහායකයන්ට ඒ ඒ පළාත්වල ද්‍රව්‍ය විකිණිය හැකි වැඩිම මිළ නියම කිරීම වැඩි වෙහෙස මහන්සියක් නැතිව කළ හැකි දෙයකි. සිරිමාන විනිශ්චයකාරතුමා **ඥානසේකරම් එ. මොහොමඩ්** අතර කියැවී 67 වෙනි න.නී.වා. 479 පිටේ වාර්තා වී ඇති නඩුවේ මිළ පාලන ද්‍රව්‍ය විකිණීමට කැමැත්තක් දක්වන අය ඒ ද්‍රව්‍යවල පාලන මිළ ගැන තම තමන් දැන සිටිය යුතුය යනු කියා ඇති බව සැබෑය. නමුත් මිළ පාලන කිරීම භාර පුද්ගලයන් විසින් වැළැක්විය හැකි අපහසුකම් ඉවත් නොකර සිටීමට එය හේතුවක් නොවේ.

එය කෙසේ හෝ වේවා මේ සිද්ධියේදී ඉතාම වැඩි මිළ නියම කිරීමෙහිලා පනතේ 4 වන ඡේදය උල්ලංඝනය කිරීමක් සිදුවී ඇතැයි මට පිළිගැනීමට නුපුලුවන. මා එසේ කිරීමට හේතුව 4 වන ඡේදයෙන් මිළ පාලකතැනට ද්‍රව්‍යයක වැඩිම මිළ නියම කිරීමට ඇති අයිතිය ගැන සඳහන් කෙරෙනු විනා එහි එම මිළ නියම මිල විය යුත්තේ කුමන අයුරකින්ද යන්න පැනැවී නැත. දැනට ඇති තත්වය අනුව වුවද තමාගේ ප්‍රදේශයට බලපවත්වන වැඩිම මිළ කුමක්දැයි ගණන් බලා ගැනීමට නිසැකවම වෙළෙන්දෙකුට පුලුවන්කම තිබේ. නිරනුමානවම මෙය අපහසුවට හේතුවන ක්‍රමයක් වුවද එය නීතිගතව ඇති ක්‍රමයකි. ඉහත සඳහන් ඥානසේකරම් එ. මොහොමඩ් අතර කියැවුන නඩුවේ යම්කිසි මිල පාලන නියෝගයක එක්තරා විශේෂ ඉලක්කමක් සඳහන්ව නැතිකම නිසා හෝ එහි කොළඹ නගරයේ පවතින කිසියම් විශේෂ මිළ පාලන නියෝගයක් ගැන සඳහන් නොවීම ගැන නිසා හෝ එය අක්‍රියාකාරී නොවන බව මීට කලින්ද නිගමනය කොට තිබෙන බව මෙහිලා කිවයුතුයි.

ඇපැල්කරුගේ නීතිවේදියා විසින් ඉදිරිපත් කරන ලද අනික් තර්කය නම් මේ නඩුවේදී පී6 දමා සලකුණු කරන ලදුව ආහාර පරීක්ෂකවරයාගේ රපෝර්තුව වැරැදි අන්දමින් නඩුවට පිළිගෙන ඇති නිසා එය ඉවත් කළ විට මෙම ලුනු බොම්බයි ලුනු බව ඔප්පු කර නොතිබීමයි. මෙම රපෝර්තුව මහේස්ත්‍රාත්වරයා විසින් නඩුවේ සාක්ෂියක් වශයෙන් පිළිගෙන ඇත්තේ ''කැමැත්ත අනුව'' බව මෙහි සඳහන් වේ. මෙම ආහාර පරීක්ෂක වරයා නඩුව අසන ලද දිනයෙහි වෙන උසාවියක පෙනී සිටීමේ හේතුවෙන් මෙම නඩුවේ පැමිණිල්ල මෙහෙයවූ නිලධාරියා නඩුව කල් දමන ලෙස ඉල්ලීමක් කර තිබේ. එහෙත් චිත්තිය වෙනුවෙන් පෙනී සිටි නීතිවේදියා එම රපෝර්තුවේ නිරවද්‍යතාවය තමන් පිළිගන්නා බවත් විකුණන ලද්දේ බොම්බයි ලුනු නොවන බවත් විරෝධයක් මතු නොකරන ලද නිසාත් ඒ හේතුවෙන් එසේ කල් දැමීම අනවශ්‍ය බවත් පැවැසිය.

රංගප්පා ගෝවින්දන් එ. අධිරාජයාණන් වහන්සේ සමස්ත භාරතීය වාර්තා **මදුරාසිය 426** වන පිටේ සඳහන් වී ඇති නඩුවේ කොර්නිස් විනිශ්චයකාරතුමා පහත සඳහන් පරිදි පෙන්වා දී තිබේ. තමා චෝදනාවට වරදකරු යැයි අවධාරනයකින් පිළිගත් අවස්ථාවක විනා අපරාධ නඩුවක යම්කිසි සාක්ෂියක් කීමේදී ඕප්පු කළම යුතු කරුණක් මිස දන්කිසි විදියේ පිළිගැනීමකට අවසර නැති බව මූලික රීතියකි. මේ සඳහා පිෆ්සම් සාක්ෂි ග්‍රන්ථයේ 19 වන පිට බලන්න.

එම නඩුවේදී දෙපක්ෂයේ කැමැත්ත අනුව සාක්ෂියක් වශයෙන් දොස්තර මහතා නොකැඳවා ඔහුගේ පශ්චාත් මරණ රපෝර්තුවක් නඩුවේදී පිළිගෙන තිබේ. කොර්නිෂ් විනිශ්චයකාරතුමා 27 කලිකතා වාර්තා 295 වන පිටේ ඇති නඩුවේ 400 වන පිටේ සඳහන්ව ඇති තත්වය

අනුගමනය කරමින් ''පශ්චාත් මරණ වාර්තාවකින් කිසිවක් ඔප්පු නොවේ. එය සාක්ෂියක් ලෙසටත් සැලකිය නොහැක. මෙය පශ්චාත් මරණ පරීක්ෂණය පැවැත්ම සාක්ෂිකරුවාට තමාගේ ස්මරණ ශක්තියට ආධාරයක් වශයෙන් පමණක් භාවිතා කළ දැය'' යි කිවේය. **නීතිවේදියා ඇස්. සී. විට්ටර් එ. ඉන්දියා රාජ්‍යය සමස්ත භාරතීය වාර්තා (37) 1950 කලිකතා 435.** යන නඩුවටද මගේ අවධානය යොමු කළේය. එහි කියැවී ඇත්තේ දාස්ගුප්ත විනිශ්චයකාරතුමා අපරාධ නඩුවක නීතිවේදියකුට කරුණු පිළිගැනීමක් කිරීමට නීතියෙන් ඉඩනැති බව පෙන්වා දීමටය. සුදුසු සාක්ෂිවලින් උසාවිය සෑහීමකට පත් කිරීමේ පැමිණිල්ලේ ඇති යුතුකමින් ඇත්වීමට නීතිවේදියකු විසින් කරන ලද පිළිගැනීමක් කිසියේත් ප්‍රමාණවත් නොවේ. එම නිසා පී6 දමා සලකුණු කරන ලද වාර්තාව සාක්ෂියක් වශයෙන් පිළිගැනීමේදී මහේස්ත්‍රාත්වරයා සඳහාස්ව කටයුතු කර ඇති බව හොඳටම පැහැදිලිය. එය කෙසේ වුවත් මෙම නඩුවේ විකුණන ලද ලූනු ගැන ඇති ප්‍රශ්නයේදී ඒවා බොම්බයි ලූනු යැයි කීමට තරම් සාක්ෂියක් නැති තත්වයක් පැන නැඟී ඇතැයි තේරුම් ගත නොහැක. එදිරිසූරිය සහ සේනාරත්න යන ආහාර හා මිළ පාලන පරීක්ෂකවරු දෙදෙනාගේ සාක්ෂිය මීට උපයෝගි කරගත හැක. ඔවිහු නිතරම පාහේ මෙවැනි කරුණු ගැන කටයුතු කරන අය වෙති. මේ නිසා මේ විකුණා ඇති ලූනු බොම්බයි ලූනු යැයි කියන ඔවුනට ඒ ලූනු මොන වර්ගයේ දැයි කීමට ඒ නිසාම සුදුසුකම් ඇත්තේය. තවදුරටත් සළකා බලන කල චිත්තිකරු විසින් විකුණන ලද ලූනු බොම්බයි ලූනු යැයි ඔහුගේම පිළිගැනීමෙන් කෙරෙන ඔහුගේම ක්‍රියාපටිපාටියෙන් එය ස්ථාපිත වේ. එයට හේතුව සේනාරත්න පරීක්ෂකවරයා බොම්බයි ලූනු ඔහුගෙන් ඉල්ලූ විට ඔහු පී1 දමා සළකුණු කොට ඉදිරිපත් කරන ලද පාර්සලය පරීක්ෂකවරයාට දුන් බව කියන සාක්ෂිය මෙහිදී පිළිගෙන තිබේ. මෙවැනිම අවස්ථාවක ශ්‍රේෂ්ඨාධිකරණයේ අංක 412/99 සහ තංගල්ලේ මහේස්ත්‍රාත් උසාවියේ 18236 දරණ නඩුව 10.3.60 වන දින ශ්‍රේෂ්ඨාධිකරණ නඩු සටහන්වල* ගැබ්වී ඇත. මෙම නඩුවේ විකුණන ලද ද්‍රව්‍ය වූයේ හරක් මස් ය. මෙහි දී සින්නතම්බි විනිශ්චයකාරවරයා කියේ මෙසේය: ''ද්‍රව්‍ය හඳුනාගැනීම පිළිබඳ මෙහි ඇති නොදම සාක්ෂිය විත්තිකරු විසින් කර ඇති පිළිගැනීමයයි මම සිතමි. මෙම නඩුවේදී විත්තිකරු අනුගමනය කළ ක්‍රියාපටිපාටියෙන් ඔහු විසින් අනික් තැනැත්තා අතට දෙන ලද ද්‍රව්‍යය හරක් මස් බව සත්‍ය වශයෙන්ම තහවුරුවේ.'' මෙනයින් බලන කල මේ නඩුවේද ප්‍රශ්නයට භාජනවී ඇති ද්‍රව්‍ය බොම්බයි ලූනු බව සැහෙන තරම් තහවුරු වී ඇතැයි මට සැහීමකට පත්විය හැක. පැමිණිලි කරුගේ නීතිවේදියා දඩය නොගෙවිවොත් ඒ වෙනුවට ගෙවිය යුතු දඩ මුදල නියම කිරීමේදී සඳහාස්ව ක්‍රියා කර ඇතැයිද චෝදනාවට පිළිතුරු වශයෙන් චෝදිතයා විසින් කරන ලද සැලකිරීම නිවැරැදි ලෙස වාර්තාවට ඇතුලත් කොට නැතැයිද පැමිණිලි කළේය. මම මේ අභියාචනයට ඉඩ දීමට සිතා ගෙන සිටි හේතුවෙන් මේ සඳහා මා විසින් මහේස්ත්‍රාත්වරයාගේ අතින් තම කාර්යය මෙවැනි දුර්වල තාවයකට සිදුවීමට බලාපොරොත්තු නොවී යැයි කීමට වඩා දෙයක් කීම අවශ්‍ය යැයි නොසිතමි.

මෙම නඩුව පිළිබඳ කරුණු අවසන් කිරීමට පෙර මෙහි යතුරු ලේඛණ පිටපත සකස්කිරීමේදී සිදුවී ඇති ආලසම් ගතිය ගැන කණගාටුවෙන් වුවද සඳහන් කළ යුතුය. චෝදනා පත්‍රයේ ඉතාම වැදගත් කොටස යතුරු ලේඛන පිටපතින් ඉවත්වී ඇති බව මට පෙනී යේ. යතුරු ලේඛන නඩු කොපිය සැකසීමේදී ඇතිව ඇති අබල දුබලතාවයන් මා දුටු අවස්ථාව මේ නඩුව පමණක් නොවනබැවින් ඒ කරුණ ගැන මා නැවතත් අවධානය යොමු කරන්නේ අනාගතයේදී එබඳු ක්‍රියා ඌනතාවයන් ගැන නැවැතත් සඳහන් කිරීමට මට නොසිදුවේය යන බලාපොරොත්තුව ඇතිවය.

මෙම නඩුවේ අභියාචනයට ඉඩ දෙන ලද්දෙන් චෝදිතයා වරදට පත්කිරීම සහ ඔහුට දෙන ලද දඩුවම ද නිශ්ප්‍රභා කරන ලදී.

ඇපැලට ඉඩ දී දඩුවම නිශ්ප්‍රභා කරන ලදී.

*75 සහිපතා ලංකා නීතිය 37 වැනි පිට බලන්න.

ගරු සිරිමාන්න සහ ද ක්‍රෙට්සර් විනිශ්චයකාරතුමන් ඉදිරිපිටදී

එච්. ජෝන් පෙරේරා එ. එච්. මානුපාලි*

ශ්‍රේ. අංක 164/67 — දි. උ. කොළඹ අංක 6613/ඩී

තර්ක කළේ: 1968 නොවැම්බර්, 30 වැනි දින
තීන්දුවට හේතු ප්‍රකාශ කළේ: 1968 දෙසැම්බර්, 14 වැනි දින

දික්කසාදයක් — ද්වේෂ සහගත ලෙස අත්හැර යාම — වගඋත්තරකාරිය 1949 දී අනාචාරයේ හැසිරී එම මිනිසා සමග ඉන්පසු ජීවත් වූ බවට පැමිණිලිකරු දී ඇති අනභියෝගිත සාක්ෂිය — දැන් ඇයට ඔහු ගෙන් දරුවෙකි — පැමිණිලිකරු රෝගාතුරව සිටි දීර්ඝ කාලය තුළ ගැහැනියක් ඔහුව රැක බලාගත් අතර ඇය ඔහුගේ අනියම් බිරිය වී දරුවන් තිදෙනෙක් ලැබීම — නඩු පැවරීමට පමාවීම ගැන හේතු දක්වා පැහැදිලි කිරීම — දික්කසාදයක් නොදිසිවිමේ උසාවියට ඇති අභිමතය — එය පැමිණිලිකරුගේ වාසියට පාවිච්චි කළ යුතු ද? — සිවිල් නීති විධිවිධාන සංග්‍රහයේ 602 වැනි වගන්තිය.

මේ වූ කලී භාර්‍යාවට විරුද්ධව ද්වේෂ සහගත අත්හැර යාමේ හේතුව උඩ ස්වාමිපුරුෂයා විසින් ගෙනෙන ලද දික්කසාද නඩුවක් ඉවත දමමින් දෙන ලද තීන්දුවකින් කරන ලද අභියාචනයකි. පැමිණිලිකරුගේ අනභියෝගිත සාක්ෂිය අනුව දෙපාර්ශ්වය අතර විවාහය සිදුවූයේ 1943 ජූලි මස 7 වැනි දිනය. වගඋත්තරකාරිය 1949 දී අනාචාරයේ හැසුරුනු අතර ඒ මිනිසා සමඟ ඉන්පසු ද ජීවත් වෙමින් දරුවකු ලැබුවා ය. මේ නඩුව පැවරීමේ දී පමාවක් ඇතිවූයේ රෝගාතුරවීම, රාජකාරියේ දී තැනින් තැනට ස්ථාන මාරු රාශියක් ලැබීම, මිල මුදල් හිඟකම, වගඋත්තරකාරිය සිටින්නේ කොහිදැයි සොයා දැනගැනීමට නොහැකිවීම යනාදී හේතූන් නිසාය. පැමිණිලිකරු අවුරුදු එකහමාරක් පමණ කාලයක් තුළ ඔත්පලව සිටි අතර එම කාලයේ දී වෙනත් ගැහැණියක් ඔහු සොයා බලා ගත්තා ය. ඇගෙන් ඔහුට දරුවෝ තිදෙනෙක් සිටිති. ඔහු මේ නඩුව පැවරුවේ මෙම දරුවන්ට අනාගතයක් නොමැති හෙයිනි.

තීන්දුව: (1) මේ කරුණු අනුව මෙම විවාහය සම්පූර්ණයෙන් ම බිඳී ගොස් ඇති බව පැහැදිලි වන අතර සිවිල් නීති විධිවිධාන සංග්‍රහයේ 602 වැනි වගන්තියේ අතුරු විධානය යටතේ උසාවිය වෙත පැවරී ඇති අභිමතය පැමිණිලිකාර ඇපැල්කරුට පක්ෂව පාවිච්චි කළ යුතුයි.

(2) දරුවන්ගේ මෙන් ම ඔවුන් සමග ජීවත්වන ගැහැණියගේ ද යහපත සඳහා මෙන් ම වගඋත්තරකාරියගේ සහ ඇගේ දරුවාගේ ද යහපත සඳහාත් පැමිණිලිකරුට ඔහුගේ භාර්යාව ගෙන් දික්කසාදයක් දෙමින් නයිසයි ආඥාවක් නිකුත් කළ යුතුය.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා: "මේ විවාහය අභාවයට පත් වී ඇති එකක් බව අභියෝග කළ නොහැකි කරුණකි. විනිශ්චයකරුවකු කෙරෙහි (පිරිනැමී) ඇති අභිමතය පාවිච්චි කිරීමට ප්‍රතික්ෂේප කිරීමෙන් කලෙක පරිශුද්ධවූත් තවදුරටත් පරිශුද්ධ නොවන්නාවූත් විවාහ බන්ධනයක් අපරිශුද්ධ වධ බන්ධනයක් බවට පත් කිරීම විවාහයේ ගෞරවනීයත්වය ආරක්ෂා කිරීමක් නොව, එය සමච්චලයට භාජනය කිරීමක් යැයි මට හැඟේ. එය පොදු මහජන ශුභ සිද්ධියට ද අදාල නොවේ. මක්නිසාද යත් කෙනකු 'අවංක විවාහ බන්ධනයක ගෞරවනීයත්වය' ගැන සිතීමේදී අප ජීවත්වන සමාජය ඒ දෙස බලන ආකාරය ගැන ද කල්පනා කළ යුතුයැයි මට සිතෙන හෙයිනි."

ඇන්. ඊ. වීරසූරිය (කණිෂ්ඨ) පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන්.

ඇස්. ඒ. මරික්කාර් වගඋත්තරකරු වෙනුවෙන්.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 66 වෙනි පිට බලනු.

සිරිමාන්න විනිශ්චයකාරතුමා:

මේ චූකලි පැමිණිලිකාර ස්වාමිපුරුෂයා විසින් තමා ද්වේෂසහගත ලෙස අත් හැර යෑමේ හේතුව උඩ ස්වකීය භාර්‍යාවට විරුද්ධව පවරන ලද දික්කසාද නඩුවකි. අසත්‍යයැයි අභියෝගයට පාත්‍ර නොවූ ඔහුගේ සාක්ෂිය අනුව මේ දෙපාර්ශ්වය 1947 ජූලි මස 7 වැනි දින විවාහ වූ බවත්, 1949 අප්‍රෙල් මාසයේදී වගඋත්තරකාරිය අනාචාරයේ හැසුරුනු බවත් ඒ පුරුෂයා සමග ජීවත් වෙමින් දරුවකු ද ලබා ඇති බවත් පෙනේ. ද්වේෂ සහගත ලෙස අත් හැර යෑමේ ප්‍රශ්නය සම්බන්ධයෙන් පැමිණිලිකාර ඇපැල්කරුට විරුද්ධව තීරණයකට පැමිණීමෙන් උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා වැරදි ලෙස ක්‍රියා කර ඇති බව ඉතා පැහැදිලිය.

මේ නඩුව පැවරීමේදී පමාවක් ඇතිවීමට හේතු පැමිණිලිකරු ගෙන හැර දැක්වීය. උදාහරණයක් වශයෙන් රෝගාතුරවීම, රාජකාරියෙහි දී තැනින් තැනට ස්ථාන මාරු රාශියක් ලැබීම, මුදල් හිහකම, වගඋත්තරකාරිය සිටින්නේ කොහිදැයි සොයා දැන ගැනීමට නොහැකි වීම යනාදියයි. මා කලින් කී පරිදි මේ සාක්ෂි අසත්‍ය යැයි අභියෝග නොකෙරිනි.

මෝටර් සයිකල් අනතුරකට භාජන වී තුවාල ලැබීම නිසා අවුරුදු එකහමාරක් පමණ ඔත්පලව සිටීමට ඔහුට සිදු වූ බව ද ඔහුගේ සාක්ෂියෙන් අනාවරණය විය. ඒ කාලය තුළ දී වෙනත් ස්ත්‍රියක් ඔහුගේ දුක සැප බැලූ අතර, ඔහු ඇය සිය අනියම් බිරිය වශයෙන් තබා ගෙන ඇත. දැන් ඔහුට ඇගෙන් දරුවෝ තිදෙනෙක් ද සිටිති.

මේ විවාහය මුළුමනින් ම මැරී ගොස් ඇති එකක් බව මේ කරුණුවලින් පෙනේ.

පැමිණිලිකරු තමාට විවාහ විය නොහැකි ස්ත්‍රියක් හා සමග වාසය කරන අතර ඔහුට ඇගෙන් අවජාත දරුවෝ තිදෙනෙක් සිටිති. වගඋත්තරකාරිය ද තමාගේ නීත්‍යානුකූල සැමියා විය නොහැකි පුරුෂයකු හා ජීවත් වන අතර ඇයට ඔහුගෙන් අවජාත දරුවෙක් සිටී. හරස් ප්‍රශ්නවලට උත්තර දීමේ දී පැමිණිලිකරු තමා මේ නඩුව පැවරුවේ දැනට පවතින තත්වය යටතේ තම දරුවන්ට අනාගතයක් නොමැති නිසා බව පැවසිය.

පැමිණිලිකරුන් අනාචාරයේ හැසිරී ඇතිබව හෝ උසාවියට පැමිණීමේ දී සාධාරණ හේතුවක් නොමැතිව පමා වී ඇති බව හෝ අනික් පාර්ශ්වයට කෲර ලෙස හැසිරී ඇති බව හෝ ඔහු ඕනෑකමින් ම අනික් පාර්ශ්වයෙන් වෙන් වී ඇති බව හෝ, අනික් පාර්ශ්වය අනාචාරයේ යෙදීමට තුඩු දෙන අන්දමට එම පාර්ශ්වය ගැන නොසලකා හැර තිබෙන බව හෝ පෙනී ගිය විට දික්කසාදයට ඉඩ දෙමින් තීන්දුවක් දීමට උසාවිය බැඳී නැති බව සිවිල් නීති විධිවිධාන සංග්‍රහයේ 602 වැනි වගන්තියේ අතුරු විධානයෙන් දැක්වෙයි.

සිවිල් නීති විධිවිධාන සංග්‍රහයේ 602 වැනි වගන්තිය යටතේ නඩු විසඳන විනිශ්චයකරුවකු පාවිච්චි කරන අභිමතය හරියාකාර අන්දමින් පාවිච්චි කොට නැති බව පෙනී ගියහොත් මිස නැති නම් මෙම උසාවිය එකී අභිමතය සම්බන්ධයෙන් මැදිහත් නොවිය යුතුය යන්න **ඒබ්‍රහම් එ. අල්විස්** 42 න.නී.වා. 373 වැනි පිට නඩුවේ දී මෙම උසාවිය තීරණය කර ඇත. එම නඩුවේ දී උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා **සෙනෙවිරත්න එ. පැනිස්හාමි** 29 න.නී.වා. 97 නඩුවේ ගාර්වින් විනිශ්චයකාරතුමාගේ පහත සඳහන් කියමන කෙරෙහි දැඩි විශ්වාසයක් තැබීය. ''විවාහ බැඳීමෙන් මිදීමට පතන්නෙක් වේ නම් හෙතෙමේ ද විවාහය සම්බන්ධ වැරදිවලින් මිදී සිටිය යුතුයි'' මෙම නීතිය බුරුල් කළ හැක්කේ අති විශේෂ අවස්ථාවල දී පමණය. ඒ චූකලි පොදු සදාචාරයේ ඉහ සිද්ධියට හානියක් නොවන පරිදි පනතු ලබන සහනය දිය හැකි වූ විටයි. 602 වැනි වගන්තිය යටතේ පැවරෙන අභිමතය පාවිච්චි කිරීමේ දී සලකා බැලිය යුතු කාරණා හතරක් එම නඩුවේ දී මොස්ලි විනිශ්චයකාරතුමා සඳහන් කළේය. ඒ කරුණු නම්:

(අ) ළමයින්ගේ තත්වය හා ඔවුන්ගේ යහපත සඳහා අවශ්‍ය සදාචාරයේ ද හැකිතාක් දුරට නීතියේ ද අනුකූලත්වය ඇති ගෙදරක් තිබිය යුතු බව.

(ආ) නීත්‍යානුකූලව විවාහ වී සිටීම තමන්ගේ යහපතට හේතු වන බව හා පැමිණිලිකරු හා ජීවත් වෙමින් සිටින ස්ත්‍රියගේ තත්වය.

(ඉ) සහනයදීම ප්‍රතික්ෂේප කිරීමෙන් පෙත්සම්කරු හා සමග සමථයකට පත්වීමේ ප්‍රතිඵලය ගෙනදීමට ඉඩක් නොමැති බව හා වගඋත්තරකාරියගේ තත්වය.

(ඊ) විවාහ වී නම්බුකාර අත්දමට ජීවත්වීමට ඉඩ ලැබීමෙන් යහපත සැලසෙන පෙත්සම්කරුගේ තත්වය.

බෙකර් එ. **බෙකර්** 1966 ශ්‍රීලංකා නීති වාර්තා 1 වෙනි වෙලුම 423 මෙහි දෙපක්ෂය 1935 දී පෝලන්තයේ දී විවාහ විය. 1939 දී පෝලන්ත යුධ හමුදාවේ සේවය සඳහා සැමියා කැඳවනු ලැබීමෙන් පසු මොවුහු වෙන්වූහ. යුද්ධයෙන් පසු සිය භාර්යාවට ලියූ ඔහු වරක් තමා ඉතාලියේ දී හමුවන ලෙසත්, පසු වරෙක එංගලන්තයේ දී හමුවන ලෙසත් ඇගෙන් ඉල්ලා සිටි නමුත් එසේ කිරීම ඇය ප්‍රතික්ෂේප කළාය. 1965 දී ඔහු දික්කසාදයක් ඉල්ලමින් පෙත්සමක් ඉදිරිපත් කළේය. ඉදිරිපත් කිරීමේ දී සාධාරණ හේතුවක් මත එකී පෙත්සම ඉවත ලන ලදී. ඇපෑලේ දී එම පෙත්සම ආපසු විභාග කිරීමට නියම කෙරුනු අතර, ද්වේෂසහගත ලෙස අත්හැරයාම පිළිබඳ නඩුවල දී ප්‍රමාදවීම, ඒ කාරණය නිසා ම දික්කසාද නියෝගයක් දීම ප්‍රතික්ෂේප කිරීමේ හේතුවක් ලෙස නොගත යුතු යයි ද සෑම අතින් ම විවාහයක් මැරි ගොස් තිබෙන අතර දික්කසාදයට ද හේතුවක් ද දක්වා ඇති කල එය දික්කසාදයට බාධාවක් ලෙස නොගත යුතු යයි ද තීරණය විය. එම නඩුවේ දී පෙත්සම්කාර ස්වාමී පුරුෂයා අනාචාරයේ ද හැසිරී තිබින. ඩෙනින් ඝාමිවරයා මෙසේ පැවසිය. ''අභිමතය පිළිබඳ ප්‍රකාශය ගැන තවත් ප්‍රශ්නයක් පැන නගී. මේ මිනිසා ගත වූ අවුරුදු ගණන තුල දී ස්ත්‍රීන් කිහිප දෙනකු සමග සම්බන්ධකම් පවත්වා ඇත. මොහු සිය බිරියගෙන් වෙන් වී සිටි කාලය ගැන සලකා බැලීමේ දී මෙය ඔහුට විරුද්ධව පමණට වඩා සැලකිල්ලට ගතයුතු නැතැයි ද දික්කසාද නියෝගයක් ප්‍රතික්ෂේප කිරීම සඳහා නම් එය මොනයම් හේතුවක් නිසා වුව ද ගණන් ගතයුතු යයි ද මම නොසිතමි.''

ලෝරි එ. **ලෝරි** (1967) ශ්‍රීලංකා නීති වාර්තා 1 වෙනි වෙලුම 789 පිට නඩුවේදී ස්වාමීපුරුෂයා 1965 දී දික්කසාද වීමට පෙත්සමක් ඉදිරිපත් කළේය. දෙපාර්ශ්වය විවාහ වූයේ 1928 දීය. මෙම නඩුවේ දී ඔප්පු වූයේ 1946 දී ස්වාමී පුරුෂයා භාර්යාව අත්හැර ගිය බවයි. ''බාල ම දරුවා ගැන සෙවිල්ලෙන් සිටීම සඳහා'' ඔහු 1956 දී නැවතත් සිය නිවසට පැමිණියේය. එහෙත් එකම වහල යට ජීවත් වුව ද සැමියාත් බිරියත් වාසය කළේ එකිනෙකාගෙන් වෙන් ව ය. 1953 හා 1956 අතර කාලය තුළ ඇය සැමියාට කෲර ලෙස සැලකීමේ වරදෙහි යෙදුනාය. රෑ වැඩ තිබුනු දිනයන්හි දවාලට නිදා ගැනීමට සැමියා ගත් සෑම උත්සාහයක් ම ඇය මහත් සේ ශබ්ද නගමින් ගෙයි වැඩ කිරීමෙන් ව්‍යාර්ථ කළාය. මේ අතර සැමියා අන්‍ය ස්ත්‍රියක සමග ඇරඹූ අනාචාරශීලී සම්බන්ධතාවයක් 1961 සිට 1964 දක්වා ම පැවැතින. කෲරකම් හා අත්හැර යාම යන හේතු උඩ ඔහු දික්කසාද නඩුවක් පවරා තමාට පක්ෂ ව සිය අභිමතය පාවිච්චි කරන ලෙස උසාවියෙන් ඉල්ලා සිටියේය. නීත්‍යානුකූල වෙන් වීමක් ඉල්ලා භාර්යාව ද ඒ සමග ම නඩු පැවරි ය. සැමියාගේ ඉල්ලීමට ඉඩ දුන් විනිශ්චයකාරතුමා භාර්යාව ගේ ඉල්ලීම ප්‍රතික්ෂේප කළේය. ඇපෑලේ දී ද එම තීන්දුව තහවුරු විය. සභාපති විනිශ්චයකාරතුමාගේ තීන්දුව ගැන සඳහන් කරමින් විල්මර් විනිශ්චයකාරතුමා මෙසේ පැවසිය. (791 පිටුව) ''දික්කසාදයකට භාර්යාව දක්වා ඇති දෘඪතර විරෝධතාවය නිසා ම මේ නඩුවේ දී විශේෂයෙන් ම වැදගත් වන විවාහයේ ගෞරවනීයත්වයත් ඉතාම පැහැදිලි ලෙස මුළු මනින් ම කැඩී බිඳිගිය විවාහයක් පවත්වා ගෙන යාමට ඉඩ හළ යුතු ද යන ප්‍රශ්නය හා සම්බන්ධ මහජන සුභසිද්ධියත් යන කරුණු දෙක අතරේ සමබර බව රැකීමට ඔහුට සිදුවිය.''

මේ නඩුවේ කරුණු අනුව බලන කල මෙම විවාහය ද සම්පූර්ණයෙන් සුනු විසුනු වී ගොස් ඇති බව පෙනේ. විවාහයේ ගෞරවනීයත්වයට හරසර දක්වන අතර ම මෙවැනි විවාහ බැම්මක් ද පවත්වාගෙන යාමට කිසිදු හේතුවක් ඇති බවක් නොපෙනේ.

මේ නඩුවේ කරුණු මත පැමිණිලිකාර ඇපැල්කරුගේ වාසියට අභිමතය පාවිච්චි කළ යුතුව පැවැති බව මගේ අදහස වේ. ළමයින්ගේ මෙන් ම ඔවුන් හා සමග සිටින ස්ත්‍රියගේ සුභසිද්ධියත්, වගඋත්තරකාරියගේ හා ඇගේ දරුවාගේ සුභසිද්ධියත් සඳහා එසේ කළ යුතුව තිබින. උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමාගේ නියෝගය ඉවත් කරන අතර පැමිණිලිකරුට වගඋත්තරකාරියගෙන් දික්කසාදයක් පිරිනමමින් නයිසයි ආඥාවක් නිකුත් කිරීමට මම නියෝග කරමි.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

මේ නඩුවට අදාල කරුණු සිරිමාන්න විනිශ්චයකාර තුමාගේ තීන්දුවේ අඩංගු වේ. එම තීන්දුව කියැවීමේ වාසිය මා ලත් අතර, මම ඒ හා සමග එකඟ වෙමි. මේ නඩුව වැනි නඩුවක දී මුල් උසාවිය සිය අභිමතය යථා පරිදි පාවිච්චිකර නොමැති බව වැටහී ගිය විට ඒ වෙනස් කිරීම සම්බන්ධයෙන් මැදිහත්වීමේ අවකාශය අපට ඇත. මේ උසාවිය මුල් උසාවිය උනා නම් අප දෙන්නේ වෙනත් තීන්දුවක් වීම පමණක් නඩුව විභාග කළ විනිශ්චයකරුගේ පාවිච්චි කළ අභිමතානුසාරී බලය කෙරෙහි වෙනසක් කිරීමට මැදිහත්වීමට හේතුවක් නොවේ. මෙම නඩුවේදී නඩුව ඇසූ විනිශ්චයකාරතුමා (කෝබට් ජයවර්ධන මහතා) පැමිණිලි කරු උසාවියට පැමිණීමේ පමාවත් පැමිණිලිකරු කළ බවට පිළිගෙන ඇති වරදත් නිබියදීත් සිය අභිමතය මේ නඩුවේ දී පාවිච්චි කළ යුතු ද යන්න සලකා බලා ඇති වගක් නොපෙනේ. මේ කරුණු නිසා පැමිණිලිකරුට විරුද්ධව සිය අභිමතය පාවිච්චි කිරීමට තමා අකමැති යැයි තීරණය කිරීමට පළමුව එම කරුණු එසේ වන්නට හේතු කවරේදැයි ඔහු සලකා බලා නැත. මේ නිසා, අභිමතය පාවිච්චි කිරීමට මෙය සුදුසු නඩුවක් ද යන්න සලකා බැලීමට අපට සම්පූර්ණයෙන් ම අවකාශ ඇති බව මට පෙනී යයි.

පමාවීම සම්බන්ධයෙන් පැමිණිලිකරු දක්වා ඇති කරුණු ගැන මතභෙදයක් නැත. 1949 දී පැමිණිලි කරුට මුහුණ පාන්නට වූ තත්ත්වය යටතේ ඔහු දක්වා ඇති හේතු අව්‍යාජ බවත්, ප්‍රමාණවත් බවත් පෙනේ. 1957 වන තුරු ඔහු විවාහය සම්බන්ධ වරදක් කර නැත. ඔහු අනියම් බිරිඳක් ගත්තේ මොන විදියේ කරුණු මධ්‍යයේ ද යන්න ඔහු නොසඟවා පිළිගෙන ඇති අතර, ඒ තත්ත්වය යටතේ ඔහු ගත් පියවර ද කෙනෙකුට තේරුම් ගත හැකිය.

අප්ටඩ් එ. අප්ටඩ් සහ බිලිස් 1930/46 වෙළුම — ටයිම්ස් නීති වාර්තා/ පිට 456 නඩුවේ දී සභාපති විනිශ්චයකාරතුමා මෙසේ පෙන්වා දුන්නේය. ''අභිමතය පාවිච්චි කෙරෙන සෑම අවස්ථාවකදී ම විවාහයේ පරිශුද්ධතාවය පවත්වාගෙන යාම සමාජයේ යහපතට අදාල වන බව සැලකිල්ලට ලක් වන ප්‍රධානතම කරුණක් වන්නේය.'' නිසැක වශයෙන් එය එසේ ම සිදු විය යුතුය. මක්නිසාද යත් විවාහ බැඳීමේ ගෞරවනීයත්වයත් පොදු සදාචාරයත් ආරක්ෂා කළ යුතු හෙයිනි. මේ අතර ම, ආරක්ෂා කිරීමට දරන උත්සාහයෙන් නවත් අලාභහානි සිදු නොවන බවට වග බලා ගැනීමට කෙනකු ප්‍රවේසම් විය යුතුය.

මේ විවාහය අභාවයට පත් වී ඇති එකක් බව අභියෝග කළ නොහැකි කරුණකි. විනිශ්චයකාරතුමකු කෙරෙහි පිරිනැමී ඇති අභිමතය පාවිච්චි කිරීම ප්‍රතික්ෂේප කිරීමෙන් කලෙක පරිශුද්ධවූත්, තව දුරටත් පරිශුද්ධ නොවන්නා වූත් විවාහ බන්ධනයක් අපරිශුද්ධ වධ බන්ධනයක් බවට පත් කිරීම විවාහයේ ගෞරවනීයත්වය ආරක්ෂා කිරීමක් නොව, එය සමච්චලයට භාජනය කිරීමෙකැයි මට හැඟේ. එය පොදු මහජන සුභසිද්ධියට ද අදාල නොවේ. මක්නිසාද යත් කෙනෙකු අවංක විවාහ බන්ධනයක ගෞරවනීයත්වය ගැන සිතීමේ දී අප ජීවත්වන සමාජය ඒ දෙස බලන ආකාරය ගැනද කල්පනා කළ යුතු යැයි මට සිතෙන හෙයිනි. සිවිල් නීති විධි විධාන සංග්‍රහය නීතිගත වූ කාලයේදී 602 වැනි වගන්තිය 1857 විවාහ නඩු පනතේ 31 වැනි වගන්තිය මත පදනම් වූවකි — පාපයේ ජීවත් වූ මිනිහා සහ ගැහැනිය — ඔවුන්ට අපකීර්තිය ගෙන දෙන විවාහය සම්බන්ධ වරදවල් පැවැති නියාත්, විවාහ වීමට නිදහස ලබා ගත නොහැකි වීම නියාත් සමාජයට ලාදුරු රෝගීන් හා සමානව සැලකිණ. අද තත්වය මෙසේ නොවේ. බොහෝ දුරට ඊට හේතුව යල් පැන්න දික්කසාද නීති නිසා හෝ පමණට වඩා දැඩි ලෙස පාවිච්චි වූ දික්කසාද විනිශ්චය කරුවකු ගේ අභිමතය නිසා හෝ එවැනි සම්බන්ධතාවන් නීත්‍යානුකූලභාවයට පත් කර ගත නොහැකිව සිටින්නන් කෙරෙහි දක්වන දයානුකම්පාව නිසාය. සත්‍ය වශයෙන් ම දෙපාර්ශ්වයක් අතර පැවැති විවාහය මැරී ගොස් ඇති බව උසාවියට ඒත්තු ගිය විට දඬුවම් කිරීමේ අදහසින් උසාවිය සිය අභිමතය පාවිච්චි කළ යුතු යයි මට නොපෙනේ. සම්බන්ධතාවය නීත්‍යානුකූලත්වයකට පත් කිරීමට තුඩු දෙන අන්දමින් අභිමතය ක්‍රියාවේ යෙදවීම දෙපාර්ශ්වයේ මෙන් ම ඔවුන්ට ඉපදී සිටින අහිංසක දරුවන්ගේ ද යහපතට හේතුවන අතර ඒ නිසාම එය මහජන යහපතට ද හේතු වන්නා සේ ම විනිශ්චයකරු වෙත පිරිනැමී ඇති අභිමතය නිසියාකාර ව පාවිච්චි කිරීමක් ද වන්නේ ය. එසේ එය පාවිච්චි කිරීමේ කාරණය කෙනකු එහි නියම වාතාවරණය මත සලකා බැලීමේ දී විවාහයේ පරිශුද්ධත්වයට හානියක් නොපමුණුවන අතර ඇත්තෙන් ම නීතියට ඇති ගරුත්වය ද ඉන් වර්ධනය වන බව පෙනේ.

මේ ඇපැල සම්බන්ධයෙන් සිරිමාන්න විනිශ්චයකාර තුමාගේ නියෝගයට මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී

(පරිවර්තනය:
අධිනීතිඥ චුල්පත්මේන්ද්‍ර දහනායක විසිනි.)

ගරු සිරිමාන සහ සමරවික්‍රම ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමන් ඉදිරිපිට

ගාර්ලිස් සිඤ්ඤෙදෝ, එ. ගිගර් සිඤ්ඤෙදෝ, සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණ නඩු අංකය 142/67 — කළුතර දිස්ත්‍රික් උසාවි නඩු අංකය පී/1046

විවාද කොට තීරණය කළේ: 1969 මැයි 5 දා

ඔප්පුවක අර්ථ නිරූපණය කිරීම — හවුල් අයිතිකරුවන් විසින් දෙන ලද පොරොන්දු සින්නක්කරයක් — විකුණුම් කරුවන් විසින් එම දේපොළ ආපසු මිල දී ගැනීම — ඔවුන් විසින්ම දුන් දෙවන පොරොන්දු සින්නක්කරය — ඔවුන්ගේ කොටස් වෙන් වශයෙන් සඳහන් නොකොට එයම ආපසු පැවරීම — ඔවුන්ගේ අයිතිවාසිකම් ප්‍රමාණයේ වෙනස් වීමක් සිදුවිය හැකිද යන්න.

කීන්දුව: පොරොන්දු සින්නක්කර ඔප්පුවකින් පවරා දෙන ලද දේපොළක් විකුණුම්කරුවන් විසින් ආපසු මිලට ගත් කලක, එහි කොටස් ප්‍රමාණයේ වෙනස්වීමක් ගැන සඳහනක් නොමැති නම්, විකුණුම්කරුවන්ගේ වාසියට ලියැවෙන ඔප්පුවේද එම දේපොළ ආපසු දෙන ලද්දේ ඔවුන් විසින් සින්නක්කර පොරොන්දු ඔප්පුව ලියන අවස්ථාවේ තිබූ කොටස්වල අයිතිවාසිකම් සහිතව යයි එසේ පෙරළා පැවැරීමේ ඔප්පුවටද අර්ථ නිරූපණය කළ යුතුයි.

ඇල්. ඩබ්ලිව්. ඔබේසේකර මහතා, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

උපාලි ද ඉසෙඩ් ගුණවර්ධන මහතා සමඟ, අසෝක ද ඉසෙඩ් ගුණවර්ධන මහතා, වගඋත්තරකරු වෙනුවෙන්.

සිරිමාන ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා:

මියගිය සිය සැමියාවූ හෙන්ද්‍රික් අප්පුගේ අයිතියෙන් අඩක් ජෙත්තොහාමිට උරුම වූ අතර ඉතිරි අඩ හෙන්ද්‍රික් අප්පුගේ දරුවන් හත් දෙනාට අයිති වූ බව පොදු පිලි ගැනීමකි. මෙම වැන්දඹුව සහ දරු හත්දෙනා පොරොන්දු සින්නක්කරයක් වන 1955 පී2 දරන ඔප්පුවෙන් සිය අයිතිවාසිකම් මීලිස් සිංඤෝට් පැවරුහ. මෙම දේපළ බේරා ගන්නා ලද අතර වැන්දඹුව සහ දරු හත් දෙනා 1957 පී3 දරන ඔප්පුවෙන් මෙම දේපළ මීලිස් සිංඤෝ ගෙන් පෙරළා මිලට ගත්හ.

පී3 දරන මෙම ඔප්පුවේ දේපළ පෙරළා පැවරීමේදී කොටස් බෙදී යන ආකාරය දක්වා නැත.

පොරොන්දු සින්නක්කරයක් මඟින් පවරනු ලබන දේපළක් විකුණුම්කරුවන් විසින් පෙරළා මිලට ගනු ලබන විට ඔවුන් සඳහා වන ඔප්පුව පොරොන්දු සින්නක්කරය ලියූ අවස්ථාවේ ඔවුන් සතුව පැවැති කොටස් ප්‍රමාණයෙන්ම යුතුව දේපළ පෙරළා පැවරුණු බව අදහස් වූයේ අර්ථගත යුතුය. එසේ නොවිය යුත්තේ, පොරොන්දු සින්නක්කරය ලියන අවස්ථාවේ ඔවුන්ට හිමිකම් තුබූ තත්ත්වයට වෙනස් කොටස් ප්‍රමාණයන් ඇතිව දේපළ පෙරළා පැවරුණු බව දැක්වෙන යමක් යළි පැවැරීමේ ඔප්පුවේ ඇතොත් පමණකි.

ඉන් පසු, වැන්දඹුව සහ දරුවෝ, තෝමස් පෙරේරාට සහ රිවඩ් පෙරේරාට පී4 දරන ඔප්පුවෙන් තවත් පොරොන්දු සින්නක්කරයක් ලියූහ. 1959 පී5 දරන ඔප්පුවෙන් ඔහු නැවත වරක් දේපළ බේරාගත්හ. කිසියම් කොටස් ප්‍රමාණයක් මේ යයි නොදක්වා, දේපළ මුල් විකුණුම් කරුවන්ට පෙරළා විකුණන ලදී. ජෙත්තොහාමි සහ ඇගේ දරුවන් පී4 දරන ඔප්පුවෙන් එම දේපළ පවරද්දී ඔවුන්ට හිමිව තුබූ කොටස් ප්‍රමාණයන්ටම අනුව එම දේපළ ඔවුන්ට පෙරළා පැවැරුණු බව කියැවෙන සේ පී5 දරන ඔප්පුවට අර්ථ නිරූපණයක් දිය යුතු යයි අපි සිතමු.

ඉන් පසුව, ජෙත්තොහාමි 1959 පී6 දරන ඔප්පුවෙන් ඇයට අයත් භාගය ඇගේ දරුවකු වන පළමුවැනි විත්තිකරුට පැවරුවා ය. ඇගේ හා ඇගේ දරුවන්ගේ හිමිකම් ප්‍රමාණයේ වෙනසක් නොවී ඇති බවට මෙය පැහැදිලි නිර්දේශකයෙකි.

විකුණුම්කරුවන්ගෙන් කෙනකු හෝ වැඩි ගණනක් හෝ දේපළ බේරා ගනිතොත් පී4 දරන ඔප්පුව යටතේ මුදල් ගෙවුවන්ට පමණක් දේපළ පෙරළා පැවරීමට ගැනුම්කරුවන්ට අයිතිය ඇති බවට පී4 දරන ඔප්පුවේ කොන්දේසියක් විය. එහෙත් මෙහි දී දේපළ යළි පැවරීම විකුණුම්කරුවන් සියල්ලන්ටම කැරුණු අතර ඔවුන්

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 87 වෙනි පිට බලනු.

ගෙන් කවරකුට වත් මුලින් තුබුණාට වඩා වැඩි හිමිකමක් ලැබිණැයි කියැවෙන කිසිවක් නැත.

පී5 දරන ඔප්පුවෙන් පෙත්තොහාමිට ඇයට හිමිව තුබූ අයිතිවාසිකම් පෙරළා ලැබුණු බව අපේ අදහසයි. ඇගේ සැමියාගේ දේපළින් අඩක් සහ ඉතිරි අඩ සමග සම සමව දරුවන්ට හිමි වීමත් මෙම අයිතිවාසිකම් වේ. අන්තර නියෝගය මෙම පදනම් මත සංශෝධනය කළ යුතුය. පළමු වැනි විත්තිකාර ඇපැල්කරු මෙම ඇපැලේ ගාස්තු අයකර ගැනීමේ අයිතිය ලබයි.

සමරවික්‍රම විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

(පරිවර්තනය: කුමාරදාස ජයසේකර විසිනි.)

ගරු ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා ඉදිරිපිට

නුවරඑළියේ මිල පාලන පරීක්ෂකතුමා එ. එස්. ටී. විරපුත්‍රන්*

ශ්‍රේ: අ: අංකය 357 — නුවරඑළියේ මහේස්ත්‍රාත් උසාවියේ නඩු අංකය 35155

විවාද කළ දිනය: 1968 ජූලි 15 දා
තීන්දුව දුන් දිනය: 1968 ජූලි 19 දා

මිල පාලන පණත — පාලන මිලේ ඉහාම වැඩි ගණනට වැඩියෙන් බොම්බායි ලූණු සහ කඩල පරිප්පු විකිණීම — දඩුවම් ලැබිය හැකි මෙම වැරැදි දෙකම එක් චෝදනාවකට ඇතුළත් කිරීම — චෝදිතයා වරද කරු කිරීම — චෝදනාවේ ඇති නීති විරෝධී බව — අපරාධ නඩු විධාන සංග්‍රහයේ 178 වන ඡේදය.

බොම්බයි ලූණු රාත්තලක් සහ කඩලපරිප්පු අවුන්ස 8 1/2 ක් ඒ දෙවර්ගයටම අය කළ හැකි වැඩිම පාලන මිල සත 59 1/16 ක්ව තිබියදී රුපියලකට විකිණීමේ චෝදනාවකට වරදකරු බවට පත් වූ චෝදිතයකු පිළිබඳව.

තීන්දුව: (1) මෙම ද්‍රව්‍යවලින් එකක් එකක් පාසා පාලන මිල ගණනට වැඩිය විකිණීම සම්පූර්ණයෙන්ම පැහැදිලි ලෙස වෙන්ව හැඳින්විය හැකි වරදක් බැවින් ඒ වැරදි දෙක එකම චෝදනාවකට ගැබ් කිරීම නීති විරෝධිය.

(2) මෙම නඩුවේදී චෝදිතයා විසින් ස්ථාපිත කිරීමට පරිශ්‍රමයක් දරණ ලද නිදහසට කරුණු අසත්‍ය වුවත් ඔහු චෝදනාවෙන් නිදහස් කර හැරීමට සුදුසු තත්වයක සිටී.

රාජනීතිඥ ඒ. එච්. සී. ද සිල්වා, පී නාගේන්ද්‍රන් සමග විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

රජයේ නීතිඥ ලලිත් රුදිගු, ඇටෝර්නි-ජනරාල්වරයා වෙනුවෙන්.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

බොම්බායේ ලූණු රාත්තලකට හා කඩල පරිප්පු අවුන්ස 8½ කට අයකළ හැකි උපරිම මිල ශත 59 9/16 ක්ව තිබියදී රුපියලක් අය කළා යන වරදකරුට විරුද්ධව නගන ලද චෝදනාවට වරදකරුවකු බව නුවරඑළියේ මහේස්ත්‍රාත්තුමා (ජේ. බී. සී. සුවාරිස් මහතා) තීන්දු කර ඇත. මහේස්ත්‍රාත්තුමා විසින් නඩුවේ කරුණු ගැන සොයා බැස තිබෙන තීන්දුව පිළිබඳ මතභෙදයක් හෝ විවාදයක් හෝ නැත.

වරදකරු වෙනුවෙන් පෙනී සිටින රාජනීතිඥ ඒ. එච්. සී. ද සිල්වා මහතා මෙම චෝදනාවට අදාලවන නීති විධි විධාන අනුව චෝදනාව සකස්කොට නොමැති නිසා එය නීති විරෝධී බවට කරුණු සැලකොට ඇත. ඒ හේතු කොටගෙන නිදහසට කරුණු කියා පෑමට ඇති වරප්‍රසාදය කෙරෙහි ද මෙය උග්‍රලෙස අහිත කර බලපෑමක් ඇතිකර ඇති බවට කරුණු කියා පා ඇත.

බොම්බායේ ලූණු මිල නියම කළ ද්‍රව්‍යයකි. රාත්තලක පාලිත මිල ශත 27 කි. නියමකළ මිලට වැඩියෙන්

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*ඉංග්‍රිසි පිටපත ඉංග්‍රිසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 88 පිට බලනු.

විකුණූ කෙනෙක් විශේෂ අපරාධයක් කරන තැනැත්තෙක් ලෙස චෝදනා ලැබීමට නියම වේ.

කඩල පරිප්පු ද මිල නියම කළ ද්‍රව්‍යයකි. රාත්තලක පාලිත මිල ශත 57 කි. නියම මිලට වැඩියෙන් විකුණූ තැනැත්තෙක් විශේෂ අපරාධයකට චෝදනා ලැබීමට නියම වේ.

වරදකරුගේ සාක්ෂි අනුව උගුල්කරු විසින් බොම්බායේ ලූණු රාත්තලක් ද, කඩල පරිප්පු රාත්තල් 1/2 ක් ද ඔහුගෙන් ඉල්ලා සිටියේය. එම ද්‍රව්‍ය දෙකේ මිල උගුල්කරු ප්‍රශ්නකොට විපරම් කොට බැලුවේ නැත. ඒ හේතුකොටගෙන ද්‍රව්‍ය දෙකටම අයකළ විට වරදකරු ද්‍රව්‍ය දෙවර්ගයම පාලිත මිලට වැඩියෙන් විකිණීමේ වරදට චෝදනා ලැබිය යුත්තෙක් විය යුතුයයි අපට සිතීමට ඉඩ ඇත. අනික් අතින් බලනවිට එක භාණ්ඩයක් පිළිබඳව පමණක් වරදක් කළ බවද අපට සිතිය හැක. එහෙත් එක් කරුණක් අපට පැහැදිලිය. එනම් නියම කළ මිලට ද්‍රව්‍ය දෙවර්ගයම නොවිකුණූ බවය. එය අහකින් තිබියදී අපරාධ නඩු සංවිධාන සංග්‍රහයේ 178 වැනි කොටසේ ප්‍රකාශනය සම්පූර්ණයෙන්ම පැහැදිලිය. එනම් වරදකරුවකුට විරුද්ධව නඟන සෑම අපරාධයකටම වෙනම චෝදනාවක් ඉදිරිපත් කළ යුතු බවය. හදිස්සියේ පැන සොයාගන්නා ලද අපරාධවලදී පැමිණිලි පක්ෂය යොදාගෙන සිටින නිලධාරීන්ගේ මෝඩකම නිසා වරදකරු කුමන අපරාධයක් කළාද යන්න නියම ලෙස විනිශ්චය කිරීමට බැරිවීම හේතුකොටගෙන වරදකරුට නීත්‍යානුකූල නොවන චෝදනාවක් ඉදිරිපත් කර හිංසා හා වධ නොකළ යුතුයි. නිදහසට කියා පෑ කරුණු අසත්‍යවීම එම කොන්දේසිය කෙරෙහි බලපෑමක් ඇති නොකරයි.

ඇපැලට ඉඩ දී වරදකරු නිදහස් කරන ලදී.

පරිවර්තනය: ඇස්. ඇම්. සේනාරත්න මෙනෙවිය විසිනි.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා සහ පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා ඉදිරිපිට

හච්පෙ ලියනගේ ඕදිරිස් එ. හච්පෙ ලියනගේ අන්ද්‍රයස්*

ශ්‍රේෂ්ඨාධිකරණ නඩු අංකය: 164/67 — මාතර දිස්ත්‍රික් උසාවි නඩු අංකය: 4875/පී

විවාද කළේ: 1968 දෙසැම්බර් 15 දා
තීන්දු කළේ: 1969 ජූනි 23 දා

කුඹුරු පනත, 3 වන හා 63 වන වගන්ති — අඳ ගොවියකුගේ අයිතිවාසිකම් — බෙදුම් නඩු තීන්දුවක තමාගේ අයිතිවාසිකම් විශේෂ කොට සඳහන් කරවා ගැනීමට ඔහුට අයිතියක් තිබේද ?—1951 බෙදුම් නඩු ආඥා පනතේ 48 වන ඡේදය.

තමාගේ සොහොයුරා වන පැමිණිලිකරු හා සමග කුඹුරක දෙකෙන් පංගුවක අයිතිකරු වූ වගඋත්තරකරු එකී සොහොයුරාගේ කොටස පිළිබඳව අඳ ගොවියා ද වූයේය.

යටෝක්ත කුඹුර වෙන්කර ගැනීම සඳහා පැමිණිලිකරු මෙම නඩුව පැවරිය. පැමිණිලිකරුගේ කොටසේ අඳ ගොවියා වශයෙන් වගඋත්තරකරුට ඇති අයිතිවාසිකම් පැමිණිලිකරුට බෙදා වෙන් කළ යුතු ඉඩම් කොටසේ අයිතියට බලපාන අවහිරයක් ලෙස සලකා බෙදුම් නඩු තීන්දුවේ එය විශේෂ කොට සඳහන් කරවා ගත හැකි ද යන ප්‍රශ්නය මේ නඩුවේ දී පැන නැඟින.

තීන්දුව: (1) අඳ ගොවියකුගේ අයිතිවාසිකම් යටා පරිදි බෙදුම් නඩු තීන්දුවක විශේෂ කොට සඳහන් කළ හැකිය.

(2) ''මොන යම් ආකාරයකින් හෝ පැන නඟින කුමන අයිතිවාසිකමක් හෝ'' යැයි බෙදුම් නඩු ආඥා පනතේ 48 වන ඡේදයේ ''අවහිරය'' යන්න විවරණය කරමින් දැක්වෙන පාඨය මෙම තීරණය පුළුල් ලෙස තහවුරු කරයි.

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* ඉංග්‍රිසි පිටපත ඉංග්‍රිසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 89 පිට බලනු.

සලකා බැලූ නඩුව: හෙන්ද්‍රික් අප්පුහාමි එ. ජෝන් අප්පුහාමි (69 නව නීති වාර්තා 29)

එච්. රුද්‍රිගු මහතා, අසෝක අබේසිංහ මහතා ද සමග විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ඩබ්ලිව්. ඩී. ගුණසේකර මහතා පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍රවිනිශ්චයකාරතුමා:

වාචික හෝ ලිඛිත ගිවිසුමක් යටතේ කිසියම් කුඹුරක් දෙනු ලැබූ ගොවියකු වන පුද්ගලයකු එම කුඹුරේ ''අඳ ගොවියා'' බව 1958 කුඹුරු පනතේ 3 වැනි ඡේදය ප්‍රකාශ කරයි. පනතේ 63 වැනි ඡේදයේ ''ගොවියා'' යන වචනයේ අර්ථ දැක්වීම කෙසේ ද කිවහොත් කුඹුරක හැම අඳ කරුවෙක්ම අවශ්‍යයෙන් ''අඳ ගොවියෙක්'' නොවෙයි. මෙම කාරණයේ දී, පැමිණිලිකරු වන සිය සොහොවුරා ද සමග කුඹුරක සමාන කොටසක් අයත් විත්තිකරු, සොහොවුරාගේ භාගයේ ''අඳ ගොවියා'' බවට සැකයෙක් නැත.

කුඹුර බෙදීම සඳහා පැමිණිලිකරු පැවැරූ මෙම නඩුවේ දී තමා පැමිණිලිකරුට අයත් භාගයේ ''අඳ ගොවියා'' බව විත්තිකරු කියා සිටි අතර, මෙහි දී පැන නගින ප්‍රශ්නය නම් පැමිණිලිකරුගේ කොටසෙහි බදුකරු හැටියට විත්තිකරු සතු අයිතිවාසිකම්, පිළිවෙළින් අන්තර් හා අවසාන තීන්දු ප්‍රකාශවලින් පැමිණිලිකරුට පවරනු ලබන කොටස හා කිම ප්‍රමාණයට බලපාන බාධකයක් වශයෙන් බෙදුම් තීන්දු ප්‍රකාශයේ නියම කොට දැක් විය හැකි ද යන්නය. මෙම ප්‍රශ්නයට පිළිතුර සම්පූර්ණයෙන්ම සුළු එකකි. විත්තිකරු කාලය ඉකුත් නුවූ බදු ඔප්පුවක් යටතේ සිය සොහොයුරාගේ භාගයේ බදු ගැනුම්කරු වීණි නම්, පැහැදිලිවම එම බද්ද තීන්දු ප්‍රකාශයේ නියම කොට සඳහන් කරවා ගැනීමෙන් විත්තිකරුට ආරක්ෂාව සලසා ගත හැකි බාධකයෙකි. කුඹුරු පනත කරණකොට ගෙන විත්තිකරු තමා වාචික ගිවිසුමක් යටතේ බදුකරු වුව ද පනතින් පමණක් සීමා කැරුණු බදු අයිතිවාසිකම් බුන්ති විඳින ස්ථාවර බදුකරුවෙකි. මේ ආකාරයට ඔහුගේ අයිතිවාසිකම් බදු ඔප්පුවක් යටතේ වූ බදු ගැනුම්කරුවකුගේ අයිතිවාසිකම්වලටත් වඩා මූලික වන අතර එවැනි බදු ගැනුම්කරුවකුට බෙදුම් පනතේ 48 වැනි ඡේදය සලසන ආරක්ෂාව ම ලැබීමට හිමිකම් ලැබිය යුතු ය. 48 වැනි ඡේදයේ 'බාධකය' යන්නට දී ඇති අර්ථයෙහි එන ''කවර හෝ කෙසේ හෝ පැන නඟින ඕනෑම අයිතිවාසිකමක්'' යන වාක්‍යාංශය ''අඳ ගොවියකු'' ගේ අයිතිවාසිකම බෙදුම් නඩු තීන්දු ප්‍රකාශයක නිසි සේ නියම කොට දැක්විය හැකිය යන තීරණය බෙහෙවින් තහවුරු කරයි.

මෙම තීරණය මත පිහිටා ක්‍රියා කිරීමට මා පසුබට වූයේ, බෙදුම් නඩුවක දී තම අයිතිවාසිකම් ප්‍රකාශ කිරීමට ''අඳ ගොවියකු'' අපොහොසත් වීමෙන් එම අයිතිය අහෝසි වී යාමේ විපාකය මෙම තීරණයෙන් සිදුවනු ඇතැයි යන බිය නිසා පමණකි. එවැනි විපාකයකට ඉඩ ඇතොත්, කුඹුරු පනතේ අරමුණු පැරද වීමේ බලාපොරොත්තුවෙන් නොපනත් ඉඩම් හිමියකුට බෙදුම් නඩුවක් පැවරිය හැකිය.

කෙසේ වුවද මා තුළ ඇති බිය අනියම් බියකියි යන මතයට බර වන නිරීක්ෂණ **හෙන්ද්‍රික් අප්පුහාමි එ. ජෝන් අප්පුහාමි** (69 නව නීති වාර්තා 29) නඩුවේ දැක්වෙයි. කවරාකාරයකින් වුවද, බෙදුම් නඩුවක දී අයිතිවාසිකම් නොකීම නිසා අඳ ගොවියකුගේ අයිතිය අහෝසි වීම නිවැරැදි තත්ත්වය වූ වත්, එය නීතිය නිසි පරිදි සංශෝධනය කිරීමෙන් වළකා ගත හැකි නපුරකි.

මෙහි දැක්වුණු හේතු කරණකොට ගෙන ඇපැලට ගාස්තු ද සමග ඉඩ ලැබෙයි. දිස්ත්‍රික් නඩුකාරතුමාගේ නඩු තීන්දුව, කොටස් නියම කෙරෙන ඡේදයෙහි ''පැමිණිලිකරුට — 1/2:'' යන වචනවලට පසුව ''පැමිණිලිකරුගේ භාගයේ අඳ ගොවියා වශයෙන් විත්තිකරුගේ අයිතිවාසිකම්වලට යටත්ව'' යන වචන ආදේශ කිරීමෙන්, වෙනස් කරනු ලැබෙයි. මෙම අතිරේක කාරණය අන්තර් තීන්දු ප්‍රකාශය හා අවසාන තීන්දු ප්‍රකාශය ද සූදානම් කිරීමෙන් පසු නිසැක ව ම නියම කොට දක්වනු ඇත.

පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා:

මම එකඟවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

(පරිවර්තනය: කුමාරදාස ජයසේකර විසිනි)

ගරු සිරිමාන සහ ගරු වීරමන්ත්‍රී විනිශ්චයකාරතුමන් ඉදිරිපිටදී

දේශීය ආදායම් බදු කොමසාරිස් එ. ඒ. ඇස්. නවරත්න රාජා*

ශ්‍රේෂ්ඨාධිකරණය අංක 1/68 — ආදායම් බදු බීආර්ඒ/343

විවාද කළ දිනය: 1969 ජූනි මස 27 වැනිදා
නිරණය කළ දිනය: 1969 ජූලි මස 15 වැනිදා

ආදායම් බදු ආඥා පනතේ 18(1)(ඊ) උප වගන්තිය යටතේ සහන — තක්සේරුවන්නා විසින් අධ්‍යාපන ආයතනයක ඉගෙන ගන්නා යැපෙන්නන්ට ආධාර කිරීම — අධ්‍යාපන ආයතනයෙන් බැහැරව පදිංචි වී සිට අධ්‍යාපනය ලබන යැපෙන්නන් වෙනුවෙන් තක්සේරුවන්නාට සහන හිමිවේද? — අධ්‍යාපන ආයතනයක් තුල නඩත්තු කිරීම යන්නෙහි අර්ථ විවරණය.

ආදායම් බදු ආඥා පනතේ 18(1)(ඊ) යන වගන්තිය යටතේ තක්සේරු වන්නා තමාගෙන් යැපෙන සහෝදරයන් දෙදෙනකු සහ යහෝදරියක වෙනුවෙන් සහන ඉල්ලා සිටියේය. අදාල තක්සේරු වර්ෂයන්හි ඉහත සඳහන් යැපෙන්නෝ අධ්‍යාපන ආයතනයෙන් බාහිර ව පදිංචි වී සිට අධ්‍යාපනය ලැබූ අතර තක්සේරු වන්නා විසින් නඩත්තු කරනු ලැබූහ. රජයේ සේවකයකු වන තක්සේරු වන්නා අදාල කාල පරිච්ඡේදයෙහි ගාල්ල හා පුත්තලම යන නගරවල නතරව සිටියේය.

18(1)(ඊ) යන උප-වගන්තිය යටතේ දෙවර්ගයක පුද්ගලයන් වෙනුවෙන් සහන ලබාගත හැක. එනම්: (ඒ) තක්සේරු වර්ෂයට පෙර අවුරුද්ද පුරා තක්සේරු වන්නා සමග ජීවත්වෙමින් ඔහු විසින් නඩත්තු කරනු ලැබූ හෝ (බී) සුබාගාරයක, රක්ෂස්ථානයක හෝ අධ්‍යාපන ආයතනයක නඩත්තු කරනු ලැබූ අය වෙනුවෙනි. මෙම නඩුව මෙයින් යැපෙන්නන් සම්බන්ධව (බී) වර්ගයට අයත් වන්නකි. ආදායම් බදු පනතේ 78(1) යන වගන්තිය යටතේ ශ්‍රේෂ්ඨාධිකරණයේ උපදෙස් සඳහා යොමුකරඇති නඩුවක ඉහත කී යැපෙන්නන් අධ්‍යාපන ආයතනයෙන් බැහැරව පදිංචි සිට අධ්‍යාපනය ලැබූ හෙයින් "අධ්‍යාපන ආයතනයක් තුළ නඩත්තු කරනු ලැබූ" යන අර්ථය ඔවුන් වෙනුවෙන් යෙදිය නොහැකි බවට රජය වෙනුවෙන් පෙනී සිටි අයිනීතිඥවරු තර්ක කළහ.

නීත්‍යුවේ: ආදායම් බදු පනතේ 18(1)(ඊ) යන උප වගන්තියේ 'නඩත්තු' (Maintained) යන වචනය අධ්‍යාපන ආයතනයක් සම්බන්ධයෙන් යෙදීමේදී අධ්‍යාපන ආයතනයක් තුළ නතරකර නඩත්තු කරනු ලැබූ යන අර්ථයට වඩා එහි ඉගෙනීමට ආධාර කළ යන අර්ථයෙහි යෙදේ. එම නිසා තක්සේරු වන්නාට එකී සහනය හිමිවිය යුතුය.

වීරමන්ත්‍රී විනිශ්චයකාරතුමා: "මෙබඳු ප්‍රශංසනීය කටයුත්තක නිරතව එය කරගෙන යන තක්සේරු වන්නකුට ඒ සඳහා ආධාර කිරීම සහ අනුකූලතාවය දැක්වීම මැනැවැයි ව්‍යවස්ථාදායක මණ්ඩලය විසින් සළකා ගනු ලැබීම, මෙවැනි කරුණකින් එනම් යැපෙන්නකුගේ නියම ඌනික පදිංචිය අධ්‍යාපන ආයතනයෙන් බැහැරය කියා නිෂේධ තත්වයකට පැමිණවීම ඉතාම දුෂ්කර කාර්යයක් වනු ඇත."

රජයේ නීතිඥ මර්වින් ප්‍රනාන්දු, ඇපැල්කරු වෙනුවෙන්.

එස්. අම්බලවානර්, කේ. නඩරාජා සහ ඩබ්ලිව්. එච්. පෙරේරා සමග වගඋත්තරකරු වෙනුවෙන්.

වීරමන්ත්‍රී විනිශ්චයකාරතුමා:

ආදායම් බදු ආඥා පනතේ 78(1) වැනි උප-වගන්තිය අනුව අපගේ නිගමනය සඳහා ඉදිරිපත් කර ඇති මෙම නඩුවෙන් එම ආඥා පනතේ 18(1)(ඊ) යන උප-වගන්තිය විවරණය කැරේ. අදාල තක්සේරු වර්ෂ 1958/59, 1959/60/1960/61, 1961/62 හා 1962/63 වන අතර, සහන ඉල්ලා සිටිනුයේ තක්සේරු වන්නාගේ සහෝදරයන් දෙදෙනකුට හා සහෝදරියකටය. රාජ්‍ය සේවයෙහි නියුක්ත වූ තක්සේරු වන්නා රක්ෂාව සඳහා මෙකී වර්ෂයන්හි ගාල්ල, පුත්තලම ආදී ස්ථානයන්හි සේවයට ගිය හෙයින් ඉහත කී යැපෙන්නන් ජීවත්වූයේ පිළිගත් පරිදි ඔහුගෙන් ඇත්වය. වෛද්‍ය ශිෂ්‍යයෙක් වූ එක් සහෝදරයෙක් තමාගේ වෛද්‍ය අධ්‍යාපනය අවසන් වන තෙක් (1968 සැප්තැම්බර් මය දක්වා) පදිංචිව සිටියේ කෝට්ටේ පාරේය. අනෙක් සහෝදරයා යාපනයේ පාරම්පරික නිවාසස්ථානයේ සිට පාසැල් ගිය අතර, පසු කලෙක කොළඹට පැමිණ තක්සේරු වන්නා විසින් කුලී ගෙවා ලබා දෙන ලද කොළඹ ඩෙව්ඩසන් පාරේ නිවසක සිට පෙම්බ්‍රෝක් ඇකඩමියෙන් අධ්‍යාපනය ලැබීය. එලෙසම ඔහුගේ සොහොයුරියද යාපනයේදී මූලික අධ්‍යාපනය ලැබ පසුව කොළඹට පැමිණ එම ලිපිනයේම පදිංචිව වැඩිදුර ඉගෙනීම සඳහා 'නවලාර් හෝල්' ආයතනයට ගියාය. මෙකී පුද්ගලයෝ සියලු දෙනාම අධ්‍යාපනය ලැබූ කාල පරිච්ඡේදය පුරා තක්සේරු වන්නා විසින් ආධාර කරනු ලැබූහ.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 103 වෙනි පිට බලනු.

18(1) (ඊ) වගන්තිය යටතේ දෙවර්ගයක පුද්ගලයන් සම්බන්ධයෙන් සහන ලබා ගත හැක. එනම්: (ඒ) අදාල තක්සේරු වර්ෂයට කලින් වර්ෂය පුරා තක්සේරු වන්නා සමග ජීවත්ව ඔහු විසින් නඩත්තු කරනු ලැබූ හෝ (බී) ඔහු විසින් සුබාගාරයක, රක්ෂස්ථානයක හෝ අධ්‍යාපන ආයතනයක් තුළ හෝ නඩත්තු කරනු ලැබූ අයවලුන් වෙනුවෙනි. මෙම නඩුවෙහි එන යැපෙන්නන් තක්සේරු වන්නා සමඟ ජීවත් නොවූ හෙයින් අප ඉදිරියේ ඇති ප්‍රශ්නය සහන ශීර්ෂද්වයයෙන් ද්විතීය ශීර්ෂය යටතේය පැන නැඟි ඇත්තේ.

රජය මඟින් ඉදිරිපත් කරන ලද තර්කය වූයේ යැපෙන්නන් නිදෙනා ඉගෙනීම් ලැබූ ආයතනයෙන් බැහැරව පදිංචිව සිටි හෙයින් අධ්‍යාපන ආයතනයක් තුළ නඩත්තු කරනු ලැබූ යන කෝන්දේසිය සපුරා ලන්නට අපොහොසත් වූ වගයි. ''තුළ'' යන්නෙන් අධ්‍යාපන ආයතනයක් ඇතුලත පදිංචිය අදහස් කැරෙන බව රජය තරයේ කියා සිටියාය. තවද රක්ෂස්ථානය, සුබාගාරය යන වදන් සමඟ යෙදී ඇති අධ්‍යාපනික ආයතනය යන්න ''Noscitur a Sociis'' යන විවරණ රීතිය අනුව නේවාසික අධ්‍යාපනික ආයතනයක් යන තේරුම් දිය යුතු බව රජය කියා සිටියේ, සුබාගාරයක හා රක්ෂස්ථානයක ප්‍රධාන ලක්ෂණය එහි ඇති නේවාසික ස්වරූපය ය යන පදනම් මතය.

තක්සේරු වන්නා තර්ක කර සිටියේ, අධ්‍යාපන ආයතනයක් තුළ විසීම අනවශ්‍ය බවත් ද්විතීය ශීර්ෂයෙන් අපේක්ෂා කරනුයේ ''අධ්‍යාපනික ආයතනයක ලා'' ආධාර කිරීමක් බවයි. ශාරීරික වශයෙන් තද් ආයතනයක් ඇතුලත නඩත්තු කිරීම ම නොවේ.

අපගේ කල්පනාවට භාජනය වී ඇති මෙම ප්‍රශ්නයට අනුරූප ඉංග්‍රීසි ආඥා පනත් අධිනීතිඥවරුන් පෙන්වා නොදුන් අතර මටද එවැනි ආඥා පනතක් සොයා ගැනීම අපහසු විය. එහෙත් ආඥා පනතේ 18(1) (ඩී) යන උප වගන්තියට අනුරූප ''ළමා සහන යක්'' ගැන දක්නට තිබුණි. ඒ වගන්තිය යටතේ දෙමව්පියනට විශ්ව විද්‍යාල ආයතනයක, පාඨශාලාවක හෝ අධ්‍යාපනික ආයතනයක පූර්ණ පාඨමාලාවක් හදාරණ ශිෂ්‍යයන් සම්බන්ධයෙන් සහන ලබා ගැනීමට අවකාශ ඇත. යැපෙන්නන්ගේ අධ්‍යාපනය වෙනුවෙන් වැයවූ වියදම් පිළිබඳ සහන සම්බන්ධයෙන් ඉංග්‍රීසි නීතිය අපට උපකාර වන වගත් පෙනෙන්නට නොමැත. එබැවිනි මෙම ප්‍රශ්නය පළමුවරට සළකා බැලීමට අපට සිදුවී තිබෙන්නේ.

මෙහිලා අප විසින් විවරණය කරනු ලබනුයේ තක්සේරු වන්නාට සහනයක් ලබා දෙන්නක් හෙයින් එවැනි කරුණකදී සැකයේ වාසිය රජයට හෝ තක්සේරු වන්නාට හෝ නිම් නොවිය යුතුය කියා විශේෂඥ මතයක් ඇත. එහෙයින් පහත සඳහන් වන නිගමනයන්ට පැමිණීමේදී ආදායම් ආඥා පනත් විවරණය කිරීමේදී සැකය ඇති තැන්වලදී බදු ගෙවන්නාට ඉතාම වාසි වන අර්ථය දිය යුතුය යන සාමාන්‍ය රීතියද අනුගමනය නොකෙළෙමි.

ආවස්ථික සහන ශීර්ෂ ද්වයයේම 'යැපුනු' යන වචනය දක්නට ලැබේ. පළමු ශීර්ෂය යටතේ සහන ලැබීමට නම් (ඒ) තක්සේරු වන්නා සමඟ ජීවත් වී (බී) ඔහුගෙන් යැපිය යුතුය. ද්විතීය ශීර්ෂය යටතේ සුදුසුකම් ලැබීමට නම් ඔහු විසින් අධ්‍යාපන ආයතනයක යැපිය යුතුය. එකම වාක්‍යයයේ දෙතැනකම 'යැපුනු' යන වචනය දක්නට ඇති හෙයින් ඒ දෙතැනටම, එකම තේරුම් දීම සාධාරණය. වචනය පළමු වරට යොදා ඇත්තේ ශාරීරික වශයෙන් විසීමක් අදහස් කර ගෙන නොවේ. ශාරීරික වශයෙන් විසීම විශේෂ එකතු කිරීමෙකි. එම නිසා 'යැපුනු' යන්න ද්විතීය ශීර්ෂයේ නැවත යොදා ඇත්තේ මුල් තේරුමම දීමට යයි සිතිය හැක. එනම් ශාරීරික වශයෙන් විසීම අදහස් නොකෙරෙන විවරණයයි. එහෙයින් යැපුනු යන්න අධ්‍යාපන ආයතනයක් සම්බන්ධයෙන් යෙදීමෙදී එහිම නේවාසිකව, ආධාර ලබන යන අර්ථයට වඩා එහි ඉගෙනීම් ලැබීමට ආධාර වන අර්ථය නිරූපනය කරන බව පෙනේ.

'යැපුනු' යන වචනය ජීවිතයට ආවශ්‍යක ආහාර-පාන, වාසස්ථාන, හා රෙදි-පිළි යන දේවල් සම්බන්ධයෙන් යෙදීමෙදී යැපෙන ස්ථානය නිවසන ස්ථානය හා පර්යාය වශයෙන් යෙදෙනියි සිතිය හැක. මේ අර්ථය අනුව කිසියම් පුද්ගලයකු යම් කිසි ස්ථානයක නඩත්තු කරනු ලැබීය යන්නෙන් අදහස් කරනු ලබන්නේ එහිම පදිංචිව නඩත්තු කරනු ලැබීය — යනුයි. එසේ වුවත් 'යැපුනු' යන්න කිසියම් තත්ත්වයෙක වෙසෙන පුද්ගලයකුට ආධාර කිරීම නැතිනම් ''ඔක්ස්ඵඩ්'' ශබ්ද කෝෂය කියන පරිදි නඩත්තු කිරීමට වැය කරන හෝ වියදම්

උසුලන යන අර්ථයන්හි ද යෙදේ. විශ්ව විද්‍යාලයයක ශිෂ්‍යයකු නඩත්තු කිරීම, තරුණ අයිනිනිඳුවරයකු නඩත්තු කිරීම යනුවෙන් අදහස් කරනුයේද ඉහත කී අර්ථය ඇති නඩත්තු කිරීමකි. ආධාර කරනු ලබන ස්ථානයේම ශාරීරික වශයෙන් පදිංචිවීමක් ඊට අවශ්‍ය නොවේ.

අප මුහුණ පා ඇති ප්‍රශ්නයේ දී අධ්‍යාපන ආයතනයක් 'තුළ' වෙනුවට 'අධ්‍යාපන ආයතනයක' යැයි සඳහන් වී තිබුනේ නම් අපගේ කාර්යය මීට වඩා පහසුවන්නට තිබුනි. එහෙත් මේසින් ඉහත පෙන්වා දී ඇති පරිදි- 'අධ්‍යාපන ආයතනයක් තුළ' යන්නෙන් ව්‍යවස්ථා දායකය අදහස් කළේ ශාරීරික වශයෙන්ද එහිම පදිංචි වී සිටීම යැයි පැවසීමට තරම් එම වචනය ශක්තිමත් නොවේ. රජය මගින් 'Noscitur a Sociis' යන විවරණ රීතිය අනුගමනය කළ යුතු යැයි ඉදිරිපත් කරන ලද තර්කය මෙහි ලා එතරම් වැදගත් නොවන්නේ සුබාගාර, රක්ෂස්ථාන හා අධ්‍යාපන ආයතනයන්ගේ මූලික ලක්ෂණය ඒවායේ දක්නට ඇති නේවාසික ස්වරූපය යන අදහස, අද එතරම් පිළිගත හැකි කරුණක් නොවන හෙයිනි. එවැනි ස්ථානයන්ගෙන් නේවාසික නොවූවාට බාහිර වශයෙන් අද ප්‍රතිකාර ලබා ගත හැක. මෙම ආයතනයන් අතර ඇති සමාන ලක්ෂණය නම් තද් ආයතනයන් භාරයේ සිටින පුද්ගලයනට එම ආයතනයන්ගෙන් බලාපොරොත්තුවන ආරක්ෂාව හා සේවය ලබා දීමයි.

අවසාන වශයෙන් 18(1) (ඊ) යන උප-වගන්තිය අනුව සහන දීමේ ප්‍රතිපත්තීන් සලකා බැලීමද වටී. ව්‍යවස්ථාදායකය මෙම වගන්තිය පැනවීමේදී අදහස් කළේ තමන්ගෙන් යැපෙන්නන්ට අධ්‍යාපනයක් ලබා ගැනීමට ආධාර වීම සම්බන්ධයෙන් තක්සේරුවන්නාට කිසියම් සහනයක් ලබා දීමයි. මෙම සහනය ලබා ගැනීමට ඉටු කළ යුතු පූර්ව කොන්දේසිය නම් අධ්‍යාපන ආයතනයක ඉගෙනීමේ කටයුතු කරගෙන යාමට ආධාර උපකාර වීමයි. මෙබඳු ප්‍රශංසනීය කටයුත්තක නිරතව එය කරගෙන යන තක්සේරුවන්නකුට ඒ සඳහා ආධාර කිරීම සහ අනුකූලතාවය දැක්වීම මැනවයි ව්‍යවස්ථාදායක මණ්ඩලය විසින් සලකා ගනු ලැබීම මෙවැනි කරුණකින් — එනම් යැපෙන්නකුගේ නියම කායික පදිංචිය අධ්‍යාපන ආයතනයෙන් බැහැරය කියා නිෂ්ඵතත්වයකට පැමිණවීම ඉතාම දුෂ්කර කාර්යයක් වනු ඇත.

පහසුවෙන්ම මගේ මනසට නැගෙන උදාහරණයක් ගෙන බලමු. ලංකා විශ්ව විද්‍යාලය වැනි ආයතනයක, නේවාසිකාගාරයන්හි ඉඩකඩ මදි වීම නිසා සමහර සිසුන්ට, සරසවි උයනෙන් බැහැරව පදිංචිවීමට සිදුවී තිබේ. වැලිවු පේරාදෙණි විශ්වවිද්‍යාලයයේ නිවාස පහසුකම් ඇතත් එවැනිම ආයතනයක් වන කොළඹ විශ්ව විද්‍යාලයයේ එවැනි පහසුකම් නොමැත. මේ අනුව විශ්ව විද්‍යාල ද්වයේ යැපෙන්නන් දෙදෙනකු ඇති, තක්සේරු වන්නකුට ඉන් එක් අයකු වෙනුවෙන් සහන ලැබෙන අතර අනෙක් අය වෙනුවෙන් සහන නොලැබෙන්නේ හුදෙක් ඔහුට එහි පදිංචිවීමට අවස්ථාව නොලැබුනු හෙයිනි. මෙම නඩුවේ අභියාචකයාට රාජකාරිය සඳහා කොළඹින් බැහැරව යන්නට සිදු වූ හෙයින් ඔහුගෙන් යැපෙන්නන් කොළඹ පදිංචි කිරීම සඳහා වෙනම නිවසක් කුලියට ගන්නට සිදුවිය. මෙවැනි අවස්ථා මෙනෙහි කර බලන කල විදුහලින් බැහැරව පදිංචි වී සිටින්නකු නඩත්තු කිරීම, අධ්‍යාපන ආයතනයක නේවාසික කර නඩත්තු කිරීමට වඩා ඇත්තෙන්ම වැඩි වියදමක් යන කටයුත්තක් බව පෙනේ.

අපට බල කර සිටින අන්දමේ වචනයන්ගෙන් තොර මෙම ඡේදයට සාධාරණ ගුණය පිළිබඳ වැඩියමක් කිව නොහැකි, රජයේ අයිනිනිඳුයන් විසින් ඉදිරිපත් කර ඇති අර්ථ විවරණය අනුමත කර එහි යථාර්ථය පිටු දකින්නට අපි මැලිවෙමු. ව්‍යවස්ථාදායකය තක්සේරු වන්නාට සහනදීම් සඳහා යැපෙන්නා ශාරීරික වශයෙන් අධ්‍යාපන ආයතනයේම පදිංචිවිය යුතුයයි අදහස් කළේ නම් 18(1) (ඊ) යන උප-වගන්තියට සමාන්තර වගන්තියෙහි දක්නට ඇති පරිදි ඉතා පහසුවෙන්ම, එය පැහැදිලි කළ හැකිව තිබුණි.

ඉහත කී කරුණු අනුව 18(1) (ඊ) යන උප-වගන්තියේ සඳහන් සහනයට තක්සේරු වන්නා හිමිවන බව මගේ අදහසයි. යැපෙන්නන් වෙනුවෙන් සහන හිමිවිය යුතු වර්ෂ අදාල කරුණු අනුව, තීරණය කළ යුතුය. වගඋත්තරකරුට මෙහි ගාස්තු වශයෙන් රු: 315/- ක් නියම කරමි.

සිරිමාන විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ගාස්තුවටත් යටත් කොට ඇපැල නිෂ්ප්‍රභා කරන ලදී.

පරිවර්තනය කළේ: එච්. සංඝදාස පෙරේරා, බී.ඒ. (ලංඩන්)

ගරු විජයතිලක විනිශ්චයකාරතුමා ඉදිරිපිටදී

කේ. ඇම්. සෙනෙවිරත්න එ. කේ. පොඩිමැණිකේ*

ශ්‍රේ. අ. 885/68 — මි. උ. මහනුවර 49411

විවාද කළේ: 1969 අප්‍රෙල් මස 28 වැනිදා
තීන්දු කළේ: 1969 ජූලි මස 3 වැනිදා

නඩත්තු නඩුවක් — විමසීම් දිනයේදී ඉල්ලුම්කරු නොපැමිණීම — ඉල්ලීම නිෂ්ප්‍රභා කිරීම — ඉන්පසු එම නඩුව නැවත ඇසීමට මහේස්ත්‍රාත් තුමාට අධිකරණ බලය තිබේ ද?

තීන්දුව: නඩත්තු නඩුවක ඉල්ලුම්කරු නඩු විභාග දිනයෙහි ඉදිරිපත් නොවීමෙන් එය නිෂ්ප්‍රභා වූවිට සෑහෙන කාලයක් ඇතුලත, ඇගේ නොපැමිණීමට හේතු ඉදිරිපත් කර නැවත නඩුව ගෙන යාමට ඉල්ලුම් කළොත් සුදුසු අවස්ථාවල නඩුව නැවත ඇසීමට නහනම් පැනවීමක් නොමැති හෙයින් එය ඇසීම මහේස්ත්‍රාත් තුමාගේ අවශ්‍ය යුතුකමකි.

සළකා බැලූ නඩු: ඇනා පෙරේරා එ. එමලියානු නෝනිස් 12 න. නී. වා. 263 වැනි පිටුව
ජුස්තිනා එ. අර්මන්, 12 න.නී.වා. 263 වැනි පිටුව
සබුර් උම්මා එ. කුස්කානි, 12 න.නී.වා. 97
බීබී එ. මෙමුඩ, 23 න.නී.වා. 123
පීරිස්හාමි එ. දාවිත්සිංඝෝ, 23 න.නී.වා. 466 වැනි පිටුව
සීති එ. මුදලිහාමි, 40 න.නී.වා. 39.
සීති එ. මුදලිහාමි 3 ලංකා නීති සහරාව 83.
පියරත්න උන්නාන්සේ එ. වැහැරකේ සෝනුත්තර උන්නාන්සේ, 51 නව නීති වාර්තා 313

මාර්ක් ප්‍රනාන්දු, විත්තිකාර ඇපැල්කරු වෙනුවෙන්.

එස්. කනගරත්නම්, ඉල්ලුම්කාර වගඋත්තරකාරිය වෙනුවෙන්.

විජයතිලක විනිශ්චයකාරතුමා:

නඩත්තු නඩු ආඥා පණතේ පැණවීම් යටතේ උසාවියට ඉදිරිපත් වූ නඩුවක කරන ලද නඩු විභාගය නැවැත්ත වාරයක් ආරම්භ කිරීම පිළිබඳ මහේස්ත්‍රාත්වරයකු වෙත පැවැරී ඇති අධිකරණ බලය ගැන මෙම අභියාචනයේදී ප්‍රශ්නය මතු වී තිබේ. වර්ෂ 1966 අගෝස්තු 6 වැනි දින උපන් වන්දුලතා මැණිකා නමැති තමාගේ ළදරියට නඩත්තු ඉල්ලා ඉල්ලුම්කාරිය විසින් ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කොට තිබේ. නඩුවේ විත්තිකරු එකී ලමයාගේ පියා බව ඇ චෝදනා මුඛයෙන් කියා සිටියි. එහෙත් විත්තිකරු පිතෘත්වය ප්‍රතික්ෂේප කළ නිසා, ඩග්ලස් විජේරත්න මහතා ඉදිරිපිට මෙම නඩුව 66.9.15, 67.5.3. සහ 67.6.4 වැනි දිනයන්හි විභාගයට ගන්නා ලදි. සාක්ෂිය යතුරු ලියන පිටු 24 ක් ඔස්සේ පැතිර යන අයුරින් එහිදී ඉල්ලුම්කාරිය ඉතාම දීර්ඝ කෝන්තර ඇසීමකට භාජනයකරන ලද බව පෙනී යන සේය.

ඉක්බිති එම මහේස්ත්‍රාත්වරයා මාරුවී යන නිසා දෙපක්ෂයේම සතුටින් ඒ මහතාට පසුව පත්ව එන මහේස්ත්‍රාත්වරයා ඉදිරියේ එය අලුත් නඩුවක් සේ නැවැත්ත විභාග කිරීමට නියම වී තිබේ. මේ අයුරින් වර්ෂ 1967 අගෝස්තු මස 26 වැනි දින ඩී. ඊ. ධර්මසේකර මහතා ඉදිරියේ විභාගයට ගත් විට ඉල්ලුම්කාරිය පැමිණ නොසිටි නමුත් විත්තිකරු පැමිණ සිටියේය. ඉල්ලුම්කාරිය වෙනුවෙන් නීතිවේදියකු ද පෙනී නොසිටියෙන් උගත් මහේස්ත්‍රාත්වරයා වර්ෂ 1967 සැප්තැම්බර් මස 7 වැනි දින ඇගේ ඉල්ලීම නිෂ්ප්‍රභා කළේය. මේ සම්බන්ධයෙන් දිව්රුම් පෙත්සමක් සහ වෛද්‍ය සහතික දෙකක්ද ඉදිරිපත් කොට නඩු පොතට ඇමුණූ ඉල්ලුම්කාරී තමා කරන ලද නඩත්තු ඉල්ලීම ප්‍රතික්ෂේප කරමින් දෙන ලද නියෝගය ඉවත ලැමට යැයි උසාවියෙන් ඉල්ලීමක් කළාය. මින් පසු විත්තිකරුට නිවේදනයක් යැවූ මහේස්ත්‍රාත්වරයා ඒ ගැන පරීක්ෂණයක්

* ඉංග්‍රිසි පිටපත ඉංග්‍රිසි අංශයෙහි 76 වෙනි කාණ්ඩයෙහි 105 පිට බලනු.

පවත්වා තමා කලින් දුන් නියෝගය ඉවත හෙලා ඉල්ලුම්කාරියට එම නඩු විභාගය නැවැත වරක් ඇරඹීමට පියවර ගැනීම සඳහා ඉඩ දෙමින් 68.3.12 වැනි දින දරණ ඔහුගේ නියෝගය ප්‍රකාශ කළේය. දැනට අප ඉදිරියේ ඇති අභියාචනය එම නියෝගයට විරුද්ධව කරන ලද්දකි.

මෙහිදී ඇපැල්කරු වෙනුවෙන් පෙනී සිටි මාර්ක් ප්‍රනාන්දු මහතා මහේස්ත්‍රාත්වරයා විසින් ඉල්ලුම් පත්‍රයක් ඉවත හෙලූ විට ඔහු ඒ නඩුව පිළිබඳ ක්‍රියා බලයෙන් බැහැර වන නිසා නැවැත වාරයක් එම නඩු විභාගය ඇරඹීමට ඔහුට අධිකරණ බලයක් නැති බව සැලකර සිටියි. සිවිල් නඩු විධාන සංග්‍රහයේ ප්‍රතිපදාවන්ට අනුව පාලනය වන සිවිල් නඩුවක එම නඩු විධාන සංග්‍රහයේ 84 වන ඡේදයෙහි සහ අපරාධ නඩු විධාන සංග්‍රහයේ ප්‍රතිපදාවන්ට අනුකූලව පාලනය වන නඩුවකදී එම නඩු විධාන සංග්‍රහයේ 194 වැනි ඡේදයේ ප්‍රතිපදාවන්හි පැණවී තිබෙන ආකාරයෙන් නඩත්තු නඩුවක නඩු විභාගය යලින් ආරම්භ කිරීමට හැකිවන සේ පැණවීමක් නඩත්තු නඩුවකදී පැණවී නැති බව ඔහු වැඩි දුරටත් සැලකර සිටියි. මෙම අධිකරණයෙන් දෙන ලද නඩු තීන්දු රාශියක පිටුවහල ඔහු විසින් පතන ලද නිසා මම එම නඩු තීන්දු ගැන මෙහිදී කරුණු විස්තර කොට දැක්වීමට කැමැත්තෙමි. *ඇනා පෙරේරා එ. එමලියානු නෝනිස් සහ ජස්තිනා එ. අර්මන්* — (12 න.නී.වා. 263 වැනි පිට) යන නඩුවේ අපරාධ නඩු විධාන සංග්‍රහයේ 194 වැනි ඡේදය) නඩත්තු නඩු විභාගවලට අදාල වන්නේද යන ප්‍රශ්නය මතුවිය. එහිදී නිගමනය වූයේ අපරාධ නඩු විධාන සංග්‍රහයේ ඡේදයන්ගෙන් විශේෂයෙන් නඩත්තු ආඥා පණතේ පැණවීම්වල ගැබ් කොට ඇති ඡේදයන් පමණක් නඩත්තු නඩුවලට අදාල වන බවත්, එම නඩු විධාන සංග්‍රහයේ 194 වැනි ඡේදය ඉන් එකක් නොවන බවත්ය. යම්කිසි නඩත්තු ඉල්ලීමක් එහි ඇති යෝග්‍යතාවය පිළිබඳ පරීක්ෂණයක් නොකොට නිෂ්ප්‍රභා වූ අවස්ථාවක ඉල්ලුම්කාරියට නඩත්තු නඩු ආඥා පණතේ 17 වැනි ඡේදය යටතේ අභියාචනයක් ඉදිරිපත් කිරීමට අයිතිවාසිකමක් නැති බවත් එහෙත් ආඥා පණතින් පැණවී ඇති කාල සීමාව අතික්‍රාන්ත වී නොමැති නම් ඇයට අලුත් ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කිරීමට පුලුවන්කමක් තිබෙන බවත් එහිදී නිගමනය වී ඇත. එම නඩුවේදී *සබුර්ඨම්මා එ. කුස්කානි* — 12 න.නී.වා. 97 යන නඩුවේ තීන්දුව පිළිනොගන්නා ලදී. මෙහි සඳහන් වූ 12 න.නී.වා. 263 පිටේ ඇති නඩුවල සඳහන් කොට ඇති ප්‍රඥප්තිය පිළිගෙන තිබෙන සේ විනිශ්චයකාරතුමා දුන් *බීබී එ. මහමුඩ* — 23 න.නී.වා. 123 නඩු තීන්දුව සහ එනිස් විනිශ්චයකාරතුමා දුන් *පීරිසාමි එ. දාවින් සිංඝෙදෝ*, 23 න.නී.වා. 466 යන නඩුවද බලා ගත හැක. ප්‍රනාන්දු මහතා 40 වන න.නී.වා. 39 වැනි පිටේ වාර්තා වී ඇති *සීනි එ. මුදලිහාමි* යන නඩුවේ ඒබ්‍රහම් අග්‍ර විනිශ්චයකාරතුමා විසින් දෙන ලද තීන්දුවට මගේ සිත යොමු කළේය. නමුත් එහි නඩු තීන්දුව දී ඇත්තේ ඉල්ලුම්කාරිය තමාගේ ඉල්ලීම තහවුරු කිරීමට යැහෙන සාක්ෂි තමාට නොමැති බව කීමේ හේතුවෙන් ඉල්ලීමේ ඇති යෝග්‍යතාවය සලකා බැලීමෙන් බව මෙහිලා පෙනෙනසේය. එම ඉල්ලුම් කාරිය විසින්ම එයට පසු අවස්ථාවක කරන ලද ඉල්ලීම පරිදි එනම් *සීනිහාමි එ. මුදලිහාමි* 3 සී.ඇල්.ජේ. වාර්තා 83 මොස්ලි විනිශ්චයකාරතුමා විසින් සලකා බලනු ලැබීමෙන් පසු එතුමා අනුගමනය කළේ ඒබ්‍රහම් අග්‍ර විනිශ්චයකාරතුමාගේ නඩු තීන්දුවය. ඇපැල්කරු වෙනුවෙන් පෙනී සිටි නීතිවේදියා *පියරත්න උන්නාන්සේ* සහ *වැහැරක සෝනුත්තර උන්නාන්සේ* අතර කියැවී 51 න.නී.වා 313 වැනි පිටුවෙහි වාර්තාවී 316 පිටුවේ සඳහන්ව ඇති පරිදි එම නඩුවේ පිටුවහල සිවිල් නඩු විධාන සංග්‍රහයේ 189 වැනි ඡේදයෙහි ක්ෂේත්‍රය **(Scope)** ගැන විමසා සෙවූ නමුත් එම නඩුව දැනට අප ඉදිරියෙහි උද්ගතවී ඇති නඩුවට කොයි විධියකින් වත් අනුබල නොවේ යැයි මට සිතේ.

12 න.නී.වා. 263 වැනි පිටුවේ සඳහන් වී ඇති නඩුවේ වුඩ්රෙංටන් විනිශ්චයකාරතුමා ප්‍රකාශ කළාක් මෙන් නඩත්තු ආඥා පණතේ ඇති ප්‍රතිපත්තිය ඉල්ලීමේ යෝග්‍යතාවය විමසා ඒ අනුව දෙන විනිශ්චයාත්මක නිගමනයකින් මිස නඩත්තු ඉල්ලීම් පිළිබඳ ඉල්ලුම් පත්‍රයක් ඉවත නොහළ යුතුය යන්නය. ප්‍රස්තුත නඩුවේ ඉල්ලුම්කාරිය තමාගේ ඉල්ලීම උද්‍යෝගමත්ව කරගෙන ගොස් උසාවියට 12 වරක් පමණ පැමිණ තිබේ. අභාග්‍යයකට මෙන් ප්‍රශ්නයට භාජනය වී ඇති දිනයට පෙර සන්නිපාත උණයකින් පෙළුණු ඇ එම රෝගය සුවවූ පසු ඉන් ඇතිවන පශ්චාත් ප්‍රතිඵල හේතුවෙන් උසාවියට පැමිණ

නැතත් තමා ආරෝග්‍යශාලාවේ වාට්ටුවක සිටි බවත්, එතැනින් බැහැර වූයේ නඩු විභාගයට දින තුනකට කලින් බවත් ගෙනහැර පෑමට වෛද්‍ය සාක්ෂි ඉදිරිපත් කොට තිබේ. එමතුද නොව මෙම දිනයට පැමිණීමට ඇ විසින් සිතාසි යවන ලද සාක්ෂිකරුවන් ද එදින උසාවියට පැමිණ සිටි බව පෙනේ.

ඉල්ලුම්කාරියට ඇතොත් ඇත්තේ තමාගේ ඉල්ලුම් පත්‍රය නිෂ්ප්‍රභා කිරීමෙන් පසු අලුත් ඉල්ලුම් පත්‍රයක් නියම කාල සීමාව අතික්‍රාන්ත නොවී නම් ඉදිරිපත් කිරීම පමණකැයි කියමින් ඇපැල්කරුගේ නීතිවේදියා කරුණු සැලකර සිටියි. ලමයා ඉපදීමෙන් පසු අවුරුද්දක කාල සීමාව නියම කාල සීමාව නිසා මෙම ඉල්ලුම් පත්‍රය පිළිබඳ කටයුතු නිමාවට ගෙන ඒමට උසාවිය මෙබඳු දීර්ඝ කාලයක් ගෙන තිබියදී' අලුත් ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කොට ගතයුතු පියවර ගෙන යෑමෙන් ඇය වැළැක්වීමට පුලුවන්කම තිබෙන්නට ඇත.

නඩත්තු ආඥා පණතේ මෙබඳු කරුණු ඇති නඩුවක් ඉදිරිපත් වූ විට එයට මුහුණ දිය යුතු ආකාරය කෙසේද යන්න ගැන ප්‍රතිපදාවක් පැණ වී නැත. ලිඛිත නීතිගත ප්‍රතිපදාවන් විරහිත මෙබඳු අවස්ථාවක යුක්තිය ඉටුවන ලෙස සහ එය පරාජිත නොවන අයුරින් තීන්දුවක් දීම මෙම අධිකරණය වෙත පැවැරී ඇති කාර්ය භාරයක් යැයි මගේ හැඟීමයි. එබඳු සම්ප්‍රදායයක් අනුගමනය කිරීම ප්‍රනාන්දු මහතා උපයෝගී කරගත් නඩු තීන්දුවලින් වැළකේ යැයි මම නොසිතමි. අපරාධ නඩු විධාන සංග්‍රහයේ සිවිල් නඩු විධාන සංග්‍රහයේත් මෙවැනි කරුණු උද්ගත වූ විට ක්‍රියා කළ යුතු අන්දම ගැන පැණවී තිබේ. ඇත්ත වශයෙන්ම නඩත්තු ඉල්ලීමකදී එය නිමාවට ගෙන ඒමට ගත වූ දීර්ඝ ප්‍රමාදයට උසාවියේ ක්‍රියාකලාපයද එක්තරා විධියකින් ආධාර වී ඇති කලෙක ඉල්ලුම්කාරියට කිසියම් පිළිසරණක් දිය යුතු ම ය. ඉල්ලුම්කාරිය වෙනුවෙන් පෙනී සිටි කනගරත්නම් උගත් නීතිවේදී මහතා කරුණු සැල කළ හැටියට ම මෙම ඉල්ලුම්කාරිය එදින උසාවියට නොපැමිණීමේ හේතුව දැක්වීමෙන් බැහැර කළහොත් එය සාමාන්‍ය යුක්තිය පිළිබඳ සියලු ප්‍රතිපත්තීන්ට පටහැනි වනු ඇත.

මෙම සැලකිරීමට මා එකඟ විය යුතු යැයි සිතේ. මේ තත්වයට සමාන තත්ව බොහෝ ගණනක් ඔට සිතා මතා ගත හැක. උදාහරණයක් වශයෙන් ගතහොත් යම්හෙයකින් ඉල්ලුම්කාරිය උසාවියට පැමිණෙන විට මගදී සිදුවන ලද හයිදී උවදුරක් නිසා ඇයට උසාවියට පැමිණෙනු නොහැකි වුවහොත් මහේස්ත්‍රාත් තුමාට තමා ලිඛිත නීතිගත ප්‍රතිපදාවකින් වළක්වා නැති අවස්ථාවක ඇයට ඇගේ නොපැමිණීම පිළිබඳ කරුණුවලට සවන්දී එම කරුණු අනුව සලකා බලා සුදුසු නම් නඩු විභාගය නැවැත ආරම්භ කිරීමට බලයක් නැද්ද? මේ පිළිබඳ තවත් නිදසුනක් දීමට මම සූදානම් වෙමි. මෙම ස්ත්‍රිය තමා පැමිණි බස්රිය කැඩීම නිසා හෝ දුම්රිය පිලි පැනීම නිසා හෝ උසාවියට පැමිණීම ප්‍රමාද වූ විටෙක මහේස්ත්‍රාන්වරයා විසින් ඇගේ ඉල්ලීම නිෂ්ප්‍රභා කර තිබුණි නම් නැවැත චාරයක් එම නඩු විභාගය ඇරඹීමෙන් මහේස්ත්‍රාත් වරයා බැහැර කෙරේද? මහේස්ත්‍රාන්වරයකුගෙන් මෙම අයිතිය තොර කිරීම සාමාන්‍ය නීතියේ සියලු ප්‍රතිපත්තීන්ට විරුද්ධ දෙයක් බව පෙන්වීමට සාධක විශාල සංඛ්‍යාවක් දිය හැක. නීති සම්පාදක මණ්ඩලය එසේ කිරීම සුදුසු යැයි නොසිතූ විටෙක මෙවැනි පියවරක් ගැනීමේ සම්ප්‍රදායයකට, සම්බාධක හරස් කිරීම නිවැරැදි යැයි මට නොසිතේ.

හේතු යුක්ති පෙන්නා සුදුසු නඩුවක විභාගය නැවැත පටන් ගැනීමට යැයි ඉල්ලා සිටින කෙනකුට එහි ඇති සියලු කරුණු සහ අවස්ථාවන් සලකා බලනවිට එම ඉල්ලීම යුක්තිසහගත සාධාරණ කාලයක් තුල කෙරෙන්නේ නම් එබඳු පුද්ගලයකුට කන්දීම මහේස්ත්‍රාත් තුමකු පිට පැවැරී ඇති වැදගත් යුතුකමක්ය යනු මගේ මතයවේ.

මහේස්ත්‍රාන්වරයාගේ නියෝගයට විරුද්ධව මැදිහත් වීමට කිසිදු හේතුවක් නොපෙනෙන හෙයින් මම ඒ අනුව නඩු ගාස්තුවටද යටත් කොට මෙම ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා කරනලදී.