# The Ceylon Law Weekly

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

*with a Section in Sinhala*

---

VOLUME LXXI

WITH A DIGEST

---


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

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

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

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



1967

---

Subscription payable in advance, Rs. **15/00** per Volume.
Copies available at: 50/3, Siripa Road ,Colombo 5.

# INDEX OF NAMES

## Action

*Mortgage bond — The death of one of two mortgagors prior to the institution of the action does not render such action a nullity.*



## Agreement

*Lease for twelve months on agreement not notarially attested — Rent payable on monthly basis — Effect — Whether obligation in agreement not arising out of lease severable.*



## Amendment

*Of pleadings — to defeat plea of prescription .*



## Ceylon (Parliamentary Elections) Order-in-Council

*Election Petition — Bribery — Ceylon (Parliamentary Elections) Order-inCouncil, section* 57(b).

The SLFP Government was defeated on a no-confidence motion in the House of Representatives on December 3rd 1964. On that date, the Respondent was the Member of Parliament for Kolonnawa, in addition to being the General Secretary of the ruling party and a junior Minister in the Government. Shortly after the defeat of the Government, but before the actual dissolution of Parliament, the Respondent who was later to become a candidate seeking re-election to the House of Representatives, contacted the Commissioner of the Industrial Exhibition, a public servant in charge of a Government sponsored project, and made a request of him that as many people as possible from his electorate be given employment at the Exhibition. Thereafter, the Commissioner received about 45 applications from persons seeking employment, each bearing an endorsement made by the Respondent to the effect that it was "strongly recommended". Of this number, about 28 applicants were given employment. In respect of 3 such employees who were voters in his electorate —

**Held:** That the Respondent was guilty of Bribery within the meaning of Section 57(b) of the Ceylon (Parliamentary Elections) Order-in-Council 1946, inasmuch as the Respondent had procured employment for each of such persons in order to induce such person to vote or refrain from voting at the impending election.

*Per* **T. S. Fernando, J.:** "It may appear from one point of view that the loss of the respondent's seat in Parliament because of the procurement of these temporary jobs in subordinate grade for three men, two of whom at any rate could be said to have needed them greatly, is too disproportionate a price for him to be called upon to pay. These three votes, even if they had been cast in favour of the respondent, could not have affected the result of this election. Indeed even if the holders of all 200 jobs at the Exhibition had been electors of this electoral district and had all voted against the respondent the result of the election would not have been different. These considerations are, however, immaterial. The aim of the law admits of no doubt. The paramount object of the stringent provisions governing elections is to ensure (1) that those in whom reposes the power of making laws by which their fellow men are to be bound shall themselves be subject to scrutiny before they enter the law-making Chamber and (2) that those who are found to have transgressed the law shall not be permitted to stay therein."



## Civil Procedure

*Death of mortgagor prior to action—Effect.*

*See under*—MORTGAGE

*Pleadings—Amendment of.*

*See under*—PLEADINGS

*Jurisdiction of Court of Requests.*

*See under*—COURT OF REQUESTS

## Civil Procedure Code

*Sections* 325, 326, 327, 327(*A*), 328, 329, 330 — *Resistance to execution of decree for recovery of possession — Order under section* 327(*A*) *against appellant — Appellant resisting again when Fiscal tried to execute decree — Appellant committed to jail under section* 326— *Is the appellant a judgment-debtor? Can he be dealt with under section* 326*?*

**Held:** (1) That a person against whom an order has been made under section 327(A) of the Civil Procedure Code is a judgment-debtor within the meaning of section 5 of the Civil Procedure Code, and could be dealt with under section 326 of that Code.

(2) That (following the dictum of Sampayo, J. in *De Silva* vs. *De Mel*, 18 N.L.R. 164) the word "order" in sections 323 to 330 of the Civil Procedure Code is synonymous with the word "decree."



*Section* 84(1) — *Dismissal of action for want of plaintiff's appearance — Application for vacating decree of dismissal supported by affidavit — Matters stated in affidavit challenged by defendant — Effect.*

**Held:** That when a party attempts to show cause by affidavit for the purposes of section 84(1) of the Code, the Court could not act on the affidavit if substantial matters stated therein are challenged by the defendant. The matters so challenged have to be established otherwise than by the affidavit.

## Compensation for Improvements

*Compensation for improvements — Whether bona fide possessor who has made improvements liable to account for value of fruits derived therefrom — Right of bona fide possessor to remain in possession until compensation paid.*

**Held:** (1) That a bona fide possessor who is entitled to compensation for improvements effected by him is under no liability to account to the owner of the land for the value of the fruits which he derived from his own improvements.

(2) That a bona fide possessor is entitled to remain in possession of the land until the compensation due to him is paid. Thereafter he is liable to pay to the owner the entire income derived or derivable from the land.



## Constitutional Law

*Power of Parliament to restrict Jurisdiction of the Courts — Can such jurisdiction be limited retrospectively — Interference with judicial power.*



*Separation of powers in the Constitution.*



## Control of Prices Act

*Control of Prices Act — Sale of potatoes above controlled price — Conviction — Contention in appeal that prosecution failed to prove accuracy of accused's scales — Accuracy of scales not challenged at trial — Presumption under section 114 of Evidence Ordinance — Burden of proof.*

*Judicial precedent — When judicial decision not binding in subsequent case.*

**Held:** (1) That where the accused in the ordinary course of business sold to his customer what purported to be a pound of potatoes weighed on his own scales, it must be presumed not only that he represented that his scales were accurate, but also in the absence of any evidence to the contrary, that they are accurate. This is a legitimate inference under section 114 of the Evidence Ordinance.

(2) That the prosecution need prove the accuracy of the scales only where the defence challenged that fact or conceded that the weights and scales are not accurate.



## Co-operative Societies

*Co-operative Societies Ordinance (Cap. 124) section 53 — Amending Act No. 21 of 1949 — Dispute between manager and Society referred to arbitration — Award against manager — Does it involve the exercise of judicial power.*

Under section 53 of the Co-operative Societies Ordinance (Cap. 124) the Registrar nominated an arbitrator to determine a dispute between a society and its Manager. The claim against the manager was prepared on the basis that he was liable to account for goods or the value of goods shown by the books of the Society to have been under his control as manager.

The arbitrator made his award against the manager who filed an application for a writ of Certiorari praying that it be set aside.

The main contention on behalf of the petitioner was that the making and the enforcement of the award involved the exercise of judicial power which conflicted with the principle of the separation of powers under the Constitution.

**Held:** (1) That the liability of the manager arose at least upon an implied contract, in the nature of an agency.

(2) That this is an ordinary civil dispute within the traditional jurisdiction of the Courts. Therefore as the amending Act No. 21 of 1949 purported to oust the jurisdiction of the Courts over disputes which at the time when the Constitution came into force were exclusively within that jurisdiction, the award should be quashed.



## Court of Criminal Appeal Decisions

*Court of Criminal Appeal — Interpretation of words used in an unusual sense — Question for the Jury — Misdirection — Defence of accused not properly and adequately put to Jury — Criminal Procedure Code, section 245(b).*

The accused-appellant was convicted of the murder of one Mudiyanse. The indictment charged him with the offence "with another." The deceased had five non-grievous incised wounds and certain other wounds described by the doctor as 17 gun shot entrance wounds and 3 exit wounds. The doctor did not rule out the possibility of these injuries being caused by a sharp pointed or cylindrical weapon.

The appellant gave evidence, and admitted that he had stabbed the deceased three times with a knife in the exercise of the right of private defence, but that he had run away before the deceased fell down. He had gone to three friends. E, P and Pabilis on the same night and told them that he had stabbed the deceased with a knife, when the latter attacked him.

E stated in evidence that the appellant had told him that he stabbed Mudiyanse with a knife, the words being, "Halgahakumbure kamathedi Mudiynaseta pihiyen anala budhikaralamai ave." E also stated that in that village, "budhikorala" denotes "killed". Pabilis stated that the appellant only told him that he had stabbed Mudiyanse with a knife. The appellant denied that he used the words "budhi Korala ave."

In his summing-up, the Commissioner on about ten occasions in referring to E's evidence, directed the Jury that the appellant told E that he had stabbed and killed the deceased.

**Held:** (1) That 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, but the Commissioner had, by putting the above interpretation of the words as the only possible interpretation, never left it to the Jury to determine what that expression meant.

**Held further:** (2) That inasmuch as in certain passages, the accused's evidence had been put to the Jury as being false, and the Jury had not been asked to consider whether E was lying rather than the accused, although the evidence of Pabilis supported the accused's version of the words used, the Jury had not been given the opportunity to consider fairly the defence put forward, and the case for the defence was not properly or adequately put to the Jury.



*Court of Criminal Appeal — Confession — Burden of proving it to be voluntary — Standard of proof — Non-direction amounting to misdirection — No substantial miscarriage of justice — Evidence Ordinance (Cap. 14) section 24 — Court of Criminal Appeal Ordinance (Cap. 7), section 5(1) proviso.*

The only point that arose for consideration in this appeal was whether the trial Judge had properly and adequately directed the Jury as to how they should consider a confession made by the appellant to the Magistrate when they came to consider their verdict.

**Held:** That although the trial Judge had more than once directed that they were not to act on the confession unless they accepted it as one that was made voluntarily by the accused to the Magistrate, and not under the influence of any inducement, threat or promise, held out to him to make it, the Jury ought also to have been directed that *the burden lay on the prosecution to prove beyond reasonable doubt that a confession put before them in evidence had been voluntarily made*, that is to say, one which was not the result of any inducement, threat or promise made by a person in authority.

**Held further:** That in this case, the verdict of the Jury would not have been different, if they had been so directed, and the appeal should, therefore, be dismissed.



*Court of Criminal Appeal — Misdirection — Indictment for murder — Conviction for grievous hurt — Medical evidence led for prosecution and defence conflicting — Duty of trial Judge in such circumstances — Need to put before Jury the evidence led for defence, however weak it may be — Non-direction.*

The appellant was indicted for murder but was found guilty of having caused grievious hurt and was sentenced to five years' rigorous imprisonment. The prosecution depended almost entirely on the evidence of an eye-witness B who stated that he saw the appellant striking the deceased two blows on his head in rapid succession with a club. He further demonstrated the manner in which the blows were dealt while the deceased was standing.

Medical evidence led for the prosecution tended to support the alleged eye witness' evidence, while medical evidence led for the defence cast doubt on it. All that the learned trial Judge said in his summing up to the jury in regard to this evidence which was given in great detail was as follows:—

> "In this case you will take into consideration the evidence of Dr. Amarasekera and also the evidence of Dr. Fernando, Professor of Forensic Medicine. Dr. Fernando had been a Professor for sometime. He was a lecturer before that. He also worked like Dr. Amarasekera with Professor De Saram. Dr. Fernando has performed a few hundred postmortem examinations, but Dr. Amarasekera has performed between 4000 to 5000 postmortem examinations and Dr. Fernando himself had admitted that a person who performs more postmortem examinations would be more experienced than he. You have listened to the medical evidence and you will take all the medical evidence into consideration. If any doubt arises out of this, that must be resolved in favour of the accused. It should not be resolved in favour of the prosecution. As I have told you, the prosecution must prove its case beyond reasonable doubt."

It was argued for the appellant that the learned Judge had ignored all the medical evidence given for the defence and that such non-direction was a misdirection which vitiated the entire trial.

**Held:** (1) That the above-quoted passage was quite inadequate as it had not dealt in the slightest way with the evidence given by either medical witness. The conviction should, therefore, be quashed.

(2) That where evidence has been led for the defence, however weak it may be, that evidence must be fairly and adequately put before the jury.

(3) That as it is always difficult for a Jury to resolve a conflict of medical opinion, they should receive proper directions from the trial Judge both as to how they should deal with conflicting medical testimony and as to what bearing the evidence given for the defence has on the case presented by the prosecution.



*Common Intention — Joint Trial — Murder — Misdirection of fact — Circumstance of suspicion — Non-direction — Irresistible inference — Mere presence insufficient — Evidence against each accused to be considered separately — Unreasonable verdict — Miscarriage of justice — Penal Code, section 32.*

The two accused were indicted with the murder of one Abraham and both were convicted of murder. The deceased and three others were seated on the verandah of a house facing a public road, beside which is an embankment. The house and the embankment are on a higher level than the road. At about 8.30 p.m. a gun-shot was heard and D, a witness, who was seated on the verandah, looked in the direction of the flash of the gun, and saw:

(a) the first accused on the embankment with a gun in his hand, and that, in a moment, he turned and

went along the embankment in a direction which would lead to his house; and

(b) the second accused about three or four feet behind the first accused, also going in the same direction.

The gun-shot injured Abraham and caused his death.

**Held:** (1) That the learned Commissioner had misdirected the Jury in summing up the evidence on the basis that the two accused persons had come together, when no witness supported the theory.

(2) That the fact that the second accused hastily left the scene after the shooting was no serious indication that he was in any way concerned with the shooting and was quite compatible with his innocence.

(3) That in the absence of evidence of any special friendship between the two accused persons, or of any association between them prior to the time of shooting the fact that some three months earlier, the second appellant had accused the deceased of a gambling offence, remained a matter of slight suspicion only and ought to have been presented to the Jury as such.

(4) That this was clearly a case in which the Commissioner should have directed the Jury:—

(a) that the inference of common intention must not be reached unless the evidence irresistibly leads to it;

(b) that the mere presence of a person at the scene of the offence does not justify an inference of guilt;

(c) that the evidence against each accused must be considered separately.

(5) That the absence of these requisite directions led to an unreasonable verdict against the second accused and to a miscarriage of justice.



## Court of Requests

*Jurisdiction — Rent and ejectment — Monetary value of action — Courts Ordinance, section 75 as amended by the Courts of Requests (Special Provisions) Act No. 5 of 1964 — Civil Procedure Code, sections 35(1), 36(2) and 408 — Consent decree — Estoppel.*

**Held:** (1) That in an action for ejectment, the monetary jurisdiction of the Court of Requests is determined under the provisions of section 75 of the Courts Ordinance as an action in which "the title to interest in or right to the possession of land" is in dispute.

(2) That where the action is for the ejectment of a monthly tenant, the value of the right to possession involved is the rent or profit which might have become due if the monthly tenancy continued.

(3) That a claim for arrears of rent if included, may be regarded as incidental and subsidiary to the claim to a right to possession and cannot oust the jurisdiction of the Court so long as the amount of arrears claimed at the date of action does not exceed Rs. 750/-

(4) That the provisions of section 75 of the Courts Ordinance read with the provisions of the Civil Procedure Code regarding joinder of causes of action empower the Court of Requests to hear and determine an action, where a cause of action in connection with a debt damage or demand is joined with a cause of action relating to an interest in land, even though their aggregate value may exceed Rs. 750/- provided that each cause of action does not exceed its own monetary limit prescribed under section 75, as amended.

(5) That where the claim is one for continuing damages for being kept out of possession of a land, the Court of Requests is not restricted to the ordinary limits of its jurisdiction when granting relief as regards such damages.

(6) That where a party consented to the compromise of an action under section 408 of the Civil Procedure Code and enjoyed the benefit of a decree for over one and a half years, he was estopped from questioning subsequently the validity of the decree on the ground that the amount of the decree fell outide the scope of the action.



## Courts Ordinance

*Power of Parliament to restrict jurisdiction of Courts defined in the Ordinance.*



*Section 36 — Right of a judge of the Supreme Court to hear appeals while on circuit.*



*Section 75 read with provisions of Civil Procedure Code— Joinder of causes of action — Aggregate value of causes of action exceeding jurisdiction of Court — Can Court entertain action?*



## Creditor and Debtor

*The institution of an action against one of several debtors in solido interrupts the course of prescription against the others.*



## Criminal Procedure

*Nolle Prosequi*



*See also under* — HEAVY OIL MOTOR VEHICLES TAXATION ORDINANCE

## Criminal Procedure Code

*Section 343 — Right of a Judge of the Supreme Court to hear appeals while on circuit — Courts Ordinance, section 36.*

*Burden of proof — Magistrate acting on evidence of mere possibility and rejecting evidence of probability favourable to defence — Effect.*

**Held:** (1) That the power conferred by section 343 of the Criminal Procedure Code on a Judge on circuit to hear appeals cannot be superseded by the prevailing practice of hearing appeals in Colombo.

(2) That where a Magistrate acted on the evidence of a mere possibility and rejected the evidence of probability, which was favourable to the defence, he erred in law, as in doing so, he has wrongly placed the burden of proof on the accused.

*Per* **Sri Skanda Rajah, J.** (*a*) "The use of the word 'ordinarily' in section 36 of the Courts Ordinance, which enacts: The appellate jurisdiction of the Supreme Court shall be *ordinarily* exercised only at Colombo, does not mean shall 'always' be exercised at Colombo. It was nine years after this provision that section 343 of the Criminal Procedure Code was enacted. Therefore, it would supersede section 36 of the Courts Ordinance even if 'ordinarily' can be interpreted to mean 'invariably'."

(*b*) "I would in conclusion add that this is not the first time that an appeal was heard by a Judge on circuit. As far back as 1920, Bertram, C.J., appears to have heard an appeal while on circuit: vide *Kannangara* vs. *Sarah* (1920) 8 C.W.R. at 224. Section 343 appears to have been enacted to eliminate delay in the disposal of appeals in criminal cases. My view is that this provision should be invoked more often than hitherto."



*Section* 245(*b*) — *Duty of the jury to determine the meaning of words used in an unusual sense.*



*Section* 152(3) —*Failure of Magistrate to assume jurisdiction under — Subject matter, robbery Rs.* 200 — *Validity of conviction.*



*Section* 306(1) — *Judgment — Duty of Magistrate to give reasons for his decision.*

Where a Magistrate merely reiterates the evidence of the witness for the prosecution without a finding that he accepts their evidence, and states that he cannot accept the evidence of the accused and that he does not appear to be speaking the truth —

**Held:** That the Magistrate had not discharged the duty cast upon him by section 306(1) of the Criminal Procedure Code and that the conviction should be set aside.



## Debt Conciliation Ordinance

*Debt Conciliation Ordinance, section* 56 — *Application by mortgagor to Board received on* 6.11.1962— *Jurisdiction of court to entertain application.*

The defendant, who is the mortgagor, made an application to the Debt Conciliation Board on 5.11.62, claiming relief under the Ordinance. This was received by the Board on 6.11.62 but was entertained by it only in April 1963. The plaintiff filed this action on the mortgage bond on 22.11.1962.

It was contended on behalf of the defendant that the court had no jurisdiction to entertain this action in view of section 56(a)(i) of the Debt Conciliation Ordinance, as it operates from the time an application is received by the Board and not after the Board has entertained the application.

**Held:** That the moment the application is received by the Board, the matters stated therein are pending before the Board and consequently the court had no, jurisdiction to entertain the action.



## Debtor and Creditor

*See under* — CREDITOR AND DEBTOR .. ..

## Decree

*Of consent — Can its validity be questioned later by a party to the decree.*



## Elections

*Parliamentary —*

*See under* — CEYLON (PARLIAMENTARY ELECTIONS) ORDER-IN-COUNCIL .. .. ..

## Electricity Act

*Electricity Act, sections* 65 *and* 67 — *Theft of electric current and interference with meters — Conviction — Submission that inadmissible evidence led vitiated conviction — Sufficiency of other evidence to sustain conviction — Evidence of accomplice — Even if his evidence not corroborated can conviction be allowed to stand—Evidence Ordinance, section* 133.

The accused was charged and convicted under sections 65 and 67 of the Electricity Act for fraudulently or dishonestly abstracting electrical energy, and with interfering with meters. Besides some inadmissible evidence led in the case, there was the evidence (*a*) of one Kadiravelu, the cinema operator employed by the accused, who gave information of the conduct of the accused to the Town Council authorities, because of an alleged assault on him.

(*b*) of the Electrical Superintendant employed under the Town Council who inspected the cabin room and found that wires had been connected in such a manner as to abstract current without the meters recording the units of current actually used.

**Held:** (1) That the witness Kadiravelu was in the position of an accomplice and as his evidence has

been corroborated by that of the Electrical Superintendent, there was ample evidence to sustain the conviction disregarding all the inadmissible evidence.

(2) That even if there was no corroboration of Kadiravelu's evidence, the conviction can be allowed to stand in view of the provisions of section 125 of the Evidence Ordinance.

(3) That the presumption created by sections 65 and 67 of the Electricity Act had not been rebutted by the accused.



## Estoppel

*Estoppel — Res judicata — Effect of default judgment — Estoppel in face of statute — Principles applicable.*

*Hire-Purchase Agreement — Action by Summary Procedure — Failure to obtain leave to appear and defend— Judgment by default—Second plaint averring first agreement and further that by arrangement plaintiff re-took possession of part of the machinery on conditions stated therein — Prayer for unpaid rent, interest, damages for wrongful detention and order for delivery of possession.*

*Defendant pleading that agreement in plaint represented moneylending transaction and complementary to a written agreement of even date purporting to sell machinery and equipment and amounting to a Bill of Sale unregistered — Therefore void — Alternatively that transaction amounted to a moneylending transaction and unenforceable as it contravened section* 10(1) *of the Moneylending Ordinance — Is the defendant estopped by judgment by default — How far does it operate as res judicata — Can plea of estoppel be taken in face of Statute.*

An action was instituted by the appellant by way of summary procedure claiming arrears of rental payments and interest due for certain months on machinery and equipment let to the respondent on an agreement in writing dated 20.6.52 and which machinery and equipment the respondent continued to hire on the same terms after the expiry of the said agreement. Judgment by default was entered for the appellant on 3.11.54 as the respondent failed to obtain leave to appear and defend.

The appellant filed a second plaint in 1957 against the respondent in which, after averring the agreement referred to in the earlier action and the terms thereof it was stated that the plaintiff, by arrangement with the defendant, re-took possession of two items of the said machinery and equipment in May 1955 and that it was agreed between the plaintiff and the defendant that the defendant should continue hiring the remainder of the said machinery and equipment on terms and conditions continued in the said agreement, subject to certain variations set out in the plaint.

This plaint also, after alleging that in accordance with a term of the 2nd agreement the appellant had terminated the hiring, claimed the return of the machinery and equipment, and further prayed for unpaid rent, interest, damages for wrongful detention and for an order for delivery of the machinery and equipment.

The respondents in defence pleaded *inter alia* (a) that the appellant at all material times, was a money lender within the meaning of section 3 of the Money Lenders' Ordinance 1951.

(b) that the agreement referred to in the plaint represented a money lending transaction and the agreement dated 20.6.52 was complementary to a written agreement of even date between the parties whereby the respondents purported to sell the machinery and equipment referred to, to the appellant.

(c) that the agreement of hire, on a true construction thereof, and having regard to all the surrounding circumstances is a Bill of Sale, and being neither in the form required by the Bills of Sale Enactments nor registered under the provisions of that Enactment is void and unenforceable and the hire charges reserved in it (in fact by way of interest) are not recoverable in law.

(d) that the agreement of sale and the alleged right of plaintiff to retain possession being ancillary to the agreement of hire and parts of a void transaction are also void and unenforceable.

(e) that in the alternative, in so far as the plaintiff seeks to recover hire charges which are really charges by way of interest and as the plaintiff did not furnish any note or memorandum of the contract complying with section 10(1) of the Money Lending Ordinance, the said loans are not recoverable.

In reply to this the plaintiff pleaded

(a) denying that he was a Moneylender or that the transaction was a moneylending transaction or that the documents referred to are Bills of Sale or that they or any of them are or is void.

(b) that the defendant is estopped by judgment dated 3.11.54 (wherein the plaintiff recovered 9 months outstanding hire from 20.9.53 to 19.6.54 on the hire agreement the subject matter of the proceedings in that case) from raising the defences under the Moneylending Enactment and the Bill of Sale Enactment as pleaded.

By agreement the issue of estoppel was argued as a preliminary point. The trial Judge held in favour of the plaintiff but the High Court of Appeal decided in favour of the defendant. Thereafter the plaintiff appealed to the Privy Council.

**Held:** (1) That a default judgment, though capable of giving rise to estoppels must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what must have been necessarily decided. To use the words of Lord Maugham L.C. in the *New Brunswick Railway Co.* case (1939) A.C. at p. 21, such judgments can estop only for what must "necessarily and with complete precision" have been thereby determined.

(2) That in the present appeal, taking notice of the plaint upon which the judgment has been obtained

and which forms part of the record, the plaintiff was entitled to recover from the defendant company a sum of money by virtue of a written agreement under which machinery and equipment was let on hire at a monthly rent and subsequent oral continuation of that agreement.

(3) That it cannot be said in this case that the respondent is seeking to set up something which either expresses or imports a contradiction of the record in the earlier action. The defence, on the contrary, is more like a plea by way of confession and avoidance than a traverse, as it maintains that when the agreement is read in conjunction with another contemporaneous agreement the obligation to pay the monies claimed will be seen to be part of a transaction, the real nature of which was the borrowing of money on the security of goods. That is an issue which was not, raised at all by the plaint in the first action.

(4) That, applying the principle stated in para (1) above, it is impossible to say that there was anything in the first judgment which "necessarily and with complete precision" decided this issue against the respondent and therefore the estoppel claimed cannot be maintained against it.

The appellant's claim of estoppel was resisted by the respondent on another principle viz. that a party cannot set up an estoppel in the face of a statute. This argument was based on the defences pleaded above in regard to the Moneylending Ordinance and the Bills of Sale Enactment.

After examining the relevant English decisions on the question, their Lordships

**Held:** (5) That there can be no estoppel in the face of the Moneylending Ordinance since the provisions on which the respondent seeks to rely renders him a "protected person" for this purpose, nor any estoppel in the face of the Bills of Sale Enactment the provision of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower.



*Decree entered of consent — Party benefiting by such decree estopped from questioning its validity on the ground that the amount of the decree fell outside the scope of the action.*



## Evidence

*Burden of proof — Magistrate acting on evidence of mere possibility and rejecting evidence of probability favourable to defence — Effect.*



*Issue of Commission to record evidence abroad — Motion to forward samples of subject matter of inquiry to Commissioner allowed by court — Has court power to allow such motion.*



*Medical Evidence led for prosecution and defence conflicting — Duty of trial judge.*



*Evidence necessary to prove common intention.*



## Evidence Ordinance

*Section* 57(4) — *Judicial notice of Parliamentary proceedings — Truth of a statement made in Parliament is not established by proof of the statement.*



*Section* 24 — *On whom is the burden of proving that a confession is not irrelevant under this section.*



*Section* 114 — *Presumption as to accuracy of weighing scales .*



*Section* 133 — *Evidence of accomplice — Corroboration.*



## Gaming

*Unlawful Gaming — Search warrant issued without written information on oath — Failure to prove that public had access to place where gaming took place — Conviction be sustained?*

**Held:** (1) That where a search warrant under the Gaming Ordinance was issued without the Magistrate having before him any written information on oath, it is invalid and the presumptive evidence of guilt under the Ordinance will not apply.

(2) That when the evidence led does not show that the public had access to the place where the card game is alleged to have been carried on, a conviction for unlawful gaming cannot be sustained.



## Habeas Corpus

*Writ of Habeas Corpus — Whether successive applications in respect of the same person upon the same facts can be made—Parliamentary proceedings—*

*Truth of statement made in Parliament not established by proof such statement was made — Should judicial notice be taken of such proceedings — Evidence Ordinance, section* 57(4).

*Judicial precedent — Decision of Privy Council on appeal from Nigeria applying English Common Law — Ceylon Courts also governed by English Common Law on such point — Should such Privy Council decision be followed.*

**Held:** (1) That successive applications for a writ of habeas corpus could be made to different Judges of the Supreme Court even in regard to the release of the same person upon the same facts.

(2) That even if it be correct that, under section 57(4) of the Evidence Ordinance, judicial notice must be taken of proceedings in Parliament, the truth or correctness of a statement made in Parliament is not established by proof of the statement.

(3) That it was not open to the Supreme Court to disregard a Privy Council decision on appeal from another country where the law applicable here on such point was the same.

*Per* **H. N. G. Fernando, S.P.J.** — "There is one additional observation I must make. Even if, in, view of the decision of the Privy Council, successive applications can be properly made to different judges for a Writ of Habeas Corpus, let it not be thought that vexation of judges by frivolous applications can lead this Court to interfere unlawfully with the Executive, or can induce the Executive to desist from exercising the powers and duties committed to it by law. I do not doubt that the Court has sufficient statutory and inherent power to discourage and punish vexatious abuse of its process."



## Heavy Oil Motor Vehicles Taxation Ordinance

*Heavy Oil Motor Vehicle Taxation Ordinance (Cap. 249) — Sections* 4(1), 5(1) *and* 5(2) *— Commission of offence under Ordinance and liability to fine — Recovery of tax due — Two different kinds of proceedings available against defaulter.*

The Government Agent filed a "plaint" under Section 148(1)(b) of the Criminal Procedure Code against the Accused-Appellant complaining that he had possessed a motor vehicle having failed to pay Heavy Oil Tax in contravention of section 5(1) of the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), and had thereby committed an offence under s. 5(2). The Accused-Appellant appeared upon summons, and upon being charged pleaded not guilty. On the trial date, the prosecuting officer withdraw the charge, and the Accused-Appellant was discharged. Thereupon, in the same proceedings, the prosecuting officer filed a certificate issued by the Government Agent under s. 4(1) of the Ordinance, specifying the amount due by way of tax, together with a statement that the defaulter had been given 7 day's notice to pay the amount.

**Held:** That the procedure followed in the first instance, and the procedure followed after the discharge, were two different kinds of proceedings available against a defaulter. It was not legally possible *in the same proceedings* to take action under section 4(1) of the Ordinance, after a discharge had been given in a case where plaint had been filed under section 148 of the Criminal Procedure Code.



## Hire Purchase

*Hire-Purchase Agreement — Possession of car under Agreement — Failure to pay balance purchase price on stipulated date — Absence of understanding regarding re-taking possession on default — Seizure and removal of car — Charge of robbery of car — Penal Code, section* 380.

Under a hire-purchase agreement between W.P. the registered owner of car No. 2 Sri 1619 and a Finance Company its absolute owner, the former paid the latter Rs. 4,500/- and obtained a loan of Rs. 4,600/- from it undertaking to repay the loan in eighteen monthly instalments. In default of any single instalment of the Company was entitled to re-take possession of the car. Guarantor on the said agreement was C.

Subsequently the car came into the possession of C. who agreed to sell it (Vide P. 1) to S. for Rs. 10,450/- on C. receiving a sum of Rs. 4,000/- as an advance. Of the balance sum, S. was to pay 4,600/- to the Finance Company, and Rs. 1,850/- to C. within one month from the date of the agreement, viz. 24.6.62 The vehicle was handed to S. to be used in good condition. There was not even an understanding that the car could be re-taken for non-payment of the balance payable to C.

Although S paid an instalment due to the Finance Company on behalf of W.P. he was unable to pay the balance sum of Rs. 1,850/- to C within the month stipulated and he obtained further time till 3.8.61 on which date S, together with his wife and another came in the car to Kegalle where C resided with the object of paying Rs. 1,000/- and asking for further time to pay the balance. While S and his wife were waiting in the car before contacting C, the four accused came armed with knives and pulled out S and his wife from the car and the 4th accused drove it off.

The four accused were later indicted with having committed the offence of robbery of the said car No. 2 Sri 1619 from the possession of S and were convicted. The accused appealed.

In appeal it was contented that

(1) there was no prima facie case of robbery established as S had lost all rights to possession of the car when he defaulted payment on the due date. C was entitled to take possession of the car using such reasonable force as was necessary.

(2) there was no evidence that the accused intended to cause wrongful loss to S.

(3) there was admissible evidence given by S in cross-examination to the effect that the accused told

him when they came up to the car that they intended to remove the car because he defaulted in paying the balance money to C, which proved that they were acting on the instructions of C.

**Held:** (1) That even assuming that S had defaulted in paying the balance sum of money to C, the car was admittedly in S's possession at the time of seizure, and as there is no common law right by which such a seizure could be effected by the owner of a movable without terminating the hiring or without having recourse to the Courts, the seizure of the car from S's possession was unlawful.

(2) That since the seizure was unlawful, and as S was entitled to possess the car under the agreement, the accused intended to cause wrongful loss to S.

(3) That in the absence of evidence given by the 1st, 2nd and 3rd accused, though their statements to S may be regarded as forming part of *res gestae* of the criminal transaction, they are not admissible in evidence as proof of their truth. Therefore there is no admissible evidence that they were acting as agents of C. and their action in seizing the car was unlawful.

*Per* **Tambiah, J.** (*a*) "The transaction evidenced by document P 1 is in fact a hire-purchase agreement which is governed by the Roman Dutch Law."

(*b*) "The Roman Dutch authorities never allowed *parate executie* by which a person could take the law into his own hands. This principle has been consistently applied to all transactions. The same principle has been applied to leases or hire of movables. I am unable to find any Roman Dutch authority in support of the proposition laid down in *de Silva* vs. *Kuruppu*. For these reasons I am unable to agree with the proposition of law laid down in that case. That decision should be carefully considered when the occasion arises."



## Husband and Wife

*Mortgage bond by — Joint and several liability — Action on bond filed four days before it become prescribed — Discovery that wife had died three years before date of action — Is action a nullity — Husband appointed representative of deceased wife after term of prescription — Whether claim against estate of deceased wife prescribed.*



## Industrial Disputes Act

*Industrial Disputes Act — Application for relief to Labour Tribunal prior to appointment of President by Judicial Service Commission — Its validity in Law.*

**Held:** (Following the decision in *Walker Sons & Co. Ltd.* vs. *Fry & Others*, 68 N.L.R. 73) That an application made to the Labour Tribunal for relief under the Industrial Disputes Act prior to the appointment of its President by the Judicial Service Commission is bad in law as he had no power or authority to entertain such application.



## Judicial Notice

*Should judicial notice be taken of Parliamentary proceedings.*



## Judicial Power

*Interference with—What is*



*Arbitrator under Co-operative Societies Ordinance —Does he exercise judicial power.*



*See also under*—INDUSTRIAL DISPUTES ACT

## Judicial Precedent

*Privy Council decision on appeal from Nigeria applying English Common Law — Ceylon courts also governed by English Common Law on such point — Should such Privy Council decision be followed.*



*When judicial decision not binding in subsequent case.*



## Jurisdiction

*Of Court of Requests — In action for ejectment — Monetary value of action — Inclusion of claim for arrears of rent.*



## Landlord and Tenant

*See also under* — RENT RESTRICTION.

*Landlord and tenant — House destroyed by fire — Tenant vacating premises in consequence — New building put up by landlord — Tenant taking forcible possession — Prosecution of tenant by police — Tenant instituting action for declaration that he is tenant — Rent Restriction Act — Its effect on statutory tenancy.*

**Held:** (1) That when a building which is the subject of a lease is burnt down without the fault of the landlord or of the tenant, the contract of tenancy is at an end, for the subject-matter is also at an end. The fact that the tenancy fell within the Rent Restriction Act made no difference.

(2) That one way in which the statutory protection given by the Rent Restriction Act to a tenant comes to an end is by the handing back of the premises to the landlord.



*Landlord and Tenant — Death of landlord — Does it extinguish tenancy — Devolution of rights and obligations on his heirs.*

**Held:** That in a contract of tenancy, which, by agreement of the parties, runs from month to month, and has not been terminated by reasonable notice, the death of the landlord does not extinguish the contract, but his rights and obligations pass to his heirs.



## Lease

*Lease for twelve months on agreement not notarially attested — Rent payable on monthly basis — Effect — Whether obligations in agreement not arising out of lease severable.*



## Local Authorities Elections

*Quo Warranto does not lie to question validity of election of a Municipal Councillor on general grounds such as general undue influence or intimidation or general bribery.*



## Local Government Service Commission

*Local Government Service Commission — Liability to pay salary to member of the Service whose post has been abolished — Liability of local authority — Local Government Service Ordinance (Cap. 264), sections 8, 9, 10, 11, 14, 23, 58 and 59.*

The Plaintiff became on the 1st April 1946 a member of the Local Government Service, and in that capacity was appointed to various posts, the last being that of Electrical Engineer, Jaffna Municipal Council, This post was abolished by the Council as from 30th September 1962. The Plaintiff claimed in this action that the Local Government Service Commission was liable to pay his salary and emoluments from the 1st October 1962 to 31st August 1963.

**Held:** That upon a consideration of the relevant sections of the Local Government Service Commission Ordinance (Cap. 264), viz, sections 8, 9, 10, 11, 14, 23, 58 and 59, it was clear that Commission was neither required, nor had the power, to pay the salaries of the members of the service.

*Per Curiam:* "The Ordinance does not envisage a member of the Service not being appointed to a post in the service of a local authority, and once a member is so appointed, the obligation to pay his salary devolves under section 23 solely on that authority."



## Maintenance

*Maintenance — Application by wife for child and herself — Defendant agreeing to pay Rs. 25/- for child — Magistrate minuting this as interim order — Wife subsequently withdrawing application for her own maintenance on a settlement — Failure to pay maintenance on a settlement — Failure to pay maintenance to child, as agreed — Distress warrant — Defendant's liability.*

*Interim orders for maintenance of children — Desirability.*

An application by a wife for maintenance for herself and her child was fixed for inquiry on the defendant refusing to take back his wife, but undertaking to pay Rs. 25/- per mensem for the child, which the Court minuted as "an interim order." On a subsequent date of inquiry ,the applicant's Counsel moved to withdraw the application for maintenance for herself in view of a payment of a sum of Rs. 1950/- by the defendant for redeeming a property. This was allowed.

The defendant failed to pay the agreed maintenance for the child for 20 months and distress warrant was applied for to recover the arrears. This was resisted by the defendant.

**Held:** (1) That in view of the agreement the defendant was under obligation as a father to maintain the child, until he got the custody of the child.

(2) That if the defendant wanted to get rid of that obligation, then he should have made a proper application to Court.



## Misdirection

*See under* — COURT OF CRIMINAL APPEAL DECISIONS.

## Mortgage

*Mortgage bond granted by husband and wife — Joint and several liability — Action on Bond filed four days before it became prescribed — Discovery that wife had died three years before date of action — Is the action a nullity — Husband appointed representative of deceased wife after term of prescription — Whether claim against estate of deceased wife prescribed — Prescription Ordinance, section 5.*

**Held:** (1) That the death of one of two mortgagors prior to the institution of the action does not render such action a nullity.

(2) That in the present case the institution of the action against the husband (co-mortgagor), was sufficient to interrupt prescription against the estate of the deceased wife. The institution of an action against one of several debtors *in solido* interrupts the course of prescription against the others.

(2) That as the deceased wife was stated to have left an estate below the value of Rs. 2,500/- and as there was no appeal from the order appointing the husband the 1st defendant as her legal representative, the 1st defendant was properly appointed.



## Municipal Councils

*Writ of Quo Warranto — Invalidation of election to Municipal Council — Grounds of general undue influence and general intimidation — Does Mandate in nature of such writ lie in Ceylon—English Common Law and Statute Law — Local Authorities Elections Ordinance (Cap. 262), Sections 9, 10, 11 — Municipal Councils Ordinance (Cap. 252), Sections 10 and 13 — Civil Law Ordinance (Cap. 79), section 3 — Courts Ordinance (Cap. 6), sections 42 — Ordinance No. 4 of 1920.*

**Held:** (1) That no mandate in the nature of a writ of Quo Warranto can be issued by the Supreme Court to question the validity of the election of a Municipal Councillor on general grounds such as, general undue influence or intimidation and general bribery, inasmuch as no provision is made in respect of this matter by the Statute Law of Ceylon, and even according to the English Law, no Writ of Quo Warranto has been available in England on such grounds since 1872 (Victoria, Cap. 60).

(2) (*Per* **Siva Supramaniam, J.**) That since relief by way of a Writ of Quo Warranto had ceased to be available under the English Common Law to invalidate a Municipal election on such grounds before Ordinance No. 4 of 1920, which authorised the issue mandates in the nature of such writs by the Supreme Court it would not be appropriate to have recourse to the principles of the English Common Law to determine the grounds on which the Court should issue that writ in connection with the invalidation of a Municipal election.

*Per* **Siva Supramaniam, J.** — "Soertsz J. at the conclusion of his judgment in *Piyadasa's case* drew attention to the desirability of adopting *mutatis mutandis* the State Council Order-in-Council in regard to elections to the State Council to govern Municipal elections. That was in 1941. Nevertheless, when the Legislature enacted Ordinance No. 53 of 1946 (Cap. 262) to amend and consolidate the law relating to the election of members to Local Bodies it did not include therein provisions to invalidate an election on grounds of general corrupt or illegal practices. The omission is significant when one considers the provisions of Section 77 of the Ceylon (Parliamentary Elections) Order-in-Council of 1946 in connection with the election of members to Parliament. In those circumstances, this Court will be encroaching on the powers of the Legislature if it adds to the grounds on which elections to Municipal bodies can be invalidated."



## Non-direction

*See under* — COURT OF CRIMINAL APPEAL DECISIONS.

## Paddy Lands Act

*Paddy Lands Act, No. 1 of 1958, sections 3, 4, 6, 7, 8, 14 and 21 — Action in District Court by owner of paddy field for ejecting his tenant on the ground of failure to maintain it diligently — Can plaintiff maintain action in view of the provisions of Paddy Lands Act.*

The appellant, as the owner of a paddy field, instituted this action seeking to have his tenant cultivator ejected therefrom on the ground that the latter had failed to maintain the field diligently. The defence raised the plea that the action could not be maintained in view of the provisions of the Paddy Lands Act, 1 No. of 1958. The learned District Judge held that there was no section in the Act to oust the jurisdiction of his Court and gave judgment for the plaintiff. The defendant appealed.

**Held:** That the Paddy Lands Act, No. 1 of 1958 provides the machinery to which an owner of a paddy field must resort, if he wants to have his tenant cultivator evicted or his paddy field properly cultivated. This is the only machinery available to him since this act was passed, and consequently the plaintiff should not have filed this action.



## Parliamentary Proceedings

*Truth of statement made in Parliament not established by proof that such statement was made.*

## Partition

*Partition action—Application to be added as a party-defendant by person claiming interest in land — Can party be added after delivery of judgment and order to enter interlocutory decree — Effect of decree not having been signed at time such application made and determined — Duty of Court when possessed of facts to adjourn hearing in order to give intervenient an opportunity to be added — Partition Act (Cap. 69), section 70.*

**Held:** (1) That section 70 of the Partition Act does not prevent a person from intervening and being added as a party in a partition suit even after delivery of judgment and order to enter interlocutory decree so long as the interlocutory decree has not been signed by the judge.

(2) That, further, in the present case as the Court was during the hearing possessed of the fact that the appellant was a person claiming to have an interest in the land sought to be partitioned, it should, having regard to the provisions of section 70 of the Partition Act and the conclusive effect of the interlocutory decree, have adjourned the hearing in order to give the appellant an opportunity of being added as a party.



## Partnership

*Partnership Act, sections 29 and 42 — Business of selling Petrol and other accesories from a Service Station — Action for an accounting (without dissolution) for a period by one partner R — Notice of termination of partnership by A (partner sued) — A entering into new agreements with owners of Service Station without knowledge of R — Business continued in A's name — Action by R for winding up by Court and for accounting — Is A liable to account?*

The Appellant and the Respondent in 1942 entered into a written partnership agreement for carrying on the business of selling Caltex Petrol and Kerosene Oil from a Service Station belonging to Caltex (Ceylon) Ltd. Differences having arisen later between the two partners, the respondent sued the appellant for an account and his share of the net profits up to 31.3. 1948 in case No. 5029 D.C. Kurunegala. This was followed by a notice on 10.9.1948 by the appellant to the respondent to determine the partnership as from 10.12.1948. Shortly after, the appellant wrote to Caltex without the respondent's consent enclosing a copy of the said notice and requesting the alteration of the name of the agency to his individual name. This request was readily complied with and the appellant carried on the business in his own name on new agreements with Caltex. The respondent aggrieved by the said conduct of the appellant filed with action claiming in effect a winding up by the Court and distribution of the assets of the partnership between the partners.

In the meantime the aforesaid action No. 5029 was tried and the appellant was decreed to pay Rs. 10,550/- to the respondent being the latter's shares of profits due up to 31.2.1948.

The learned District Judge in this action held (1) that the respondent's half share of profits from 31.3.1948 (the date of judgment in case No. 5029) up to 10.12.1948 was Rs. 2,300/-; (2) as the account books were not produced the respondent was entitled to Rs. 2,000/- per year as his share up to date of distribution.

An appeal to the Supreme Court was dismissed with a variation in regard to two subsidiary matters, holding that section 42 of the Partnership Act, 1890 applied to the facts of this case.

In the Privy Council it was contended that the said section 42 was not applicable as the partnership had no continuing business; they merely had a licence to sell the goods of Caltex and a few other accessories, which licence could be determined at very short notice. Therefore, the appellant could not be said to be carrying on the partnership business after dissolution, but he was merely licenced to carry on a new trade at the premises by Caltex.

**Held:** (i) That there was in the present case, a profitable business with a measure of goodwill.

(ii) That since after the dissolution (a) the appellant continued in business making use of the respondent's capital and of his shares of profits due up to 31.3.1948 which remained in the business and (b) the new agreements made between the appellant and Caltex during the subsistence of the partnership must be treated as partnership property, the appellant must be made to account for the profits he thereby made.

(iii) That both sections 29 and 42 of the Partnership Act applied to the facts of this case.



## Penal Code

*Section 311 — Charge of grievous hurt under grave and sudden provocation — Injured man in hospital for 20 days — Is this sufficient to sustain conviction*

**Held:** That the mere fact that the injuired man had been in hospital for twenty days is not sufficient to prove that he was suffering from grievous hurt.

*Charges under sections* 382 *and* 315 — *Subject-matter of robbery Rs.* 200/- — *Failure to assume Jurisdiction under section* 152(3) *of the Criminal Procedure Code — Illegality of conviction.*

When a Magistrate, without assuming jurisdiction under section 152(3), convicted the appellant on charges under section 382 and 315 of the Penal Code, and where the subject matter of the charge of robbery was Rs. 200/-.

**Held:** That the conviction was illegal.

S.I. POLICE, PADUKKA *vs.* SIMON .. .. 56

*Section* 32 — *Common intention.*

DAVID & ANOTHER *vs.* THE QUEEN .. .. 75

*Section* 380.

ALMEIDA & OTHERS *vs.* DE ZOYSA (S. I. POLICE) .. 103

## Pleadings

*Pleadings, amendment of — Amendment which would defeat plea of prescription not to be permitted — Unjust enrichment —Period of prescription for cause of action based thereon — Prescription Ordinance* (*Cap.* 68), *section* 10.

**Held:** (1) That a cause of action based on unjust enrichment would be prescribed in three years.

(2) That it would not be permissible to amend a plaint so as to include such a cause of action where this would have the effect of defeating a plea of prescription available to the defendant.

FERNANDO *vs.* MUNASINGHE .. .. 80

## Prescription

*Mortgage bond granted by husband and wife — Joint and several liability — Action on bond filed four days before it became prescribed — Discovery that wife had died three years before date of action — Is the action a nullity — Husband appointed representative of deceased wife after term of prescription — Whether claim against estate of deceased wife prescribed.*

SELLATHMAI *vs.* YOGAMMA .. .. .. 17

*Period of prescription for cause of action based on unjust enrichment.*

FERNANDO *vs.* MUNASINGHE .. .. 80

## Prevention of Frauds Ordinance

*Prevention of Frauds Ordinance* (*Cap.* 70), *section* 2 — *Lease for twelve months on agreement not notarially attested — Rent payable on monthly basis — Effect — Whether obligations in agreement not arising out of lease severable.*

*Civil Procedure Code, sections* 34 *and* 406 — *Abandonment of part of claim without reservation of right to sue — Fresh action filed — Abandonment of part of claim made "without prejudice to rights of parties" in such fresh action — Defence based on such abandonment already taken in second action at time of such settlement — Defendant not precluded from taking such defence.*

The plaintiff first filed action against the defendants in D.C. Colombo case No. 46753/M for the recovery of a sum of Rs. 16,445/99 pleading an agreement marked 'A' dated 10th April 1958. The defendants filed answer and thereafter the plaintiff amended his plaint on 3rd March 1960.

In the amended plaint the plaintiff pleaded the written agreement dated 10th April 1958 and averred that he had leased to the first defendant a certain cinema hall for a period of 6 months, together with the equipment and apparatus set out in the Schedule to the said agreement. He also averred that the second, third and fourth defendants signed the said agreement as guarantors. In the amended plaint, the plaintiff also restricted his claim to a sum of Rs. 1406/94 alleging that this was due in terms of certain account particulars marked 'B' and filed therewith. This action was of consent dismissed without costs on 21st March 1961. However, when the plaintiff restricted his claim in the amended plaint he had neither asked for any reservation of a right to sue for that part of the claim he was abandoning, nor was any permission given by Court to withdraw the plaint with liberty to file a fresh action.

The present action was filed by the plaintiff on 4th April 1960 and the first to third defendants were the same as those in the earlier action (the first defendant as the principal debtor and the second and third as guarantors). The plaintiff claimed in the present action a sum of Rs. 12,039/09 on a written agreement dated 24th April, 1957. This was a sum which had been included in the claim originally made in the earlier action (46753/M), but which had been dropped when the plaint in that action was amended on 3rd March 1960.

Paragraph two of the Indenture of 24th April 1957 recited that the premises were demised for a period of 12 months on the rents and conditions set out in the the said Indenture. The rent was to be Rs. 1,000/- per month payable monthly on or before the last day of the month.

At the trial certain issues raised by counsel for the defendants were tried as preliminary issues. They related broadly, to two matters—(a) whether the said Indenture of 24th April 1957 not being notarially attested was of any force or avail in law, and (b) whether the plaintiff when filing his second amended plaint had abandoned his claim to the sum of Rs. 12,039/05 earlier claimed or whether his claim was barred by the provisions of section 406 of the Civil Procedure Code. The learned trial Judge held with the plaintiff on these issues and directed that the trial do proceed on the other issues. The defendants appealed.

**Held:** (1) That although the rent was to be paid on a monthly basis, the duration of the lease being fixed for a period of one year, the Indenture of 24th April 1957 was, by reason of the stringent provisions of section 2 of the Prevention of Frauds Ordinance, of no force or avail on law as it had not been notarially attested.

(2) That the present action being based on the written agreement and not on a monthly tenancy, the submission that a lessee on a non-notarial agreement which was invalid in law should be treated as a monthly tenant, would not avail the plaintiff.

(3) That the obligations such as the agreement to pay film hire and entertainment tax did not arise out of the lease and were severable. The plaintiff was therefore not precluded from making these claims by section 2 of the Prevention of Frauds Ordinance.

(4) That sections 34 and 406 of the Civil Procedure Code were a bar to the present claim of the plaintiff. By filing the amended plaint in case No. 46753/M restricting his claim to Rs. 1,406/94, the plaintiff abandoned the rest of his claim set out in the original plaint. Further, that action was dismissed without any reservation to sue upon the abandoned claim.

(5) That although the dismissal of case No. 46753/M was on a settlement reached "without prejudice to the rights of parties" in the present case, this could not help the plaintiff. For, at that time, the defendants having already taken up the plea (in the present case) that the plaintiff had abandoned his claim without permission of Court and was precluded from maintaining it, the defendants were not precluded from taking that defence.

*Per* **Tambiah, J.** "It is difficult to conceive how a monthly tenancy can be created when an indenture of lease which requires notarial execution is null and void of no effect in law. But it may be possible in such cases to sue for use and occupation."



## Privy Council Decisions



*It is not open to the Supreme Court to disregard a Privy Council decision on appeal from another country where the law applicable here on such point was the same.*



## Quo Warranto

*Writ does not lie to question validity of election of a Municipal Councillor on general grounds such as general undue influence, or intimidation or general bribery.*



## Rent Restriction

*See also under*—LANDLORD AND TENANT

*Rent Restriction Act (Cap. 274) as amended by Acts Nos. 10 of 1961 and 12 of 1966, sections 12A and 13 — Effect of section 4 of amending Act No. 12 of 1966 — Validity of said section.*

*Courts Ordinance (Cap. 6) — Power of Parliament to restrict jurisdiction of Courts defined in said Ordinance — Whether jurisdiction can be limited retrospectively — Interference with judicial power.*

In terms of an amendment to the Rent Restriction Act (Cap. 274) by Act No. 12 of 1966 certain restrictions were introduced regarding actions for ejectment from premises having a standard rent not exceeding Rs. 100/-. These restrictions were different from those which in terms of section 13 of the principal Act applied to other premises covered by the Acts. The new restrictions were to be deemed to have come into operation on 20th July 1962 and as set out in section 4 of the 1966 Act were also to affect pending actions. The provisions of section 4 were as follows:—

"(a) any action which was instituted on or after that date and before the date of commencement of this Act for the ejectment of a tenant from any premises to which the principal Act as amended by this Act applies shall, if such action is pending on the date of commencement of this Act be deemed at all times to have been and to be null and void.

(b) any appeal preferred to the Supreme Court from any judgment or decree of a Court in any such action as is referred to in paragraph (a) and is pending

before the Supreme Court on the date of commencement of this Act shall be deemed at all times to have been and to be null and void, and

(c) proceedings shall not be taken for the enforcement of any judgment or decree in any such action as is referred to in paragraph (a), and where such proceedings have begun before the date of commencement of this Act but have not been completed on the date of commencement of this Act, such proceedings shall not be continued."

It was submitted on behalf of the respondent (landlord) to this appeal that the said section 4 which introduced the restrictions regarding pending actions was *ultra vires* the powers of Parliament as — (a) in purporting to annul decrees entered by Courts prior to the enactment of this Act it constituted an exercise of the judicial power of the State; (b) that in purporting to direct Courts as to the manner of disposal of pending cases it constituted an unlawful interference with the judicial power exclusively vested in the Courts.

**Held:** (1) That section 4 of Act No. 12 of 1966 was valid and was not *ultra vires.*

(2) That the pith and substance of the amending Act No. 12 of 1966 was to alter permanently the law relating to actions for ejectment from premises of a particular rental value and incidentally to make that alteration retrospective. The new section 12A limited the jurisdiction of the original civil Courts to entertain actions for ejectment and equally clause (c) of section 4 limited the jurisdiction to order the execution of past decrees for ejectment. Both limitations were of general application and were within the powers of Parliament to impose.

*Per* **Sansoni, C.J.** (*a*) "It is my view that the Act of 1966 deals with jurisdiction alone, and that it has nothing to do with judicial power. It is a pure case of the statutory jurisdiction of the Courts being altered both prospectively and retrospectively. Sections 2 and 3 restrict that jurisdiction further in respect of future actions and lay down the law which is to apply to them. Section 4 gives these amendments retroactive effect as from 20th July 1962, and accordingly declares all pending actions filed on or after that date, and all pending appeals, to be null and void. In the case of decided actions, judgments and decrees which had not been completely executed cease to be executable, but nothing else is done to such judgments and decrees. No right or claim is ascertained or determined no adjudication of any kind is made; no decision of any court is upheld or reversed."

(*b*) "The Legislature for its part cannot dictate to the Court how it should decide a dispute. It can however, prescribe the conditions that govern the jurisdiction of the Courts, and declare the terms under which a justiciable dispute can or cannot arise, since under our Constitution the jurisdiction of all the Courts is purely statutory. This is not to be confused with an assumption of judicial power. The two concepts are distinct. 'Jurisdiction is the authority of a Court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a Court exercises when it assumes jurisdiction and hears and decides a case' — See the Commentary on the Constitution of the United States of America (1963 Edition) p. 563."

(*c*) "The word "deemed" has its uses for this purpose. In *St. Aubyn* vs. *Attorney-General* (1952) A.C. 15 at 53, Lord Radcliffe said that the word is sometimes used to give a comprehensive description that includes "what is, in the ordinary sense, impossible". It is so used in section 4 to require the Courts to regard an Act which was passed in 1966 as having come into force on 29th July 1962."

*Per* **H. N. G. Fernando, S.P.J.,** "It was not argued that Parliament cannot lawfully enact a partial abolition of the jurisdiction of the civil courts to execute decrees. In fine, the objection then is only to the abolition of jurisdiction to execute a decree previously entered, or to the faintly retrospective element in paragraph (c). This objection is in effect a resort to the principle that a party litigant is entitled to obtain from the Courts all the relief available at the time of the institution of his action under the law then prevailing. But that principle is one recognised by our common law and not by our Constitution, and it is not denied that Parliament has the power to alter the common law even retrospectively."

NAIDE *vs.* THE CEYLON TEA PLANTATIONS CO. LIMITED .. .. .. .. 1

*Rent Restriction (Amendment) Act, No.* 12 *of* 1966, *sections,* 2, 3, 4 — *Rent Restriction Act* (*Cap.* 274), *section* 9, 13 — *Whether provisions in main Act in regard to subletting affected by sections* 2, 3 *and* 4 *of the amending Act.*

**Held:** (1) That sections 2 and 3 of the Rent Restriction (Amendment) Act, No. 12 of 1966, do not in any way affect the provisions of section 9 of the principal Act (No. 29 of the 1948) which deals with restrictions on subletting.

(2) That though section 4(1) A refers to *any* action, for the ejectment of a tenant "from any premises to

which the principal Act as amended by the Act applies, " the section did not affect the proceedings in this action.

KUNJI MOOSA *vs.* SITTHY ANNI & ANOTHER .. 71

*Rent Restriction Act — Landlord suing for ejectment on the ground of reasonable requirement in order to run a business — Landlord's poor financial position and inability to get one out of several premises owned by him — Tenant running a prosperous business with branches elsewhere—Tenant's unwillingness to find alternative accommodation or to leave premises — Notice to quit — Failure to mention therein the purpose for which premises required— Can inference adverse to landlord be drawn therefrom.*

Plaintiff, once a successful businessman, but at the time of the institution of this action in a poor financial position and whose only means to support his wife and children consisted of some house rent, sued the defendant, his tenant, carrying on a business — (a kiosk and hotel) for ejectment on the ground that the premises were reasonably required to run a textile business to enhance his income.

The learned Commissioner, while accepting the evidence of the plaintiff in regard to his poor financial position and the consequent necessity to sell up his capital assets in order to meet his requirements, and holding that the plaintiff's inability to get one of the several premises he owned for his own use did cause hardship stated that because the notice to quit did not mention the purpose for which the premises were required, he was unable to hold that the plaintiff's needs outweighed those of the defendant.

Further, the learned Commissioner failed to consider the effect of the defendant's evidence on the question of alternative accommodation when he said in cross-examination.

(*a*) that he was not aware whether there were several other premises available to run his business.

(*b*) that he was not prepared to leave the premises even if other suitable alternative accommodation was offered to him by the plaintiff.

**Held:** (1) That the learned Commissioner misdirected himself when he drew an inference adverse to the plaintiff from the fact that the notice did not contain the purpose for which the premises were required, as there is no legal requirement that such purpose or any purpose at all need be mentioned in a notice to quit.

(2) That having regard to this misdirection which had influenced the learned Commissioner's mind and in view of—

(*a*) the aforesaid evidence of the defendant regarding alternative accommodation, and his *mala fides* revealed thereby and the failure on the part of the learned Commissioner to consider this in arriving at his conclusion;

(*b*) the acceptance by him of the plaintiff's evidence that he wanted to carry on a new textile business;

the plaintiff was entitled to succeed.

(3) That even though the requirement of the landlord is to start a new business in premises where the tenant is already carrying on a business, he is entitled in law to recover possession of his premises provided his need is genuine and more urgent than that of the tenant.

(4) That in a case in which the relative urgency of the requirement of the landlord vis-a-vis that of the tenant is in issue, the comparative means of each of them is also a relevant though not a necessarily decisive factor.

THAMBY LEBBE *vs.* RAMASAMY .. .. 83

## Res Judicata

*See under*—ESTOPPEL .. .. .. 41

## Revised Edition of the Legislative Enactments Act (Cap. 1)

*Inclusion of original Act as a Chapter in Revised Edition—Is original Act thereby impliedly repealed.*

ATTORNEY-GENERAL *vs.* MOHAMED SANOON .. 93

## Shop and Office Employees Act

*Shop and Office Employees Act No. 19 of 1954 (Cap. 129) — Charge of keeping shop open and not preventing customer entering shop on Sunday — Contravention of Closing Order issued by Minister in terms of regulations made under section 2 of the Act — Does such order apply to an owner of a shop who has no employees.*

**Held:** That the owner of a shop, who has no employees, is an employer within the meaning of the Shop and Office Employees Act and is bound by the closing orders contained in the regulations made by the Minister under the provisions of the Act.

RATNALINGAM, LABOUR OFFICER *vs.* SINNADURAI .. 81

## Statute

*Retrospective Legislation — Validity.*

NAIDE *vs.* THE CEYLON TEA PLANTATIONS CO., LTD. 1

*Estoppel — Party cannot set up — In face of a statute*

*See under* — ESTOPPEL .. .. .. 41

*Interpretation of — If words of statute are clear, preamble or long title cannot control its clear meaning.*

RATNALINGAM, LABOUR OFFICER *vs.* SINNADURAI .. 81

*Statutes — Act of Parliament enacted and in force prior to Revised Edition of the Legislative Enactments becoming operative — Such Act reproduced as Chapter of Revised Edition — Is original Act thereby impliedly repealed— Effect of charge reciting sections of original Act — Revised Edition of the Legislative Enactments Act (Cap. 1), sections 3(1) and 12(3).*

**Held:** (1) That an Act of Parliament which had been enacted and was in force before the Revised Edition of the Legislative Enactments came into force and which has been reproduced in the Revised Edition does not become impliedly repealed when the Revised Edition came into force.

(2) That when a Price Control order by error recited that it was made under Section 4 of the Control of Prices Act No. 29 of 1950, instead of Section 4 of the Control of Prices Act, Cap. 173, Legislative Enactments, the error did not invalidate the order which must in law be taken to have been duly made under the law as set out in Cap. 173 of the Legislative Enactments, as

(a) section 4 of the Control of Prices Act 1950 had remained unaltered at the time it was reproduced in the revised edition and

(b) no prejudice was caused to the accused by the erroneous reference in the Order.

ATTORNEY-GENERAL *vs.* MOHAMED SANOON .. 93

## Surveyors Ordinance

*Surveyors Ordinance, section 3 — Plan made and submitted by Surveyor who had failed to renew his annual license — Effect.*

**Held:** That a plan prepared and submitted to court by a surveyor at a time his annual license had not been renewed is not receivable as evidence in view of section 3 of the Surveyor's Ordinance (Cap. 108).

FELICIA NONA *vs.* ELARIS .. .. .. 111

## Unjust Enrichment

*Period of prescription for cause of action based thereon.*

FERNANDO *vs.* MUNASINGHE .. .. 80

## Words and Phrases

*'Judicial power'*—KARUNATILEKE *vs.* ABEYWIRA 36

NAIDE *v.* THE CEYLON TEA PLANTATIONS CO. LTD. .. .. 1

*"Order" in sections 323 — 330 of Civil Procedure Code.*

PERERA *vs.* THILLAIRAJAH .. .. .. 29

## Writs

*Habeas Corpus.*

WEERASINGHE *vs.* SAMARASINGHE & ANOTHER .. 16

*Quo Warranto —*

PERERA *vs.* WICKREMATUNGE .. .. 77

*Present:* **Sansoni, C.J., H. N. G. Fernando, S.P.J., and Tambiah, J.**

P. A. ANTHONY NAIDE *vs.* THE CEYLON TEA PLANTATIONS COMPANY, LIMITED OF LONDON, ENGLAND.

*S.C. No.* 63/1965 (*R.E.*) — *C.R. Nuwara Eliya No.* 21348

*Argued on:* 10th, 11th and 12th August, 1966.
*Decision and reasons on:* 16th September, 1966.

*Rent Restriction Act* (*Cap.* 274) *as amended by Acts Nos.* 10 *of* 1961 *and* 12 *of* 1966, *sections* 12*A and* 13 — *Effect of section* 4 *of amending Act No.* 12 *of* 1966 — *Validity of said section.*

*Courts Ordinance* (*Cap.* 6) — *Power of Parliament to restrict jurisdiction of Courts defined in said Ordinance — Whether jurisdiction can be limited retrospectively—Interference with judicial power.*

In terms of an amendment to the Rent Restriction Act (Cap. 274) by Act No. 12 of 1966 certain restrictions were introduced regarding actions for ejectment from premises having a standard rent not exceeding Rs. 100/-. These restrictions were different from those which in terms of section 13 of the principal Act applied to other premises covered by the Acts. The new restrictions were to be deemed to have come into operation on 20th July 1962 and as set out in section 4 of the 1966 Act were also to affect pending actions. The provisions of section 4 were as follows:—

"(*a*) any action which was instituted on or after that date and before the date of commencement of this Act for the ejectment of a tenant from any premises to which the principal Act as amended by this Act applies shall, if such action is pending on the date of commencement of this Act, be deemed at all times to have been and to be null and void.

(*b*) any appeal preferred to the Supreme Court from any judgment or decree of a Court in any such action as is referred to in paragraph (a) and is pending before the Supreme Court on the date of commencement of this Act shall be deemed at all times to have been and to be null and void, and

(*c*) proceedings shall not be taken for the enforcement of any judgment or decree in any such action as is referred to in paragraph (a), and where such proceedings have begun before the date of commencement of this Act but have not been completed on the date of commencement of this Act, such proceedings shall not be continued."

It was submitted on behalf of the respondent (landlord) to this appeal that the said section 4 which introduced the restrictions regarding pending actions was *ultra vires* the powers of Parliament as — (a) in purporting to annul decrees entered by Courts prior to the enactment of this Act it constituted an exercise of the judicial power of the State; (b) that in purporting to direct Courts as to the manner of disposal of pending cases it constituted an unlawful interference with the judicial power exclusively vested in the Courts.

**Held:** (1) That section 4 of Act No. 12 of 1966 was valid and was not *ultra vires.*

(2) That the pith and substance of the amending Act No. 12 of 1966 was to alter permanently the law relating to actions for ejectment from premises of a particular rental value and incidentally to make that alteration retrospective. The new section 12A limited the jurisdiction of the original civil Courts to entertain actions for ejectment and equally clause (c) of section 4 limited the jurisdiction to order the execution of past decrees for ejectment. Both limitations were of general application and were within the powers of Parliament to impose.

*Per* **Sansoni, C.J.,** — (*a*) "It is my view that the Act of 1966 deals with jurisdiction and jurisdiction alone, and that it has nothing to do with judicial power. It is a pure case of the statutory jurisdiction of the Courts being altered both prospectively and retrospectively. Sections 2 and 3 restrict that jurisdiction further in respect of future actions and lay down the law which is to apply to them. Section 4 gives these amendments retroactive effect as from 20th July 1962, and accordingly declares all pending actions filed on or after that date, and all pending appeals, to be null and void. In the case of decided actions, judgments and decrees which had not been completely executed cease to be executable, but nothing else is done to such judgments and decrees. No right or claim is ascertained or determined; no adjudication of any kind is made; no decision of any court is upheld or reversed."

(*b*) "The Legislature for its part cannot dictate to the Court how it should decide a dispute. It can, however, prescribe the conditions that govern the jurisdiction of the Courts, and declare the terms under which a justiciable dispute can or cannot arise, since under our Constitution the jurisdiction of all the Courts is purely statutory. This is not to be confused with an assumption of judicial power. The two concepts are distinct. 'Jurisdiction is the authority of a Court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a Court exercises when it assumes jurisdiction and hears and decides a case' — See the Commentary on the Constitution of the United States of America (1963 Edition) p. 563."

(c) "The word "deemed" has its uses for this purpose. In *St. Aubyn* v. *Attorney-General* (1952) A.C. 15 at 53, Lord Radcliffe said that the word is sometimes used to give a comprehensive description that includes "what is, in the ordinary sense, impossible". It is so used in section 4 to require the Courts to regard an Act which was passed in 1966 as having come into force on 29th July 1962."

*Per* **H. N. G. Fernando, S.P.J.,** — "It was not argued that Parliament cannot lawfully enact a partial abolition of the jurisdiction of the civil courts to execute decrees. In fine, the objection then is only to the abolition of jurisdiction to execute a decree previously entered, or to the faintly retrospective element in paragraph (c). This objection is in effect a resort to the principle that a party litigent is entitled to obtain from the Courts all the relief available at the time of the institution of his action under the law then prevailing. But that principle is one recognised by our common law, and not by our Constitution, and it is not denied that Parliament has the power to alter the common law even retrospectively."

**Cases referred:** *Garthwaite* vs. *Garthwaite*, (1964) 2 W.L.R. 1108
*St. Aubyn* vs. *Attorney-General*, (1952) A.C. 15
*Ex parte Mc Cardle*, (1869) 7 Wall 506
*Premaratne* vs. *De Silva*, (1954) 55 N.L.R. 448
*The State* (*Tennessee*) vs. *Fleming*, (1846) 46 American Decisions 73
*Liyanage and others* vs. *The Queen*, (1962) 64 N.L.R. 313; LXII C.L.W. 49
*Liyanage and Others* v. *The Queen*, (1965) LXX C.L.W. 1; 68 N.L.R. 265; (1966) 2 W.L.R. 682
*Ranasinghe* vs. *Bribery Commissioner* (1964) 66 N.L.R. 73; LXVI C.L.W. 1; 1965 A.C. 172
*Greenhough* vs. *Greenhough*, 51 American Decisions 567
*Denny* vs. *Mattoon*, (1861) 79 American Decisions 784.
*Maxwell* vs. *Goetschius*, (1878) 29 American Reports 242.
*Piyadasa* vs. *Bribery Commissioner*, (1962) 64 N.L.R. 385; LXII C.L.W. 73
*Danina Umma* vs. *Jailabdeen* (1962) 64 N.L.R. 419
*Walker Sons and Co. Ltd.* vs. *Fry*, (1965) LXIX C.L.W. 65; 68 N.L.R. 73

*C. Ranganathan, Q.C.*, with *Siva Rajaratnam, T. N. Wickremasinghe* and *C. Chakradaran*, for the defendant-appellant.

*H. W. Jayawardene, Q.C.*, with *D. S. Wijewardene* and *Mark Fernando*, for the plaintiff- respondent.

**Sansoni, C.J.**

My brother H. N. G. Fernando, in his judgment, which he has kindly shown me, has dealt with Mr. Jayawardene's argument that the Act of 1966 is *ultra vires*, in that it constituted an exercise of judicial power or unlawfully interfered with the judicial power of the Courts. Mr. Ranganathan submitted that this Act was only an exercise of the power of the Legislature to limit or to take away the jurisdiction which the Courts exercised. I wish to make some observations myself in view of the importance of the matter in dispute.

It is my view that the Act of 1966 deals with jurisdiction and jurisdiction alone, and that it is nothing to do with judicial power. It is a pure case of the statutory jurisdiction of the Courts being altered both prospectively and retrospectively. Sections 2 and 3 restrict that jurisdiction further in respect of future actions and lay down the law which is to apply to them. Section 4 gives these amendments retroactive effect as from 20th July 1962, and accordingly declares all pending actions filed on or after that date, and all pending appeals, to be null and void. In the case of decided actions, judgments and decrees which had not been completely executed cease to be executable, but nothing else is done to such judgments and decrees. No right or claim is ascertained or determined; no adjudication of any kind is made; no decision of any court is upheld or reversed.

It is always open to the Legislature to fix the point of time from which a statute or an amendment of a statute shall operate. The words "and accordingly" in section 4 are entirely appropriate, since retrospective operation was given to these amendments contained in sections 2 & 3. All actions and appeals which were pending prior to the amendments are by section 4 declared null and void, and this is not unexpected, since the causes of action upon which pending actions had been filed were repealed with retrospective effect by the amendment. It is not for us to question the decision of the Legislature to give the amending Act retroactive operation. Our function is merely to decide the rights of parties according to the law as laid down by the Legislature, if such a law is not unconstitutional.

The Legislature for its part cannot dictate to the Court how it should decide a dispute. It can, however, prescribe the conditions that govern the jurisdiction of the Courts, and declare

the terms under which a justiciable dispute can or cannot arise, since under our Constitution the jurisdiction of all the Courts is purely statutory. This is not to be confused with an assumption of judicial power. The two concepts are distinct. "Jurisdiction is the authority of a Court to, exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a Court exercises when it assumes jurisdiction and hears and decides a case"—See the Commentary on the Constitution of the United States of America (1963 Edition) p. 563. In *Garthwaite* v. *Garthwaite* (1964) 2 W.L.R. 1108 at 1120, Diplock, L.J. said, "in its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors." Sections 2 and 3 of the amending Act have altered those limits in respect of actions for the ejectment of tenants.

It is clear law that a judgment given without jurisdiction is a nullity, for judicial power is capable of being exercised by a court only when it is a court of competent jurisdiction, and that means competent under some law. Alter the law retrospectively in respect of jurisdiction, and actions and appeals can be rendered null and void retrospectively. The word "deemed" has its uses for this purpose. In *St. Aubyn* v. *Attorney-General* (1952) A.C. 15 at 53, Lord Radcliffe said that the word is sometimes used to give a comprehensive description that includes "what is, in the ordinary sense, impossible". It is so used in section 4 to require the Courts to regard an Act which was passed in 1966 as having come into force on 29th July 1962. Pending actions, appeals, and execution proceedings are to be dealt with according to that imaginary state of affairs. This is quite in order, for as Lord Asquith of Bishopstone has said: "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it." Hence the words "and accordingly" in section 4 of the amending Act to ensure that there will be no mistake on this point.

I do not think it necessary, nor am I competent, to comment on the American decisions cited by Mr. Jayawardene. My knowledge of the American Constitution does not equip me for that task. But I entirely agree, with respect, in the dictum of Chase, C. J. in *ex parte McCardle* (1869) 7 Wall 506, when he said that when the jurisdiction of the Courts is thus taken away, "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." We no longer have jurisdiction since this amending Act was passed to hear this appeal, since the appeal itself is null and void. "Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause", as Chase, C.J. said in the same case. But the respondent is in no better position than the appellant, since proceedings cannot be taken to enforce the decree it has obtained in the lower Court.

Having set out what I believe to be the legal position, I would dismiss this appeal without costs.

**H. N. G. Fernando, S.P.J.**

In this case I must first refer to certain provisions of our law affecting the right of a landlord to institute an action for ejectment of a tenant. Subsection (1) of Section 13 of the Rent Restriction Act (Cap. 274 of the revised edition 1956) provided that such an action shall not be instituted in or entertained by any Court unless the action had been previously authorised by a Rent Control Board. But the Sub-section contained a proviso that such authorisation would not be necessary in specified circumstances which were set out in paragraphs (a) to (d) of that proviso. This sub-section was a re-enactment of sub-section (1) of Section 8 of the former Rent Control Act of 1942.

In 1961 Parliament passed the Rent Control (Amendment) Act No. 10 of 1961, which I shall refer to as the Act of 1961. Section 13 of the Act of 1961, altered the law previously set out in Section 13 of Cap. 274 by providing that an action for ejectment could only be instituted only on one or more of the following grounds:—

(*a*) that the rent of the premises had been in arrears for three months

(*b*) that premises have been used for an immoral or illegal purpose

(*c*) that wanton destruction or damage had been caused to the premises by a tenant or another person of a specified description

This alteration of the law was expressed in the Act of 1961 to have retrospective effect as from 20th July 1960, but was to be in force for only two years, that is to say until the 20th July 1962. In the result Section 13 of the principal Act was superseded temporarily for the two year period, but as from 20th July 1962 a landlord's right to institute an action for ejectment again became subject only to the restrictions set out in Section 13 of the principal Act and not to the more onerous restrictions set out in the Act of 1961.

In May 1966 Parliament enacted the Rent Restriction (Amendment) Act No. 12 of 1966, which I shall refer as to the Act of 1966. This Act introduced into the principal Act a new Section 12A applicable to an action for ejectment of the tenant of premises the standard rent of which does not exceed Rs. 100/-. The restrictions which this Section imposed were susbstantially the same as those contained in the temporary Act of 1961, and in addition the new Section 12A permitted a Court to refuse ejectment in certain circumstances, if arrears of rent were paid up during the pendency of an action. Accordingly as from May 10th 1966, the restrictions affecting an action for ejectment from premises having a standard rent not exceeding Rs. 100/- are different from the restrictions which, under Section 13 of the principal Act, apply to actions affecting other premises.

"(1) The provisions of Sections 2 and 3 of this Act shall be deemed to have come into operation on the twentieth day of July, 1962, and accordingly —

(*a*) any action which was instituted on or after that date and before the date of commencement of this Act for the ejectment of a tenant from any premises to which the principal Act as amended by this Act applies shall, if such action is pending on the date of commencement of this Act, be deemed at all times to have been and to be null and void.

(*b*) any appeal preferred to the Supreme Court from any judgment or decree of a Court in any such action as is referred to in paragraph (a) and is pending before the Supreme Court on the date of commencement of this Act shall be deemed at all times to have been and to be null and void, and

(*c*) proceedings shall not be taken for the enforcement of any judgment or decree in any such action as is referred to in paragraph (a), and where such proceedings have begun before the date of commencement of this Act but have not been completed on the date of commencement of this Act, such proceedings shall not be continued."

In the instant case an action for ejectment had been instituted on 24th July 1963 and decree for ejectment was entered in the Court of Requests on 2nd April 1965. An appeal against that decree was filed forthwith by the defendant in the action and this appeal was pending in the Supreme Court on 10th May 1966 when the Act of 1966 became law. Some argument was addressed to us regarding the standard rent of the premises but the only evidence (according to the judgment) was that the agreed rent was Rs. 25/- per month, and in the absence of an allegation to the contrary it must be assumed that this was the authorised rent. (*Premaratne* v. *De Silva* 55 N.L.R. 448). Accordingly, this action is prima facie affected by Section 4 of the Act of 1966. It was instituted after 20th July, 1962 and before 10th May 1966: in terms of paragraph 1 of Section 4 the action must "be deemed at all times to have been and to be null and void". This appeal preferred in the action must in terms of paragraph (b) of Section 4" be deemed at all times to have been and to be null and void." And in terms of paragraph (c) of Section 4 "proceedings shall not be taken for the enforcement of the decree for ejectment" entered by the Court of Requests on 2nd April 1965. In orher words the action, the decree and the appeal were each a nullity and must be regarded as never having been constituted, entered and filed respectively.

The argument which was addressed to us on behalf of the plaintiff-landlord (the respondent to this appeal) is that Section 4 of the Act of 1966 was *ultra vires* the powers of Parliament, and it was pressed upon two principal considerations. Firstly, that Section 4, in purporting to annul decrees entered by Courts prior to the enactment of this Act, constitutes the exercise of judicial power of the State; and secondly, that in purporting to direct the Courts as to the manner of disposal of pending cases the Section constitutes an unlawful interference with the judicial power exclusively vested in the Courts. In regard to both these grounds reliance was

placed on the principle of the Separation of Powers, recognised in recent decisions.

Counsel for the plaintiff referred to many decisions in America of the State Courts of that country, and I shall examine a few of them. In *The State* (*Tennessee*) v. *Fleming* (1846, 46 American Decisions 73) a person was charged with the offence of retailing spirituous liquor in contravention of an Act of 1838. A prosecution under that Act was pending in 1846, and at that stage a new Act was passed by which it became lawful under certain restrictions to retail certain spirituous liquors. The legislature also passed *a resolution* that "no fine, forfeiture, or imprisonment should be imposed or recovered for the offence of tippling under the Act of 1837, and that all causes pending in any of the Courts for such offence should be dismissed". According to the report, the defendants were tried, convicted *and fined* after the new Act was passed, but before the promulgation of the Act and resolution. The Court stated that *the Act* "did not upon any principle operate so as to discharge persons guilty of retailing under the Act of 1838, but they were left liable to punishment under that Act": "and the question, reduced to simplicity is this, can the legislature by resolution direct that an individual who stands charged with crime in a Court of justice be discharged therefrom?"

In answering this question, the Court relied on the rule of the Separation of Powers, which is expressly enacted in the State's Constitution, and held that *the resolution* of the legislature was an unwarranted assumption of judicial power:— "before conviction the Attorney-General and the Court are the only power that can discharge without acquittal, and that by *nolle-prosequi*."

If that same question arose in Ceylon, the simple answer would be that Parliament cannot, *by a resolution*, alter the law, and with respect I think it should have been answered by the American Court on the same ground. In fact, the American judgment does distinguish between an Act of the legislature, and a mere *resolution*.

The existence in the Attorney General of Ceylon of the power to enter a *nolle prosequi* shows that an official of the Executive can terminate a criminal prosecution. That being so, it seems to me that in principle there may be no objection to some other official being also empowered by an Act of Parliament to terminate a prosecution. It follows in my opinion that such an Act may even directly terminate a prosecution, provided it is not by legislation *ad hominem* this matter, however, falls to be considered in the light of the recent decision of the Privy Council in *Liyanage's Case* (68 N.L.R. 265).*

*Greenough* v. *Greenough* (51 American Decisions 567) concerned the validity of a Will made in 1840. The Act regulating the validity of Wills was then an Act of 1833, which provided that where the signature of a Testator is attached to a Will by some other person there must be proof that the signature was so attached by the testator's express direction. Decisions of the Courts had so construed that Act. In 1848 however, the legislature had passed an Act providing for a lesser standard of proof for Wills and further enacted that "every last Will and testament heretofore made, or hereafter to be made, except such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid."

The Court regarded the Act of 1848 as an attempt to over-rule the construction previously placed on the Act of 1833 by the Courts, and as a mandate to the Courts "to establish a particular interpretation of a particular statute". This, it was held was the exercise of judicial power in settling a question of interpretation.

The will in question in this case had apparently not been the subject of a prior "final adjudication", for if so the 1848 amendment clearly would not apply to it. It was apparently before the Courts in 1849 for the first time. That being so, what the Act of 1849 provided for the case of such a Will was that in the future it should be regarded as valid. With great respect, I cannot agree that the 1849 amendment over-ruled earlier constructions of the 1833 Act. It only laid down a rule of construction for the future, but applicable also to past Wills not previously the subject of adjudication. I cannot see here either the exercise of, or interference with, the judicial power. Indeed the Court's opinion to that effect was much influenced by the Court's apparently strong bias against retrospective legislation.

In any event, the decision was also based on violation of the due process clause of the Federal Constitution, the Court holding that parties had from

* 70 C.L.W. 1

1840 (when the testator died enjoyed property rights under the Will, which)rights could not be taken away except by adjudication of the Courts. This ground of invalidity does not exist under our Constitution.

In *Denny* v. *Mattoon* (1861, 79 American Decisions 784), the State Supreme Court had previously held to be illegal and invalid, for want of jurisdiction, an order of an inferior Judge declaring one Stone to be insolvent, and had enjoined the appointed assignees from administering Stone's estate. Thereafter the State Legislature passed an Act confirming the proceedings held before the inferior Judge and dissolving the injunction of the Supreme Court. This Act was subsequently held to be invalid.

The question for determination was thus stated:— "Whether the Act can confer jurisdiction over parties and proceedings which it has been judicially determined did not exist, and can give validity to acts and processes which have been declared void."

This question was first considered in the light of the rule of the Separation of Powers, and the Court held that "the legislature has no power to interfere with the jurisdiction of the Courts in such a manner as to change the decision of pending cases or to impair or set aside their judgments, or take cases out of the settled course of judicial proceeding."

But in addition the Court also relied on the due process clause, holding that unless there is a valid adjudication of insolvency by a competent Court, the property of a debtor cannot be said to have been taken from him by due process according to the law of the land. "*If such a Statute does not constitute an exercise of the judicial power by the legislature*, it is certainly a violation of another fundamental principle of the Constitution. It takes away from a subject his property not by due process of law, but by an arbitrary exercise of legislative will."

I will assume that the judgment in this case distinctly held that an Act, which is not a violation of the due process clause, must be regarded as arrogating judicial power if it purports to nullify an order of a Court made in past proceedings. But even if so, the question for our determination is not the same as that which arose in the American Case. The Act of 1966 does not purport to confer jurisdiction retrospectively, nor is it a piece of ad hoc legislation.

*Maxwell* v. *Goetschius* (1878, 29 American Reports 242). In the year 1833, the Supreme Court of the State of New Jersey had decided that the Judges of the Common Pleas had no authority to make an order of sale of estates in remainder and that commissioners have no authority to make such a sale and conveyance. In this case, there had been such a sale in the year 1832, and the dispute as to title (arising about 1878) was between the purchasers at that sale and the remaindermen. The claim of the purchasers was based on an Act of 1861 declaring that any sale of land ordered by certain Courts (including the said Court of Common Pleas) before the Act or thereafter would be binding (*inter alia*) on remaindermen. It was held that the Act of 1861 was invalid and ineffectual in so far as it purported to validate the sale of 1832.

The Court relied, both on the Separation of Powers set out in the State Constitution of 1844 and on "the clause in the Constitutional bill of privileges which declares that among the inalienable privileges of men shall be that of possessing and protecting property". (the clause thus referred to was probably one in the State Constitution; else the reference was to the due process clause in the Federal Constitution). The Court held that this clause meant that deprivation of property can be effected only under the law of the land administered by judicial decision, and that a legislative Act purporting to vest A's title in B violated the due process clause. The reasoning, as I undertsand it, was that the due process clause postulates the exercise of judicial, and not legislative power. Having regard to the terms of the judgment, it cannot properly be said that the Court would have declared the Act invalid on the sole ground that it offended the principle of the Separation of Powers.

Counsel for the Appellant, in reply, relied on the decision of the United States Supreme Court in *Ex parte Macardle*, the report of which is not available to us. I reproduce below the reference to this case in *The Constitution on the United States* (1952) prepared by the Library of Congress:-

"*The McCardle Case*

The power of Congress to make exceptions to the Court's appellate jurisdiction has thus become, in effect, a Plenary power to bestow, withhold, and withdraw appellate jurisdiction, even to the point of

> its abolition. And this power extends to the withdrawal of the appellate jurisdiction even in pending cases. In the notable case of *Ex parte McCardle*, a Mississippi newspaper editor who was being held in custody by the military authorities acting under the authority of the Reconstruction Acts filed a petition for a writ of habeas corpus in the circuit court for Southern Mississippi. He alleged unlawful restraint and challenged the validity of the Reconstruction statutes. The writ was issued, but after a hearing the prisoner was remanded to the custody of the military authorities. McCardle then appealed to the Supreme Court which denied a motion to dismiss the appeal, heard arguments on the merits of the case, and took it under advisement. Before a conference could be held, Congress, fearful of a test of the Reconstruction Acts, enacted a statute withdrawing appellate jurisdiction from the court in certain habeas corpus proceedings. The court then proceeded to dismiss the appeal for want of jurisdiction. Chief Justice Chase, speaking for the court said: 'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law and when it ceases to exist. the only function remaining to the Court is that of announcing the fact and dismissing the cause.'. "

The decision just cited, at the least, supports the appellant's contention that the legislature can validly inhibit the United States Supreme Court from determining pending appeals. The basis of the decision appears to be that the Supreme Court's appellate jurisdiction is derived, not from the Constitution, but from Acts of Congress. But also implicit in the decision is the consideration that retrospective abolition of appellate jurisdiction does not constitute the exercise of judicial power.

I cannot lose sight of the differences between our Constitution and the Federal and State Constitutions of America, nor of the attitude towards retrospective legislation entertained by some of the State Courts in the last century. There is then the due process clause. In these circumstances, it is not easy for a court of another jurisdiction to assess how far American decisions, apparently based on the principle of the Separation of Powers, were influenced by the existence in a Statute of retrospective elements and by considerations relevant to the due process clause. It is in my view unsafe for this Court to adopt and apply American decisions declaring Statutes invalid, although such decisions can be of much assistance to confirm opinions independently reached on questions arising under our Constitution. Since in the instant case the opinion which I reach independently is that our Constitution does not render our Act of 1966 invalid, the only American decision which I feel entitled to rely upon is that in the *McCardle Case*.

I pass now to refer to decisions upon our Constitution, and to the scope and effect of the Act of 1966.

*Piyadasa* v. *Bribery Commissioner* (64 N.L.R. 385),* *Ranasinghe* v. *Bribery Commissioner* (64 N.L.R. 449)** decided by this Court and approved by the Privy Council (66 N.L.R. 73),*** *Danina Umma* v. *Jailabdeen* (64 N.L.R. 419) and *Walker Sons and Co. Ltd.* v. *Fry* (68 N.L.R. 73,)† are not directly of assistance in the present context. What they decided was that certain offices are judicial offices, and that the powers and functions of such an office cannot be lawfully exercised except by a person appointed thereto in terms of Section 55 of the Constitution by the Judicial Service Commission. There was accordingly no need in those decisions for the Courts to examine Acts of Parliament in the light of the question whether such Acts infringed the principle of Separation of Powers.

This question was actively examined in the case of *Liyanage and others* v. *The Queen* both by this Court (64 N.L.R. 313) and more recently by the Privy Council (68 N.L.R. 265).†† In the first of the judgments (if I may attempt to summarise its effect very briefly), this Court held that the power to nominate a Bench of the Supreme Court to hear a particular case was a judicial power exercisable by the Chief Justice, and that an Act of Parliament purporting to authorise a Minister to exercise that judicial power constituted an arrogation of judicial power. Apart from the circumstance that the judgment decided for the first time that the principle of the Separation of Powers is implied in our Constitution, it is not directly relevant to the question which arises in this appeal, for there has here not been an attempt to divert to any authority other than a Court the exercise of any judicial power. More directly relevant is the second of the two judgments delivered by the Privy Council. In affirming the correctness of the earlier judgment, their Lordships held that "there exists a separate power in the Judicature which under the Constitution as it stands cannot be usurped or infringed by the Executive or the Legislature". They then considered the question whether the Acts of 1962 (i.e. the Criminal Law (Special Provisions) Act No. 1 of 1962 and the Criminal Law Act No. 31 of

* 62 C.L.W. 73
** 64 C.L.W. 32
*** 66 C.L.W. 1
† 69 C.L.W. 65
†† 70 C.L.W. 1

1962), usurped or infringed this separate power of the Judicature. They noted with emphasis that in the Acts, Parliament had no general intention of legislating either by the creation of crimes and penalties or by enacting rules relating to evidence; that the Acts were clearly aimed at particular know individuals who had been named in a White Paper and were in prison awaiting their fate; that the alterations of the prevailing law were limited to the participants in a particular alleged Coup and that the law would thereafter revert to its normal state. Their Lordships approved Counsel's attack on the Acts as being in pith and substance a legislative plan *ex post facto* to secure the conviction of particular individuals and concluded that "if such Acts as these were valid the judicial power could be wholly absorbed by the Legislature and taken out of the hands of the Judges."

Let me now consider the Rent Restriction (Amendment) Act No. 12 of 1966 in the light of the reasoning of their Lordships judgment in 68 N.L.R. 265, and in doing so it is necessary to appreciate firstly what was the legislative plan to which the Act gave effect. The new Section 12A which was introduced into the principal Act (Cap. 274) is a permanent provision generally applicable to all actions for ejectment from premises having standard rents not exceeding Rs. 100/-, and it is clear that Parliament intended that tenants of all such premises should be protected from ejectment except on specially defined grounds specified in the new Section. Having enacted this protective provision for the future, Parliament proceeded to add in Section 4 provision that the earlier Sections of the Act would have retrospective effect as from 20th July 1962. Had that been the only provision made in Section 4, what would be the proper inference to be drawn from such a provision as to the intention of Parliament? The clear answer seems to me an intention that persons who on 10th May 1966 (when the Act of 1966 came into force), or thereafter, are in occupation of premises having a standard rent not exceeding Rs. 100/- must not be ejected upon any grounds other than those enumerated in the new Section 12A. In other words Parliament legislated for the protection of occupancies existing on 10th May 1966 or commencing thereafter and intended that the protection must extend even to occupancies which were then the subject of pending actions.

There was here no intention to legislate *ad hominem* ; there was no White Paper enumerating the names of landlords or tenants involved pending actions, against or in favour of whom in Parliament was invited to exercise legislative power; there was no direction or restriction affecting" the discretion or judgment of the Judiciary in specific proceedings" (68 N.L.R. at 284). Whereas the Criminal Law Acts of 1962 were construed to be in substance provisions designed to dictate to the Court the manner of exercise of its discretion or the formation of its judgment, there is no such dictation involved in Section 4 of the Act of 1966 now under consideration. Instead there is in substance a retrospective dictation that in pending cases the plaintiff never had a right of action. The pith and substance of the Act of 1966 was to alter permanently the law relating to actions for ejectment from premises of a particular rental value, and incidentally to make that alteration retrospective. There is not here present either of the grounds of invalidity (legislation *ad hominem* and legislation *ex post facto*) which were jointly present in the legislation declared invalid in *Liyanage's Case*. Their Lordships were careful to state that even the co-existence of these two grounds may not necessarily render an Act of Parliament invalid.

Although Section 4 of the impugned Act of 1966 purports to be retrospective, and although paragraphs (a) and (b) of the Section purport to declare null and void pending actions and appeals, the real efficacy of the Section is contained in paragraph (c), which purports to prohibit the execution of any judgment or decree already entered by a Court. This prohibition is not retrospective in a strict sense. for it only enjoins a court against ordering execution in the future. The effective 'protection which Parliament wished to give the tenants is protection from ejectment, and paragraph (c) is in law quite sufficient to afford that protection. No purpose would be served by a Court hearing an action or an appeal if its decree is not to be executable, for a court will not act in vain.

In considering the validity of clause (c), it is relevant to notice that the clause is complementary to the new Section 12A introduced into the principal Act (Cap. 274). That new Section limits the jurisdiction of the original civil courts to entertain actions for ejectment, and equally paragraph (c) limits the jurisdiction to order execution of past decrees for ejectment. It was not argued that Parliament cannot lawfully enact a partial abolition of the jurisdiction of

the civil courts to execute decrees. In fine, the objection then is only to the abolition of jurisdiction to execute decree previously entered, or to the faintly retrospective element in paragraph (c). This objection is in effect a resort to the principle that a party litigant is entitled to obtain from the Courts all the relief available at the time of the institution of his action under the law then prevailing. But that principle is one recognised by our common law, and not by our Constitution, and it is not denied that Parliament has the power to alter the common law even retrospectively.

I must now briefly comment upon an interesting and important argument adduced by counsel for the appellant in this case. He pointed out that while the recognition in our Constitiution of the exclusive vesting of judicial power in the Judicature is now a matter beyond debate, there is not in the Constitution any limitation of the power of the Legislature to define or restrict the jurisdiction of the Courts. For instance, the jurisdiction of the Supreme Court, District Courts, Courts of Requests and Magistrate Courts is defined in the Courts Ordinance, and he argued that the Legislature has the power at any time by a simple majority to enact laws adding to or abolishing that jurisdiction. I myself had previously entertained some doubt as to the question whether such a law could for instance abolish the jurisdiction of the Supreme Court in the nature of that conferred by provisions such as Sections 42 and 45 of the Courts Ordinance, and I continue to entertain such doubts. It may well be that the Constitution has, in Section 52, recognised and adopted and thus incorporated, some provisions of the Courts Ordinance which confer jurisdiction on the Supreme Court. But for present purposes there appear to be much force in the contention that the Legislature has power to abolish the jurisdiction of the Civil Courts of original jurisdiction and thus indirectly to abolish the appellate jurisdiction of the Supreme Court, provided of course that the legislature does not attempt to arrogate such jurisdiction to itself or to transfer such jurisdiction, to Some authority not holding judicial office. The Constitution as recently construed, does not permit any such arrogation or transfer by means of an Act of Parliament passed by a simple majority. But if it is the will of Parliament that there should not be, in any particular field, a right to invoke the judicial power of the State as exercised by an original civil court there seems to me no objection to legislation of general application limiting the citizen's right of recourse to that court. Viewed in this light, Section 12A introduced by the Act of 1966 limited a landlord's right of recourse to the judicial power of the State and Section 4 of the Act limited that right with retrospective effect. Both limitations were within the power of Parliament to impose.

I hold that Section 4 of the Act of 1966 was not *ultra vires* of the powers of Parliament. Applying its provisions to this action, I hold that the action and the appeal are null and void and that the original court has no jurisdiction to enforce the judgment and decree already entered. I would make no order as to costs.

**Tambiah, J.**

Counsel for the respondent contended that the provisions contained in section 4(1)(a), (b) and (c) of the Rent Restriction (Amendment) Act No. 12 of 1966, are *ultra vires* the constitution. In *Walker Sons and Co. Ltd.* vs. *Fry* (1965) 68 N.L.R. 73, I have already drawn the distinction between judicial power of the State and the jurisdiction of the Courts. The sovereign power of the Parliament is set out very clearly in the opinion of Lord Pearce in the case of *The Bribery Commissioner* v. *Ranasinghe* (1964) 66 N.L.R. 73.

After stating that the general conceptions of the Constitution of Ceylon are modelled on those of a Parliamentary democracy founded on the pattern of the constitutional system of the United Kingdom, he said —

> "The Constitution does not specifically deal with the judicial system which was established in Ceylon by the Charter of Justice of 1833 and is dealt with in certain Ordinances, the principal being the Courts Ordinance, Cap. 6. The power and jurisdiction of the Courts are therefore not expressly protested by the Constitution."

The judicial power of the State is the power to try disputes between subject and subject or subject and the State. Under our Constitution, this power is vested in a system of courts with the Queen as the final repositary of this power.

The power to vest jurisdiction in courts is conferred on the Legislature and could be exercised by an ordinary majority of Parliament. The power to confer jurisdiction also includes the power to take away the jurisdiction conferred

on the courts. If, however, the Legislature confers jurisdiction on other tribunals which have to exercise judicial power then it can only be done in the manner contained in the provisions of the Constitution. In the case of *The Bribery Commissioner* v. *Ranasinghe* (1964) 66 N.L.R. 73, Lord Pearce after citing *MacCawley's case* (1920) A.C. 691, said —

> "These passages show clearly that the Board in *MacCawley's case* took the view, which commends itself to the Board in the present case, that a legislature has no power to ignore the conditions of law making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the Legislature is sovereign, as is the Legislature of Ceylon, or whether the Constitution in uncontrolled as of the Board held the Constitution of Queensland to be. Such a Constitution can indeed be altered or amended by the Legislature if the regulating instrument no provides and the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provisions."

There are no provisions in the Ceylon (Constitution) Order-in-Council of 1946 or the Ceylon Independence Act of 1947 which restricts the Parliament to take away a jurisdiction conferred on any court. No doubt if there is a legislative plan or design by the Legislature to take away the judicial power conferred on the judicature then such legislation may be *ultra vires*. The present case is not one of such cases. The whole purpose of this amendment is to provide relief to tenants who live a precarious existence in houses, the rents of which are under Rs. 100/-. In view of the great dearth of houses it has become a problem for the people who are unable to afford to live in houses the rent of which is under Rs. 100/- per mensem. In these circumstances the Legislature has passed a law to relieve a class of people who are undergoing hardships. On reading through the Act it is clear that the intention of the Legislature is to help this class of tenants who live in such houses. No doubt the effect of the legislation would be to cause great hardships to landlords of moderate means who own only one house which is required for their own use. The Act no doubt takes away vested rights obtained by the due process of law. But it is not for the Courts to go into these matters.

Mr. Jayawardena, the Counsel for the respondent, also cited the case of *The Queen* v. *Liyanage* and referred to certain passages and contended that judicial power is vested in the courts and the effect of the amending Act of 1961 is to give directions to a Court not to try pending cases and to nullify the effect of a decree passed by it. The rationale of *Liyanage's case* is that Their Lordships of the Privy Council found in the Original Law (Special Provisions) Act a piece of *ad hoc* legislation which "in pith and substance was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of the persons" whose names were mentioned in the White Paper (*vide* the observations of Lord Pearce in 68 N.L.R. at 284).

Mr. Jayawardena cited American cases for the proposition that the Legislature should not interfere with the judicial power of the State. As pointed out by my brother H. N. G. Fernando J., some of these cases can be distinguished and others were dealing with certain provisions of the American Constitution which are not found in our Constitution. In the Constitution of the United States of America there are certain provisions setting out fundamental rights. In the United States a person cannot be deprived of this property or personal safety excepting by the due process of law. One should not apply the principles set out in these cases in construing our Constitution Order-in-Council and the Ceylon Independence Act, the provisions of which are entirely different from the provisions in the American Constitution.

If the Courts Ordinance can be amended by a simple majority, there is no reason why the Legislature by this amending Act cannot take away the jurisdiction of the courts to hear certain types of cases. As pointed out by Mr. Ranganathan, the effects of this Amending Act is merely to deprive the landlords whose houses fetch a rent of less than Rs. 100/- to come to a court and ask for ejectment except on the grounds set out in the amending Act read along with the main Act and to render such pending actions null and void.

For these reasons I hold that the provisions of section 4(1)(a), (b) and (c) of the Rent Restriction (Amendment) Act No. 12 of 1966 is not *ultra vires* the Constitution. There will be no order for costs.

*Action and appeal held to be null and void.*

*Privy Council Appeal No. 27 of 1963*

*Present:* **Lord Guest, Lord Pearce, Lord Upjohn, Lord Pearson, Sir Frederic Sellers**

ROBERT WATTE PATHIRANA *vs.* ARIYA PATHIRANA*

*From*
*THE SUPREME COURT OF CEYLON*

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

DELIVERED THE 28TH JUNE, 1966.

*Partnership Act, sections 29 and 42—Business of selling Petrol and other accesories from a Service Station — Action for an accounting (without dissolution) for a period by one partner R — Notice of termination of partnership by A (partner sued) — A entering into new agreements with owners of Service Station without knowledge of R — Business continued in A's name — Action by R for winding up by Court and for accounting — Is A liable to account.*

The Appellant and the Respondent in 1942 entered into a written partnership agreement for carrying on the business of selling Caltex Petrol and Kerosene Oil from a Service Station belonging to Caltex Ceylon Ltd. Differences having arisen later between the two partners ,the respondent sued the appellant for an account and his share of the net profits up to, 31. 3. 1948 in case No. 5029 D.C. Kurunegala. This was followed by a notice on 10. 9. 1948 by the appellant to the respondent to determine the partnership as from 10. 12. 1948. Shortly after, the appellant wrote to Caltex without the respondent's consent enclosing a copy of the said notice and requesting the alteration of the name of the agency to his individual name. This request was readily complied with and the appellant carried on the business in his own name on new agreements with Caltex. The respondent aggrieved by the said conduct of the appellant filed this action claiming in effect a winding up by the Court and distribution of the assets of the partnership between the partners.

In the meantime the aforesaid action 5029 was tried and the appellant was decreed to pay Rs. 10550/- to the respondent being the latter's shares of profits due up to 31. 3. 1948.

The learned District Judge in this action held (1) that the respondent's half share of profits from 31. 3. 1948 (the date of judgment in case No. 5029) up to 10. 12. 1948 was Rs. 2300/- (2) as the account books were not produced the respondent was entitled to Rs. 2,000/- per year as his share up to date of distribution.

An appeal to the Supreme Court was dismissed with a variation in regard to two subsidiary matters, holding that section 42 of the Partnership Act, 1890 applied to the facts of this case.

In the Privy Council it was contended that the said section 42 was not applicable as the partnership had no continuing business; they merely had a licence to sell the goods of Caltex and a few other accessories, which licence could be determined at very short notice. Therefore, the appellant could not be said to be carrying on the partnership business after dissolution, but he was merely licenced to carry on a new trade at the premises by Caltex.

**Held:** (i) That there was in the present case, a profitable business with a measure of goodwill.

(ii) That since after the dissolution (a) the appellant continued in business making use of the respondent's capital and of his shares of profits due up to 31.3.1948 which remained in the business and (b) the new agreements made between the appellant and Caltex during the subsistence of the partnership must be treated as partnership property, the appellant must be made to account for the profits he thereby made.

(iii) That both sections 29 and 42 of the Partnership Act applied to the facts of this case.

**Case referred to:** *Manley* v. *Sartori* (1927) 1 Ch. 157; 96 L.J. Ch. 65.

**The judgment of the Supreme Court is reported in LXI C.L.W. 51.**

*T. O. Kellock, Q.C.*, with *R. K. Handoo*, for the appellant.

No appearance for the respondent.

* For Sinhala translation, see Sinhala section, Vol. 13, part 1, p. 1

**Lord Upjohn,**

This is an appeal from a judgment of the Supreme Court of Ceylon (Gunasekara and Sinnetamby J.J.) given on 25th July 1961 which affirmed a Judgment of the District Court of Kurunegala dated 31st July 1958 with certain variations, whereby the appellant was held liable to account to the respondent for certain sums arising out of a partnership formerly carried on between them. The respondent was not represented before their Lordships.

The appellant and respondent who though bearing the same name were unrelated had been partners in the business of selling Caltex petrol and Kerosene oil from a Service Station belonging to Caltex Ceylon Limited (who will be referred to as Caltex) as their agents in the district of Kurunegala ever since 1942. The appellant was the active partner who conducted the day to day affairs of the business while the respondent who followed the profession of a dentist was virtually a sleeping partner but whose superior knowledge of the English language was thought to be advantageous in dealing with Caltex.

The partnership was governed by the terms of a written agreement made between the partners on the 30th November 1942. Its terms were clear and are not in dispute and it is not necessary to review it in any detail. It is sufficient to say that it provided (*a*) that the partnership should continue until determined by three months' notice to be given by one partner to the other (*b*) that the name of the firm should be "R. W. and A. Pathirana" (*c*) that the capital of the firm was to be Rs. 4,000/- which had been contributed in equal shares by the partners and that the profits and losses of the business should be divided between them in equal shares (*d*) that the management of the business should be in the hands of the appellant who should be entitled to an allowance of Rs. 50/- per month for the performance of this duty (*e*) that upon the determination of the partnership the assets of the partnership should be realised and applied first in payment of the debts and liabilities of the firm, secondly in paying to each partner the amount of his capital in the business and the surplus if any should be divided between the partners in equal shares.

The terms upon which the partnership occupied the Service Station, and this was the only business of the firm, were elaborately set out in a number of agreements between Caltex and the firm. Briefly these agreements provided that Caltex would remain in legal possession of the Service Station but the firm should be entitled to use the premises as licensees for the sole purpose of carrying on business as retailers of the products of Caltex there but subject to the consent of Caltex they should be at liberty to stock and market tyres and other non-petroleum motor accessories; that the equipment tools and other articles on the premises would remain the sole property of Caltex but should be used by the firm for the purpose of the business at an agreed monthly rental; that Caltex would supply to the firm for cash, such quantities of its products as it thought fit; that petrol should be retailed to the public coming to the Service Station at such prices as might be fixed by Caltex and that the firm should be entitled to such rebates and allowances as Caltex should currently allow to its retailers.

The business prospered though at one stage the firm had to borrow money to pay for its petrol. However differences arose between the partners and by a plaint (No. 5029) issued in the District Court of Kurunegala on the 19th August 1948 by the respondent against the appellant the respondent claimed that the appellant had withheld from him access to the partnership's books of account, had failed to render proper accounts and he asked for an account of what was due to him as his shares of the net profits of the partnership during the three years ending 31st March 1948. This action, which did not ask for dissolution of the partnership, ultimately came on for trial in 1954 and judgment was delivered on 12th November 1954 when it was ordered and decreed that the appellant should pay to the respondent Rs. 10,550/- being the respondent's share of the profits less drawings made by him for the three years ending 31st March 1948.

In the meantime and stung no doubt by the issue of this plaint, on 10th September 1948 the appellant gave three months' notice to the respondent to determine the partnership which accordingly terminated on the 10th December 1948.

Shortly after giving this notice, on the 21st September 1948 the appellant wrote to Caltex an important letter without the knowledge or consent of the respondent enclosing a copy of the notice served on the respondent terminating the partnership and continuing "I shall be much

grateful if you will kindly alter the name and style of the Agency from 1st October to 'R. W. Pathirana' instead of the present style 'R. W. & A. Pathirana'."

By return of post Caltex agreed to this. They duly gave notice to determine the existing agreements and in the months of September and October 1948 (before the partnership was terminated) entered into new agreements with the appellant alone. Thereafter the appellant continued to carry on the business on the premises in his own name and did not account to the respondent for his share of capital or any profits.

This change of name and the execution of new agreements with Caltex and the appellant alone during the subsistence of the partnership subsequently came to the knowledge of the respondent who naturally complained bitterly of such conduct but as he received no satisfactory answer to his letter of complaint, on the 25th August 1949 he issued another plaint against the appellant in the District Court of Kurunegala claiming in effect a winding up by the Court and distribution of the assets of the partnership between the partners.

Pleadings were duly delivered but the action seemed to have remained in abeyance pending the hearing of the earlier plaint No. 5029. Ultimately it came on for trial before the District Judge in May 1958, when a large number of issues were framed and duly answered by him in his reserved judgment.

Having regard to the submission made to their Lordships they however find it necessary to examine only three of them.

The finding in plaint No. 5029 was rightly treated as *res judicata* as to the profits down to 31st March 1948 and the District Judge held in his answer to issue (1) that the profits of the partnership from that date down to dissolution on the 10th December 1948 amounted to Rs. 4,600/-. He answered issue (2) by saying that the amount due to the plaintiff at the date of the dissolution of the partnership would be Rs. 2,300/-; plainly as their Lordships think half of the sum of Rs. 4,600/- mentioned in the judge's answer to issue (1). In his answer to issue (6) the District Judge held:—

> "As the account books are not produced I assess that the plaintiff is entitled to Rs. 2,000/- per year as his share of the profits from the business up to date of dissolution."

Counsel for the appellant accepts that "dissolution" must be a misprint for "distribution". The District Judge then ordered and decreed that the appellant should pay to the respondent profits at the rate of Rs. 2,000/- per annum from 31st March 1948 up to date of payment of his capital and taxed costs of action. The appellant appealed to the Supreme Court who affirmed the order and decree of the District Court but varied it in two respects. First because the District Judge seemed to have omitted the sum of Rs. 2,300/- due to the respondent under issue (1) that sum was added to the amount of the judgment. That has not been disputed before their Lordships. Secondly upon a concession made by Counsel for the respondent in the Supreme Court the judgment for Rs. 2,000/- per annum was limited to the date of the decree.

Before their Lordships Counsel for the appellant directed his main argument to the question whether section 42 of the Partnership Act 1890, which the District Judge impliedly and the Supreme Court expressly held to be applicable to the facts of this case, had in fact any application thereto.

Section 42(1) is in these terms:—

> "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets."

It was argued before their Lordships that section 42 had been wrongly applied to this case.

It was said that this partnership had no assets and no continuing business; they merely had a licence to sell the goods of Caltex and a few other accessories, which licence could be determined at very short notice. This could not be described, so it was argued, as a business in the ordinary sense at all but a mere licence to trade. So the appellant could not be said to be carrying on the partnership business after dissolution, he was merely licenced to carry on a new trade at the premises by Caltex.

Their Lordships think this argument is entirely fallacious. True it is that the firm's occupation

of the premises and its right to trade hung at all times by the most tenuous thread from the good offices of Caltex. But this frequently happens. Caltex was content to let the partnership continue trading on the premises for some years so the firm was able to build up a substantial business at the service station. This brought with it a substantial goodwill, that is the possibility of customers returning to the premises for more petrol, especially as according to the partnership agreement they were the sole agents for their district of Caltex products. As Romer J. (as he then was) pointed out in *Manley* v. *Sartori* (1927) 1 Ch. 157 at page 166, goodwill may exist notwithstanding that it is incapable of being ascertained in pounds, shillings and pence.

Here there was a profitable business with a measure of goodwill and after the dissolution it is perfectly clear that the appellant continued in business making use of the respondent's capital none of which had been repaid to him, and of his share of profits since 31st March 1946 which remained in the business. Furthermore the new agreements made between the appellant and Caltex in September and October 1948 during the subsistence of the partnership must on clearly settled principles be treated as partnership property; they were the life blood of the business and so as the Supreme Court pointed out the appellant must be made to account for the profits he thereby made.

It seems clear to their Lordships that section 42 applies, that the respondent "is entitled to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets."

The Supreme Court also held section 29 of the Partnership Act applied and their Lordships agree. It was argued in the alternative that if section 42 applied there should be a reference back to the District Court with a direction to make such inquiries upon this matter as were directed in *Manley* v. *Sartori* (*supra*). Their Lordships however do not propose to give such directions; in the first place the appellant did not ask for this relief in either of the Courts below; secondly after this lapse of time it would be wrong to re-open such matters of account and finally it would be most unjust to the respondent to order such inquiries when, as it appears, the appellant refused to produce his books of account at the trial.

The District Judge had to answer the question posed by section 42 as to the share of the profits to which the respondent was entitled in a robust way by reducing the half share of profits which the respondent would have received had the partnership continued to a one-third share of the profits, and on that footing he considered Rs. 2,000/- was his proper share of the annual profits.

The Supreme Court saw no reason to differ from that practical assessment and neither do their Lordships.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

*Appeal dismissed.*

*Present:* **Sansoni, C.J. and Sirimane, J.**

## GIFFRY *v.* DE SILVA*

*S.C. No.* 139/64 — *D.C. Panadura Case No.* 8121

*Argued on:* September 30, 1965.
*Decided on:* October 8, 1965.

*Landlord and tenant — House destroyed by fire — Tenant vacating premises in consequence — New building put up by landlord — Tenant taking forcible possession — Prosecution of tenant by police — Tenant instituting action for declaration that he is tenant — Rent Restriction Act — Its effect on statutory tenancy.*

**Held:** (1) That when a building which is the subject of a lease is burnt down without the fault of the landlord or of the tenant, the contract of tenancy is at an end, for the subject-matter is also at an end. The fact that the tenancy fell within the Rent Restriction Act made no difference.

(2) That one way in which the statutory protection given by the Rent Restriction Act to a tenant comes to an end is by the handing back of the premises to the landlord.

* For Sinhala translation, see Sinhala section, Vol. 13 part 3, p. 7.

*H. W. Jayawardene*, Q.C., with *M. T. M. Sivardeen* and *D. S. Wijewardena*, for the defendant-appellant.

*C. Thiagalingam*, Q.C., with *Nihal Jayawickrema*, for the plaintiff-respondent.

**Sansoni, C.J.**

The defendant gave premises No. 360, Main Street, Panadura, on rent to the plaintiff, who occupied them for some time prior to 4th August, 1961. On that night, a fire broke out in these premises, and the plaintiff vacated them in consequence of the damage done by the fire. The defendant put up a new building there, and when it was almost ready for occupation plaintiff took possession of it. The defendant complained to the Police and the plaintiff was prosecuted in consequence of such entry by him.

This action has been brought by the plaintiff for a declaration that he is a tenant of the premises, and entitled to remain there and to exercise all the rights of a statutory tenant.

The defendant in his answer denied that the plaintiff is his tenant. He stated that the plaintiff is in forcible and unlawful occupation of the premises, and he asked for ejectment and for damages. After trial, the learned District Judge gave judgment in favour of the plaintiff and the defendant has appealed.

The first matter for consideration is the effect that the fire had upon the contract of tenancy. The learned Judge found that the frontage, which consisted of a framework of planks, and also one side of the premises which consisted only of a row of almirahs, were completely destroyed by the fire: so was the main roof of the building. The walls on the two other sides remained standing, and so did a room at the rear of the building. That room, however on the plaintiff's own evidence, was not in his occupation at the time of the fire, but had been rented by the defendant to a third party.

It is clear that after the fire there was nothing that the plaintiff could occupy as a building, and that is why he vacated the premises. The learned Judge correctly found that the building could not be used either for purposes of habitation or business. Thus the subject matter of the lease, which was the building, had been completely destroyed, because there was nothing left except two walls. The law is clear that where a building which is the subject of a lease is burnt down without the fault of the landlord or of the tenant, as was the case here, the contract is at an end, for the subject matter of the contract is also at an end. By the contract the tenant is entitled to the use and occupation of the building, and if there is no building to use and occupy, there is no existing contract — see Wille, Landlord and Tenant in South Africa, (5th Edition) page 255.

It is common ground that the tenancy was one which fell within the Rent Restriction Act, but that makes no difference. The statutory tenancy was in respect of the building, and when building perished the statutory tenancy also cease to exist.

I do not think that the law in Ceylon is different from the English law in this respect. In neither country can there be a statutory tenancy in respect of bare land. I think the statement in Mr. R. E. Megarry's Book on The Rent Acts (8th Edition) that "the restrictions of the Acts do not inhere in the land after the demolition of the dwelling-house, but remain only so long as it is there, " and which was approved by Evershed M. R. in *Morleys (Birmingham) Ltd.* v. *Slater* (1950) 1 K.B. 506, is applicable to Ceylon.

Apart from these considerations, it is proved by the evidence that after the fire the plaintiff vacated these premises, and gave up possession to the defendant. That is how the defendant came to build a new house in place of the old one which had been destroyed. The legal effect of the plaintiff handing over possession to the defendant was that the tenancy was terminated, and along with it the statutory protection of the plaintiff came to an end. This has been decided by this Court in *Ibrahim Saibo* v. *Mansoor* (1953) 54 N.L.R. 217. One way in which the statutory protection given by the Rent Restriction Act to a tenant comes to an end is by the handing back of the premises to the landlord.

Mr. Thiagalingam relied on a promise said to have been made by the defendant to the plaintiff about two days after the fire, that he would repair the building and give it back to the plaintiff. Even if this is true, it amounts to nothing more than an agreement by the defendant to let the

premises again to the plaintiff. For the breach of such an agreement the only remedy is an action for damages. It certainly does not entitle the plaintiff to take forcible possession of the building as he appears to have done in this case.

The plaintiff's occupation from the time he went back into possession of the building is therefore wrongful, and he must be ejected. He must also pay damages for his wrongful possession, and as he has stated that the statutory rent is Rs. 58/85 a month this would be the measure of damages.

I would set aside the judgment of the learned Judge and dismiss the plaintiff's action. The defendant is entitled to a decree of ejectment against the plaintiff, and to damages at Rs. 58/85 a month from 16th December 1961 until he is restored possession. The plaintiff will also pay the defendant's costs in both Courts.

**Sirimane, J.**

I agree.

*Appeal allowed.*

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

D. A. WEERASINGHE *vs.* G. V. P. SAMARASINGHE, PERMANENT SECRETARY TO THE MINISTRY OF DEFENCE AND EXTERNAL AFFAIRS, AND ANOTHER

*In the matter of an application for a mandate in the nature of a Writ of Habeas Corpus to produce the body of Captain Duleepsingh Upawansa Weerasinghe under section 45 of the Courts Ordinance.*

*Application No.* 263/1966

*Argued on:* 22nd June, 1966.
*Reasons and decision on* 23rd July, 1966.

*Writ of Habeas Corpus — Whether successive applications in respect of the same person upon the same facts can be made — Parliamentary proceedings — Truth of statement made in Parliament not established by proof such statement was made — Should judicial notice be taken of such proceedings — Evidence Ordinance, section* 57(4).

*Judicial precedent — Decision of Privy Council on appeal from Nigeria applying English Common Law — Ceylon Courts also governed by English Common Law on such point — Should such Privy Council decision be followed.*

**Held:** (1) That successive applications for a writ of habeas corpus could be made to different Judges of the Supreme Court even in regard to the release of the same person upon the same facts.

(2) That even if it be correct that, under section 57(4) of the Evidence Ordinance, judicial notice must be taken of proceedings in Parliament, the truth or correctness of a statement made in Parliament is not established by proof of the statement.

(3) That it was not open to the Supreme Court to disregard a Privy Council decision on appeal from another country where the law applicable here on such point was the same.

*Per* **H. N. G. Fernando, S.P.J.** — "There is one additional observation I must make. Even if, in view of the decision of the Privy Council, successive applications can be properly made to different judges for a Writ of Habeas Corpus, let it not be thought that vexation of judges frivolous applications can lead this Court to interfere unlawfully with the Executive, or can induce the Executive to desist from exercising the powers and duties committed to it by law. I do not doubt that the Court has sufficient statutory and inherent power to discourage and punish vexatious abuse of its process."

**Followed:** *Eleko* v. *The Officer Administering the Government of Nigeria*, 1928 A.C. 459.
*Weerasinghe* v. *Samarasinghe*, (1966) LXX C.L.W. 71.

*G. D. C. Weerasinghe*, with *Maureen Seneviratne* and *Desmond Fernando*, for the petitioner.

*H. L. de Silva, Crown Counsel* for the 1st respondent.

**H. N. G. Fernando, S.P.J.**

This is an application for a Writ of Habeas Corpus made with the object of securing the discharge from custody of the 2nd Respondent, who was since 15th March, 1966 detained in custody under a Detention Order made under Emergency Regulations by the 1st Respondent. A similar application for the discharge of the 3rd Respondent was heard and determined by the Chief Justice, who refused the application on its merits by his Order of 13th May, 1966. Before the present application was made, another similar application was made to this Court on 25th May, 1966, but my brother Alles refused to notice thereof, on the ground that it was not open to make a second application for a Writ for the release of the same person upon the same facts.

The present (third) application was referred to me by the Registrar for consideration, and I thought fit to hear argument on the question decided by Alles, J. in Chambers. On the basis of certain recent decisions of the English Courts, he held it to be an exploded theory that applications of this nature could be made successively to different Judges of the same Court.

In an appeal from the Supreme Court of Nigeria (*Eleko* v. *the Officer Administering the Government of Nigeria*, 1928 A.C. 459) the Privy Council held, applying the English common law, that such applications could be made to different judges of the Supreme Court of Nigeria. Even if that case was wrongly decided, I consider that it is not open to me to disregard a judgment of the Privy Council declaring what the English common law was, and holding it applicable *in pari materia* to a Court which is governed in the matter by the English common law. Accordingly, I heard this application on its merits.

The judgment of the Chief Justice, in Application No. 177/66,* deals with many of the matters argued before me, and I respectfully agree with it. One fresh point, which counsel attempted to argue, depended on certain statements said to have been made in Parliament by a Minister on 24th April, 1966 to the effect that the Emergency Regulations are no longer necessary. Counsel proposed, on that footing, to argue that the Emergency Regulations are being kept in force, not for the purposes authorised by the Public Security Act, but for some collateral purpose. But even if it be correct that, under section 57(4) of the Evidence Ordinance, judicial notice must be taken of proceedings in Parliament, the truth or correctness of a statement made in Parliament is not established by proof of the statement. There is therefore not before me any evidence upon which I can properly hold that the Regulation under which the 2nd Respondent is detained are being kept in force for purposes not authorised by law. For these reasons the application was refused with costs.

There is one additional observation I must make. Even if, in view of the decision of the Privy Council, successive applications can be properly made to different judges for a Writ of Habeas Corpus, let it not be thought that vexation of judges by frivolous applications can lead this Court to interfere unlawfully with the Executive, or can induce the Executive to desist from exercising the powers and duties committed to it by law. I do not doubt that the Court has sufficient statutory and inherent power to discharge and punish vexatious abuse of its process.

*Application refused.*

* 70 C.L.W. 71.

*Present:* **T. S. Fernando, J. and Sri Skanda Rajah, J.**

KANDIAH SELLATHMAI *vs.* R. YOGAMMA

*Argued on:* July 3, 1966.
*Decided on:* July 10, 1966.

*S.C.* 485/64(F)—*D.C. Jaffna* 5043/MB

*Mortgage bond granted by husband and wife — Joint and several liability — Action on Bond filed four days before it became prescribed — Discovery that wife had died three years before date of action — Is the action a nullity — Husband appointed representative of deceased wife after term of prescription —Whether claim against estate of deceased wife prescribed—Prescription Ordinance, section 5.*

**Held:** (1) That the death of one of two mortgagors prior to the institution of the action does not render such action a nullity.

(2) That in the present case the institution of the action against the husband, (co-mortgagor) was sufficient to interrupt prescription against the estate of the deceased wife. The institution of an action against one of several debtors *in solido* interrupts the course of prescription against the others.

(2) That as the deceased wife was stated to have left an estate below the value of Rs. 2,500/- and as there was no appeal from the order appointing the husband the 1st defendant as her legal representative, the 1st defendant was properly appointed.

**Cases referrd to:** *Muthu Ramaie et al.* vs. *Athimulam et al.*, (1961) LX C.L.W. 8; 66 N.L.R. 251. *Dharmasena* vs. *Lewis et al.*, (1930) 31 N.L.R. 353,

*Bala Nadarajah*, for the 1st defendant-appellant.

*S. Sharvananda*, for the plaintiff-respondent.

**Sri Skanda Rajah, J.**

The 1st defendant-appellant and his wife, Avayambal, granted the plaintiff-respondent a mortgage bond on the 4th of September, 1952. The land mortgaged was Avayambal's dowry property, but the bond was an obligation in solido (joint and several). Four days before the term of prescription, namely, on 30th August, 1962, the plaintiff-respondent filed the plaint in this case against the 1st defendant, husband of Avayambal who it was discovered later had died over three years before the action. When the fact of the death of Avayambal came to the plaintiff-respondent's knowledge, he made an application to appoint the 1st defendant-appellant himself to represent the estate of the deceased Avayambal, which estate was stated in the petition for such appointment to be worth under Rs. 2,500. That application was made on 18th of February, 1963, and the 1st defendant-appellant on whom notice of that application was served was absent on 28th of March, 1963, and on that date the application to appoint him to represent the estate of the deceased Avayambal was allowed. Answer was filed thereafter. There was no appeal from the order allowing that application.

The case went to trial on a number of issues. The issues relevant for the decision of this appeal are:

(2) Was the action properly constituted in so far as the 2nd defendant was dead at the time of the institution of this action?

(3) If so, is the appointment of the first defendant as legal representative of the deceased wife valid?

(4) In any event, is plaintiff's claim prescribed as against the estate of the deceased, wife of the first defendant?

These issues were answered by the learned trial Judge as follows:

(2) I hold that the joinder of the second defendant as a party defendant in this case was not proper in view of the fact that the second defendant was already dead at the time of this action, but this does not prescribe plaintiff's claim against 1st defendant.

(3) No.

(4) Does not arise.

It was argued before us that the action was a nullity. In the case of *Muthu Ramaie et al.*, vs. *Athimulam et al.*, (1961) 66 N.L.R. 251, where a mortgagee instituted a hypothecary action in respect of a land mortgaged to him by two co-mortgagors A and B, and B had died prior to the date of action but a representative of his estate was appointed in the mortgage action and added as a defendant, it was held that the death of co-mortgagor B prior to the institution of the mortgage action could not render the action a nullity.

It was also argued that the action against the second defendant wife was prescribed because the substitution was made over 10 years after the date of the mortgage bond. But in this case the institution of the action against the husband, the 1st defendant, was sufficient to interrupt prescription against the estate of the deceased

wife. In *Dharmasena* vs. *Lewis et al.*, (1930) 31 N.L.R. 353, the facts were as follows: The plaintiff sued the defendants for the recovery of money due upon a mortgage bond dated August 1, 1917. The mortgage was executed by the first and second defendants and their mother, Nona Rodrigo, jointly and severally. The plaint was filed on July 27, 1927, four days before the expiration of ten years, as in the present case. Nona Rodrigo had died six months before action, and the third defendant was described as her legal representative. On December 12, 1927, on the application of the plaintiff the third defendant was appointed as a fit person to be the legal representative of the deceased mortgagor. It was contended for the defence that the action was prescribed as it must be regarded as having been instituted on December 12. The learned District Judge held that the action was instituted on July 27, and gave judgment for the plaintiff. This Court held that the action against the third defendant must be regarded as having been instituted on December 12, that is over 10 years after the bond, but went on to hold that the institution of an action against one of several debtors *in solido* interrupts the course of prescription against the others. Therefore, in this case, too, the institution of action against the 1st defendant-appellant interrupted the course of prescription against the estate of the deceased Avayambal. For these reasons, the 1st defendant-appellant's appeal is dismissed with costs.

There was a cross-objection filed by the plaintiff-respondent because the learned District Judge did not hold that the 1st defendant was properly appointed to represent the estate of the deceased. In view of our finding that the appointment has been properly made and that the claim is not prescribed, this cross-objection is entitled to succeed.

Enter decree as prayed for in the plaint.

**T. S. Fernando, J.**

I agree.

*Appeal dismissed.*
*Cross-objection allowed.*

*SUPREME COURT OF THE ISLAND OF CEYLON*
*HOLDEN AT JAFFNA*

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

THIYAGARAJAH *Alias* NALLIAH *vs.* SAUNDRANAYAKAM

*S.C.* 1048/1965 — *M.C. Kayts No.* 1796

*Argued and decided on:* 24th August, 1966.

*Criminal Procedure Code, section* 343 — *Right of a Judge of the Supreme Court to hear appeals while on circuit — Courts Ordinance, section* 36.

*Burden of proof — Magistrate acting on evidence of mere possibility and rejecting evidence of probability favourable to defence — Effect.*

**Held:** (1) That the power conferred by section 343 of the Criminal Procedure Code on a Judge on circuit to hear appeals cannot be superseded by the prevailing practice of hearing appeals in Colombo.

(2) That were a Magistrate acted on the evidence of a mere possibility and rejected the evidence of probability, which was favourable to the defence, he erred in law, as in doing so, he has wrongly placed the burden of proof on the accused.

*Per* **Sri Skanda Rajah, J.** — (*a*) "The use of the word 'ordinarily' in section 36 of the Courts Ordinance, which enacts: The appellate jurisdiction of the Supreme Court shall be *ordinarily* exercised only at Colombo, does not mean shall 'always' be exercised at Colombo. It was nine years after this provision that section 343 of the Criminal Procedure Code was enacted. Therefore, it would supersede section 36 of the Courts Ordinance even if 'ordinarily' can be interpreted to mean 'invariably'."

(*b*) "I would in conclusion add that this is not the first time that an appeal was heard by a Judge on circuit. As far back as 1920, Bertram, C.J., appears to have heard an appeal while on circuit: vide *Kannangara* v. *Sarah* (1920) 8 C.W.R. at 224. Section 343 appears to have been enacted to eliminate delay in the disposal of appeals in criminal cases. My view is that this provision should be invoked more often than hitherto."

**Case referred to:** *Kannangara* v. *Sarah* (1920) 8 C.W.R. 224.

*K. V. S. Shanmuganathan*, for the accused-appellant. Accused-Appellant present in Court.

*K. Abeynaike*, Crown Counsel, for the Attorney-General.

**Sri Skanda Rajah, J.**

This is an appeal from a Court of the Northern Circuit, where I am on circuit from 28. 7. 66. On 12. 8. 66 I made the following order:

"This record was received in the Supreme Court as far back as 27. 10. 65 and appears to have been listed for the first time for 20. 12. 65.

Acting under the provisions of Section 343(2) proviso 2 I direct that this appeal be heard before me in Jaffna, where I am on circuit on 24. 8. 1966. (Town Hall).

Counsel for the appellant and Attorney-General to be informed.

Also accused to be informed — information to be served in duplicate by the Kayts Police and the Fiscal.

Put up a notice on the board here and in Jaffna."

Section 343 of the Criminal Procedure Code runs thus:

"343(1) When the record and petition of appeal have been transmitted to the Supreme Court the Registrar shall number the appeal and enter it on the list of appeals and such list shall be kept suspended in the Registry of the Supreme Court.

(2) The appeal shall come on for hearing in its order without further notice to the parties concerned;

Provided that the court may of its own motion or on the application of a party concerned accelerate or postpone the hearing of an appeal upon any such terms as to the prosecution or the costs of the appeal or otherwise as it may think fit;

Provided also that a Judge on circuit may direct that any appeal pending from any Magistrate's Court or District Court of such circuit be heard before him on such circuit *and the same shall be heard accordingly*."

Mr. Chitty, Q.C., who had been retained to appear for the appellant has written to the Registrar protesting against the hearing of this appeal in Jaffna. Suffice it to say that this is a peremptory provision and no protest is of any avail.

The direction was issued by a Judge on circuit. The Registrar had nothing to do with it. In view of the peremptory nature of the provision under which this lawful direction was given the Registrar may, if he failed to forward the record and the brief to Jaffna, run the risk of being dealt with for contempt of Court. Therefore, there was no purpose in sending a letter of protest to the Registrar, who is bound to take all steps to comply with the direction.

One of the statements in the letter of protest is that "the appellant will be effectively deprived of his right to be represented by counsel of his choice". I am aware that this is a principle enunciated by the Courts in England, a country whose traditions we purport to follow. I am equally aware of another principle, which qualifies this principle, also enunciated by the Courts in England, viz., that no case should be postponed for the reason that counsel cannot be present in two or more Courts at the same time — when an application is made on that ground any Judge in England would invariably say, "I regret that Mr. A. is unable to assist this Court; but, there are equally good other counsel who could do so" and refuse the application. It is high time that we also adopted this principle too. Then it will, *inter alia*, help to distribute work and not concentrate same, as at present, in the hands of only a few counsel, some of whom take work in several courts, appellate and original, at the same time. This would prevent delay in the disposal of appeals and trial and further eliminate undue and prolonged anxiety to convicted persons.

It is pertinent to point out that Section 343 of the Criminal Procedure Code envisages only one list of appeal cases and not monthly lists. A strict compliance with this provision appears to be called for. What is the purpose of monthly lists, which are prepared to suit the convenience of counsel, if they are permitted to move out cases for the reason that they are engaged else-

where on that date which had been fixed to suit them? The first proviso to section 343(2) is not meant to meet such a situation but only some exceptional circumstances such as illness. The prevailing practice of hearing appeals in Colombo cannot supersede the power conferred by Section 343 of the Criminal Procedure Code on a Judge on circuit.

The use of the word "ordinarily" in Section 36 of the Courts Ordinance, which enacts: The appellate jurisdiction of the Supreme Court shall be *ordinarily* exercised only at Colombo, does not mean shall 'always' be exercised at Colombo. It was nine years after this provision that Section 343 of the Criminal Procedure Code was enacted. Therefore, it would supersede Section 36 of the Courts Ordinance even if "ordinarily" can be interpreted to mean "invariably". It may be perhaps because section 36 of the Courts Ordinance does contemplate the hearing of appeals in places other than Colombo under exceptional circumstances that this special statutory power was expressly conferred on a Judge on circuit.

The interests of justice in this case demand that I should not revoke the direction already given by me. It would be unjust and unfair by the appellant to let this conviction hang over the head of this "old teacher on the verge of retirement and of modest financial means", to borrow the words from the protest, for even a moment longer, just to suit the convenience of a Queen's Counsel, who should have seen his way to arguing this appeal earlier and to wipe off the appellant's mental agony, instead of moving this appeal out on more than one occasion, including the last time it was on the list, in August, because he was engaged elsewhere. That is one reason why Mr. Shanmuganathan's application for postponement was refused.

The charges against the accused were that on 27th July, 1964, he stabbed one Sivapathasuntharam and his father-in-law Gunaratnam with a knife. The plaint was filed on 6th August, 1964, and the accused was convicted on 2nd September, 1965, and sentenced on 16th September, 1965, to three month's rigorous imprisonment on each count, sentences to run consecutively. On the same day the accused filed petition of appeal. These facts were not known to me when I issued the direction. My attention had been drawn only to the fact that an appeal which was forwarded to the Supreme Court on 25th October, 1965, had not yet been disposed of.

This being a criminal case the burden of proving the case beyond reasonable doubt that the appellant inflicted the injuries with a knife on the persons above mentioned was on the prosecution. The defence was that the injuries were not inflicted with a knife but with a pick-axe, admittedly brought by Sivapathasundaram to dig holes to erect a fence closing the lane which was in dispute and under certain circumstances. Admittedly there was a struggle over the pickaxe.

The doctor who was called by the prosectuion said in cross-examination, "Having regard to the uniformity of the depth of the injury found on Gunaratnam, if the cutting edge of a pick-axe had fallen on the injured man, that injury could have been caused. It is more probable for this injury to have been caused with a pick-axe having regard to the uniformity of the depth of the injury. The two injuries on Sivapathasunderam could have been caused by one corner of a pick-axe, if that weapon was brandished by the person who had this weapon". Then in re-examination he said, "I would not rule out the *possibility of* the injuries found on the injured people having been caused with a knife".

At the lowest the medical evidence created reasonable doubt regarding the evidence of the two injured persons.

In the judgment the learned magistrate disposed of this evidence as follows: "No doubt, the doctor in his cross-examination had said that it was very probable that the injuries were caused with a pick-axe. However, in re-examination, he said that he would not rule out the possibility that the injuries found on the injured persons could have been caused with a knife." In saying this the learned magistrate erred in that he acted on the evidence of a mere possibility and rejected the evidence of probability, which was favourable to the defence. In doing so he was placing the burden of proof beyond even the possibility of a doubt on the accused. This amounts to an error of law.

The statements D1 to D2 made by the injured persons to the police contradicted their evidence in Court and indicated that the appellants' version of attack on him by a number of persons was probably true, though the attack may not have been so severe as he tried to make out.

It was alleged by Gunaratnam that the accused pulled out an open knife from the pocket of his national banian. It is most unlikely that a

knife — described also as a pen knife— would have been carried in the pocket of such a banian with blade open. That would have pierced the pocket. Besides, when struggling over the pick-axe, it would have been difficult to take a knife out of a pocket.

The benefit of the doubt should have been given to the appellant.

Therefore, I would set aside the conviction and sentence and acquit the accused.

Even a raw junior could have achieved this result and saved the appellant from the prolonged mental agony he had to undergo. I am glad that he was represented by counsel in this Court today.

I would in conclusion add that this is not the first time that an appeal was heard by a Judge on circuit. As far back as 1920, Bertram, C.J., appears to have heard an appeal while on circuit: vide *Kannangara* v. *Sarah* (1920) 8 C.W.R. at 224. Section 343 appears to have been enacted to eliminate delay in the disposal of appeals in criminal cases. My view is that this provision should be invoked more often than hitherto.

*Accused acquitted.*

*IN THE COURT OF CRIMINAL APPEAL*

*Present:* **Sansoni, C.J.** (*President*), **H. N. G. Fernando, S.P.J., and Abeyesundere, J.**

THE QUEEN *vs.* GALUKANDALAGE SETHAN *alias* DELAN

*Appeal No* 56 *of* 1966 with
*Application No.* 96 *of* 1966 — *S.C. No.* 124 *M.C. Ratnapura No.* 4996

*Argued on* September 1, 1966.
*Decided on:* September 14, 1966.

*Court of Criminal Appeal — Interpretation of words used in an unusual sense — Question for the Jury — Misdirection — Defence of accused not properly and adequately put to Jury — Criminal Procedure Code, section* 245(*b*).

The accused-appellant was convicted of the murder of one Mudiyanse. The indictment charged him with the offence "with another." The deceased had five non-grievous incised wounds and certain other wounds described by the doctor as 17 gun shot entrance wounds and 3 exit wounds. The doctor did not rule out the possibility of these injuries being caused by a sharp pointed or cylindrical weapon.

The appellant gave evidence, and admitted that he had stabbed the deceased three times with a knife in the exercise of the right of private defence, but that he had run away before the deceased fell down. He had gone to three friends, E, P and Pabilis on the same night and told them that he had stabbed the deceased with a knife, when the latter attacked him.

E stated in evidence that the appellant had told him that he stabbed Mudiyanse with a knife, the words being, "Halgahakumbure kamathedi Mudiyanseta pihiyen anala budhikaralamai ave." E also stated that in that village, "budhi-korala" denotes "killed". Pabilis stated that the appellant only told him that he had stabbed Mudiyanse with a knife. The appellant denied that he used the words "budhi Korala ave."

In his summing-up, the Commissioner on about ten occasions in referring to E's evidence, directed the Jury that the appellant told E that he had stabbed and killed the deceased.

**Held:** (1) That 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, but the Commissioner had, by putting the above interpretation of the words as the only possible interpretation, never left it to the Jury to determine what that expression meant.

**Held further:** (2) That inasmuch as in certain passages, the accused's evidence had been put to the Jury as being false, and the Jury had not been asked to consider whether E was lying rather than the accused, although the evidence of Pabilis supported the accused's version of the words used, the Jury had not been given the opportunity to consider fairly the defence put forward, and the case for the defence was not properly or adequately put to the Jury.

*E. R. S. R. Coomaraswamy*, with *G. C. Wanigasekera* and *Miss Adela P. Abeyratne* (assigned) for the accused-appellant.

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

**Sansoni, C.J.**

The accused was convicted of murder by a 6 to 1 verdict, on an indictment which charged him with having on or about the 19th August 1964, with another, committed the murder of one Mudiyanse.

It was common ground that on the evening of that day the accused, Mudiyanse and one Heenmahathmaya drank pot arrack in the house of Heenmahathmaya from about 5.30 p.m. At about 6.30 p.m. the accused and Mudiyanse left Heenmahathmaya's house, and went walking together towards their respective houses. The next day Mudiyanse's dead body was found on the threshing floor of a paddy field called Halgahakumbura.

The medical evidence pointed to the deceased having received 5 incised wounds on various parts of his body, none of which were grievous. There were also what the Doctor described as 17 gun shot entrance wounds in the front of his chest and 3 exit wounds in his back. No pellets were found in the body, nor was any wadding found at the spot. The Doctor's opinion that they were gun shot injuries was based on the appearance and distribution of those entrance and exit wounds. When it was suggested to him by Crown Counsel that they could have been caused with a sharp pointed weapon like a spoke, or by a cylindrical weapon, he said that it was possible. The body was in an advanced state of putrefaction and that may have caused difficulty in diagnosing the exact nature of the weapon used.

The accused gave evidence. He said that while he and the deceased were walking home together from Heenmahathmaya's house on the evening in question, after they had drunk a lot of pot arrack, they came to Halaghakumbura. There the deceased took a knife into his hand and stabbed him. He held up his hand and received a cut injury. The deceased stabbed him again, and when he tried to stab him a third time he took a knife from his waist and stabbed the deceased three times. The deceased retreated, and he got frightened and ran away. He said more than once that the deceased had not fallen down or died although he appeared to be becoming lifeless. From the threshing floor the accused said he came to the house of one Emanis and called him out. He also went to the house of one Podimahathmaya and fetched him. The three of them then walked to the accused's house. The accused said that on the way he told them that at Halgahakumbura Mudiyanse stabbed him with a knife, and fearing that he would be killed he stabbed Mudiyanse. He also told Pabilis, another friend of his, the same thing.

The accused's position throughout his evidence was that when he left the threshing floor he thought Mudiyanse was still alive, although injured. But Emanis' evidence was to the effect that on the night in question the accused came to his house and told him that at Halgahakumbura threshing floor he stabbed Mudiyanse with a knife, the words used being "Halgahakumbura kamathedi Mudiyanseta pihiyen anala budhikaralamai āve." Emanis also said "When a person is killed in that village it is said 'budhikorala'." In answer to Court he said the word used was not "bāwala" which means "to lay low", but "budhikorala" which means "to kill". Pabilis, however, said that the accused only told him that he had come after stabbing Mudiyanse with a knife. and that he was left at Halgahakumbura threshing floor. Since much turns in this case on the expression said to have been used by the accused to Emanis, it should be remembered that the accused denied that he told Emanis that he used the words "Budhi karala āve".

Thus at the close of the evidence, there was on the one hand the evidence of Pabilis and the accused which only referred to the stabbing of the deceased by the accused; and on the other hand, there was the evidence of Emanis that the accused had used the word "budhikorala" in respect of what he had done to the deceased.

The chief complaint made against the learned Commissioner's summing up in this case is that on several occasions, in fact whenever he referred to Emanis' evidence, he instructed the Jury that the accused told Emanis that he had stabbed and killed the deceased. For instance, he said this, and there are other similar passages: "The important point is, Emanis says that the accused when asked by them "why all this" said, 'I have stabbed Mudiyanse with a knife and I have put him to sleep — mamma Mudiyanseta pihiyen anala budhikorala thamai āve'. And, you will remember, that the witness himself explained that by that term "I have put him to sleep" literally in the English, as understood in the Sinhalese certainly in their circles if not everywhere, that the man had been killed. In other words, 'I have stabbed and killed Mudiyanse' that is what it means."

Mr. Coomaraswamy said that when the learned Commissioner on about ten occasions told the Jury that the accused had informed Emanis that he stabbed and killed the deceased, he left them with no option but to hold that the words used meant that the accused stabbed and killed Mudiyanse. This was Emanis' interpretation of the expression "budhikarala", but it was put to the Jury as the only possible interpretation of that expression.

Under section 245(b) of the Criminal Procedure Code it is the duty of the Jury to determine the meaning of the words used in an unusual sense, but the Commissioner never left it to the Jury to determine what that expression meant.

When the Commissioner was dealing with the accused's evidence he said "He (the accused) was at pains to make it quite clear that at the time he left the scene of the incident, Mudiyanse was still alive and standing ..... How is it then, having set out from that place, he goes and tells Emanis 'I have stabbed and killed him?' The point again, Gentlemen, is if the accused had used the gun, why did accused want to hide that and take the credit on himself that he stabbed and killed?" It is quite clear that the Jury were told to put one and only one interpretation on what the accused is said to have told Emanis, as if no other interpretation was possible.

Moreover, in this passage, and elsewhere, the accused's evidence is put to the Jury as being false. They were not asked to consider whether Emanis may not have been lying rather then the accused. Time and again in the summing up, even when the accused's defence was being dealt with, it was put to the Jury that the accused came to Emanis and said that he had killed the man. Pabilis's evidence as to what the accused told him was not given anything like the same attention, and this would have gravely prejudiced the accused, for Publis's version was favourable to the accused. The Jury were therefore not given the opportunity to consider fairly the defence put forward. The summing up proceeds throughout on the basis that the accused did utter the words which Emanis says he uttered, and they bore only one meaning. Even when it came to the question of the Jury deciding what the accused's intention was when he inflicted the injuries on the deceased, they were told that they could take into account that the accused said "I have killed him with a knife and come".

We have considered the summing up carefully, and we have come to the conclusion that the case for the defence was not adequately or properly put to the Jury. We therefore quash the conviction and acquit the accused.

*Accused acquitted.*

*Present:* **Tambiah, J. and Alles, J.**

A. H. SAMARAKOON & OTHERS *vs.* H. V. STARREX & ANOTHER

*S.C.* 86/61 (Inty) — *D.C. Colombo* 49708/M

*Argued on:* March 24, 1965.
*Decided on:* April 2, 1965.

*Prevention of Frauds Ordinance* (*Cap.* 70), *section* 2 — *Lease for twelve months on agreement not notarially attested — Rent payable on monthly basis — Effect — Whether obligations in agreement not arising out of lease severable.*

*Civil Procedure Code, sections* 34 *and* 406 — *Abandonment of part of claim without reservation of right to sue — Fresh action filed — Abandonment of part of claim made "without prejudice to rights of parties" in such fresh action — Defence based on such abandonment already taken in second action at time of such settlement — Defendant not precluded from taking such defence.*

The plaintiff first filed action against the defendants in D.C. Colombo case No. 46753/M for the recovery of a sum of Rs. 16,445/99 pleading an agreement marked 'A' dated 10th April 1958. The defendants filed answer and thereafter the plaintiff amended his plaint on 3rd March 1960.

In the amended plaint the plaintiff pleaded the written agreement dated 10th April 1958 and averred that he had leased to the first defendant a certain cinema hall for a period of 6 months, together with the equipment and apparatus set out in the Schedule to the said agreement. He also averred that the second, third and fourth defendants signed the said agreement as guarantors. In the amended plaint, the plaintiff also restricted his claim to a sum of Rs. 1406/94 alleging that this was due in terms of certain account particulars marked 'B' and filed therewith. This action was of consent dismissed without costs on 21st March 1961. However, when the plaintiff restricted his claim in the amended plaint he had neither asked for any reservation of a right to sue for that part of the claim he was abandoning, nor was any permission given by Court to withdraw the plaint with liberty to file a fresh action.

The present action was filed by the plaintiff on 4th April 1960 and the first to third defendants were the same as those in the earlier action (the first defendant as the principal debtor and the second and third as guarantors). The plaintiff claimed in the present action a sum of Rs. 12, 039/09 on a written agreement dated 24th April. 1957. This was a sum which had been included in the claim originally made in the earlier action (46753/M), but which had been dropped when the plaint in that action was amended on 3rd March 1960.

Paragraph two of the Indenture of 24th April 1957 recited that the premises were demised for a period of 12 months on the rents and conditions set out in the said Indenture. The rent was to be Rs. 1000/- per month payable monthly on or before the last day of the month.

At the trial certain issues raised by counsel for the defendants were tried as preliminary issues. They related broadly, to two matters — (a) whether the said Indenture of 24th April 1957 not being notarially attested was of any force or avail in law, and (b) whether the plaintiff when filing his second amended plaint had abandoned his claim to the sum of Rs. 12,039/05 earlier claimed or whether his claim was barred by the provisions of section 406 of the Civil Procedure Code. The learned trial Judge held with the plaintiff on these issues and directed that the trial do proceed on the other issues. The defendants appealed.

**Held:** (1) That although the rent was to be paid on a monthly basis, the duration of the lease being fixed for a period of one year, the Indenture of 24th April 1957 was, by reason of the stringent provisions of section 2 of the Prevention of Frauds Ordinance, of no force or avail in law as it had not been notarially attested.

(2) That the present action being based on the written agreement and not on a monthly tenancy, the submission that a lessee on a non-notarial agreement which was invalid in law should be treated as a monthly tenant, would not avail the plaintiff.

(3) That the obligations such as the agreement to pay film hire and entertainment tax did not arise out of the lease and were severable. The plaintiff was therefore not precluded from making these claims by section 2 of the Prevention of Frauds Ordinance.

(4) That sections 34 and 406 of the Civil Procedure Code were a bar to the present claim of the plaintiff. By filing the amended plaint in case No. 46753/M restricting his claim to Rs. 1406/94, the plaintiff abandoned the rest of his claim set out in the original plaint. Further, that action was dismissed without any reservation to sue upon the abandoned claim.

(5) That although the dismissal of case No. 46753/M was on a settlement reached "without prejudice to the rights of parties" in the present case, this could not help the plaintiff. For, at that time, the defendants having already taken up the plea (in the present case) that the plaintiff had abandoned his claim without permission of Court and was precluded from maintaining it, the defendants were not precluded from taking that defence.

*Per* **Tambiah, J** — "It is difficult to conceive how a monthly tenancy can be created when an indenture of lease which requires notarial execution is null and void and of no effect in law. But it may be possible in such cases to sue for use and occupation."

**Cases referred to:** *Hinniappuhamy* v. *Kumarasinghe*, (1957) 59 N.L.R. 566
*Wambeck* v. *Le Mesurier*, (1898) 3 N.L.R. 105.
*Buultjens* v. *Carolis Appu*, (1919) 21 N.L.R. 156
*Ukkuwa* v. *Fernando*, (1936), 38 N.L.R. 125
*Bandara* v. *Appuhamy*, (1923) 25 N.L.R. 176.
*Sabapathipillai* v. *Ramupillai*, (1956) 58 N.L.R. 367

*H. W. Jayawardene, Q.C.*, with *N. S. A. Goonetilleke*, for the defendants-appellants.

*G. T. Samerawickrema*, for the plaintiff-respondent.

**Tambiah J.**

The plaintiff brought this action against the four defendants for the recovery of a sum of Rs. 12,039/05. He based his cause of action on the written agreement dated 24th April 1957, marked "A" which had not been notarially executed. In case D. C. Colombo 46753/M, the plaintiff filed an action for the recovery of a sum of Rs. 16,445/99. In that action, after pleading agreement dated 10th April 1958, marked "A" ,the plaintiff set out his cause of action as follows:

Between the dates 25th April 1958 and 30th September 1958 the following sums of money were due and owing by the 1st defendant to the plaintiff.

| | *Rs. Cts.* |
|---|---|
| Rent of Theatre from 30/11/57 to 30/9/58 .. omitting June 1958 for which there is no charge. .. .. .. | 9589 00 |
| Film hire due as at 30/9/58 to Ceylon Theatres Limited .. | 2237 07 |
| Entertainment Tax due as at 30/9/58 .. | 1889 40 |
| Electricity Charges due as at 30/9/58 .. | 2220 00 |
| 2nd and 3rd quarter taxes for 1958 .. | 510 52 |
| | 16,445 99 |

Which the 1st defendant has failed and neglected to pay though thereto often demanded, and a cause of action has thereby accrued to the plaintiff to sue the defendants jointly and severally therefor.

The defendants (who are the same as in this case except the 4th defendant) in that case filed answer and the plaintiff thereafter amended his plaint on 3rd March 1960. In his amended plaint in case D.C. Colombo No. 46753/M he pleaded the written agreement dated 10th April 1958 marked "A" and averred that he leased to the 1st defendant for a period of six months from 25th April 1958 the cinema hall known as "New Imperial Talkies" Avissawella, together with the equipment and apparatus set out in the first and second schedules to the said agreement, upon the terms and conditions contained therein. He also averred that the 2nd & 3rd defendants and the 4th defendant in that case, signed and became parties to the said agreement as guarantors. He restricted his claim in a sum of Rs. 1406/94 alleging that these sums were due on account particulars filed marked "B". In the amended plaint he neither asked for any reservation to sue for the claim that he has abandoned, nor was any permission given by Court to withdraw the plaint with the liberty to institute a fresh action.

The plaintiff filed this action on 4th April 1960. He based his cause of action again on the written agreement dated 24th April 1957 marked "A" and sued on the obligations arising from the said document and claimed the sum of Rs.. 12,039/09 as sums of money due between 24th April 1957 and 24th April 1958. In this action he is suing on the claims that he has abandoned earlier.

At the trial issues 1 to 3 were framed by the plaintiff on the footing that the obligations envisaged in these issues were covered by agreement dated 24th April 1957.

The counsel for the defendant raised the following issues:

4. Is the agreement referred to in issue 1 of any force or avail in law inasmuch as the same was not notarially executed?
5. Did the plaintiff institute action No. 46753/M of this Court in respect of the amounts set out in the schedule to the answer?
6. Did the plaintiff restrict his claim in the said action to moneys alleged to be due only after 25.4.58?
7. Has the said action 46753/M been dismissed on 21.3.61?
8. Was the sum of Rs. 12,039/05 claimed in this action in respect of rent, electricity charges, entertainment tax and film hire, part of the plaintiff's claim in action No. 46753/M?
9. If issues 4 to 8 are answered in the defendant's favour, can plaintiff have and maintain this action in view of the provisions of section 406 of the Civil Procedure Code?
10. Has the plaintiff abandoned his claim to the moneys now sued for in this action without liberty to bring a fresh action?
11. If so, can the plaintiff maintain this action?
12. Has the plaintiff waived his claims, if any, on writing dated 24.4.57?
13. If so, can plaintiff have and maintain this action?

In the present action the first defendant is sued as the person liable under the written contract and the 2nd and 3rd defendants are made parties as guarantors to the said written agreement. At the trial issues 4 to 13 were tried as preliminary issues and learned District Judge held that the agreement sued upon created a monthly tenancy and there was no abandonment of claim by the plaintiff when he filed the second amended plaint in case No. 46753/M and directed that the trial should proceed on the other issues. The defendants have appealed from this order.

It was contended on behalf of the appellant that the plaintiff having abandoned his claim in the amended plaint filed in case No. 46753/M and that action being dismissed of consent on the 21st March 1961 without permission being given to sue on the abandoned portion of the action, the plaintiff cannot maintain this action. It was also urged that since this cause of action is based on agreement which has to be notarially executed in view of the fact that the lease is for a fixed period of twelve months, this action cannot be maintained. The agreement marked "A" is an indenture of lease by which the plaintiff leased the cinema hall and premises known as "New Imperial Talkies" situated at Avissawella and also certain apparatus, tools etc. necessary for a period of twelve months, to the first defendant.

Paragraph 2 of the indenture of lease states that premises are demised for a period of 12 months on the rents and conditions set out in the said indenture. The habendum clause states that the lessee shall possess the demised premises for the full term of one year commencing from 24th April 1957 and ending on the 24th April 1958, yielding and paying an income on lease of a clear monthly rent of Rs. 100/- to be paid on or before the last day of each and every month, the first of such payment being on or before 13th April 1957.

The counsel for the respondent contended that the indenture of lease only created a monthly tenancy. I regret I am unable to agree with this view. This lease is for a definite period of twelve months. The mode in which the rental is to be paid is no doubt on a monthly basis. The duration of the lease being fixed for a period of one year, indenture marked "A" is of no force or avail in law unless it has been notarially executed in view of the stringent provisions of section 2 of the Frauds and Perjuries Ordinance (Cap. 70).

Counsel for the respondent conceded at a later stage of his argument that since this action has been based on document "A" which is of no force or avail in law, the plaintiff's action for rent should be dismissed. But he contended that the obligation to pay the rates and taxes undertaken by the first defendant and the obligation to pay the electricity charges, entertainment tax and film hire, could be enforced since they are severable from rents due on the theatre. He also contended that where a lessee is placed in possession of lease premises on a non-notarial document, it is invalid in law and the lessee should be treated

as a monthly tenant. In support of his contention he cited 3 N.L.R. 105, 21 N.L.R. 156, 38 N.L.R. 125, 25 N.L.R. 176 and 58 N.L.R. 368.

As stated earlier the cause of action is based on the written agreement marked "A". Therefore the cases cited by counsel for respondent have no application to the facts of the present case. The view taken in these cases however have been doubted (vide *Hinniappuhamy* v. *Kumarasingha* (1957) 59 N.L.R. 566). It is difficult to conceive how a monthly tenancy can be created when an indenture of lease which requires notarial execution is null and void and of no effect in law. But it may be possible in such cases to sue for use and occupation. It is unnecessary in the present case to decide the correctness of the principle laid down in the decision cited by counsel for the respondent, since this action is based on the written agreement marked "A" out of which the payment is sought to be enforced and the action is not based on monthly tenancy. As such the cases cited have no application.

The counsel for the respondent contended that some of the causes of action are severable and therefore all other claims except the claims for rent could be maintained. The agreement to pay entertainment tax and film hire are not obligations arising out of the lease and are severable. I am of the opinion that the plaintiff is not precluded by section 2 of the Frauds and Perjuries Ordinance from claiming the same.

The contention of the counsel for the appellant that the plaintiff has abandoned the causes of action on which he is now suing is also entitled to succeed. Section 34(2) of the Civil Procedure Code enacts that if a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or so relinquished. Section 406 of the Civil Procedure Code enacts:

> "(1) If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff —
>
> (*a*) that the action must fail by reason of some formal defect, or
>
> (*b*) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned.
>
> the court may grant such permission on such terms as to costs or otherwise as it thinks fit.
>
> (2) If the plaintiffs withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part."

Counsel for the respondent contended that in the original plaint filed in case No. 46753/M, the cause of action is based on the agreement marked "A", dated 10th April 1958 and rents for the theatre for an earlier period had been erroneously claimed. He therefore ventured to submit that the rents for the earlier period did not arise out of the cause of action set out in paragraph 2 of the plaint dated 16th April 1959. Therefore he urged that the present action is not based on the same cause of action as the cause of action set out in the plaint dated 16th April 1959 filed in case No. 46753/M. The cause of action set out is in paragraph 5 of that plaint and includes the film hire due up to 30/9/58 and entertainment tax up to 30/9/58.

Counsel for the respondent cited certain decisions of the Indian Courts where it was held that where the plaintiff sues on an alleged cause of action, which does not exist and thereafter sues on a proper cause of action, the first action is not a bar to the maintenance of the second action. The ruling in these Indian cases do not apply in view of the fact that the causes of action sued upon in the original plaint filed in case No. 46753/M dated 16th April 1959 and the present causes of action are almost identical. The words of section 34 as well as section 406 of the Civil Procedure Code make it clear that if a person abandons his claim without permission to sue upon, he cannot thereafter bring another action to recover the same. By filing the amended plaint in case No. 46753/M restricting his claim to Rs. 1406/94 the plaintiff abandoned the rest of the claim which is set out in the original plaint marked 1D1. That action was dismissed without any reservation to sue upon the abandoned claim. In the settlement raised in the present case, the same claim is sued upon. Therefore sections 34 and 406 of the Civil Procedure Code are a bar to the present claim.

The counsel for the respondent however contended that in view of the settlement entered into between parties on 21/3/61 in case No. 46753/M, the plaintiff could maintain this action although

he has abandoned the claim earlier. The settlement reached is as follows:

> "Of consent the plaintiff's action is dismissed without costs. This settlement is without prejudice to the rights of parties in case No. 49708/M."

At the time of the settlement, the defendant had already taken up the plea that the plaintiff has abandoned a part of his claim without permission of court and therefore he is precluded from maintaining this claim. Therefore the defendant is not precluded from taking up that defence in the present case in view of the fact that the settlement was without prejudice to the rights of parties.

The plaintiff cannot maintain this action since he has abandoned his claim by amending the plaint without getting the necessary authority of court to bring a fresh action for the claim. For these reasons I set aside the order of the learned District Judge and dismiss the plaintiff's action with costs in both courts.

**Alles, J.**

I agree.

*Appeal allowed.*

---

*Present:* **Sirimane, J. and Alles, J.**

---

C. V. S. PERERA *et al. vs.* THILLAIRAJAH *et al.*

---

*S. C.* 20-21 *of* 1966 (*D. C. Special*) — *D. C. Colombo* 928/*ZL.*

---

*Argued on:* 22nd & 24th September, 1966.
*Decided on:* 7th October, 1966.

---

*Civil Procedure Code, sections* 325, 326, 327, 327(*A*), 328, 329, 330 — *Resistance to execution of decree for recovery of possession — Order under section* 327(*A*) *against appellant — Appellant resisting again when Fiscal tried to execute decree — Appellant committed to jail under section* 326. *— Is the appellant a judgment-debtor? Can he be dealt with under section* 326?

**Held:** (1) That a person against whom an order has been made under section 327(A) of the Civil Procedure Code is a judgment-debtor within the meaning of section 5 of the Civil Procedure Code, and could be dealt with under section 326 of that Code.

(2) That (following the dictum of Sampayo, J. in *De Silva* vs. *De Mel*, 18 N.L.R. 164) the word "order" in sections 323 to 330 of the Civil Procedure Code is synonymous with the word "decree."

*Per* **Sirimane, J.** — "In regard to orders under section 327 (A) (which was enacted after these decisions) I think the correct position is: that where such an order is made, a person whose claim has been rejected, is (for the purposes of execution) placed in the same position as the judgment-debtor in the *original decree*, the execution of which he prevented by his frivolous or vexatious claim. The Court, therefore, orders the *original decree* to be executed against the claimant as well."

*Per* **Alles, J.** — "The reason for not equating an 'order' under section 327A to a 'decree' is obvious in view of the provision in the latter part of that section which enables a person against whom an order is made under the section to institute proceedings to establish his right to possession in the property within a month of such order."

**Cases referred to:** *De Silva* vs. *De Silva*, (1898) 3 N.L.R. 161
*Silva* vs. *De Mel*, (1915) 18 N.L.R. 164
*Suppramaniam Chetty* vs. *Jayawardene*, (1922) 24 N.L.R. 50

*H. Rodrigo*, for the 2nd and 3rd respondents-appellants.

*S. Sharvananda*, for the plaintiffs-respondents.

**Sirimane, J.**

The appellants had resisted the execution of a decree for the recovery of possession of immovable property, and an order had been made against them under section 327(A) of the Civil Procedure Code. When the Fiscal tried to execute *the decree*, by placing the judgment-creditor in possession, as directed by that order, the appellants resisted him again.

When they were brought up before Court a second time on proceedings initiated by the judgment-creditor under section 325, they took up the position in the lower Court that they could not be dealt with under section 326 because they were not "judgment-debtors". This position is clearly untenable as section 5 of the Civil Procedure Code enacts that " 'judgment-debtor' means any person against whom a decree or order capable of execution has been made."

The learned District Judge rightly rejected this contention and dealt with the appellants under section 326, by committing them to jail for 30 days.

In appeal it was argued that there was a distinction between "Order" and "Decree", and that sections 325 and 326 applied only to "Decrees", and not "Orders", and much reliance was placed on the case of *De Silva* vs. *De Silva*, 3 N.L.R. 161. In that case the order was one for delivery of possession to a purchaser at a Fiscal's sale, and not for execution of a decree. In such cases the claim of the person resisting is not examined before an order for the delivery of possession is made. Here, the rights claimed by the appellants were investigated and found to be frivolous and vexatious. There is a clear distinction between an order for delivery of possession to a purchaser under section 287 and an order to the Fiscal under section 327(A) to execute a decree, after a claim has been investigated and found to be frivolous.

In drawing this distinction between an "Order" and a "Decree", Counsel for the appellants pointed out that by section 329 orders under section 327 and 328 were equated to a decree in a regular action, but that there was no similar provision in regard to an order under section 327 (A). But, I do not think that this matter affects the question involved here at all. One can see several reasons why it was necessary to regard final orders under sections 327 and 328 as decrees, e.g., a person dispossessed of property who succeeded in his claim under section 328 would have to execute that order as a decree to get back possession. Or again in order to give finality to a decision between a judgment-creditor and a *bona fide* claimant in possession, it would be necessary to look upon the order under section 327 as a decree in a regular action.

These considerations do not arise in an order to the Fiscal under section 327 (A) *to execute the decree*. This is not a final order, for the claimant whose claim has been rejected as frivolous may (under the provisions of the same action) canvass that order by instituting an action within a month.

In regard to the distinction between 'Order' and 'Decree', it is noteworthy that in the case of *De Silva* vs. *De Mel*, 18 N.L.R. 164, where *De Silva* vs. *De Silva* (*supra*) was considered, Sampayo, J. pointed out that section 323 provides for the application for execution of *a decree or order* for the recovery of immovable property, and thereafter the word "Order" disappeared altogether. With reference to sections 323 to 330, the learned Judge said, "I cannot resist the conclusion that in these sections "Order" is synonymous with "Decree' for otherwise there would be no provision in the Code at all for enforcing an order for delivery of possession as distinguished from a decree". I am in respectful agreement with that observation.

In regard to orders under section 327 (A) (which was enacted after these decisions) I think the correct position is: that where such an order is made, a person whose claim has been rejected, is (for the purposes of execution) placed in the same position as the judgment-debtor in the *original decree*, the execution of which he prevented by his frivolous or vexatious claim. The Court, therefore, orders the *original decree* to be executed against the claimant as well.

An examination of sections 325 to 330 clearly show that they were intended to empower the Court to grant a judgment-creditor the fruits of the decree he has obtained, in the same action, without resorting to further litigation.

I find it impossible to subscribe to the view advanced by learned Counsel for the appellants that the Court having made an order under section 327(A) is powerless to enforce that order if the persons against whom it was made persist in defying it.

The appeal is dismissed with costs.

**Alles, J.**

I have had the advantage of reading the order proposed by my brother Sirimane, J. and I am in entire agreement with his observations.

It has been submitted by Counsel for the respondents-appellants that in as much as the

Court has only power to make an 'order' under Section 327A, the Court has no power to proceed under Sections 325 and 326 of the Civil Procedure Code, which only deal with resistance to the execution of 'decrees'. If the contention of Counsel is entitled to succeed, it would mean that the appropriate procedure to be adopted in such a case is the institution of criminal proceedings in a Magistrate's Court. Such a course would result in the provisions of the Code with regard to resistance to the execution of proprietary decrees being rendered ineffective. Sections 325 to 330 of the Code were specially designed to enable a judgment-creditor to reap the fruits of a decree successfully obtained with the least possible delay. In *Silva* v. *De Mel* 18 N.L.R. 164 at 167 De Sampayo, J. said 'that the whole scheme of the Procedure Code is to provide speedy and inexpensive remedies and it appears only reasonable to allow disputes arising from the execution of an order for possession in favour of a purchaser at a Fiscal's sale to be inquired into and settled by the means provided in Section 328 instead of driving parties to a separate action'. The learned Judge made these observations, with which I am in respectful agreement, in connection with an order for delivery of possession under Section 287 of the Code and before Section 327A found a place in the Statute Book, but it seems to me that, having regard to the scheme of the Code, this observation would apply with equal force to an 'order' made under Section 327A. This section was apparently introduced into the Code to extend the scope of the procedure available to a successful judgment-creditor to deal with the resistance to the execution of decrees, not only by the judgment-debtor and persons claiming under him, but also third persons who make frivolous and vexatious claims to defeat his rights. Again De Sampayo, J. observed in the later case of *Suppramaniam Chetty* v. *Jayawardene*, 24 N.L.R. 50 at 53, where the District Judge erroneously refused to exercise the powers of the Court under Section 325 in favour of a successful execution-purchaser or even the inherent powers of the Court in respect of a party who obstructed the execution of the Court's own orders:—

> 'This is a very narrow view of the Court's duty and power. I think the form of the application is quite sufficient to enable the District Judge whatever power he has in regard to the matter.'

The reason for not equating an 'order' under Section 327A to a 'decree' is obvious in view of the provision in the latter part of that section which enables a person against whom an order is made under the section to institute proceedings to establish his right to possession in the property within a month of such order. Such a person becomes a judgment-debtor within the meaning of that word in the Code and consequently Sections 325 and 326 would be applicable to him.

The respondents' appeal is dismissed with costs.

*Appeal dismissed.*

---

*IN THE COURT OF CRIMINAL APPEAL*

*Present:* **Sansoni, C.J., Alles, J., and Siva Supramaniam, J.**

THE QUEEN *vs.* KATHIRAVELU KALIMUTTU

*Appeal* 62 *of* 1966 *with Application* 106 *of* 1966 — *S.C.* 3/*M.C. Jaffna* 30692

*Argued on:* 29th September, 1966.
*Decided on:* 14th October, 1966.

*Court of Criminal Appeal — Confession—Burden of proving it to be voluntary—Standard of proof — Non-direction amounting to misdirection — No substantial miscarriage of justice — Evidence Ordinance (Cap. 14) section 24 — Court of Criminal Appeal Ordinance (Cap. 7), section 5(1) proviso.*

The only point that arose for consideration in this appeal was whether the trial Judge had properly and adequately directed the Jury as to how they should consider a confession made by the appellant to the Magistrate when they came to consider their verdict.

**Held:** That although the trial Judge had more than once directed that they were not to act on the confession unless they accepted it as one that was made voluntarily by the accused to the Magistrate, and not under the influence of any inducement, threat or promise, held out to him to make it, the Jury ought also to have been directed that *the burden lay on the prosecution to prove beyond reasonable doubt that a confession put before them in evidence had been voluntarily made*, that is to say, one which was not the result of any inducement, threat or promise made by a person in authority.

**Held further:** That in this case, the verdict of the Jury would not have been different, if they had been so directed, and the appeal should, therefore, be dismissed.

**Followed:** *R.* vs. *Cave* (1963) Cr.L. Review 371.

**Referred to:** *The Queen* vs. *Martin Singho* (1964) 66 N.L.R. 391.
*R.* vs. *Bass* (1953) 2 W.L.R. 825; (1953) 1 A.E.R, 1064.
*Sparks* vs. *The Queen* (1964) 2 W.L.R. 566; (1964) 1 A.E.R. 727.

*E. R. S. R. Coomaraswamy*, with *Anil Obeysekera*, *G. C. Wanigasekera*, *N. Wijenathan*, *C. Chakradaran*, and *S. S. Sahabandu* (assigned) for the accused-appellant.

*V. T. Thamotheram*, Deputy Solicitor-General, with *T. A. de S. Wijesundera*, Senior Crown Counsel, for the Attorney-General.

**Sansoni, C.J.**

The appellant was convicted by the unanimous verdict of the Jury of the murder of Thamayanti Rajamathandar, and the attempted murder of Rajaluxmy Devarajan. It was proved conclusively, apart from the admissions of the appellant himself when he gave evidence at the trial, that these two women were attacked by him with a club which he took with him to the house in which the women were living. Both women had been severely attacked and a number of injuries were inflicted on them.

The defence put forward by the appellant was that he had suffered grave and sudden provocation which reduced the offence to culpable homicide and attempted culpable homicide not amounting to murder, respectively.

The only point we need consider on this appeal is whether the learned trial Judge properly directed the jury as to how they should consider a confession made by the appellant to the Magistrate when they came to consider their verdict. It was submitted that the learned Judge's directions were inadequate in this respect.

At an early stage of the charge he said this when referring to the confession:—

> "Then the Crown also relies in this case on a statement which the Crown says is an alleged confession made by the accused to the Magistrate. Under our law, Gentlemen, before you can act on an alleged confession of this nature, firstly you will have to satisfy yourselves that the accused did make that alleged confession which the Magistrate says was made to him and it is found in P11. Then, Gentlemen, you cannot act on that confession unless you take the view that no inducement threat or promise was held by any person in authority to the accused to make that statement."

Shortly afterwards he said this:—

> "First consider whether there was any inducement, threat or promise from a person in authority or by any other person in the presence of a person in authority in order to have this accused to make a statement of this nature and which gave him grounds for supposing that by making that statement he would gain any advantage or avoid any evil of some temporal nature in reference to the proceedings against him. For instance, if you take the view that the Inspector threatened him to make a statement and through fear he made this statement and if that was the state of affairs that existed at the time he made the statement to the Magistrate or if you take the view that he was induced to make a statement to the Magistrate then you cannot act on the alleged confession as such which is set out in P11, a copy of which will be given to you."

Towards the end of the charge there are the following passages:—

> "The accused made a long statement before the Magistrate and in this statement what the accused alleges now in this Court that when he went there Mrs. Rajamathandar abused him, is not there. Gentlemen, would it not have been foremost in his mind the fact that Mrs. Rajamathandar abused him? The fact that thereafter he was taken inside the kitchen and assaulted by Mrs. Devarajan, would it not have been a grievance foremost in his mind? As I told you, this evidence was led to show that no inducement, threat or promise was made to him. On the other hand there is the accused's evidence that he was assaulted and promised that if he made the statement he would be pardoned. It is for you to consider whether inducement, threat or promise was made to the accused to make that statement."

and a little further on

> "Then, Gentlemen, the accused told you that he went there and asked Mrs. Rajamathandar, who was seated there. He got to the verandah and asked Mrs. Rajamathandar for his salary whereupon Mrs. Rajamathandar scolded him and called him a '*sakkiliya*' and then said, "why did you come here, get out". Then he says he became very angry and lost his self-control and assaulted her. If you accept the confession as something which was made voluntarily to the Magistrate and if you take the view that no inducement, threat or promise was held out to the accused and if you act on that, you will note that he does not say in it that Mrs. Rajamathandar abused him."

It is urged that the learned Judge should have directed the jury that they should not act on the confession unless it was proved beyond reasonable doubt by the prosecution to have been a voluntary confession, that is to say, one which was not the result of any inducement, threat or promise made by a person in authority.

The most recent judgment of this court which dealt with this matter is the *Queen* v. *Martin Singho* (1964) 66 N.L.R. 391, where Basnayake, C.J. said — "that fact (that it was voluntarily made) has to be determined at the trial when it is sought to prove the confession in evidence. In such a case the burden is on the prosecution to prove beyond reasonable doubt (*Stuart* v. *The Queen* (101) C.L.R. 1) facts necessary to make the confession not irrelevant under Section 24 of the Evidence Ordinance". It would appear that the view of the court there was that a confession should not be acted upon unless the prosecution has proved beyond reasonable doubt that it was voluntarily made.

The Court of Criminal Appeal in England seems to have taken the view in *R.* v. *Cave* (1963) Criminal Law Review, 371, that a jury should be directed that the burden was on the prosecution of proving beyond reasonable doubt that the confession was voluntary. This view seems to go further than that previously held by that Court. For example, it decided in *R.* v. *Bass* (1953) 2 W.L.R. 825, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, and the judge should direct the jury that if they are not satisfied that it was made voluntarily, they should give no weight at all and disregard it. There is a similar reference to such a direction in *Sparks* v. *The Queen* (1964) 2 W.L.R. 566, decided by the Privy Council. The trial Judge there had given the jury a direction that unless they were satisfied that a statement or confession was voluntary, they must reject and disregard it and give it on weight whatsoever. There was no criticism of this direction by the Privy Council.

It seems to us, however, that the better course for a Judge to follow in such a case would be to direct the jury that the burden lay on the prosecution to prove beyond reasonable doubt that a confession put before them in evidence had been voluntarily made. In the case before us this has not been done. The learned Judge has, however, directed the jury more than once that they were not to act on the confession unless they accepted it as one made voluntarily by the accused to the Magistrate, and not under the influence of any inducement, threat or promise held out to him to make it. They were told at least twice that they were not to act on it unless they took the view that it was voluntarily made.

Whatever view of the law may be the correct one, we think that in the interests of uniformity the latest view taken by the Court of Criminal Appeal in England should be followed, and the jury should be directed that the prosecution must satisfy the court beyond reasonable doubt that the confession was voluntarily made.

We do not think, however, that in this case the verdict of the Jury would have been any different, if they had been directed in those terms. No reasonable jury would have found the accused guilty of any lesser offence in view of the strong direct evidence led by the prosecution. The totality of the evidence satisfies us that the offence with which he was charged had been established beyond reasonable doubt.

We accordingly dismiss the appeal.

*Appeal dismissed.*

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

WIJEWEERA *vs.* THUSIMAN DE SILVA

*S.C.* 46 (*Inty*) 1965 — *D.C. Matara* — *M*/2420.

*Argued and decided on:* September 11, 1966

*Civil Procedure Code, section* 84(1) — *Dismissal of action for want of plaintiff's appearance — Application for vacating decree of dismissal supported by affidavit — Matters stated in affidavit challenged by defendant — Effect.*

**Held:** That when a party attempts to show cause by affidavit for the purposes of section 84(1) of the Code, the Court could not act on the affidavit if substantial matters stated therein are challenged by the defendant. The matters so challenged have to be established otherwise than by the affidavit.

*P. A. D. Samarasekera*, for the defendant-appellant.

*R. L. Jayasuriya*, for the plaintiff-respondent.

**H. N. G. Fernando, S.P.J.**

In this case for want of appearance of the plaintiff on 26th March, 1965 a decree was entered dismissing the plaintiff's action with costs. Although it was not in terms a decree nisi, the Court purports to have entered it as such.

On 2nd March, 1965 the plaintiff's proctor filed a petition, together with an affidavit of the plaintiff and a document purporting to be a medical certificate, and moved that the earlier decree of dismissal be vacated.

The motion was fixed for inquiry on 12th April, 1965. But in the meantime the defendant had got leave from Court to file his objections. These objections were filed on 9th April and the defendant denied the truth of certain statements in the plaintiff's petition. He specifically put the plaintiff to the proof of the statements that the plaintiff had been ill on 26th March and had despatched a telegram to his proctor on the 25th of March. At the inquiry on 12th April, it appears that the plaintiff was again not present in Court, and although his proctor had filed a list of witnesses including the doctor who had purported to sign the medical certificates there were no persons present in Court whom the plaintiff's proctor could have called. The proctor therefore invited the Court to make an order on the papers which had been filed.

It seems to us that when a party attempts to show cause by affidavit for the purposes of Section 84(1) of the Code the Court should not act on the affidavit if substantial matters stated therein are challenged by the defendant. The contents of the affidavit if challenged are not evidence properly before the Court, and where there is such a challenge the matters upon which a plaintiff relies to show cause have to be established otherwise than by the affidavit. Counsel who appeared for the defendant stated that he should have had an opportunity to cross-examine the plaintiff as to the matters stated in his affidavit. At least this opportunity should have been afforded to the defendant, even if the judge did not think it is necessary to have direct evidence from the plaintiff repeating the averments in his affidavit.

The order vacating the decree nisi is set aside, and when the case returns to the District Court the inquiry which commenced on 12th April, 1965 will be resumed. It will be open to the plaintiff to call evidence in support of his petition and to the defendant to cross-examine any witness so called or to call his own witnesses. The learned judge will thereafter decide whether or not the decree entered on 5th April, 1965 should be made absolute.

The defendant is entitled to the costs of this appeal and of the proceedings on 12th April, 1965.

**Sirimane, J.**

I agree.

*Set aside.*

*Present:* **Tambiah, J. and Sirimane, J.**

HILDA PERERA *Nee* SAMARANAYAKE *vs.* DR. G. L. LORENZ PERERA

*S.C. No.* 80/63 (*Inty.*) — *D.C. Negombo No.* 441/MB

*Argued and decided on:* 6th April, 1965.

*Debt Conciliation Ordinance, section* 56 — *Application by mortgagor to Board received on* 6.11.1962 — *Application entertained by Board in April,* 1963 — *Action filed by mortgagee on* 22.11.1962 — *Jurisdiction of court to entertain application.*

The defendant, who is the mortgagor, made an application to the Debt Conciliation Board on 5.11.62, claiming relief under the Ordinance. This was received by the Board on 6.11.62 but was entertained by it only in April 1963. The plaintiff filed this action on the mortagage bond on 22.11.1962.

It was contended on behalf of the defendant that the court had no jurisdiction to entertain this action in view of section 56 (a)(i) of the Debt Conciliation Ordinance, as it operates from the time an application is received by the Board and not after the Board has entertained the application.

**Held:** That the moment the application is received by the Board, the matters stated therein are pending before the court and consequently the court had no jurisdiction to entertain the action.

*E. B. Wikremanayake*, Q.C., with *S. W. Jayasuriya*, for the defendant-appellant.

*C. Ranganathan*, for the plaintiff-respondent.

**Tambiah, J.**

This is a mortgage action. The defendant made an application on 5.11.62 to the Debt Conciliation Board. In his application he set out certain matters and asked for certain reliefs. The application was received by the Board on 6.11.62. Thereafter, the plaintiff filed this action to enforce the mortgage bond on 22.11.62. In April, 1963, the Debt Conciliation Board entertained this application.

The defendant filed answer and moved for dismissal of the action on the ground that the Court had no jurisdiction to entertain this action, in view of the provisions of Section 56 of the Debt Conciliation Ordinance, Chapter 81. The relevant portion of Section 56 of the Debt Conciliation Ordinance reads as follows:—

> "No civil court shall entertain any action in respect of any matter pending before the Board."

The learned District Judge has taken the view that an action is only pending when the defendant has received notice of the action. He drew an analogy between the doctrine of lis pendens and the receipt of notice of this application by the creditor and he held, therefore, that the action was maintainable. From this order, the defendant has appealed.

The short point for consideration is whether when an application had been received by the Debt Conciliation Board, section 56(a)(i) operates, or whether it operates only after the Board has entertained the application.

Mr. Wikremanayake, on behalf of the appellant, contended that proceedings are initiated by an application, and, when the application is received by an officer of the Board, proceedings commence, and are pending before the Board. He submitted that the fact that the Board had to act under Section 19 of the Debt Conciliation Ordinance to consider whether it would entertain the application, does not, in any way, alter the situation.

Mr. Ranganathan on behalf of the respondent, contended that the matter is only pending before the Board after the Board had entertained the application under Section 19 of the Debt Conciliation Ordinance.

The Debt Conciliation Ordinance was enacted to provide for the establishment of a Debt Conciliation Board and for other matters connected with the purposes for which it was established. It was clearly a piece of legislation intended to give relief to debtors. The language of Section 56 of the Ordinance is plain. It states that "no civil court shall entertain any action in respect of any matter pending before the Board." By

the word "matter", is meant the particulars in the application. In my view, the moment the application is received by the Board, the matters stated in the application are pending before the Board. Thereafter, it is for the Board to decide as to whether they wish to entertain the application or not. We are fortified in taking this view by the ruling in *The Agricultural and Industrial Credit Corporation of Ceylon* vs. *de Silva* reported in 41 Ceylon Law Weekly at page 96. In this connection, it is noteworthy that under Section 17 of the repealed Partition Ordinance, any alienation of undivided interests pending a partition action is null and void. It was held in *Fernando* vs. *Amarisa* in 4 Ceylon Law Recorder, page 135 that "under the provisions of Section 17 of the Partition Ordinance, the date after which an alienation is void is the date of the filing of the plaint."

If the contention of Mr. Ranganathan is correct, the relevant portion of Section 56 of the Debt Conciliation Ordinance would have read: "No civil court shall entertain any action in respect of any matter *entertained* by the Board."

The function of a Court is not to legislate but to interpret the plain words found in a Statute. If the interpretation given to Section 56 of the Debt Conciliation Ordinance by Mr. Ranganathan is adopted, great hardship would be caused to debtors who have already filed applications and which are awaiting attention by the Board. Due to various reasons, applications by debtors do not come before the Board for consideration for a long period of time.

There is, therefore, no reason for us to place the construction urged by Mr. Ranganathan in considering Section 56(1)(a) of the Debt Conciliation Ordinance.

For these reasons, we set aside the order of the learned District Judge and dismiss the plaintiff's action with costs in both Courts.

**Sirimane, J.**

I agree.

*Appeal allowed.*

*Present:* **H. N. G. Fernando, S.P.J., Sri Skanda Rajah, J. and G. P. A. Silva, J.**

H. S. KARUNATILLEKE

*vs.*

J. D. ABEYWIRA & THE GALATUMBA CO-OPERATIVE SOCIETY *

*Application No.* 298 of 1963

*In the matter of an application for the issue of a mandate in the nature of a Writ of Certiorari under section 42 of the Courts Ordinance.*

*Argued on:* 29th June 1966.
*Decided on:* 13th August 1966.

*Co-operative Societies Ordinance (Cap. 124) section 53 — Amending Act No. 21 of 1949 — Dispute between manager and Society referred to arbitration — Award against manager — Does it involve the exercise judicial power.*

Under section 53 of the Co-operative Societies Ordinance (Cap. 124) the Registrar nominated an arbitrator to determine a dispute between a society and its Manager. The claim against the manager was prepared on the basis that he was liable to account for goods or the value of goods shown by the books of the Society to have been under his control as manager.

The arbitrator made his award against the manager who filed an application for a writ of Certiorari praying that it be set aside.

The main contention on behalf of the petitioner was that the making and the enforcement of the award involved the exercise judicial power which conflicted with the principle of the separation of powers under the Constitution.

**Held:** (1) That the liability of the manager arose at least upon an implied contract, in the nature of an agency.

* For Sinhala translation see Sinhala section, Vol. 13, part 3, p. 9

(2) That this is an ordinary civil dispute within the traditional jurisdiction of the Courts. Therefore as the amending Act No. 21 of 1949 purported to oust the jurisdiction of the Courts over disputes which at the time when the Constitution came into force were exclusively within that jurisdiction, the award should be quashed.

*Nimal Senanayake*, with *Bala Nadarajah*, for the petitioner.

*H. Deheragoda*, Senior Crown Counsel, with *H. L. de Silva*, Crown Counsel, as *amici curiae*.

**H. N. G. Fernando, S.P.J.**

Section 53 of the Co-operative Societies Ordinance (Cap. 124) provides for the decision of certain disputes by the Registrar of Co-operative Societies or by arbitrators nominated by him. Included within the category of such disputes are those arising:—

(*a*) among members or past members of a co-operative society;

(*b*) between a member on the one side, and a society or its committee on the other;

(*c*) between a society or its committee, and any officer or employee of the society.

Section 53 represents in an amended form the former Section 45 of the Ordinance (cap. 107 of the 1938 edition). For the purposes of the present case, it is important to note that the former Section 45 declared that "a claim by a registered society for any debt, demand or damages due to it from a member or past member shall be deemed to be a dispute touching the business of society." The Section was amended by Act No. 21 of 1949, and the declaration as it now stands in Section 53 of Chapter 124 includes within the category of "disputes" any such claim by a society against any officer or employee of the society.

In the present case, the dispute is one between a person who had been the manager of the respondent society, and that society. A manager is included within the meaning of "officer" by a definition in the Ordinance. But it is apparent that prior to the amendment of 1949 to which I have just referred, a dispute between a society and one of its officers arising on a "claim" was not declared to be one capable of decision by the Registrar or an arbitrator. The principal ground on which the petitioner now asks for the quashing of the award made against him by an arbitrator is that the making and enforcement of the award involves the exercise of judicial power, and conflicts with the principle of the Separation of Powers which prevails under our Constitution.

I find it helpful to consider firstly the object which were plainly intended to be achieved by the former Section 45 of the Ordinance. As between a society and its members, disputes can well arise as to the construction and effect of the rules governing relations between members *inter se* and the relations between a society and its members, as to whether a society or a member had acted in breach of the rules, as to the qualification of members to hold office in the society, as to the validity of elections or appointments to office in a society, as to the scope of the business which a society may lawfully carry on, and as to similar matters peculiar to associations of persons. It was clearly the intention of the Legislature that such disputes should be finally decided by the Registrar, in the exercise of his supervisory functions, or by arbitrators appointed by him. Disputed claims by a society against its members, in their capacity as such, were also in contemplation, although it is arguable whether Section 45 applied also to other claims against members, not arising by reason of ther membership of a society, but arising instead upon transactions involving ordinary contractual rights and obligations, or else arising in delict. Except in regard of the nature lastly mentioned, I have no doubt that the determination by the Registrar or an arbitrator of a dispute affecting any of the matters just mentioned does not involve the exercise of the judicial power of the State.

An "officer" of a co-operative society is not necessarily in a contractual relationship with the society. The duties and responsiblities of the Chairman or the President or the Secretary of a society may be such as not to involve contractual or obligations on either side. But if in addition an officer has custody or control of goods or funds of the society, or has power to negotiate contracts on behalf of the society, then contractual relationships, such as that between principal and agent, can exist between a society and its manager. In this way, disputes can arise as to the due performance of contractual rights and obligations. In the instant case, there is no evidence as to the terms of the contract if any between the society

and the petitioner; but claim against the petitioner has been preferred on the basis that he is liable to account for goods or the value of goods shown by the books of the society to have been under his control as manager. The liability of the manager arises at the least upon an implied contract, in the nature of agency. The dispute concerning the existence of this liability ond the duty to perform it is an ordinary civil dispute within the traditional jurisdiction of the Courts. It is not such a dispute as might, prior to the passing of the Act No. 21 of 1949, have been determined under the special procedure provided by the Co-operative Societies Ordinance. The amending Act purported to oust the jurisdiction of the Courts over disputes which at the time when the Constitution came into force were exclusively within that jurisdiction. In the language of recent judgments, there has thus been a clear encroachment of the powers exclusively vested in the Courts.

I have already expressed some doubt as to whether even the former Section 45 of the Ordinance was intended to apply to disputes arising between a society and its members in regard to contractual rights and obligations unrelated to the fact of membership. In that context, it may be some significance that the Ordinance itself did not contain provision for the enforcement of awards made under it, but only provided (Section 54(t) ) that Rules may be made for this purpose. The fact that this matter was left to be dealt with by Rules may be some indication that disputes ordinarily determined by the Courts were not intended to be the subject of awards.

The award made against the petitioner is quashed.

**Sri Skanda Rajah, J.**

I agree.

**G. P. A. Silva, J.**

I agree.

*Application allowed.*

*Present :* **Herat, J.**

LIPTONS LTD. *vs.* SINNA VELOO

*S.C.* 218/61—*C.R. Badulla* 16085

*Argued on :* 2nd February, 1962.
*Decided on :* 11th September, 1963.

*Civil Procedure Code Section* 408—*Compromise of action—Whether party must be present in person at time notified to Court—Whether presence of proctor sufficient—Can party resign from such settlement before decree entered*?

**Held :** (1) That when section 408 of the Civil Procedure Code speaks of a settlement being notified to Court in the presence of the parties, this does not mean the presence of the parties personally. The presence of the proctors representing the parties would be sufficient.

(2) That once the terms of a settlement agreed upon between the parties is presented to Court and recorded, a party cannot resile from the settlement even though decree has not been entered.

Followed : *Meis Singho vs. Josie Perera* (1929) 31 N.L.R. 168.

*G. F. Sethukavalar* for the Defendant-Appellant.

*S. J. Kathiragamar* with *K. N. Choksy* for the Plaintiff-Respondent.

HERAT, J.

The Plaintiff-Respondent sued the defendant-appellant for ejectment and damages from a boutique on Dambatenne Estate at Haputale on the 19th May, 1961. Terms of settlement were filed in Court and the case was directed to be called on the 3rd July, 1961.

The terms of settlement provided that the case was to be called on the 3rd July in order to find out whether one of the parties had carried out one

of the terms of the settlement, and for the decree to be entered on that date. But in fact, decree was entered on the 19th May, 1961, namely the date the terms of settlement were rendered. On the 28th of June, 1961 the defendant-appellant having revoked the proxy given to his Proctor Mr. K.V. Nadarajah, filed a fresh proxy in favour of Mr. Sebastian together with a Petition and moved to set aside the decree entered on the ground *inter alia* that the settlement had been entered into without his consent and notified to Court in his absence. As regards the point relating to the absence of parties, both parties were represented by their Proctors who were present, and, in my opinion, Section 408 of the Civil Procedure Code when it speaks of the settlement being filed in the presence of parties does not mean the presence of parties personally for the Code provides that the parties are represented by their Proctors unless the Code expressly required personal appearance. That the defendant-appellant was fully aware of the terms of settlement and consented to it appears from the evidence in the case and from the finding of the Commissioner on the point. Once the terms of settlement are presented to Court as an agreed upon settlement, the Court can enter a decree thereon. Once such a settlement so agreed upon is presented to Court and notified thereto and recorded by Court, a party cannot resile from the settlement even though the decree has not yet been entered. See the judgment of Mr. Justice Drieberg, with whom Chief Justice Fisher agreed in *Meis Singho vs. Josie Perera*, 31 N.L.R. 168. The appeal is dismissed with costs.

*Appeal dismissed.*

*Present:* **Sirimane, J.**

INSPECTOR OF POLICE, ARANAYAKA *vs.* DINGIRI BANDA

*S.S.* 949/66 — *M.C. Kegalla Case No.* 54091

*Argued and decided on:* 30th September, 1966

*Penal Code section* 311 — *Charge of grievous hurt under grave and sudden provocation — Injured man in hospital for* 20 *days — Is this sufficient to sustain conviction.*

**Held:** That the mere fact that the injured man had been in hospital for twenty days is not sufficient to prove that he was suffering from grievous hurt.

**Cases referred to:** *Silva* vs. *Gunasekera* (1942) 43 N.L.R. 404

*Neville Wijeratne*, for the accused-appellant.

*F. C. Perera*, Crown Counsel, for the Attorney-General.

**Sirimane, J.**

The accused-appellant has been convicted of causing grievous hurt under grave and sudden provocation sentenced to four months' rigorous imprisonment.

It was urged in appeal that it has not been established that the injury was grievous. The injury was an incised wound on the left forearm cutting the muscles. The prosecution apparently relied on the 8th kind of hurt described in section 311 of the Penal Code as greivous, namely, that this injury was one which caused the sufferer to be during the space of twenty days, in severe bodily pain or unable to follow his ordinary pursuits.

The prosecution does not, however, appear to have paid much attention to proof of this fact. There were two doctors called and neither of them could say how long the injured man was in hospital, though one of them expressed an opinion that he would not have been able to use his hand for twenty-one days; but this doctor saw him only on the date of admission and not thereafter.

The injured man himself has stated (to use his words) "Altogether I was twenty-one days in hospital". On the first day that he gave evidence,

he had said that he was a 'contractor' and on second that he was a 'cultivator'. He has not said however that he was unable to follow his ordinary pursuits, and one cannot infer this from the meagre evidence available in this case. This Court has held in *Silva* v. *Gunasekera* (43 N.L.R. p. 404) that the mere fact that a person has been in hospital for twenty-one days is not sufficient to prove that he is suffering from grievous hurt.

I think the prosecution has not established beyond reasonable doubt that the injury in this case was grievous. I alter the conviction to one of voluntarily causing hurt under provocation under section 325 of the Penal Code and sentence the accused-appelant to one month's rigorous imprisonment.

*Varied.*

---

**G. P. A. Silva, J.**

---

THE SUPERINTENDENT, WELLANDURA ESTATE

*vs.*

THE UNITED PLANTATION WORKERS' UNION

---

*S.C. No.* 1/66—*Labour Tribunal No.* R. 242.

---

*Argued and decided on:* 17th October, 1966.

---

*Industrial Disputes Act — Application for relief to Labour Tribunal prior to appointment of President by Judicial Service Commission — Its validity in Law.*

**Held :** (Following the decision in *Walker Sons & Co, Ltd.* vs. *Fry & Others*, 68 N.L.R. 73) That an application made to the Labour Tribunal for relief under the Industrial Disputes Act prior to the appointment of its President by the Judicial Service Commission is bad in law as he had no power or authority to entertain such application.

*Lakshman Kadirgamar*, with *Ananda Paranavitarne*, for the employer-appellant.

No appearance for the applicant-respondent.

**G. P. A. Silva, J.**

In this case the application was made to the Labour Tribunal by the applicant Union on 15th August, 1964, and the ground for the application was discontinuance from service. Re-instatement with back wages was the relief sought among other things.

At the time the application was made, the President of the Labour Tribunal had not been appointed by the Judicial Service Commission. It has been held subsequently in a case reported in 68 N.L.R. page 73, that Labour Tribunals had not been appointed by the Judicial Service Commission and therefore were not properly constituted to hear and decide applications under the Industrial Disputes Act. Although the President who actually heard and decided this case was one who was subsequently appointed by the Judicial Service Commission, there is no doubt that the Tribunal had not been properly constituted at the commencement of the proceedings and had therefore no power or authority to entertain the application in law.

It is necessary that the application for relief in these cases should be filed within three months of discontinuance from service, and there should therefore have been a properly constituted Tribunal from which to ask for relief at the time the application was entertained.

In these circumstances I quash the order of the Labour Tribunal made in this case.

I make no order as to costs.

*Order quashed.*

*Privy Council Appeal No.* 36 *of* 1962

*Present:* **Viscount Radcliffe, Lord Morris of Borth-y-Gest, Lord Guest**

KOK HOONG *vs.* LEONG CHEONG KWENG MINES LIMITED

*From*
*THE SUPREME COURT OF THE FEDERATION OF MALAYA*

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

DELIVERED THE 10TH DECEMBER, 1963.

*Estoppel—Res judicata—Effect of default judgment—Estoppel in face of statute—Principles applicable.*

*Hire-Purchase Agreement — Action by Summary Procedure—Failure to obtain leave to appear and defend—Judgment by default—Second plaint averring first agreement and further that by arrangement plaintiff re-took possession of part of the machinery and equipment included in first agreement and that defendant allowed to continue hiring remainder of machinery on conditions stated therein — Prayer for unpaid rent, interest, damages for wrongful detention and order for delivery of possession.*

*Defendant pleading that agreement in plaint represented moneylending transaction and complementary to a written agreement of even date purporting to sell machinery and equipment and amounting to a Bill of Sale unregistered—Therefore void—Alternatively that transaction amounted to a moneylending transaction and unenforceable as it contravened section* 10(1) *of the Moneylending Ordinance—Is the defendant Estopped by judgment by default—How far does it operate as res judicata ?—Can plea of estoppel be taken in face of Statute.*

An action was instituted by the appellant by way of summary procedure claiming arrears of rental payments and interest due for certain months on machinery and equipment let to the respondent on an agreement in writing dated 20.6.52 and which machinery and equipment the respondent continued to hire on the same terms after the expiry of the said agreement. Judgment by default was entered for the appellant on 3.11.54 as the respondent failed to obtain leave to appear and defend.

The appellant filed a second plaint in 1957 against the respondent in which, after averring the agreement referred to in the earlier action and the terms thereof it was stated that the plaintiff, by arrangement with the defendant, re-took possession of two items of the said machinery and equipment in May 1955 and that it was agreed between the plaintiff and the defendant that the defendant should continue hiring the remainder of the said machinery and equipment on terms and conditions contained in the said agreement, subject to certain variations set out in the plaint.

This plaint also, after alleging that in accordance with a term of the 2nd agreement the appellant had terminated the hiring, claimed the return of the machinery and equipment, and further prayed for unpaid rent, interest, damages for wrongful detention and for an order for delivery of the machinery and equipment.

The respondents in defence pleaded *inter alia* (a) that the appellant at all material times, was a money lender within the meaning of section 3 of the Money Lenders' Ordinance 1951.

(b) that the agreement referred to in the plaint represented money lending transactions and the agreement dated 20.6.52 was complementary to a written agreement of even date between the parties whereby the respondents purported to sell the machinery and equipment referred to, to the appellant.

(c) that the agreement of hire, on a true construction thereof, and having regard to all the surrounding circumstances is a Bill of Sale, and being neither in the form required by the Bills of Sale Enactment nor registered under the provisions of that Enactment is void and unenforceable and the hire charges reserved in it (in fact by way of interest) are not recoverable in law.

(d) that the agreement of sale and the alleged right of plaintiff to retain possession being ancillary to the agreement of hire and parts of a void transaction are also void and unenforceable.

(e) that in the alternative, in so far as the plaintiff seeks to recover hire charges which are really charges by way of interest and as the plaintiff did not furnish any note or memorandum of the contract complying with section 10(1) of the Money Lending Ordinance, the said loans are not recoverable.

In reply to this the plaintiff pleaded

(a) denying that he was a Moneylender or that the transaction was a moneylending transaction or that the documents referred to are Bills of Sale or that they or any of them are or is void.

(b) that the defendant is estopped by judgment dated 3.11.54 (wherein the plaintiff recovered 9 months outstanding hire from 20.9.53 to 19.6.54 on the hire agreement the subject matter of the proceedings in that case) from raising the defences under the Moneylending Enactment and the Bill of Sale Enactment as pleaded.

By agreement the issue of estoppel was argued as a preliminary point. The Trial Judge held in favour of the plaintiff but the High Court of Appeal decided in favour of the defendant. Thereafter the plaintiff appealed to the Privy Council.

**Held:** (1) That a default judgment, though capable of giving rise to estoppels must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what must have been necessarily decided. To use the words of Lord Maugham L.C. in the *New Brunswick Railway Co.* case (1939) A.C. at p. 21, such judgments can estop only for what must "necessarily and with complete precision" have been thereby determined.

(2) That in the present appeal, taking notice of the plaint upon which the judgment has been obtained and which forms part of the record, the plaintiff was entitled to recover from the defendant company a sum of money by virtue of a written agreement under which machinery and equipment was let on hire at a monthly rent and subsequent oral continuation of that agreement.

(3) That it cannot be said in this case that the respondent is seeking to set up something which either expresses or imports a contradiction of the record in the earlier action. The defence, on the contrary, is more like a plea by way of confession and avoidance than a traverse, as it maintains that when the agreement is read in conjunction with another contemporaneous agreement the obligation to pay the monies claimed will be seen to be part of a transaction, the real nature of which was the borrowing of money on the security of goods. That is an issue which was not raised at all by the plaint in the first action.

(4) That, applying the principle stated in para (1) above, it is impossible to say that there was anything in the first judgment which "necessarily and with complete precision" decided this issue against the respondent and therefore the estoppel claimed cannot be maintained against it.

The appellant's claim of estoppel was resisted by the respondent on another principle viz. that a party cannot set up an estoppel in the face of a statute. This argument was based on the defences pleaded above in regard to the Moneylending Ordinance and the Bills of Sale Enactment.

After examining the relevant English decisions on the question, their Lordships

**Held :** (5) That there can be no estoppel in the face of the Moneylending Ordinance since the provisions on which the respondent seeks to rely renders him a "protected person" for this purpose; nor any estoppel in the face of the Bills of Sale Enactment the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower.

**Cases referred to:** *Re South American & Mexican Co. Ltd.* (1895) Ch. 37; 63 L.J. Ch. 803
*Hoystead* v. *Commissioner of Taxation* (1926) A.C. 155; 42 T.L.R. 207; (1925) A.E.R. Rep. 56
*Howlett* v. *Tarte* (1861) 10 C.B. (N.S.) 813; 31 L.J.C.P. 146
*New Brunswick Railway Co.* v. *British & French Trust Corporation Ltd.* (1939) A.C. 1; (1938) 4 A.E.R. 747
*Irish Land Commission* v. *Ryan* (1900) 2 Ir.R. 565
*Cox* v. *Dublin City Distillery Co.* (1917) 1 Ir. R. 203
*Thomson* v. *Clarke* 17 T.L.R. 455.
*Huffer* v. *Allen* (1866) L.R. 2 Ex. 15; 15 L.T. 225
*Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* (1937) A.C. 610; (1937) 1 A.E.R. 748; 156 L.T. 444
*Southend Corporation* v. *Hodgson* (1962) 1 Q.B. 416; (1961) 2 A.E.R. 46; (1961) 2 W.L.R. 806
*In re A Bankruptcy Notice* (1924) 2 Ch. 76; 131 L.T. 307
*Humphries* v. *Humphries* (1910) 2 K.B. 531,
*Leroux* v. *Brown* 12 C.B. 810
*Barrow Mutual Ship Insurance Co.* v. *Ashburner* 54 L.J.Q.B. 377; 54 L.T. 58
*Carter* v. *James* 13 M. & W. 137
*Welch* v. *Nagy* (1950) 1 K.B. 455; (1949) 2 A.E.R. 868; 66 T.L.R. 278
*In re Stapleford Colliery Co.* 14 C.D. 432
*Roe* v. *Mutual Loan Fund* 19 Q.B.D. 347
*Comitti* v. *Maher* 94 L.T. 158
*Huddersfield* v. *Todd* 42 T.L.R. 52; 134 L.T. 82; (1925) A.E.R Rep. 475

[Editorial Note: This judgment is of interest to Ceylon in view of (*a*) Section 207 of our Civil Procedure Code, and our law of estoppel and *res judicata*; (*b*) The provisions of the Moneylending Ordinance and the Bills of Sale Enactment referred to here. Our Money Lending Ordinance and Registration of Documents Ordinance, contain similar provisions.]

*Dingle Foot, Q.C.*, with *Joseph Dean*, for the appellant.

*Philip Goodenday*, for the respondent.

**Viscount Radcliffe**

The issue raised by this appeal involves a preliminary point of law taken by the appellant in an action pending between him and the respondent company in the High Court of the Federation of Malaya. In that action the appellant is suing the respondent for monies alleged to be due to him and certain other relief, and he has objected to a defence or set of defences put in by the respondent, on the ground that the latter is estopped from raising them by virtue of a previous judgment given in an earlier action between the same parties. It is the validity of this objection that was argued and decided as a preliminary point. In the High Court Ong J. upheld it: his judgment was reversed in the Court of Appeal who decided that there was no estoppel.

The issue is one of law. The relevant facts embrace nothing more than the circumstances of the earlier action, in which was given the judgment that is said to have created the estoppel, and the pleadings in the present action which is now pending.

The former action was instituted as a Civil Suit in the High Court of the Federation on June 30, 1954. The appellant filed a plaint by way of summary procedure, alleging that under an agreement in writing dated 20th June 1952 he had let certain machinery and equipment on hire to the respondent for twelve months from the date of the agreement at an agreed monthly rent, and that on the expiry of the twelve months period the respondent had continued the hiring on the same terms. The respondent was, he claimed, in arrears with the rental payments for the month commencing from the 20th September 1953 and subsequent months, and he asked for judgment accordingly for a stated sum of dollars in respect of rent and a further sum in respect of interest on arrears of rent, as provided in the agreement. Particulars showing the manner in which these sums were computed were annexed to the plaint.

On the November 3, 1954 the appellant obtained a decree in his suit giving him judgment against the respondent for the sums of money claimed. This judgment was obtained on the respondent's default, the decree reciting that the respondent had not obtained leave to appear and defend.

The present action was begun on the June 14, 1957. It also is a Civil Suit in the High Court and it is between the same parties as before. The appellant has filed a plaint in the suit, and in its amended form paragraphs 2 to 10 inclusive of the plaint run as follows:—

"2. That under an agreement in writing dated the 20th day of June 1952 the Plaintiff let certain machinery and equipment on hire to the Defendant for the term of twelve months from the 20th day of June 1952 at $2,500/- (dollars two thousand five hundred only) per month, the first of such payments to be made on the 19th July, 1952 and each subsequent payment on the 19th day of each succeeding month. A copy of the said agreement is attached hereto and marked 'A'.

3. That on the expiry of the term of twelve months aforesaid the Defendant continued hiring the said machinery and equipment on the terms and conditions contained in the said agreement.

4. By arrangement with the Defendant the Plaintiff re-took possession of two items of the said machinery and equipment in May 1955 and it was agreed between the Plaintiff and the Defendant that the Defendant was to continue hiring the remainder of the said machinery and equipment, which are in the Defendant's possession, on the terms and conditions contained in the said agreement subject to the following variations thereof, namely:—

(*a*) The hiring to commence from 20th day of April, 1955.
(*b*) The rent for the hire to be $2,000/- (dollars two thousand only) with first payment on the 19th day of May and subsequent payments on the 19th day of each succeeding month.
(*c*) That insurance to be in the sum of $80.000/- (dollars eighty thousand only).

5. The particulars of the two items hereinbefore mentioned of which possession was re-taken are as follows:—

(*a*) on 260 BHP diesel engine.
(*b*) one 130 BHP diesel engine.

6. That the Defendant has failed and neglected to pay rent for the said machinery and equipment for the month commencing from 20th April 1955 and subsequent months.

7. That by Clause 7 (seven) of the said agreement the Defendant agreed, *inter alia*, to pay interest on all arrears of rent at the rate of 12% (twelve per centum) per annum until the time of payment.

8. That as per statement annexed hereto and marked 'B', the following sums of money are due and owing by the Defendant to the Plaintiff, namely:—

$16,000/- being rent for the period 20.4.55 to 19.12.55 (eight months).

$560/- being interest on arrears of rent up to 18.12.55.

9. That the Defendant has failed to pay the aforesaid sums or any part thereof though demanded.

10. By the said agreement it was provided, *inter alia*, that if the Defendant shall make default in punctual payment of the monthly sums to be paid by him for the hire of the said machinery and equipment the Plaintiff may without any notice determine the hiring and it shall thereupon be lawful for the owner to re-take possession of the said machinery and equipment and for that purpose to enter into or upon any premises where the same may be and that such determination should not affect the right of the Plaintiff to recover from the Defendant any moneys due to the Plaintiff under the said agreement or damages for breach thereof."

The plaint then goes on to allege that the appellant has determined the hiring and has claimed the return of the machinery and equipment covered by it, but that the respondent wrongly detains it, and judgment is prayed for unpaid rent and interest, damages for wrongful detention and an order for delivery up of the machinery and equipment.

The respondent's amended defence contains the following eight paragraphs:—

"1. The Plaintiff is and was at the material times a moneylender within the meaning of Section 3 of the Moneylenders Ordinance, 1951.

2. At the time of the making of the two agreements hereinafter mentioned, that is by June 20th 1952, the Plaintiff had advanced the sum of $90,000.00 on loan to the Defendant and the Defendant had repaid by way of principal and interest the sum of $16,710.00. On the 26th June 1952 the Plaintiff made two further advances by way of loan to the Defendant totalling $22,000.00.

3. The Defendant admits the execution of the written agreement referred to in paragraph 2 of the Statement of Plaint. This agreement (hereinafter referred to as the 'agreement of hire') was complementary to a written agreement of even date between the Plaintiff and the Defendant (hereinafter referred to as the 'agreement of sale') under which the Defendant purported to sell the machinery and equipment therein referred to (which is also the subject matter of the agreement of hire) to the Plaintiff. The two agreements are to be read together and form part of the same continuous transaction the purpose and effect of which was to make the Defendant's said machinery and equipment security for the money advanced to the Defendant and interest thereon.

4. The agreement of hire is on a true construction thereof and having regard to all the surrounding circumstances (including the agreement of sale) a Bill of Sale and being neither in the form required by the Bills of Sale Enactment nor registered under the provisions of that Enactment it is void and unenforceable and the hire charges reserved in it (which in fact are charges by way of interest) are not recoverable in law. The agreement of sale being ancillary to the agreement of hire and part of a void transaction is also void and unenforceable and in the premises the Plaintiff has acquired neither the title to the said machinery and equipment nor the right to possession thereof.

5. Without prejudice to the contentions set forth in the preceding paragraphs the Defendant admits the variations in the agreement of hire set forth in paragraphs 4 and 5 of the statement of plaint.

6. In regard to paragraphs 10, 11, 12 and 13 of the statement of plaint the Defendant says that the alleged right of the Plaintiff to retake possession of the said machinery and equipment is part of an agreement and transaction which is void and unenforceable and is therefore of no effect. The Defendant further says that the ownership of the said machinery and equipment remains and always has remained in the Defendant.

7. Further and in the alternative, in so far as the statement of plaint seeks to revover hire charges which the Defendant says are really charges by way of interest the Defendant will rely on the provisions of the Moneylenders' Ordinance, and says that the Plaintiff not having furnished any note or memorandum of the contract complying with Section 10(1) of the said Ordinance to the Defendant before the making of the said loan or loans, the said loans and any interest thereon are not recoverable in law.

8. Save and in so far as is expressly admitted herein the Defendant denies each and every allegation in the statement of plaint as though the same has been specifically set out and traversed."

To this pleading the appellant delivered a reply, of which paragraphs 2 and 3 are as follows:—

"2. The plaintiff denies that he is a moneylender or that the transaction was or is a moneylending transaction or that the document or documents therein referred to are bills of sale or that they or any of them are or is void under the Bills of Sale Enactment or otherwise.

3. The defendant is estopped by judgment dated the 3rd November 1954 in Kuala Lumpur High Court Civil Suit No. 272 of 1954 between the plaintiff and the defendant (wherein the plaintiff recovered judgment against the defendant for 9 months outstanding hire from 20.9.53 to 19.6.54 on the hire agreement being also the subject matter of those proceedings) from contending either that the plaintiff is a moneylender or that the transaction in question was a moneylending transaction

or that the documents are other than what they purport to be or that they or either of them are or is void or that the plaintiff is not entitled to the reliefs claimed."

In that state of the pleadings it was agreed that the issue of estoppel should be argued as a preliminary point of law, and on the 28th July 1961 the Court made an order that the point should be set down for hearing and disposed of before the trial of the action. This was done and, as has been said, the High Court (Ong J.) decided in favour of the appellant. On 6th September 1961 that Court made a declaration to the effect of paragraph 3 of the reply, though in rather ampler terms; while the Court of Appeal (Thomson C.J., Hill J.A., Good J.A.) decided in favour of the respondent and by order dated 6th March 1962 allowed its appeal and set aside the order of the High Court.

In their Lordships' opinion the decision of the Court of Appeal was correct. It is entitled to be supported, in their view, on two separate and distinct grounds. One of these, that which formed the basis of the judgment appealed from, concerns the proper limitations of a default judgment as foundation for an estoppel. The other, which did not enter into the consideration of the court of Appeal, depends on those rules that preclude a Court from allowing an estoppel, if to do so would be to act in the face of a statute and to give recognition through the admission of one of the parties to a state of affairs which the law has positively declared is not to subsist.

Their Lordships turn to the first ground. In their view there is no doubt that by the law of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel *per rem judicatam*. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (see *Re South American & Mexican Co. Ltd.* (1895) Ch. 37 at 45) and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever re-opening before the Court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default.

It is true that in certain contexts estoppel *per rem judicatam* has been given a very wide operation. The rule laid down by Wigram V.C. in *Henderson* v. *Henderson* (1843) 3 Hare 100 at 114 has been frequently cited with approval. "The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." This rule was spoken of as "settled law" by Lord Shaw when delivering the opinion of this Board in *Hoystead* v. *Commissioner of Taxation* (1926) A.C. 155 at 170; and a similar principle, probably based on *Henderson* v. *Henderson*, was adopted in the Civil Procedure Code of India and from there passed into the Civil Procedure Code of the Federated Malay States (Cap. 7 Laws of the F.M.S., s. 6, Explanation III). It should be stated in passing that, since the Civil Procedure Code was repealed with effect from the 1st April 1958 and replaced by the Rules of the Supreme Court, it has been common ground in the argument of this case that the former section has no direct bearing on the rights of the parties and that they are to be determined in accordance with the general law of England as applied in the territory of the Federation.

Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to apply the full rigour of any principle as widely formulated as that of *Henderson* v. *Henderson* (supra). It may well be doubted whether the learned Vice-Chancellor had in mind at all the peculiar circumstances of a default judgment and whether such a judgment would not naturally fall into his reservation of "special cases". In any event it is clear from what has been said in other authorities more immediately directed to the point that a much more restricted operation must be given to any estoppel arising from a default judgment.

*Howlett* v. *Tarte* 10 C.B. (N.S.) 813 is usually referred to as supplying the governing rule in this context. It is at any rate a decision explicitly

arising out of a judgment by default. The report of it contains several short and separate opinions, but the effect of them is taken to be that, while such a judgment can give rise to estoppel in subsequent proceedings, the defendant in such proceedings is estopped only from asserting something which, if pleaded in the earlier action, would have amounted to a direct traverse of what was there asserted and founded upon by the party who obtained that judgment. Thus, if what he wishes to set up in the second action would have been matter only for a plea by way of confession and avoidance or, it seems, a special plea in the first action, there is no estoppel.

This formula may be all very well for those who practise or are familiar with the old system of pleading that prevailed in the English Courts of common law in the first half of the nineteenth century. But it is a valid criticism of its utility for the solution of questions of estoppel that arise now or in the future that the formula itself could hardly avoid being conditioned by the special and very complicated rules by which that system was governed (see per Lord Shaw in *Hoystead's* case (supra) at p. 168), and the exercise of imagination that is required in order to translate modern pleadings into the forms of the older ritual becomes progressively harder to achieve for those for whom the work of translation is by now merely an antiquarian exercise.

Fortunately, perhaps, *Howlett* v. *Tarte* (supra) has twice been reconsidered in much more recent cases of high authority. One is *Hoystead's* case, to which reference has already been made. There it was spoken of as being essentially the product of the older system of pleading and as involving no derogation from the true general principle that, for the purposes of estoppel, a judgment stands for every point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The other case is the House of Lords decision in *New Brunswick Railway Co.* v. *British & French Trust Corporation Ltd.* (1939) A.C. 1, in which full consideration was given to the authority of *Howlett* v. *Tarte* (supra) and an attempt was made to decide to what extent it represented a principle of general application for the purposes of modern litigation.

In their Lordships' opinion the *New Brunswick Railway Co.* case can be taken as containing an authoritative reinterpretation of the principle of *Howlett* v. *Tarte* in simpler and less specialised terms. This re-interpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham, L.C. (1939) A.C. at p. 21, they can estop only for what must "necessarily and with complete precision" have been thereby determined.

What then must the default judgment be taken to have decided in this earlier action? As a decree it adjudges in terms no more than that the appellant is entitled to recover from the respondent a fixed sum of dollars, interest and costs, and it was argued on this appeal that the judgment can estop from nothing more than a denial of that bare fact. That would not cover the respondent's proposed plea that the hiring agreement of 20th June 1952 was in reality only one aspect of a larger transaction which, in truth though not in form, amounted to a money lending transaction and a bill of sale. Their Lordships however do not think that, where, as here, the plaint upon which the judgment has been obtained is itself upon and so forms part of the record, there is any valid ground for refusing to notice what case it is that a plaintiff has set up in order to found the order that he claims. The only authority which can be advanced in favour of such an extreme view is the opinion expressed by Fitzgibbon L.J. in the Irish case of *Irish Land Commission* v. *Ryan* (1900) 2 Ir. R. 565, a case in which judgment had passed after the issue of writ but without pleading. Even so, his view differs in a material respect from that expressed by Holmes, L.J. in the same case (see p. 583 where it is said that the judgment showed the money to be owing "on account of tithe rent charge") and it seems fairly clear from what was said by O'Brien, L.C. and Ronan L.J. in the later Irish case of *Cox* v. *Dublin City Distillery Co.* (1917) 1 Ir. R. 203 that the opinion of Fitzgibbon, L.J. on this point was not that of the Irish Courts. It would not be difficult, their Lordships think, to find several English cases in which the estoppel on a default judgment has been allowed to go further than the mere terms appearing on the face of the judgment, see for instance, *Thomson* v. *Clarke* 17 T.L.R. 455.

Now what can the judgment of the 3rd November 1954 stand for, taking account of the plaint and the decree obtained upon it? That the plaintiff was entitled to recover from the defendant a sum of money by virtue of a written agreement under

which machinery and equipment was let on hire at a monthly rent and a subsequent oral continuation of that agreement. It can be said for the appellant that what the respondent is now seeking to set up as part of his defence to the action based on the third agreement, that now in suit, is that the original agreement, out of which the others were formed, was not in reality a hiring agreement for rent at all, but a form of borrowing money on security. In that sense it might be said that the respondent is seeking to set up something which either expresses or imports a contradiction of the record in the earlier action, to use the words employed by the Court in *Huffer* v. *Allen* (1866) L.R. 2 Ex. 15. It comes near to a traverse. But, in their Lordships' opinion, this proposition would not express the true nature of the respondent's proposed defence. They say nothing as to its ultimate validity as a defence, when the action comes to be tried, or as to the legal analysis of what it is that the respondent is seeking to say; but it seems that it does not deny the fact that it entered into the written agreement founded upon, which speaks of "rent" and "hire", but rather that it maintains that, when that agreement is read in conjunction with another contemporaneous agreement the obligation to pay the monies claimed will be seen to be part of a transaction the real nature of which was the borrowing of money on the security of goods. That is an issue which was not raised at all by the plaint in the first action. As a defence, it is more like a plea by way of confession and avoidance than a traverse. On the whole their Lordships think it impossible to say that there was anything in the first judgment which "necessarily and with complete precision" decided this issue against the respondent, and they hold consequently that the estoppel claimed cannot be maintained against it.

This is sufficient to dispose of the appeal, and their Lordships' opinion has proceeded on the same lines as those adopted by the Court of Appeal of the Federation and expressed by Thomson, C.J. as the judgment of that Court. There is however another ground upon which their Lordships think that this appeal should fail, and, as the issue was fully argued before them and involves a question of some general importance, they think it desirable to state the conclusion that they have come to upon it.

The defence from which the appellant claims that the respondent is estopped is intended to rely on certain provisions of two statutes, the effect of either of which is to render void and unenforceable such contracts as the respondent asserts the agreement sued upon to have been. One of these statutes is the Bills of Sale Ordinance (No. 30 of 1950) and the other is the Moneylenders Ordinance (No. 24 of 1951). Shortly stated, the Bills of Sale Ordinance makes attestation, registration and a true statement of the consideration essential to the validity of a bill of sale as security for goods (section 4 ) and requires (section 6) a prescribed form, containing certain necessary particulars, under penalty of rendering the bill of sale void if the form is not observed. The Moneylenders Ordinance (section 16) renders moneylending transactions void unless, *inter alia*, note or memorandum of the contract is supplied to the borrower at the time of the loan and the note includes certain prescribed contents.

The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation upon which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel in pais from performing its duty and asserting legal rights accordingly. See *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* (1937) A.C. 610 and *Southend Corporation* v. *Hodgson* (1962) 1 Q.B. 416. Given a "statutory obligation of an unconditional character" it is not open to the Court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel; see *In re A Bankruptcy Notice* (1924) 2 Ch. 76, in particular per Atkin, L. J. at p. 96.

It does not appear to their Lordships that the principle invoked is confined to transactions that have been made the subject of legislation or that, where legislation is in question, the bare prescription that a transaction is to be void or unenforceable is sufficient by itself to justify the principle's application. Thus, on the one hand, the common law may itself prohibit the enforcement of certain contracts, such as those of an infant not for necessaries, and it cannot be supposed that it would any the less refuse to base a judgment on an estoppel against an infant who had so contracted. An infant who has obtained goods from a tradesman by representing himself to be

of full age cannot be estopped from setting up his infancy, if sued for the price of the good. On the other hand, there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the Statute of Frauds (see *Humphries* v. *Humphries* (1910) 2 K.B. 531, in which it was no doubt considered that, following *Leroux* v *Brown* 12 C.B. 810, the statute ought to be treated as regulating procedure, not as striking at essential validity): another is the Stamp Act or Acts in their application to oral contracts of marine insurance, which, according to the decision in *Barrow Mutual Ship Insurance Co.* v. *Ashburner* (1885) 54 L.J.Q.B. 377 are not prohibited so much as penalised.

It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied upon is imposed in the public interest or "on grounds of general public policy" (see *In Re a Bankruptcy Notice* (supra) at p. 97, per Atkin L.J.) But a principle as widely stated as this might prove to be rather an elusive guide since there is no statute, at least public general statute, for which this claim might not be made. In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of money lending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the Court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury (*Carter* v. *James* 13 M. & W. 138) override an estoppel; so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies (*Welch* v. *Nagy* (1950) 1 K.B. 455.)

General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of person enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for man's benefit and what is for his protection are not synonymous terms. Nor is it open to the Court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands. See *In re Stapleford Colliery Co.* 14 Ch.D. 432 at p. 441, per Bacon V.-C.

These principles, as their Lordships understand them, would point very directly to the conclusion that there can be no estoppel in the face of the Moneylenders Ordinance, since the provisions on which the respondent seeks to rely render him a "protected person" for this purpose, nor any estoppel in the face of the Bills of Sale Ordinance, the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower. The analogy between the latter Ordinance and the Deeds of Arrangement Act 1914, which was the subject of decision *In re a Bankrupcty Notice* (supra), is very close.

It is true, nevertheless, that there have been decisions in England, the effect of which seems to be to allow binding estoppels that preclude reliance on the Bills of Sale Acts, legislation which is for all relevant purposes identical with the Malayan Ordinance. The two decisions that matter on this point are *Roe* v. *Mutual Loan Fund* 19 Q.B.D. 347, a decision of the Court of Appeal, and *O. Comitti* v. *Maher* 94, L.T. 158. As the latter case was expressly decided on the authority of the earlier, it is to the principle expressed in *Roe's* case that their Lordships must direct their attention.

They do not think that it is necessary for them to say a great deal about it. What they are concerned with is to interpret the law of England on this subject as applicable to the Federation of Malaya, not to reconcile or adjust all the English decisions that have been given. It is not certain that the principle applied in *Roe's* case is altogether reconcilable with that adopted in *In re a Bankruptcy Notice*—see the remarks of Wright J. in *Huddersfield Fine Worsteds Ltd.* v. *Todd* 42 T.L.R. 52. Having regard to what was said in the later decision of the Court of Appeal (see Atkin L.J. at pp. 96-100) it appears to their Lordships that *Roe's* case cannot now be relied upon for any general principle governing estoppel in the face of a statute and that its continuing authority depends on the resort that a Court may feel to be necessary in special circumstances to the general rule forbidding approbation and repro-

bation on the part of a litigant. Thus, despite the principle that limits estoppel where statutes are infringed, a litigant may be shown to have acted positively in the face of the Court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the Court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.

It is necessary only to notice the facts to see how large a part such considerations must have played in forming the Roe decision. A man had given a bill of sale on his furniture to secure an advance of money. Later, he presented his petition in bankruptcy, showing the lenders as creditors secured by the bill. They seized the furniture, sold it, paid off the debtor's landlord who has put in a distraint, appropriated the balance of the proceeds in part satisfaction of their debt and came in as unsecured creditors for the residue. The bankruptcy proceedings went on, the debtor having notice of all of them and in fact initiating some of them himself. A composition with creditors on the basis of his statement of affairs was proposed, reported on by the official receiver and sanctioned by the Court. To quote from the judgment of Esher M.R. at p. 349, the debtor "knew also that his solicitors had put a receipt before the (lenders) to sign, so that, from beginning to end, he knew that the creditors were acting on the faith of his statement, and that by that means he got a release from all his debts on payment of 2/6d. in the pound to all the creditors on their debts, and to the defendants on the balance due to them after taking credit for the proceeds of sale."

The debtor then started an action against the lenders, alleging that the bill of sale was invalid and that they had trespassed in seizing his goods. The Court of Appeal upheld the judgment of Pollock B. that the action could not proceed. It is difficult to see how in the circumstances of that case they could have done otherwise. They may have thought that what the debtor had done was to "waive the tort", as Atkin, L.J. suggested in *In Re a Bankruptcy Notice* (supra) at p. 100, or they may have proceeded on the wider principle that a person who had gone so far as the debtor had in approbating the seizure and sale of his goods and in implicating the Court and other creditors in the consequences could not on any principle of law be allowed to reprobate them in another action.

It does not appear to their Lordships that any further analysis of *Roe's* case is called for in order to decide the present appeal. The respondent's actions bear no relation to the proceedings of the debtor in that case. The most that can be said against the respondent here is that it suffered or subjected itself to a judgment by default in the first action. Such a judgment is not incapable of giving rise to an estoppel, but there is nothing in the attendant circumstances which would permit an estoppel based upon it, whatever its range, to exclude a plea based upon the invocation of statutes of such nature as the Moneylenders Ordinance and the Bills of Sale Ordinance.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the appeal should be dismissed with costs.

*Appeal dismissed.*

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

## L. K. LEBBAYTHAMBY & OTHERS *vs.* THE ATTORNEY-GENERAL & ANOTHER*

*S.C. No.* 24 (*Inty.*) *of* 1964 — *D.C. Colombo* 935/Z

*Argued & decided on:* 20th July 1965
*Reasons delivered on:* 23rd July 1965

*Civil Procedure Code, sections* 423 *and* 434—*Action for declaration that seizure of certain gold bars as forfeit under Customs Ordinance illegal and for their return— Issue of commission to record evidence abroad — Motion to forward samples of gold bars to commissioner allowed by Court — Has the Court power to allow such motion* ?

In an action for a declaration that the seizure of certain bars of gold as forfeit under the Customs Ordinance was illegal and for their return to the plaintiff, the District Judge allowed applications by the defendant—

* For Sinhala translation, see Sinhala section, Vol. 13, part 3, p. 12

(a) for the issue of a commission for the purpose of having the evidence of certain specified persons recorded in London.

(*b*) that samples of the gold bars be forwarded to the person who is to execute the Commission.

In appeal the only contention on behalf of the plaintiff-appellant was that the Court had no power to order the forwarding of samples of the gold bars.

**Held:** (1) That section 434 of the Civil Procedure Code enables the Commissioner to call for the gold bars and the Court too has the power to send the bars without waiting for them to be sent for.

(2) That even if there had been no section like 434, the Court has power to do all things reasonably necessary to effectuate the purposes for which it has exercised its statutory power of issuing a commission.

*Per* **T. S. Fernando, J.** — " Further, although the document or thing may be temporarily out of the custody of the court, it is undeniable that it always remains within its control."

*H. V. Perera, Q.C.*, with *G. D. Welcome*, for the plaintiffs-appellants.

*J. G. T. Weeraratne*, Crown Counsel, with *S. Pasupathi*, Crown Counsel, for the defendants-respondents.

**T. S. Fernando, J.**

At the close of the evidence for the plaintiffs in this case which was filed to obtain (*i*) a declaration of Court that 132 bars of gold seized as forfeit under the Customs Ordinance were not liable to be so seized and that the forfeiture was illegal and (ii) a return to the plaintiffs of the said bars of gold, the defendants applied to court, in terms of section 423 of the Civil Procedure Code, for the issue of a commission for the purpose of having the evidence of certain specified persons recorded in London. The court by its order of 4th December 1963 granted the application as well as a motion of the defendants that samples of the gold bars be forwarded to the person who is to execute the Commission. The present appeal is one canvassing the correctness of the District Court's order of 4th December 1963.

Mr. Perera, for the appellants, does not now argue that the order appealed from in so far as it relates to the taking of the evidence of the specified persons is wrong, but he has submitted that the Court had no power to grant the further motion which related to the forwarding of samples of the gold bars. He argues that these gold bars are part of the very subject of the litigation, and there is no provision in the Civil Procedure Code or any other law permitting a court to send out of its custody and, as in this case, out of its jurisdiction the very subject of the litigation. He concedes, however, that there is no express provision of law which prevents the very subject of the litigation being so sent out of its custody.

Learned Crown Counsel has pointed to section 434 of the Code which authorises the Commissioner appointed under Chapter XXIX of the Code to call for and examine documents and other things relevant to the subject of the inquiry. That these gold bars or samples thereof are relevant cannot possibly be the subject of any dispute. It would therefore have been open to the Commissioner to call for the gold bars, the subject-matter of the litigation in this case. If that be so, I do not see why the Court in such an obvious case as this cannot send any of the gold bars without waiting for them to be sent for. The procedure followed has the additional merit of saving further time in reaching a final decision in the case.

Even if there had been no section like 434 enabling the Commissioner to call for and examine documents and other relevant things, I would have been prepared to say that a Court has power to do all things reasonably necessary to effectuate the purpose for which it has exercised its statutory power of issuing a commission. If the witness cannot give meaningful testimony without access to the document or other thing, surely there is an implied power to make that document or other thing available to the witness. Arguments based on possible loss of or substitution in transit of

some other thing for the thing sent are not entitled to much weight as it must be presumed that all reasonable steps will be taken for the safe despatch from and return of the thing to court. Further, although the document or thing may be temporarily out of the custody of the court, it is undeniable that it always remains within its control.

For these reasons we have dismissed the appeal with costs.

**Alles, J.**

I agree.

*Appeal dismissed.*

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

PARAMANANDAN *vs.* MAHESWARI*

*S.C.* 434/1964 — *M.C. Mullaitivu Case No.* 33957

*Argued & decided on:* 10th July, 1964

*Maintenance — Application by wife for child and herself — Defendant agreeing to pay Rs.* 25/- *for child — Magistrate minuting this as interim order — Wife subsequently withdrawing application for her own maintenance on a settlement — Failure to pay maintenance to child, as agreed —Distress warrant— Defendant's liability.*

*Interim orders for maintenance of children — Desirability.*

An application by a wife for maintenance for herself and her child was fixed for inquiry on the defendant refusing to take back his wife, but undertaking to pay Rs. 25/- per mensem for the child, which the Court minuted as "an interim order." On a subsequent date of inquiry, the applicant's Counsel moved to withdraw the application for maintenance for herself in view of a payment of a sum of Rs. 1950/- by the defendant for redeeming a property. This was allowed.

The defendant failed to pay the agreed maintenance for the child for 20 months and distress warrant was applied for the recovery of the arrears. This was resisted by the defendant.

**Held:** (1) That in view of the agreement the defendant was under obligation as a father to maintain the child, until he got the custody of the child.

(2) That if the defendant wanted to get rid of that obligation, then he should have made a proper application to Court.

*Per* **Sri Skanda Rajah, J.** — "I would commend the practice of making interim orders for maintenance in respect of children till a final order is made after inquiry as a very useful and necessary practice."

*V. Nalliah*, for the respondent-petitioner.

*M. T. M. Sivardeen* with *Nihal Jayawickrema*, for the applicant-respondent.

**Sri Skanda Rajah, J.**

This was an application by the wife for maintenance for herself and her child. On 27.9.60 the defendant had appeared after service of summons and he admitted marriage and paternity of the child Shanthini. The defendant was not willing to take his wife back. Thereupon the magistrate fixed the matter for inquiry as regards maintenance for the wife and child for the 25th of October, 1960, and the defendant at that stage agreed to pay Rs. 25/- per mensem as maintenance for the child. The magistrate made the minute "This is an interim order". Therafter, the date for inquiry was altered on that day itself to 8.11.60.

The defendant was absent on 8.11.60. He had sent a medical certificate and the matter came up for inquiry on 20.12.60. There appears to have been an earlier settlement. Counsel appeared for the applicant but the defendant appeared in person. Mr. Tharmalingam, counsel for the applicant, stated that the applicant moved to withdraw the application as regards maintenance for herself in view of the payment of a sum of Rs. 1950/- by the defendant to the applicant for redeeming a property. The property had since been transferred to the applicant. This was allowed.

It is quite clear that what was withdrawn was the application for maintenance in respect of

* For Sinhala translation, see Sinhala section, Vol. 13, part, 3, p. 11

the applicant herself. Therefore, what was described as an interim order for maintenance in respect of the child continued to be in force from the date on which it was made. It will continue to be in force unless and until rescinded either on application by the defendant himself or by the effluxion of time under the Maintenance Ordinance.

The applicant did not take any steps to recover the amount of maintenance in respect of the child for some time. On 18.6.62 she made an application for a distress warrant for arrears of maintenance for 20 months totalling to a sum of Rs. 500/-. This was resisted by the defendant and it came up for inquiry before another Magistrate who had succeeded the Magistrate who made what had been described as the interim order.

In the course of his order discussing the objections of the defendant the Magistrate described the practice of making interim order for maintenance as an immemorial practice.

When an application for maintenance is made in respect of a child who is with the applicant the defendant is obliged to maintain his child; but, as it so often happens, no order for maintenance is made in respect of the child for a long time. The child will have to go without maintenance in some instances for a period of even two years as had happened in the same Magistrate's Court in an earlier appeal dealt with by this Court.

In this particular case the defendant was unwilling to take back the wife with whom the child was. In effect he told the wife, "I am not prepared to take you back or maintain you"; but, as a father he was under obligation to maintain the child. If he wanted to get rid of that obligation then he should have made a proper application to this Court. Until he got the custody of the child he was bound to maintain the child.

I would commend the practice of making interim orders for maintenance in respect of children till a final order is made after inquiry as a very useful and necessary practice. The appeal is dismissed with costs.

*Appeal dismissed.*

*Present:* **Alles, J.**

## PONNIAH *vs.* FOOD & PRICE CONTROL INSPECTOR, KALMUNAI

*S.C.* 312/66 — *M.C. Kalmunai Case No.* 21691

*Argued on:* 12th and 14th July, 1965.
*Decided on:* 19th July 1966.

*Control of Prices Act — Sale of potatoes above controlled price — Conviction — Contention in appeal that prosecuion failed to prove accuracy of accused's scales — Accuracy of scales not challenged at trial — Presumption under section* 114 *of Evidence Ordinance — Burden of proof.*

*Judicial precedent—When judicial decision not binding in subsequent case.*

**Held:** (1) That where the accused in the ordinary course of business sold to his customer what purported to be a pound of potatoes weighed on his own scales, it must be presumed not only that he represented that his scales were accurate, but also in the absence of any evidence to the contrary, that they are accurate. This is a legitimate inference under section 114 of the Evidence Ordinance.

(2) That the prosecution need prove the accuracy of the scales only where the defence challenged that fact or conceded that the weights and scales are not accurate.

*Per* **Alles, J.** — "The unreality of accepting the submission of the defence that in every case of this kind the burden is on the prosecution to prove the accuracy of the scales, may be illustrated from the facts of the instant case itself. The price charged for the controlled commodity was almost 50 per cent more than the controlled price. It must therefore mean that the accused, without his knowledge, was using scales that were so inaccurate that a customer received 1 1/2 times the quantity of the commodity for one unit of the price. Is it conceivable that any person carrying on his daily business as a trader would use so inaccurate a pair of scales? "

(*b*) "This case is also useful for another purpose. Lord Goddard had to consider whether he was bound by a decision of another Bench of three Judges which laid down the proposition that all speedometers must be tested and the Court can only act on the evidence of a police constable supported by a speedometer reading if the speedometer was tested. Lord Goddard thought that the principle laid down in this case went too far, particularly as certain other decisions relevant

to the issue had not been cited to the Judges in that case; he therefore adopted the dictum laid down by the Court of Appeal in *Young* vs. *Bristol Aeroplane Co. Ltd.*, (1944) KB 718 'that where *material cases and statutory provisions* which show that a Court had decided a case wrongly, were not brought to its attention, the Court is not bound by that decision in a subsequent case'."

**Not followed:** *S. I. Police vs. Wassira*, (1945) 46 N.C.R. 93.

**Cases referred to:** *De Alwis* (*Food and Price Control Inspector*) vs. *Subramaniam*,S.C. 787, 788 M.C. Badulla 7812, S.C. Minutes of 23.9.1949.
*Joseph* vs. *M. D. H. Perera* (1952) 53 N.L.R. 502 at 503.
*Nicholas* vs. *Penny* (1950) 2 K.B. 466.
*Young* vs. *Bristol Aeroplane Co. Ltd.*, (1944) K.B. 718.
*Segarajasingham* (*Food and Price Control Inspector*) vs. *William Singho* (S.C. 810/ M.C. Galle 5343/S.C. Minutes of 19.8.47)
*Gnanaiah* vs. *Kandiah* (1948) 49 N.L.R. 153.

*A. H. C. de Silva, Q.C.*, with *P. Nagendra*, for the accused-appellant.

*L. B. T. Premaratne*, Senior Crown Counsel, with *Aloy N. Ratnayake*, Crown Counsel, for the Attorney-General.

**Alles, J.**

The accused in this case was charged on two counts under the Control of Prices Act. On the first count he was charged with selling a pound of potatoes at 50 cents a pound when the controlled price of a pound was 34 cents; on the second count he was charged with failing to exhibit in a conspicuous place in his boutique the price at which price-controlled articles have to be sold. After trial he was convicted on both counts and sentenced to a term of 6 months rigorous imprisonment and a fine of Rs. 1,000/- in default a further term of six months rigorous imprisonment on the first count, and a fine of Rs. 500/- in default six weeks rigorous imprisonment on the second count. Counsel for the accused-appellant has not canvassed the conviction and sentence on the second count but has urged that the conviction on the first count cannot be maintained on the ground that the accuracy of the accused's scales on which the potatoes were weighed has not been established by the prosecution by satisfactory evidence. In support of his submission, Counsel has relied on certain decisions of this Court to which I shall presently refer.

The facts of the case are not in dispute and may be briefly stated. According to the evidence of Food and Price Control Inspector, Sheriff, he sent a decoy, Somadasa, with a marked rupee note to buy a pound of potatoes from the accused's boutique. Another Inspector, Karunaratne, was sent to watch the sale. Somadasa went to the boutique and asked for a pound of potatoes. He inquired for the price of a pound from the accused and was informed that it was 50 cents. The accused then weighed the potatoes on his balance and gave Somadasa the potatoes and the balance of 50 cents. Sheriff then rushed up, revealed his identity, took charge of the potatoes and the balance sum of 50 cents from Somadasa, weighed the potatoes in the accused's balance and found that it weighed a pound. He tested the balance by interchanging the pans and found them to be correct. Counsel, however, submits — a submission with which I agree — that this test does not establish the accuracy of the scales. The accused did not give evidence at the trial and, in spite of a lengthy cross-examination of the prosecution witnesses, the only substantial suggestion made to them was that the commodity in question may not be potatoes but some other kind of yam. However, in the course of Counsel's submissions at the end of the trial, the accuracy of the scales on which the potatoes were wieghed appears to have been raised by the defence.

Counsel for the Crown submits that on the evidence led in the case, the prosecution has established the accuracy of the scales on which the potatoes were weighed and in particular draws my attention to the fact that the accuracy of the scales was neither challenged in the course of the cross-examination of the prosecution witnesses nor did the accused by giving evidence seek to rebut the natural inference to be drawn in such a case that his scales were accurate. In *De Alwis* (*Food and Price Control Inspector*) vs. *Subramaniam* S.C. 787, 788 M.C. Badulla 7812, S.C. Minutes of 23.9.49, Basnayake, J (as he then was) said:—

> "I think it can safely be presumed that in the ordinary course of business a trader will not keep a balance which gives the customer more goods than the quantity he purports to sell, nor is a trader likely to keep a weight

which weighs more than the weight indicated on its face, for the reason that a trader who sells with such scales or such weighs is inviting loss and not gain. Profit being the motive of trade, it must be presumed that a trader's scales are not inaccurate at least to the extent of causing him loss. A person who claims that he trades with scales which favour the customer must rebut the presumption in favour of the accuracy of his scales and weights."

The learned Judge thereafter draws attention to the various provisions of the Weights and Measures Ordinance which provide for the periodic examination and stamping of weights and the imposition of penalties for the possession of false weights to indicate that the law seeks to ensure that traders carry on their business regularly and without prejudice to the public. When a trader carries on business using scales and weights which represent to prospective customers that the scales and weights are accurate, I do not think it is open to such a trader to submit that the prosecution must prove the accuracy of the scales. The prosecution need only go so far, if the defence challenges that fact or concedes that the weights and scales are not accurate. In this case the defence did not dispute that what was represented to Somadasa was, that a pound of potatoes was sold to him and weighed on scales, which *prima facie* were represented to be accurate. When the accused therefore in the ordinary course of business, sold to his customer what purported to be a pound of potatoes weighed on his own scales, it must be presumed not only that he represented that his scales were accurate but also, in the absence of any evidence to the contrary, that they are in fact accurate; that is the logical inference to be drawn from the proved facts. In my view this is a case to which the Court may legitimately presume the existence of such a fact under Section 114 of the Evidence Act. As Swan, J. said in *Joseph* vs. *M. D. H. Perera* (1952) 53 N.L.R. 502 at 503 in dealing with a case of profiteering in bread, where the Magistrate had acquitted the accused on the ground that the accuracy of the scales had not been established by the prosecution, 'the Magistrate did not realise that the accused was under a legal obligation to use correct weights himself and if the loaf weighed 15 ounces according to the accused's own scales and weights there was, to say the least, a *prima facie* case made out against the accused'. The unreality of accepting the submission of the defence that in every case of this kind the burden is on the prosecution to prove the accuracy of the scales, may be illustrated from the facts of the instant case itself. The price charged for the controlled commodity was almost 50 per cent more than the controlled price. It must therefore mean that the accused, without his knowledge, was using scales that were so inaccurate that a customer received 1 1/2 times the quantity of the commodity for one unit of the price. Is it conceivable that any person carrying on his daily business as a trader would use so inaccurate a pair of scales? In this connection, Mr. Premaratne for the Crown brought to my notice the interesting case of *Nicholas* vs. *Penny* (1950) 2 KB 466. In this case the question that arose for decision was the accuracy to be attached to a watch or speedometer which was used to calculate the speed at which a motorist was driving his car. The police constable gave evidence that he drove a police car at an even distance behind the defendant's motor car for four-tenths of a mile along a road subject to a speed limit of 30 m.p.h. and that the speedometer showed an even speed of 40 m.p.h. The Court (Lord Goddard C.J., Humphreys and Morris JJ.) held that when a watch or speedometer, records a particular time or speed, that is *prima facie* evidence of that time or speed, notwithstanding that no evidence is adduced as to the accuracy of the device. Said Lord Goddard at p. 473:—

'The question in the present case is whether, if evidence is given that a mechanical device such as a watch or speedometer — and I cannot see any difference in principle between a watch and a speedometer—recorded a particular time or a particular speed, which is the purpose of that instrument to record, that can by itself be prima facie evidence, on which a court can act, of that time or speed. It might be that in a particular case the court would refuse to act on such evidence. For instance, if it were a question whether a man died before mid-night on a certain day and one party alleged that he died half a minute before 12 o'clock and another party that he died half a minute after 12 o'clock, and the first party said "It was half a minute before 12 because I observed the time by the clock" it might be that the court would say "we will not find that as a fact unless we are satisfied as to the accuracy of the clock". In the present case counsel for the prosecution called our attention to the fact that the speedometer must have been very inaccurate if the offence was not committed. The offence is driving at a speed exceeding 30 m.p.h. and the evidence is that the speedometer showed at the time in question the defendant was exceeding 30 m.p.h. by no less than 10 m.p.h. It would be a considerable error in the speedometer if it were as much out as that'.

Counsel for the Crown submits, with considerable force, that the same analogy would apply to the facts of the present case. The variation in the price demanded for the controlled commodity was so great that the accused's scales must have been unreasonably inaccurate. He therefore argues that the accused's scales in this case must be *prima facie* presumed to be accurate, in the absence of any evidence to the contrary.

This case is also useful for another purpose. Lord Goddard had to consider whether he was bound by a decision of another Bench of three Judges which laid down the proposition that all speedometers must be tested and the Court can only act on the evidence of a police constable supported by a speedometer reading if the speedometer was tested. Lord Goddard thought that the principle laid down in this case went too far, particularly as certain other decisions relevant to the issue had not been cited to the Judges in that case; he therefore adopted the dictum laid down by the Court of Appeal in *Young* vs. *Bristol Aeroplane Co. Ltd.*, (1944) KB 718 'that where *material cases and statutory provisions* which show that a Court had decided a case wrongly, were not brought to its attention, the Court is not bound by that decision in a subsequent case'. This observation has some bearing on the submission made by Counsel for the accused-appellant in the present case, who cited certain decisions of this Court in support of the proposition, as to the quantum of evidence required from the prosecution to prove the accuracy of the scales and which decisions, according to him, were binding on me.

In *Sub-Inspector of Police* vs. *Wassira* (1945) 46 N.L.R. 93, the Crown appealed from an acquittal. The Magistrate acquitted the accused for the reason that there was no evidence as to the accuracy of the scales and weights on which the bread was weighed, the bread having been weighed only on the accused's scales. In appeal the further point was raised by appellant's Counsel that, since the amounts of bread controlled were 16-ounce and 8-ounce loaves the accused had not offended against the provisions of the Ordinance in selling two quarter-lb. loaves at more than the controlled price. Howard C.J. considered this latter submission sound, and then proceeded to make the following observation on the point raised by the Crown in appeal:

> 'With regard to the weighing of the bread on the scales of the respondent, criminal cases of this kind must be established beyond all reasonable doubt. With *no evidence* as to the accuracy of the scales it cannot be said that this standard of proof has been reached."

The head note of the report of this case correctly represents, in my view, the two matters on which the learned Chief Justice came to a decision, the second of which was that the prosecution was bound to establish by *satisfactory evidence* the accuracy of the scales and weights on which the bread was weighed. In 1947 Howard C.J. had occasion to consider the decision in *Wassira's* case in *Segarajasingham* (*Food and Price Control Inspector*) vs. *William Singho* (S.C. 810/ M.C. Galle 5343/S.C. Minutes of 19.8.1947) where he distinguished the facts in the former case from the facts in the latter case. In *Segarajasingham* vs. *William Singho* there was the additional evidence, that after the controlled commodity was weighed on the accused's scales, it was again re-weighed on the Inspector's scales with standard weights and tallied with the weight as found on the accused's scales. This same additional evidence was available in the later cases that were cited before me — *Gnanaiah* vs. *Kandiah* (1948) 49 N.L.R. 153; *De Alwis* vs. *Subramaniam* (1952) (*supra*) and *Joseph* vs. *M. D. Perera* (1952) (*supra*).

*Gnanaiah* vs. *Kandiah* was a decision of two Judges; it is not apparent from the report why two Judges should have heard this appeal when ordinarily it should have been decided by a single Judge; there is nothing in the report to indicate that the case had been refered to a Bench of two Judges as a result of any important or controversion question of law. This decision merely re-affirmed the view taken by Howard, C.J. (Soertsz, S.P.J. agreeing) in the unreported Galle case, that the accuracy of the accused's scales had been established by the prosecution, when the additional evidence referred to earlier, was available Although *Wassira's* case was referred to in the course of the judgment by the learned Chief Justice, the decision did not endorse the view taken by him in the earlier case, that where the only evidence consisted of the commodity being weighed on the accused's scales, the prosecution had not proved by satisfactory evidence the accuracy of the weights and scales. As Basnayake J. said in the later case of *De Alwis* vs. *Subramaniam* the ratio decidendi in *Gnanaiah* vs. *Kandiah* was that 'in the *absence of any evidence indicating the inaccuracy* of the weights and scales, the accused should have been convicted' and according to Swan, J. in *Joseph* vs. *M. D. H. Perera* 'the ratio decidendi of that appeal was *not the absence of evidence regarding the accuracy* of the scales and weights employed'.

I am therefore unable to agree with the submission of learned Counsel for the accused-appellant that *Gnanaiah* vs. *Kandiah* reaffirmed the view taken by Howard C.J. as to the quantum of evidence required from the prosecution to establish the accuracy of the scales and weights.

Even if the case of *Gnaniah* vs. *Kandiah* can be called a decision of a Divisional Bench, I do not agree that it lays down the proposition of law for which Counsel for the accused-appellant contends. The evidence in the instant case is almost on all fours with the evidence that was available in *Wassira's* case and the question for determination in the present case is whether, in similar circumstances, the prosecution has established by satisfactory evidence the accuracy of the scales and weights. With all respect to the learned Chief Justice I am unable to subscribe to the proposition of law laid down in that judgment with regard to the quantum of evidence required from the prosecution. Had the statutory provision laid down in Section 114 of the Evidence Act been brought to the notice of the learned Chief Justice in *Wassira's* case it may well be that he might have come to a different conclusion.

I think, therefore, that the accused has been rightly convicted on the first count. In regard to the default sentence passed by the learned Magistrate on the first count, the Magistrate on an erroneous view of Section 312(1)(c) of the Criminal Procedure Code, has imposed a default term of six months' rigorous imprisonment when it should have been a term of six weeks' imprisonment. I therefore alter the default sentence on the first count to one of six weeks' rigorous imprisonment instead of one of six months. Subject to this variation the appeal is dismissed.

*Appeal dismissed.*

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

S. I. POLICE (PADUKKA) *vs.* V. SIMON

*S.C.* 243/64. *M.C. Avissawella No.* 58554.

*Argued and decided on:* June 12, 1964.

*Penal Code—Charges under sections* 382 *and* 315*—Subject-matter of robbery Rs.* 200/*—Failure to assume Jurisdiction under section* 152(3) *of the Criminal Procedure Code — Illegality of conviction.*

When a Magistrate, without assuming jurisdiction under section 152(3), convicted on appellant on charges under section 382 and 315 of the Penal Code, and where the subject matter of the charge of robbery was Rs. 200/-.

**Held:** That the conviction was illegal.

*S. B. Lekamage*, with *Clarence M. Fernando*, for the accused-appellant.

*W. K. Premaratne, Crown Counsel*, for the Attorney-General.

SRI SKANDA RAJAH, J.

This conviction has to be set aside because the Magistrate could not have tried these charges *qua* Magistrate. The charges were under section 382 and 315 of the Penal Code. The total value of the property which was the subject matter of the robbery was Rs. 200/-. Reference to the schedule to the Criminal Procedure Code shows that the Magistrate would have jurisdiction over a charge under section 382 only where the value of the property in respect of which the offence is committed does not exceed Rs. 200/- and where the hurt caused is simple hurt, which hurt would be otherwise triable under section 314. Here the hurt caused was not triable under section 314 but under section 315. If the Magistrate had looked at this before framing the charge, he would probably have assumed jurisdiction under section 152(3). The proceedings are illegal. Therefore I set aside the conviction and order fresh proceedings to be taken according to law before another Magistrate.

*Set aside.*

## *ELECTION PETITION No. 6 OF 1965*

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

## LIYANAGE SOMADASA PERERA *vs.* DON SENADHEERA SAMARASINGHE

ELECTORAL DISTRICT NO. 17 — KOLONNAWA

*Order delivered on:* June 23, 1966

*Election Petition — Bribery — Ceylon (Parliamentary Elections) Order-in-Council, Section* 57(b).

The SLFP Government was defeated on a no-confidence motion in the House of Representatives on December 3rd 1964. On that date, the Respondent was the Member of Parliament for Kolonnawa, in addition to being the General Secretary of the ruling party and a junior Minister in the Government. Shortly after the defeat of the Government, but before the actual dissolution of Parliament, the Respondent who was later to become a candidate seeking re-election to the House of Representatives, contacted the Commissioner of the Industrial Exhibition, a public servant in charge of a Government-sponsored project, and made a request of him that as many people as possible from his electorate be given employment at the Exhibition. Thereafter, the Commissioner received about 45 applications from persons seeking employment, each bearing an endorsement made by the Respondent to the effect that it was "strongly recommended". Of this number, about 28 applicants were given employment. In respect of 3 such employees who were voters in his electorate —

**Held:** That the Respondent was guilty of Bribery within the meaning of Section 57(b) of the Ceylon (Parliamentary Elections) Order-in-Council 1946, inasmuch as the Respondent had procured employment for each of such persons in order to induce such person to vote or refrain from voting at the impending election.

**Cases referred to:** *The Borough of Wigan Case* (4 O'M & H at p. 15)
*The Kingston-upon-Hull Case* (6 O'M & H at p. 388)
*The Salisbury Case* (2 O'M & H at p. 28)

*Per* **T. S. Fernando, J.** — "It may appear from one point of view that the loss of the respondent's seat in Parliament because of the procurement of these temporary jobs in a subordinate grade for three men, two of whom at any rate could be said to have needed them greatly, is too disproportionate a price for him to be called upon to pay. These three votes, even if they had been cast in favour of the respondent, could not have affected the result of this election. Indeed even if the holders of all 200 jobs at the Exhibition had been electors of this electoral district and had all voted against the respondent the result of the election would not have been different. These considerations are, however, immaterial. The aim of the law admits of no doubt. The paramount object of the stringent provisions governing elections is to ensure (I) that those in whom reposes the power of making laws by which their fellow men are to be bound shall themselves be subject to scrutiny before they enter the law-making Chamber and (2) that those who are found to have transgressed the law shall not be permitted to stay therein.'

*G. G. Ponnambalam, Q.C.*, with *Izzadeen Mohamed, B. J. Fernando* and *R. R. Nalliah*, for the petitioner

*Hannan Ismail*, with *Stanley Tillekeratne* and *Nihal Jayawickrama*, for the respondent.

**T. S. Fernando, J.**

At the general election held on March 22, 1965, the respondent to this petition was declared elected as the member of the House of Representatives for the electoral district of Kolonnawa. He had 13,267 votes polled for him, being 828 votes in excess of the total number of votes polled in favour of the candidate, Mrs. Kusuma Gunawardene, who was the runner up in a contest among six candidates. In this petition filed on April 9, 1965, the petitioner, who has been proved to be a person who had a right to vote at the election for the return of a member for the electoral district in question, seeks a declaration from this court that the election of the respondent is void on three grounds specified therein:—

(1) that the respondent was guilty of bribery as defined in section 57 of the Ceylon (Parliamentary Elections) Order in Council, 1946;

(2) that the respondent was guilty of undue influence as defined in section 56 of the said Order-in-Council;

and (3) that by reason of misconduct on the part of the respondent and by reason of other circumstances the majority of electors were or may have been prevented from electing the candidate whom they preferred— a ground of avoidance of an election as set out in paragraph (a) of section 77 of the said Order-in-Council.

On an application for particulars made by the respondent on April 20, 1966, the court on April 29 directed the petitioner to furnish the required particulars by May 8. Particulars having been furnished as so directed, the trial commenced on May 27, 1966.

During the opening of the case for the petitioner, counsel appearing for him withdrew the second charge of undue influence, and evidence was led during the trial only in respect of the first and the third charges. In the course of leading evidence, petitioner's counsel intimated to the Court that it was not proposed to lead evidence on the first of the twelve items in the particulars relating to the charge of bribery. Towards the conclusion of the evidence led for the petitioner, his counsel informed the court that the petitioner was not proceeding with the charge of misconduct and other circumstances affecting the freedom of election. The trial was thereafter accordingly restricted to items two to twelve of the particulars furnished in respect of the charge of bribery. I need therefore examine the evidence only so far as it affects the charge of bribery, and that too limited to the eleven items referred to immediately above.

The Elections Order-in-Council defines the corrupt practice of bribery as an offence which could be committed in one or more of the nine ways set out in the nine paragraphs (a) to (i) of section 57 therein. So far as the petition now before me is concerned, it was common ground that we are concerned only with bribery as defined in paragraph (b) attributed to acts of the respondent, and with bribery as defined in paragraph (f) in which some of the witnesses may be involved. If I might attempt to analyse paragraph (b) of the said section 57, so far as is relevant for the purposes of this case, the offence of bribery there described could itself be committed in one or more of eight ways, viz.:

(1) By giving
(2) By procuring
(3) By agreeing to give
(4) By agreeing to procure
(5) By offering
(6) By promising
(7) By promising to procure
(8) By promising to endeavour to procure any employment to or for any elector *in order to induce such elector to vote or refrain from voting.*

The words I have underlined above indicate the state of mind of the person giving or procuring employment, which corrupt mental element of the offence must be established beyond reasonable doubt by the petitioner because that is admittedly the extent of the burden of proof in the case of election offences of this nature.

The allegations made in this petition against the respondent on the charge of bribery relate to employment which some electors of the Kolonnawa electoral district in fact obtained and other electors attempted to obtain in connection with the work of the Industrial Exhibition held by the Government of Ceylon at the Colombo Race Course Grounds in February and March 1965. It is conceded that the respondent could not himself have given employment as that had to be done by or on behalf of the Government. It is contended, however, that he procured employment in the case of certain electors. The gravamen of the charge against him is that, after a prior arrangement reached with the Director of the Exhibition who was the officer of the Government in a position to give employment, the respondent recommended applicants who were electors in circumstances which amounted to bribery. It is conceded that there is no evidence of an agreement by the respondent to give or to procure such employment. The evidence does not show that in any one of the cases examined at the trial there was an offer or promise of employment made by the respondent. That too is conceded by counsel. In the case of two electors, it was argued for the petitioner that the evidence was capable of establishing on the part of the respondent a promise to procure or a promise to endeavour to procure employment. These concessions became, in my opinion, inevitable in the state of the evidence led, and all that I have now to do is to consider whether the evidence establishes the commission of one or more offences of bribery falling under heading (2) or (7) or (8) as detailed above.

The Industrial Exhibition above referred to was, as I have already stated, a Government undertaking, and was a responsibility of the Ministry of Industries and Rural Development. At all relevant times that Ministry was headed by Mr. Maitripala Senanayake, a senior Minister of the Government formed in July 1960 by the Sri Lanka Freedom Party. From June 1964 to January 7, 1965 the Parliamentary Secretary to the Minister was Mr. T. B. M. Herath, M. P. for Walapane. The idea of holding a large-scale exhibition had been under consideration for some time and, although the Coalition Government which was formed in 1964 by the Sri Lanka Freedom Party and certain other Members of Parliament who had hitherto been in the Opposition was defeated on December 3, 1964, on an important Parliamentary measure and Parliament itself was dissolved as from 18, December 1964, the Caretaker-Government decided to go on with the holding of the Exhibition as planned.

It was admitted by all three witnesses called for the respondent, viz. by Mr. Senanayake, Mr. Herath and Mr. Samarasinghe himself,that the question of unemployment had been causing the Government a growing anxiety since 1960 or even or earlier. Electors were bringing pressure on Members of Parliament to alleviate distress due to unemployment, particularly among the youths, and this pressure was in turn transferred by Members of Parliament on to more responsible shoulders like those of Parliamentary Secretaries and Ministers. In that situation, it was not unusual to encounter a scramble for jobs where they were available. In connection with the Exhibition some jobs (approximately 200) were available in the subordinate grades of watchers and labourers. Mr. Serasinghe who had been appointed Director of the Exhibition and functioned as such, was called for the petitioner. He stated that the original arrangement was to recruit men for these jobs through the Employment Exchange. The first lot of twelve men taken through that Exchange refused to work on the excuse that the land they had first to clear was serpent-infested! He therefore obtained sanction to recruit workmen without going through the Employment Exchange. He thereafter began selecting people who, he thought were fit enough and without inquiring as to their Political Party affiliations or loyalties. It would appear that there was an Exhibition Committee headed by the Permanent Secretary to the Minister of Industries; but this Committee's work appears to have been limited to the siting and allocation of stalls and allied matters rather than to employment of workmen.

According to Serasinghe, about the first week of October 1964, he received a telephone call from one Harold Jayewardene. Mr. Maitripala Senanayake, in his evidence here, stated that Jayawardene was the President of the S.L.F.P. Trade Union. Serasinghe had known Jayewardene when the former was Employment Relations Officer in the Ministry. Serasinghe testified that Jayawardene insulted him over the telelphone and insinuated that he (Serasinghe) was giving employment to gardeners and houseboys of United National Party men. Serasinghe told Jayawardene that the proper person to whom that complaint should be made is the Minister, and to this remark Jayawardene retorted with the information that complaint had already been so made. Serasinghe volunteered that he was not conscious of having taken over for employment the kind of person indicated in the telephone conversation. Mr. Senanayake, when he gave evidence, stated he could not recall Jayawardene complaining to him about such a matter. He conceded however that Jayawardene would ordinarily have been anxious to see as many S.L.F.P. Trade Union members as possible offered employment, and that it would not have been unnatural for Jayawardene to have complained to the officer who was recruiting workmen. I must, of course, bear well in mind that any action taken or statement made by Jayawardene cannot be held or weighed against the respondent. The latter cannot be accountable for actions and statements of another.

This alleged Harold Jayawardene incident, if I may so term it, will only be looked at by me in understanding the state of mind and consequent action of the witness Serasinghe. On the question of fact, I am prepared to accept Serasinghe's evidence in regard to this telephone conversation as being true. If, therefore, such a conversation did take place, it would undoubtedly have irritated Serasinghe and it is unlikely that he would forget the incident. It was not reasonable to have expected the petitioner to call Jayawardene as his witness. If the alleged telephone conversation was being challenged, opportunity was available to the respondent to have called Jayawardene to deny any such insinuation or indeed any converstaion at all. In the absence of any attempt to contradict Serasinghe,

on this point, I accept his evidence. It does not, of course, follow that Jayawardene had complained to the Minister about this matter. The Minister had no recollection of such a complaint and was inclined to think there was no need for it.

Serasinghe went on to say that he attempted to meet the Minister that very day, but learnt that he was away from Colombo. He was able to get an interview only on some subsequent day, though not much later. Serasinghe was unable to recall exactly what was said by the Minister. It was somewhat unfortunate, as I thought at that time. that counsel for the petitioner was attempting to elicit only the impressions gathered by Serasinghe at the end of his interview with the Minister. It would have been better, from the point of view of the court, had the memory of the witness been prodded in regard to any statements made by the Minister on this occasion. Serasinghe said he left the Minister's chambers with the impression that as a public servant he should do away with this type of selection and make the selections as desired, i.e take in people who were supporters of the Party in power. In answer to me, at one stage, he replied that the Minister observed to him "Why do you want to quarrel with these people?"; "You know what to do" or "what is expected of you". After this interview, he stated, he thought he should employ only S.L.F.P. supporters who were recommended. He was careful to add that no direct instructions to that effect were given by the Minister. Counsel for the petitioner observed in the course of his address that Serasinghe probably did not want to let down his former Minister otherwise than gently. Be that as it may, reluctance of that kind is not helpful to the Court in the performance of its own duties.

The Minister had no recollection of Serasinghe coming and speaking to him over any complaint of the nature referred to. It is not improbable that a busy Minister may forget incidents that have occurred over twelve months ago and to which he himself attached no particular importance, whereas a public officer whose conduct has been criticised will have good reason to remember the nature of a conversation he has had with his Minister concerning his past actions and affecting the pattern of his future conduct. It is in evidence that Serasinghe had direct access to the Minister in matters touching the Exhibition. There is nothing novel in such direct access being permitted without complying with red tape arrangements calling for access to a Minister only *via* the latter's Permanent Secretary.

Mr. Senanayake, the Minister of Industries up to 24th March 1965, thought he would not have given any such instructions as Serasinghe implied or said anything which could have left on Serasinghe the impression the latter said was created. In regard to Mr. Senanayake's lack of recollection, it has been demonstrated in court before me that his recollection can be faulty — *vide* his answers given under cross-examination in reference to document P38 before that document itself was available for production. Mr. Senanayake thought that in matters touching employment of personnel he would only have communicated with Serasinghe through the Permanent Secretary of the Ministry; P38 however discloses a direct communication suggesting employment being given to some persons who brought the chit to Serasinghe. I am inclined to agree with counsel for the petitioner that in the circumstances Serasinghe could hardly have felt himself free not to employ them even if he had concluded they were unsuitable.

In the state of the evidence before me, I accept Serasinghe's testimony that the Minister used word to the following effect:— "Why do you want to quarrel with these people? You know what is expected of you". The question of any quarrel "with these people" could have arisen only because "these people" were not satisfied. The inference is clear that the dissatisfaction was over the non-employment of persons who were in sympathy with the Party to which "these people" belonged. Serasinghe gave his evidence with confidence, and I cannot say that it has been shown that he has any axe to grind against the respondent in this matter. I am not unmindful of the fact that he is still serving as Director of the Industrial Exhibition which is in a Department within the political control of the husband of the candidate who was the only serious rival at the election which resulted in the return of the respondent. I do not, however, think that there is any good reason to suspect that Serasinghe was giving anything but truthful evidence. Th acceptance of this evidence that about the middle of October 1964 Serasinghe had a meeting with the Minister at the end of which he left with certain definite impressions as to what shape his future conduct should take must, of course, not be regarded as something weighing against the respondent on the charge he is facing here. As in the case

of the Harold Jayawardene incident adverted to already, this evidence was received only as being relevant to the state of mind of Serasinghe before his alleged meeting with the respondent.

Again, in regard to the state of mind of Serasinghe, the next incident, in point of time, so far as one can glean from the evidence, is that revolving round the minute P1 originating from Mr. Herath, the Parliamentary Secretary. It is a minute dated 26.11.64 by Mr. Herath to the Minister, Mr. Maitripala Senanayake, requesting the latter to obtain for him a report regarding the policy adopted in recruiting two named persons for work at the Exhibition. One of them was alleged in the minute to have been employed as a watcher, the other as a labourer. The Minister appears to have dealt with P1 only as late as 10.12.64 when it was endorsed by him to his Permanent Secretary who, in turn, endorsed it to Serasinghe for report. No report as such appears to have been furnished. Serasinghe's explanation on the point was that he saw the Minister direct regarding the employment of these two men and the document was filed away among his own papers as he understood that the matter may be regarded as closed.

Serasinghe's evidence was that in November 1964, probably on the same date as that appearing on P1, viz. 26.11.64, he was sent for by Mr. Herath. Mr. Herath denied sending for him, but I prefer to accept Serasinghe on this point. Mr. Herath informed him that complaint had been made by the respondent that he (Serasinghe) had employed these two men who were committee members of a branch organisation of the United National Party. Sersainghe said he was not aware of employing any such committee members and told Mr. Herath as much and suggested that the matter be taken up with the Minister. According to Serasinghe, Mr. Herath then said he had already made a complaint to the Minister. Mr. Herath was not called by the petitioner to prove the truth of the statements attributed to him in the course of Serasinghe's evidence. On the contrary, Mr. Herath was called as a witness for the respondent. He has denied sending for Serasinghe or making any statements as alleged by Serasinghe. He has also stated that the respondent did not at any time complain to him about committee members of the U.N.P. being given employment at the Exhibition. The evidence of Serasinghe in regard to the truth of statements attributed to Mr. Herath therefore remains complete hearsay. In the result there is nothing in this part of the evidence which affects the respondent. Mr. Herath's denial shows that there is no proof at all against the respondent that it was he who made a complaint about the two men named in P1. It is significant also that P1 itself is silent as to the addresses of these two men. Any complaint by Herath to Serasinghe or to anybody else cannot affect the respondent on the charge he is facing in this court. I shall return to document P1 when I come to deal with Serasinghe's evidence as to his second interview with the Minister regarding the policy to be followed when giving employment at the Exhibition.

As I propose to deal with the relevant matters as far as possible chronologically, it is time now to turn to Serasinghe's evidence touching a meeting between the respondent and himself. This brings me to what I believe is the most important question of fact I have to decide in this case, a decision which I realise is fraught with serious consequences to the respondent.

Serasinghe testified that after his interview with the Minister (presumably the interview which took place about the middle of October 1964), several Members of Parliament saw him or telephoned to him from about the second week in December right up to the opening of the Exhibition on February 1, 1965 in regard to jobs. He went on to say that about the middle of December the respondent himself saw him. The respondent had not only been the Member of Parliament representing Kollonnawa from July 1960 till dissolution on December 18, 1964, but was also the Parliamentary Secretary to the Minister of Broadcasting and Information. He had once even acted for the Minister, apart from having been Parliamentary Secretary to the Minister of Communications and, for two short periods, acting Minister of Communication. He was one of the joint Secretaries of the Sri Lanka Freedom Party, the major and senior partner in the Coalition Government and, in his own words, was a person known to be of some influence and power within his Party. According to Serasinghe, the respondent met him just before the dissolution of Parliament. The nature of the conversation when the respondent met him is given by Serasinghe in the following words:— "When he saw me he told me to try and get as many people as possible employed at the Exhibition. It was understood that it was to be from his electorate. Therefore he began sending the people with

applications and recommendations". An answer in the affirmative has, I notice, been obtained to the following leading question put to Serasinghe: "The respondent's request was to give employment to people from his electorate and he would be beholden to you?" The form of the question had apparently escaped my notice and also perhaps notice of counsel for the respondent at the time it was put, and in deciding this important question of fact, I propose to leave entirely out of reckoning the answer obtained to that leading question. After seeing him on the occasion referred to, Serasinghe said that the respondent on one occasion telephoned to him about a man called Joseph who later brought with him a letter P25 addressed by the respondent to him (Serasinghe) commending the man for employment.

The respondent, when he gave evidence, stoutly denied any such meeting with Serasinghe. He went on to say that he had never met Serasinghe in his life before the day the evidence in this case began (i.e. May 27, 1966), and that he had never spoken to him even over the telephone. Indeed he had not stepped into the Exhibition grounds. He was busy during that period with other preoccupations, mostly General Election preoccupations. Counsel for him suggested to Serasinghe during his cross-examination that the latter was probably making a genuine mistake when he said (a) the respondent saw him and (b) telephoned to him. Serasinghe said he was not making a mistake. In this conflict of evidence, having given my most anxious and prolonged consideration to the matter, I have reached the conclusion that I cannot reject the evidence of Serasinghe. I cannot bring myself to believe that Serasinghe is so wicked a man that he is consciously speaking of a meeting as well as a telephone conversation between him and the respondent where no such meeting and conversation had taken place. I entertain doubts about the evidence of the respondent that he had not seen Serasinghe before the date of this trial. Counsel referred me to document P27 of 5.1.65 in which the respondent addresses Serasinghe as "Dear (*Hithawath*) Mr. Serasinghe", the argument advanced being that this form of address betokens some little degree of friendship or familiarity and was unlikely between utter strangers. This argument is not convincing and I do not like to place any dependence on it in any way in reaching my conclusion. Serasinghe is 50 years of age and is a Government officer of some seniority. I can see no good reason for bias in him against the respondent or, notwithstanding the connection between his present Minister and the candidate who was his principal rival at the election, bias in favour of the petitioner who, it was suggested, was but an agent of Mrs. Kusuma Gunawardene for the purpose of filing and prosecuting this election petition. I accept his evidence on this important point.

Serasinghe also testified that he saw the Minister — as it now turns out on December 30, 1964 — on a date after 17.12.64 when P1 was received by him from the Permanent Secretary and explained to the Minister that, if the two persons named in P1 are workmen belonging to the United National Party, their employment for work as watcher and labourer respectively was a bona fide mistake arising through his ignorance of their political affiliations. He told us that he explained to the Minister in what appeared to me to be a picturesque way that when people come along seeking employment they do not come with Party placards on their backs! The Minister himself could not recall any such interview or conversation with Serasinghe. This incident too is relevant and has any importance only in so far as it may have contributed to the forming of the attitude Serasinghe adopted in giving temporary employment to applicants. I accept Serasinghe's evidence in regard to his meeting the Minister on some date, probably December 30, 1964, as well as his meeting Mr. Herath towards the end of November sometime before P1 reached him. It does seem strange that the appointment of a watcher and a labourer on purely temporary jobs at the Exhibition should have assumed such importance as to warrant a Parliamentary Secretary asking his own Minister to furnish him with a report on the policy involved or pursued. The Minister was inclined to think that the terms of his Parliamentary Secretary's minute must be put down to the latter's apparent unfamiliarity with the observance of proper protocol in these matters. I would agree with the Minister on the point. But it is admitted that Mr. Herath was dissatisfied with what he believed was the policy behind these two appointments. It is pardonable to inquire what high question of policy was involved in the appointment, for example, of a temporary labourer. A labourer would or should have been chosen by the officer of Government in charge of the work without the policy makers of Government bothering their heads on complicated or delicate matters of policy! Petitioner's counsel argued that the occasion for the minute issuing forth was the employment of non S.L.F.P.-minded labourers.

The insinuation was denied by Mr. Herath, and I am myself unable in the state of the evidence to come to any conclusion regarding the reason for this minute. My indecision does not appear to me to matter as there is no proof either that the two men named in P1 were from Kollonnawa or that they were committee members of a U.N.P. branch. Nor is there any proof that the respondent had in any manner been responsible for briefing Mr. Herath on the question raised by the latter.

I have already found as a fact that about the middle of December 1964 the respondent met Serasinghe and made a request that as many people as possible sent with applications bearing his recommendation be given employment. There is, no doubt, an absence of evidence of an express statement by the respondent to Serasinghe that the men to be taken are from his constituency. Serasinghe understood that the respondent was interested in this matter on behalf of persons from his constituency. I believe his understanding was correct. If a busy man like the respondent was really interested in unemployment in general, a special visit to Serasinghe was hardly called for. The matter has to be considered without forgetting that, according to Serasinghe, there were other Members of Parliamant of the Goverment Party who saw him and made similar requests. Believing, as I do, that part of Serasinghe's evidence also, all these Members of Parliament were seeing Serasinghe not because they wanted to make an appeal in strength for employment to be given to pro-S.L.F.P. applicants, but because they were really interested directly only in applicants from each Member's particular constituency. I should mention that at this stage the mind of Serasinghe, the public servant, had already been conditioned, if not actually cowed, by the Harol Jayawardene incident and the first interview with the Minister followed by his interview with the Parliamentary Secretary, the minute P1 sent to him for report and his explanation at the end of December 1964 to the Minister at the second interview. This public officer who had thought, correctly, that his duty was to appoint such workmen as he thought suitable felt that the easiest way he could remain "without quarrelling with these people" was by giving way to what was "expected" of him. He was expected to appoint persons who were considered by Government Parliamentarians as their supporters. Serasinghe, if I may so put it, took the line of least resistence, and may have consoled himself with the thought that even men more highly placed had similarly given way in like situations in the past.

The way in which the applicant to be preferred was to be identified was through the recommmendation and "not by a Party placard displayed on his back". I hold that there was an arrangement suggested by the respondent and acquiesced in by Serasinghe to appoint "as many (of his) people" as possible. How many could have been appointed? The evidence disclosed that there were only some 200 jobs available. Serasinghe thought that 45 applications bearing the respondent's recommendation were to be found in his files. The respondent, in the course of his evidence, stated that he must have given about a hundred recommendations (and certificates), of which about 60 or 65 would have been to residents of Kolonnawa electorate. Serasinghe said that of the 45 applicants, 28 were awarded employment. It is possible that some did not enter the applications or decided that it was too late to apply. Kollonnawa is an urban electorate, adjoining the city of Colombo, but Colombo where the Race Course itself was situated and other adjoining electorates had also to be catered for. Serasinghe said he had to resort to a scheme of allocation, really yet another rationing scheme, this time a rationing of jobs among applicants coming with recommendations from Members of Parliament belonging to the Party then in power.

Turning now to the eleven persons whose names are disclosed in the eleven items in the particulars, it has been established that nine of them, viz. D. P. C. Korale (item 2), I. G. Wimalasena (item 3), Walawage Cyril (item 4), Premadasa Weerakkody (item 6), Hettiaratchige Sirisena (item 7), B. M. Cooray (item 8), M. G. Dharmadasa (item 9), Wilson Seneviratne (item 11) and H. L. Jayasekere (item 12) were all registered electors of Kollonnawa at the time relevant to this election. There is no evidence that the names of J. K. Lionel and Gunasena Sudasinghe appear in the register of electors. On these nine electors it is now unnecessary to consider the cases of three, viz. I. G. Wimalasena, Premadasa Weerakkody and H. L. Jayasekere who did not receive employment. Moreover, as I have already said, not even a suggestion has been made that at the time of the endorsing of the recommendation on the applications there was a solicitation of the vote or any conversation regarding the voting at the impending election. Of the six remaining, although Wilson Seneviratne did receive employment as a watcher, he was not called as a

witness and there was really no identification in evidence of Wilson Seneviratne the elector as the man who received employment. Seneviratne was on the list of witnesses, and summons was allowed on him at the instance of the petitioner, but no attempt was made to call him by obtaining a warrant to ensure his attendance. In this situation, bearing in mind the extent of the burden of proof on the petitioner, while it is probable, even highly probable that Wilson Seveviratne whose application P11 was recommended by the respondent on 8.1.65 was indeed an elector of Kolonnawa, I am unable to reach a sure conclusion that the man for whom employment was procured was indeed no other than the elector whose name appears in the electoral register at P36J.

There are, therefore, only five persons left of those whose cases form the subject of the charge of bribery. In respect of two of these petitioner's counsel was that in the cases of Korale and W. Cyril the respondent promised to procure or to endeavour to procure employment. Korale was a member of the Sri Lanka Freedom Party, and as such was a member of a Village Committee in the Kolonnawa area at the time the respondent came to write letter P2 to the Permanent Secretary to the Minister of Industries requesting him to employ Korale in some job at the Exhibition. Korale had by this time been without employment for some 18 months. In his plight to find employment, he said, he sought help from the respondent who promised to make an effort. That was how letter P2 came to be written. According to him, he was offered employment, probably as a result of letter P2, as a labourer. This V.C. member, however, felt that a labourer's work was unsuitable for a person of his position despite his then unemployed state. He was willing to accept a job as a watcher, but not as a labourer, an attitude illustrative of class distinction in actual practice in a section of the community where one is disappointed to find it. In the result he did not get employment at the Exhibition. The fact that he has after the election secured employment as a watcher at the Textile Corporation which is an undertaking of the Ministry of Industries now headed by the husband of the respondent's principal election rival is irrelevant. I accept Korale's evidence in respect of the promise by the respondent as it finds support in letter P2 of 7.12.64. This letter, however, was written before the respondent met Serasinghe and, having regard to the obvious friendship or political association that then existed between Korale and the respondent, I cannot come to believe that this letter had anything to do with a voting at the Parliamentary election which was not even certain at the time. Moreover, the charge in this instance must fail for reason of want of proof of intention. As at 7.12.64 Korale was a solid S.L.F.P. man and, in the words of petitioner's counsel employed both during the cross-examination of the respondent and the final address, was part of the solid core of Party support. There was no necessity as at 7.12.64 to attempt to bribe him in order to secure his vote. The instance relied on as item 2 therefore is not established.

If I may now turn to the case of elector W. Cyril, although he received no employment in spite of undated application P4 which was "strongly recommended" by the respondent on 10.1.65 reliance was placed on his evidence as establishing an offence of bribery. That evidence was to the effect that, when he met the respondent and told him he was late in answering the Exhibition's call-up and was thereby denied employment, the respondent remarked that he would be given a job when their Government comes into power. I am not satisfied that such a statement was made by the respondent; but even assuming that it was made, that can hardly be said to be a firm promise and was no more than a hope of employment at a problematic future time. It may even have meant no more than that the Government hoped to solve the unemployment problem in a big way ensuring jobs for many. in my opinion, this instance of alleged bribery, viz. item 4, also fails.

I am now left with three instances of alleged bribery, items 7, 8 and 9 in the particulars, the cases of the registered electors; Hettiaratchige Sirisena, B. M. Cooray and M. G. Dharmadasa. In the case of Sirisena, his application P7 of 20.12.64 was not only strongly recommended by the respondent but bore also the additional endorsement "forwarded for favourable consideration." This man received employment as a watcher on 2.1.65. He did not say that there was any conversation between him and the respondent at the time the endorsement was made on P7 or that he met the respondent subsequently. He did say that in gratitude for respondent's recommendation he did vote for the respondent. The subsequent voting need not be established before a charge of bribery can be maintained. What is important is the intention of the respondent at the time of his making of the endores-

ment. I shall deal with this element of the charge shortly in connection with all three instances. It was suggested for the respondent that this witness has since received employment as a labourer under the Port Cargo Corporation where, it was alleged, the husband of Mrs. Kusuma Gunawardene has influence. That does not however affect my confidence in the truth of his evidence. Even if his motive in now testifying against a former benefactor is gratitude for having obtained him his present job, the question awaiting my decision is whether he is speaking the truth. The respondent's admission of an endorsement on P7 is sufficient guarantee of the truth of his evidence.

B. M. Cooray had, according to him, supported the respondent at the earlier election as well. He took application P8 to the respondent on 8.1.65, and the respondent endorsed it that day "strongly recommending and forwarding it for favourable consideration". He took it to Serasinghe who employed him as a watcher as from the very next day. Cooray said he was thankful for what the respondent had done and indeed worked for him. In so working for him he said he was not influenced by the recommendation of P8 as he was always a Sri Lanka Freedom Party man. It is not unimportant to remember that Cooray was not a man who really needed the temporary employment he secured at the Exhibition. He had 5 acres of coconut land which brought him 3000 to 4000 nuts each pick. He owned 3 houses which had all been given out on rent. He ran a boutique and a firewood shed. In his own words, he was "fairly well-to do man" in the area. Despite his comparative affluence, he solicited employment in this temporary job of watcher or machine-minder and received Rs. 136/39 a month on appointment, shutting out many a man, equally competent. I presume as watchers or machine-minders, in dire need of employment. The respondent admitted he knew, that Cooray ran a boutique and owned property but added he was not aware whether he was in sole possession of the property or had to share it with his parents.

The other instance, that relating to M. G. Dharmadasa (item 9), centres round application P9 which the respondent strongly recommended on 10.1.65. Dharmadasa received employment as a watcher on 14.1.65 and worked for 3 months. He said he knew the respondent, but could not say whether the respondent knew him. During the general election period, he said, he recalled the respondent coming to his house canvassing electors, and he then told the respondent he would vote for him. On that occasion he told the respondent he would vote for him. On that occasion he told the respondent also that he did receive employment at the Exhibition. The respondent denied he went canvassing from house to house, implying necessarily that he did not therefore have occasion to canvass the vote of Dharmadasa at his house, or presumably any where at all. In respect of the conflict of evidence on this point, I was impressed with the evidence of Dharmadasa and was not satisfied with the respondent's denial. At the time of testifying before me Dharmadasa was unemployed. This taunt that he had been bought over by giving him employment in a Corporation or other such institution was neither available nor attempted in Dharmadasa's case.

I should mention at this stage that the question whether these three men, Sirisena, Cooray and Dharmadasa have themselves committed the offence of bribery as defined in section 57(f) of the Order-in Council has not escaped my mind, but even if they are to be regarded as accomplices of the respondent, there is independent corroboration of their evidence in the shape of the applications and the admitted endorsements therein. Having regard, then,to my earlier finding in respect of a meeting between the respondent and Serasinghe at which the question of giving employment in temporary jobs at the Exhibition was discussed, and the arrangement which that discussion implied and, according to Serasinghe, resulted in, I think the petitioner has succeeded in establishing that the respondent did procure employment for Sirisena, Cooray and Dharmadasa, leaving me now free to discuss the question of the mental element necessary to be proved before an offence of bribery can be brought home to any person.

The petitioner must prove, again beyond a reasonable doubt that employment at the Exhibition was procured by the respondent for these three men in order to induce them to vote at the election due to be held in March 1965. What is implied — at any rate so far as this petition is concerned — is an inducement to vote for the respondent. Even if no question of a vote had been present in the mind of the receiver at the time of receiving the recommendation, the material question is whether the question of voting was present in the mind of the person who gave the recommendation which resulted in the procuring

of the jobs. It is not contended that at the time of endorsing the applications of these three men there was any talk of voting at the election. There is a total absence of any evidence to that effect or even suggestive of any such talk. The evidence relied on to prove the mental element constituting the offence of bribery is therefore purely circumstantial, and I have to bear in mind that the inference of unlawful intention must be a necessary one to be deduced from the proved facts if it is to be operative against the respondent to this petition.

There is a presumption — no doubt a presumption of fact and therefore rebuttable — that a rational human being intends the natural and probable consequences of his acts. What are the natural and probable consequences of the procuring by a candidate for election of a job for a person who is in dire need of or who was anxious to secure employment. The obvious answer that suggests itself is gratitude, a natural human reaction. Would not the person procuring the job himself have known that that would be the natural reaction? If he must have known it did he not intend to obtain the benefit of such a reaction arising?

The respondent himself admitted that the question of growing unemployment, particularly in urban areas like his own, was a pressing one. People, electors of Kollonnawa, as well as of other places, came to him for help, and, if a certificate or recommendation was appropriate, he was in the habit of giving it. He said that the people had come to look upon the granting of recommendations etc. as a necessary duty or function of a Member of Parliament. In giving these recommendations he had no thought of obtaining some advantage for himself. He even went the length of saying that he did not realise that even if a man got a job as a result of his recommendation that would influence the man to vote for him. One can, of course, never find out how the man did vote because the voting is by secret ballot; but it is a reasonable inference that a candidate would expect a man who received something he really needed and valued to be grateful to the person who was responsible for obtaining it for him. If an opportunity of showing the gratitude was known to be presenting itself shortly, would not the likelihood of receiving that gratitude be operating on the mind of the giver at the time of the giving?

The respondent stated that he gave these recommendations out of sympathy for the plight of the persons concerned. This kind of thing had become, he said, a matter of routine with him. He gave no special thought to procuring jobs for them. These were trivial jobs and he merely wished them well. He was compelled to answer that he did not think he would fall into disfavour if he refused recommendations. Nevertheless, the respondent, busy man as he undoubtedly was, deemed it necessary to pay visit to Serasinghe and discuss an arrangement by which some at least of the persons who would ordinarily be electors of his area could obtain jobs if he recommended their grant. There was, I apprehend, no special qualification necessary in a labourer certainly no educational qualification. All that the employer had to satisfy himself on would have been the apparent physical fitness of a man. There is no substantial difference in the case of a watcher. Sympathy for the poor and the needy is a noble motive, but there the sympathy was to be extended to the few who were to be designated by means of a pre-arranged device which had the effect of removing from the field of competition another group of applicants who would not receive the benefit of the arrangement.

Motives may ordinarily be noble. But as Bowen J. said in *The Borough of Wigan* case — (40'M & H. at p. 15) in a different but not dissimilar context, "Charity at election times ought to be kept by politicians in the background..... In truth, I think, it wll generally be found that the feeling which distributes relief to the poor at election time, though those who are the distributors may not be aware of it, is really not charity, but party feeling following in the steps of charity, wearing the dress of charity, and mimicking her gait".

Bucknill J. in the *Kingston-upon-Hull* case — (6 O'M. and H. at p. 388) — drew attention to the above-quoted remark of Bowen J. and went on to suggest the reason:—

> "Why? The reason is obvious — because whilst you the donor, may be gratifying your own charity and doing a kindness, doing kindly acts to others, you may be doing a great injustice to your opponent; you may be doing what he is not".

What was there said in relation to distribution of charity is, in my opinion, equally appropriate to a case of procuring employment which is what is complained of here. By the arrangement reached in December 1964 the respondent's rivals at the

election were effectively barred from procuring jobs for persons whom they would have liked to help. The true position is that the procurement of the circumstances obtaining in the immediate pre-election period would have been equally unlawful whoever the candidate was who resorted to that kind of arrangement.

Even if a person had been unaware of the relevant law, it would not have been open to him to plead his ignorance as an excuse for an otherwise unlawful act. In the present case, however, the respondent stated that just before the giving of the recommendations in the three instances we are now concerned with — (and indeed the others as well) —he had a fair knowledge of the election law and that he had read section 57 of the Order in Council. He volunteered the evidence that about ten days before nomination day a member of his Party who was well acquainted with the provisions of the Order in Council and election law in general had instructed him and others of the Party on election law. Counsel for the petitioner, seizing upon what may appear to be alterations of the date of some of the applications for jobs, attempted to maintain an argument that the respondent had come to believe that, while it may have been not unlawful to grant recommendations for jobs at the Exhitbtion before 11.1.65 which was Nomination Day for candidates for seats in the House of Representatives, it was not in order so to do after a person had legally become a candidate for election. Such a belief has, in my opinion, no sound basis in law, but an examination of the dates of some of the applications and the dates of the corresponding recommendations are against the validity of this argument. Moreover, it seems to me that if the respondent had come by such a theory or had reached such a belief, it would have been simple enough for him to have requested the applicants to bring to him fresh applications bearing dates anterior to 11.1.65 marked upon them.

The respondent stated that the electors of Kolonnawa are so highly enlightened in a political sense that they cannot be won over by recommendations or certificates. He himself did not think that even a single elector there could have been influenced to vote by recommendations of the kind he gave. Nor did he think he would have fallen into disfavour had he refused recommendations. He however granted them to all, even if they were not known to him so long as they brought along a letter of introduction from a person known to him (the respondent) or from a V.I.P. I am quite unable to accept that part of the respondent's evidence.

Two striking questions were put to the respondent during his cross-examination. I followed these two questions very carefully at the time they were put, and I paid attention to the demeanour of the respondent at the time he was answering them. I am reproducing the questions and answers below —

*Q.* "From your point of view, did you not feel that if a man gets a job by virtue of your recommendation, you will not be pestered by him any further?"

*A.* "People have come to me even 15 times and obtained letters from me."

*Q.* "For that reason, did you feel that this kind of nuisance will diminish if people get jobs?"

*A.* "No I did not feel."

Having regard to the answers given which I accept as truthful, it is quite unnecessary for me to consider what my finding might have been in respect of the mental element of the offence if the respondent had chosen to reply that the reason dominant in his mind at the time of endorsing recommendations or writing letters requesting jobs for his electors was one of ridding himself of the importunities of people who were constant pests at his house or office. The evidence actually given was that he did not consider them a nuisance. He signed the documents put up to him and wished the applicants well.

By the arrangement reached earlier with Serasinghe, the respondent's rivals at the election were effectively barred from procuring jobs for persons whom they might have wished to help. It is hardly reasonable to expect a Court to believe that, when the question of the fresh election was in everybody's mind, it was not in the mind of the candidate who had been the sitting member for that very electorate or that whatever effort was put out to procure employment had not as its dominant objective the evocation of a feeling of gratitude in the mind of the receiver of employment that might, naturally enough, manifest itself in a casting of a vote at the election shortly due. It is, in my opinion, almost idle to contend, in the face of the arrangement reached with Serasinghe, that the respondent was not much concerned with these jobs as they were trivial jobs lasting a mere six weeks to three months. Considering the possible consequences of a

verdict adverse to the respondent in this case following upon the part he played in connection with these trivial jobs, I am tempted to echo the words employed in another context by the poet:—

"What mighty contests rise from trivial things!"

As has been said in so many cases and as repeated by Bucknill J. in the *Kingston-upon-Hull* case (supra), — 6.O'M and H. at 389 — "You cannot allow a man to say 'I did not intend to do that which amounted to bribery', if when you look at all the things which he did, and all the things which he said, there is only one conclusion to draw, which is the natural inference, and that is that he has done that which he said he did not intend to do". Dealing with the question of bribery at an election arising by reason of a distribution of charity, Baron Pollock said in the *Salisbury case* — (2.O'M, and H. at p. 28) — "We must take the whole of the evidence into consideration and consider whether the governing principle in the mind of the man who gave away such gifts was that he was doing something with a veiw to corrupt the voters or whether he was doing something which was a mere act of kindness and charity." I think it is incumbent on me in the proved circumstances of this case to draw as a necessary inference that the respondent procured jobs for Sirisena, Cooray and Dharmadasa in order to induce each of them to vote for him at the pending election. I have therefore to find three offences of bribery as described in section 57(b) of the Parliamentary Elections Order in Council proved as against the respondent. It follows that the respondent's election on March 22, 1965 as Member of the House of Representatives for the Electoral District No. 17 — Kolonnawa — is void, and I hereby so declare.

It may appear from one point of view that the loss of the respondent's seat in Parliament because of the procurement of these temporary jobs in a subordinate grade for three men, two of whom at any rate could be said to have needed them greatly, is too disproportionate a price for him to be called upon to pay. These three votes, even if they had been cast in favour of the respondent, could not have affected the result of this election. Indeed even if the holders of all 200 jobs at the Exhibition had been electors of this electoral district and had all voted against the respondent the result of the election would not have been different. These considerations are, however, quite immaterial. The aim of the law admits of no doubt. The paramount object of the stringent provisions governing elections is to ensure (1) that those in whom reposes the power of making laws by which their fellow-men are to be bound shall themselves be subject to scrutiny before they enter the law-making Chamber and (2) that those who are found to have transgressed the law shall not be permitted to stay therein.

In regard to costs, as two of the charges were abandoned by the petitioner, one early and the other towards the close of his case, I award to him two-thirds of his taxed costs to be paid by the respondents.

*Election declared void.*

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

ROMIS SINGHO *vs.* FERNANDO, ELECTRICAL SUPERINTENDENT, WELIMADA, T.C.*

*S.C.* 95/65 — *M.C. Badulla,* 3065

*Argued and decided on:* 20th December, 1965.

*Electricity Act, sections* 65 *and* 67—*Theft of electric current and interference with meters — Conviction — Submission that inadmissible evidence led vitiated conviction—Sufficiency of other evidence to sustain conviction — Evidence of accomplice — Even if his evidence is not corroborated can conviction be allowed to stand, Evidence Ordinance, section* 133.

The accused was charged and convicted under sections 65 and 67 of the Electricity Act for fraudulently or dishonestly abstracting electrical energy. and with interfering with meters. Besides some inadmissible evidence led in the case, there was the evidence (*a*) of one Kadiravelu, the cinema operator employed by the accused, who gave information of the conduct of the accused to the Town Council authorities, because of an alleged assault on him.

* For Sinhala translation, see Sinhala section, Vol. 13, part, 4, p. 15

(*b*) of the Electrical Superintendant employed under the Town Council who inspected the cabin room and found that wires had been connected in such a manner as to abstract current without the meters recording the units of current actually used.

**Held:** (1) That the witness Kadiravelu was in the position of an accomplice and as his evidence has been corroborated by that of the Electrical Superintendent, there was ample evidence to sustain the conviction disregarding all the inadmissible evidence.

(2) That even if there was no corroboration of Kadiravelu's evidence, the conviction can be allowed to stand in view of the provisions of section 135 of the Evidence Ordinance.

(3) That the presumption created by sections 65 and 67 of the Electricity Act had not been rebutted by the accused.

*G. E. Chitty*, Q. C., with *Nimal Senanayake*, *Miss A. P. Abeyratne* and *N. J. Abeysekera*, for the accused-appellant.

*C. D. S. Siriwardene*, with *Miss C. M. M. Karunaratne*, for the complainant-respondent.

**Sri Skanda Rajah, J.**

The plaint in this case was apparently filed under section 148(1)(d) of the Criminal Procedure Code. The following words at the beginning of the plaint, "appears before me and states on oath" are superfluous and may be ignored. Summons was issued. The Town Council is the complainant in the written report filed on the 7th August, 1963. The summons refers to the complainant as "Electrical Superintendent of Welimada Town Council". Those words, "Electrical Superintendent' are also superfluous and may be ignored.

This is a case to which sections 171 and 425 of the Criminal Procedure Code would apply. The accused was all along aware of the nature of the complaint and what the charges against him were. He has not in any way been prejudiced: nor has there been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted—see *Jayawardane* vs. *Aluvihare*, 64 C.L.W. 93.

Undoubtedly there has been inadmissible evidence led in this case. But shorn of all that evidence there was ample evidence to justify the conviction. In this connection I would refer to S.C. 1130/64, M.C. Kuliyapitiya, 15039, S.C. minutes of 24.6.65.

The simple issue in this case was whether the accused fitted wires in such a way as to abstract current without the current used being recorded by the meters. Kadiravelu, the cinema operator working under the accused and who had occasion to make a complaint of assault to him, was in the position of an accomplice; but, because he was assaulted he went and gave the information to the Town Council authorities. On the 19th July, 1963, the Electircal Superintendent, who works under the Town Counell and who signed this plaint, inspected the cabin room and found that wires had been connected in such a manner as to abstract current without the meters recording the units of current actually used. The evidence of the Electrical Superintendent Fernando goes to corroborate the evidence of the accomplice Kadiravelu. Though the Magistrate himself has not referred to Kadiravelu as an accomplice in so many words he has considered this question in saying that Kadiravelu was not deriving any benefit himself by this device, it was the accused who was benefitted. Therefore, disregarding all the inadmissible evidence that is complained of, there is ample evidence to sustain the convictions.

In this connection it is necessary to refer to the presumption created by sections 65 and 67 of the Electricity Act under which the accused was charged. The relevant words of section 65 are "the possession of artifici almeans for such abstraction shall be prima facie evidence of such fraudulent or dishonest abstraction of energy." The relevant words in section 67 are "possession of any artificial means for making such connections.....shall.....be prima facie evidence that such connections, alterations, prevention use or supply as the case may be has been knowingly or wilfully caused by the person charged." This presumption has not been rebutted by the accused.

It is also relevant to advert to section 133 of the Evidence Ordinance which reads as follows:

> "An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorrogorated testimony of an accomplice.'

Therefore, even if there was no corroboration of Kadiravelu's evidence the conviction can be allowed to stand. In this case, however, there was ample corroboration of Kadiravelu's evidence. Therefore, I would affirm the conviction of the accused on both counts.

This is a serious offence and I was inclined to sentence the accused to a substantial term of imprisonment; but, it is brought to my notice that this has led to the accused being deprived of his licence to run the theatre. Therefore, with great reluctance I refrain from altering the sentence. The conviction and sentences are affirmed.

*Conviction and sentences affirmed.*

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

FERNANDO & OTHERS *vs.* DE SILVA*

*S.C. No.* 429/64 (*F*) — *D.C. Colombo No.* 10222/*L*

*Argued on:* 10.9.66.
*Decided on:* 25.10.66.

*Landlord and Tenant — Death of landlord—Does it extinguish tenancy? — Devolution of rights and obligations on his heirs.*

**Held:** That in a contract of tenancy, which, by agreement of the parties, runs from month to month, and has not been terminated by reasonable notice, the death of the landlord does not extinguish the contract, but his rights and obligations pass to his heirs.

**Disapproved:** *Abdul Hafeel et al v. Muthu Bathool* 58 N.L.R. 409.

*C. Ranganathan, Q.C.*, with *D. C. Amerasinghe* for the plaintiff-appellants.

*G. T. Samarawickrama, Q.C.*, with *S. W. Walpita*, for the defendant-respondents.

**Manicavasagar, J.**

The issue which we have to determine in this appeal is whether the death of the landlord terminates a contract of monthly tenancy.

The plaintiffs who are the heirs of the deceased landlord seek the ejectment of the tenant, on the basis that the contract was terminated by his death.

The learned District Judge dismissed the plaintiffs' action, and counsel for the appellants submits that his decision is wrong. His contention is that a monthly tenancy is terminated on the death of either of the contracting parties. In making this submission he relied on the opinion of Chief Justice Basnayake (Pulle, J. agreeing) in the case of *Abdul Hafeel et al* and *Muthu Bathool* (58 N.L.R. 409) that a monthly tenancy is terminated on the death of the tenant, and his rights and obligations do not pass to his heirs. The learned Chief Justice citing passages from Roman Dutch Law texts said a monthly tenancy is a contract for a period not exceeding a month, and it expires on the last day of the month, but is tacitly renewed on the first day of each month by the silence and conduct of the parties.

The citations from Voet (Book xix. 2. 9 and 10) and the Censura Forensis (iv. xxxii. 14) to which reference is made in the judgment, are, in my view, referable only to the case of a lease for a definite period —— and not to a periodic tenancy —— when after the expiry of the period of the lease, the lessee continues in the enjoyment of that which was let, and the lessor permits him to do so. Pothier says, quoting from the *Digest* (19. 2. 14):

> "Relocation is a contract of letting and hiring presumed to have been tacitly entered into by the lessor and the lessee when, after the expiry of the period of a previous lease, the lessee has continued in the enjoyment of the thing, and the lessor has permitted him to do so. This relocation is therefore not a continuation of the previous lease, but a new lease, created by a

* For Sinhala translation, see Sinhala section, Vol. 13, part 4, p. 17

new and tacit agreement between the parties, following upon the previous one". (Sec. 342 Contract of Letting and Hiring. 1953 edition)

With respect, I do not agree that monthly tenancy terminates at the end of the month, nor with the view that it is tacitly renewed from month to month. A monthly tenancy is a periodic tenancy: it is a tenancy which *by agreement* between the contracting parties runs from month to month, and *is terminated by a month's notice.* Wille says,

> "The essence of a periodic tenancy is, under the common law, that it continues for successive periods *until it is terminated by notice, given by either party.*" (Lanlord and Tenant page 45. 5th edition)

The termination of a monthly tenancy is by reasonable notice, unlike a tenancy for a definite period which ends with the efflux of time, unless it is dissolved before expiry by operation of law.

The answer to the problem before us lies elsewhere. There being no statutory provision which provides a solution, recourse must be had to the common law. The principle applicable to this question is expressed in these words by Pothier:

> "A lease is not dissolved by the death of one of the parties: but, in accordance with a rule common to all contracts, the rights and obligations arising from the lease pass to the person of his heirs, or to that of his vacua successio". (Sec. 317)

He gives two exceptions to this general rule, which is accepted by the writers on Roman Dutch Law, that

(1) where the lessor's title was one for his life only, such as a fiduciary interest or life usufruct, the death of lessor terminates the lease, and

(2) where the lease is at the will of the lessor, or leasee, death of the lessor, or the lessee as the case may be, terminates the lease.

There is also unanimity for the view that where the lease is for a definite time, the death of either party during the continuance of the lease, does not terminate the lease, and the estate is bound by the lease, except where the lessor's title is limited to his life.

What then is the answer to the issue in this case? A periodic lease does not come within the exceptions in the texts : it is terminated by notice by either party: where the contract, by agreement of the parties runs from month to month, and has not been terminated by reasonable notice, the death of the landlord does not extinguish the contract, but his rights and obligations pass to his heirs; in the instant case the tenancy has not been terminated by the plaintiffs.

The plaintiffs action was rightly dismissed, and this appeal fails.

I have not considered, as I do not think it necessary to do so in view of the decision I have reached, whether the tenant of rent-controlled premises is entitled to the protection of the Rent Act, even if the contract had been terminated by the heirs: and the larger question, whether a monthly tenant, assuming Chief Justice Basnayake's opinion is right, has protection from ejectment, under the Rent Act, on the death of his landlord.

The appellant will pay the costs of appeal, and of the original Court.

**H. N. G. Fernando, S.P.J.**

I agree.

*Dismissed.*

*Present:* **Sirimane, J.**

KUNJI MOOSA *vs.* SITHY ANNI & ANOTHER

*S.C.* 116/65 — *C.R. Colombo No.* 84304

*Argued and decided on:* 29th September, 1966.

*Rent Restriction (Amendment) Act, No.* 12 *of* 1966, *sections* 2, 3, 4—*Rent Restriction Act (Cap.* 274), *section* 9, 13 — *Whither provisions in main Act in regard to subletting affected by sections* 2, 3 *and* 4 *of the amending Act.*

**Held:** (1) That sections 2 and 3 of the Rent Restriction (Amendment) Act, No. 12 of 1966, do not in any way affect the provisions of section 9 of the principal Act (No. 29 of the 1948) which deals with restrictions on subletting.

(2) That though section 4(1) A refers to *any* action, for the ejectment of a tenant "from any premises to which the principal Act as amended by the Act applies," the section did not affect the proceedings in this action."

*Per* Sirimane, J. — "I am attracted by the submission of Mr. Ranganathan, that in this context, the provisions of Section 4 were meant to apply to pending actions filed in contravention of section 12A, i.e. actions relating to premises where the standard rent is below Rs. 100/- per month."

*G. T. Semarawickrema, Q.C.*, with *B. C. F. Jayaratne*, for the defendant-appellant.

*C. Ranganathan, Q.C.*, with *E. B. Vannitamby*, for the plaintiffs-respondents.

**Sirimane, J.**

The plaintiff-respondent had obtained a decree on 11.5.65, for ejectment against his tenant, the appellant, on the ground that the appellant had sub-let the premises in contravention of the provisions of section 9 of the Rent Restriction Act 29 of 1948. I see no reason to interfere with the finding of fact, that the appellant had sub-let the premises, the standard rent of which is over Rs. 100/- per month.

By section 2 of the amending Act 12 of 1966 a new section, 12A(1) was introduced by which the right to institute proceedings for ejectment from premises of which the standard rent for a month did not exceed Rs. 100/-, was restricted.

By section 3, the original section 13 was amended in order to make it clear that the provisions of that section now applied to premises, the standard rent of which was *over* Rs. 100/- per month. The purposes of these provisions, is to extend a greater measure of protection to tenants of *premises where the standard rent is below Rs. 100/- per month.*

By section 4 of the amending act the provisions of section 2 and 3 were made retrospective as from the 20th July, 1962, and *accordingly* actions filed on or after that date and appeals to the Supreme Court pending at the date of commencement of the amending act were declared null and void.

I am attracted by the submission of Mr. Ranganathan, that in this context, the provisions of Section 4 were meant to apply to pending actions filed in contravention of section 12A, i.e. actions relating to premises where the standard rent is below, Rs. 100/- per month.

But, it was argued for the Appellant, by Mr. Samarawickrema, that because section 4(1)A refers to *any* action for the ejectment of a tenant "from any premises to which the Principal Act as amended by this Act applies", therefore the proceedings in this action (as indeed in all pending actions where the standard rent in over Rs. 100/- per month,) should also be declared null and void. There is much to be said for this argument, though I am not inclined to accept it. I am also in agreement with the submission made by Mr. Ranganathan for the Respondent that in any event sections 2 and 3 of the amending act in no way affect the provisions of section 9 of the principal Act 29 of 1948.

The appeal is dismissed with costs.

*Appeal dismissed.*

*IN THE COURT OF CRIMINAL APPEAL*

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

THE QUEEN *vs.* RATNAM KUMARADASAN

*Appeal No.* 73 *of* 1966 with *Application No.* 122 *of* 1966 — *S.C. No.* 24 *M.C. Mallakam* 12809

*Argued on:* 29th and 30th October, 1966.
*Decided on:* 30th October, 1966.
*Reasons delivered on:* 12th November, 1966.

*Court of Criminal Appeal—Misdirection—Indictment for murder—Conviction for grievous hurt—Medical evidence led for prosecution and defence conflicting—Duty of trial Judge in such circumstances—Need to put before Jury the evidence led for defence, however weak it may be—Non-direction.*

The appellant was indicted for murder but was found guilty of having caused grievous hurt and was sentenced to five years' rigorous imprisonment. The prosecution depended almost entirely on the evidence of an eye-witness B who stated that he saw the appellant striking the deceased two blows on his head in rapid succession with a club. He further demonstrated the manner in which the blows were dealt while the deceased was standing.

Medical evidence led for the prosecution tended to support the alleged eye witness' evidence, while medical evidence led for the defence cast doubt on it. All that the learned trial Judge said in his summing up to the jury in regard to this evidence which was given in great detail was as follows:-

> "In this case you will take into consideration the evidence of Dr. Amarasekera and also the evidence of Dr. Fernando, Professor of Forensic Medicine. Dr. Fernando had been a Professor for sometime. He was a lecturer before that. He also worked like Dr. Amarasekera with Professor De Saram. Dr. Fernando has performed a few hundred postmortem examinations, but Dr. Amarasekerea has performed between 4000 to 5000 postmortem examinations and Dr. Fernando himself has admitted that a person who performs more postmortem examinations would be more experienced than he. You have listened to the medical evidence and you will take all the medical evidence into consideration. If any doubt arises out of this, that must be resolved in favour of the accused. It should not be resolved in favour of the prosecution. As I have told you, the prosecution must prove its case beyond reasonable doubt."

It was argued for the appellant that the learned Judge had ignored all the medical evidence given for the defence and that such non-direction was a misdirection which vitiated the entire trial.

**Held:** (1) That the above-quoted passage was quite inadequate as it had not dealt in the slightest way with the evidence given by either medical witness. The conviction should, therefore, be quashed.

(2) That where evidence has been led for the defence, however weak it may be, that evidence must be fairly and adequately put before the jury.

(3) That as it is always difficult for a Jury to resolve a conflict of medical opinion, they should receive proper directions from the trial Judge both as to how they should deal with conflicting medical testimony and as to what bearing the evidence given for the defence has on the case presented by the prosecution.

*G. E. Chitty, Q.C.*, with *D. V. A. Joseph* and *K. Vaikunthavasan* (assigned) for the accused-appellant.

*T. A. de S. Wijesundera*, Senior Crown Counsel, for the Attorney-General.

**Sansoni, C.J.**

The appellant was indicted for the murder of Sivaguru Pararajasingham on or about the 7th day of February, 1965. He was found guilty, by a majority verdict of 5 to 2, of having caused grievous hurt, and sentenced to rigorous imprisonment for 5 years.

The case for the prosecution depended almost entirely on the evidence of a witness Balasuntheram. He said that when he was at the Community Centre at Uduvil at about 6 p.m. that evening, Pararajasingham also came there, and was standing on the compound. He then saw the appellant come from behind Pararajasingham and strike the latter two blows on his head in quick succession,

with what looked like a club. Balasuntheram also said that he and another chased after the appellant who ran away with the club, but they could not seize him.

Four doctors were called for the prosecution. The most important medical evidence was given by Dr. Amarasekera, Deputy Judicial Medical Officer, Colombo, who held the postmortem examination on the body of the deceased on 1st September, 1965. He described one of the internal injuries as a pond-shaped depressed fracture of the skull, almost circular, about 3" by 2 1/2" situated on the outer rear part of the right side of the skull, above and behind the right external ear. He gave further particulars of this injury, and described certain fissured fractures which radiated from it. He was of the opinion that a person standing behind the injured man could have caused the injury, though it was more likely that the assailant was on a side of the victim, and slightly forward. He thought that two blows caused that injury, but one blow could have caused it. When asked whether the injuries could have been caused in the manner demonstrated by the witness Balasuntheram, he said it was possible. That witness had demonstrated two blows dealt in rapid succession while the injured man was standing.

For the defence, Professor H. V. J. Fernando, Professor of Forensic Medicine of the University of Ceylon, gave evidence. He said that he agreed with Dr. Amarasekera when the latter said that the injuries were probably caused by one or two blows. He was then asked whether Balasuntheram's demonstration of how the blows were struck was a likely way in which the injury was received. He replied that, going on the description given by Dr. Amarasekera, he thought it unlikely that the blows were inflicted in that manner. Giving reasons for his opinion he said that the presence of an extensive fracture which constituted the main injury, and three fissured fractures radiating from that main injury, led him to conclude that the injury was caused when the head was supported. He thought the most likely way the injury could have been caused was by a blow dealt from in front, after the injured man had fallen down, and when his head was resting on the ground. He thought that one blow could have caused that injury.

At the end of the re-examination of this witness, the learned Trial Judge questioned him, and the following questions and answers have been recorded:—

"**Court:** *Q.* When were you consulted regarding this matter?

*A.* I was consulted about two or three months ago or more than that.

*Q.* By whom?

*A.* By Mr. Ponnambalam.

*Q.* Did you charge any consultation fees?

*A.* It is charged, but it is credited to the University Fund. I do not get anything.

*Q.* What are the fees you charge?

*A.* For consultation Rs. 52/50 and Rs. 150/- for giving evidence.

*Q.* Mr. Ponnambalam means Mr. G. G. Ponnambalam?

*A.* Yes.

**Foreman:** No questions."

We are unable to understand the purpose of these questions, or their relevancy to the issues in the case.

The chief complaint made against the summing-up of the learned Judge is that he ignored all the evidence given by Professor Fernando, upon which the entire case for the defence rested. It was urged that such a non-direction was a mis-direction which vitiated the entire trial.

It seems to us that this complaint is justified. The learned Judge has not dealt at all with the evidence of either Dr. Amarasekera or of Professor Fernando. All he said with regard to their evidence is this:—

> "In this case you will take into consideration the evidence of Dr. Amarasekerea and also the evidence of Dr. Fernando, Professor of Forensic Medicine. Dr. Fernando had been a Professor for sometime. He was lecturer before that. He also worked like Dr. Amarasekera with Professor De Saram. Dr. Fernando has performed a few hundred postmortem examinations, but Dr. Amarasekera has performed between 4000 to 5000 postmortem examinations and Dr. Fernando himself has admitted that a person who performs more postmortem examinations would be more experienced than he. You have listened to the medical evidence and you will take all the medical evidence into consideration. If any doubt arises out of this, that must be resolved in favour of the accused. It should not be resolved in favour of the prosecution. As I have told you, the prosecution must prove its case beyond reasonable doubt."

This is quite inadequate, and would in no way have helped the Jury to assess their evidence. The evidence of these two medical witnesses dealt in very great detail with the manner in which they thought the deceased could have received the injury on his head. Dr. Amarasekera's evidence tended to support the alleged eye witness's evi-

dence, while Professor Fernando's evidence cast doubt on it. The passage I have quoted has not dealt in the slightest way with evidence given by either witness.

It is always difficult for a Jury to resolve a conflict of medical opinion. In the end they would have to make up their minds as to which of the experts was the more likely to be right. But before that stage is reached, they should receive proper directions from the trial Judge both as to how they should deal with conflicting medical testimony, and as to what bearing the testimony of Professor Fernando had on the case presented by the prosecution. We need hardly say that where evidence has been led for the defence, however weak it may be, that evidence must be fairly and adequately put before the Jury; and they must be asked to consider that evidence before they arrive at their verdict. This fundamental principle has been ignored in the present case, and the trial cannot therefore be said to have been a fair trial.

We therefore quash the conviction. This is the second trial which has been held upon this indictment. We do not order a new trial.

*Conviction quashed.*

*IN THE COURT OF CRIMINAL APPEAL*

*Present:* **H. N. G. Fernando, S.P.J.** (*President*), **T. S. Fernando, J. and Sri Skanda Rajah, J.**

AMERASINGHE ARACHCHIGE DAVID & ANOTHER *vs.* THE QUEEN

*Nos.* 33 & 34 *of* 1966. — *S.C. No.* 252, *M.C. Kalutara,* 18895.

*Argued and decided:* 11th June, 1966.
*Reasons delivered:* 9th August, 1966.

*Common Intention — Joint Trial — Murder — Misdirection of fact — Circumstance of suspicion — Non-direction — Irresistible inference — Mere presence insufficient — Evidence against each accused to be considered separately — Unreasonable verdict — Miscarriage of justice — Penal Code, section* 32.

The two accused were indicted with the murder of one Abraham and both were convicted of murder. The deceased and three others were seated on the verandah of a house facing a public road, beside which is an embankment. The house and the embankment are on a higher level than the road. At about 8.30 p.m. a gun-shot was heard and D, a witness, who was seated on the verandah, looked in the direction of the flash of the gun, and saw:

(a) the first accused on the embankment with a gun in his hand, and that, in a moment, he turned and went along the embankment in a direction which would lead to his house; and

(b) the second accused about three or four feet behind the first accused, also going in the same direction.

The gun-shot injured Abraham and caused his death.

**Held:** (1) That the learned Commissioner had misdirected the Jury in summing up the evidence on the basis that the two accused persons had come together, when no witness supported the theory.

(2) That the fact that the second accused hastily left the scene after the shooting was no serious indication that he was in any way concerned with the shooting and was quite compatible with his innocence.

(3) That in the absence of evidence of any special friendship between the two accused persons, or of any association between them prior to the time of shooting, the fact that some three months earlier, the second appellant had accused the deceased of a gambling offence, remained a matter of slight suspicion only and ought to have been presented to the Jury as such.

(4) That this was clearly a case in which the Commissioner should have directed the Jury:—

(a) that the inference of common intention must not be reached unless the evidence irresistibly leads to it;

(b) that the mere presence of a person at the scene of the offence does not justify an inference of guilt;

(c) that the evidence against each accused must be considered separately.

(5) That the absence of these requisite directions led to an unreasonable verdict against the second accused and to a miscarriage of justice.

*E. R. S. R. Coomaraswamy*, with *N. S. A. Goonetilleke, Nihal Jayawickrema, Anil Obeyesekere, Kumar Amerasekera* and *Neville Wijeratne* (assigned) for the appellants.

*E. R. de Fonseka*, Senior Crown Counsel for the Attorney-General.

**H. N. G. Fernando, S.P.J.**

The two appellants were convicted of the murder of one Abraham and were sentenced to death. The relevant evidence can be quite briefly summarised.

The deceased and three other men were seated on the verandah of a house which faced a public road. The road is about 10 feet wide, and beside it is an embankment. The house and the embankment are both on a higher level than the road. At about 8.30 p.m. a gun-shot was heard, and the witness Dharmadasa (one of the men on the verandah) who looked in the direction of the flash of the gun, saw the 1st Appellant on the embankment with a gun in his hand; in a moment the first appellant turned and went along the embankment in a direction which would lead to his home, and the witness also saw the 2nd appellant about 3 or 4 feet behind the 1st appellant also going in the same direction. The gun-shot had injured Abraham who had been seated on the verandah, and caused his death.

We saw no reason to question the propriety of the conviction of the 1st appellant, and we dismissed his appeal. But we were satisfied that the verdict against the 2nd appellant was unreasonable.

The learned Commissioner summed up the evidence on the basis that the two appellants had come together to the scene of the shooting, although no witness supported that theory. The embankment was a public place on which any inhabitant of the village could have walked without any unlawful purpose in view. The fact that he hastily left the scene after the shooting is no serious indication that he was in any way concerned in the shooting. His leaving the scene immediately was quite compatible with his innocence.

The only matter which could properly raise some suspicion against the 2nd appellant was the fact that some three months earlier he had accused the deceased man of a gambling offence, of which the latter had been acquitted. But in the absence of evidence of any special friendship between the two appellants or of any association between them prior to the time of the shooting, that matter remained one of slight suspicion only and should have been presented to the Jury as such.

This was clearly a case in which the learned Commissioner should have heeded the repeated observations of this Court, that in cases under Section 32 of the Penal Code, the Jury must be directed —

(a) that the inference of common intention must not be reached unless the evidence irresistibly leads to it;

(b) that mere presence of a person at the scene of an offence does not justify an inference of guilt;

(c) that the evidence against each accused must be considered separately.

In our opinion, the absence of these requisite directions led to an unreasonable verdict and to a miscarriage of justice. For these reasons we set aside the verdict against the 2nd appellant and the sentence imposed on him, and we directed his acquittal.

*Conviction of 1st accused affirmed.*

*Conviction of 2nd accused set aside.*

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

KOLONNAGE PAULIS PERERA *vs.* HARRIS WICKREMATUNGE

*S.C. Application No.* 39 *of* 1966.

*In the matter of an application for a Mandate in the nature of Writ of Quo Warranto under Section* 42 *of the Courts Ordinance* (Cap. 6) *on Harris Wickrematunge*

*Argued on:* 9th and 10th October, 1966.
*Decided on:* 10th October, 1966.

*Writ of Quo Warranto—Invalidation of election to Municipal Council—Grounds of general undue influence and general intimidation—Does Mandate in nature of such writ lie in Ceylon—English Common Law and Statute Law—Local Authorities Elections Ordinance* (*Cap.* 262), *Sections* 9, 10, 11—*Municipal Councils Ordinance* (Cap. 252), *Sections* 10 *and* 13—*Civil Law Ordinance* (Cap. 79), *section* 3—*Courts Ordinance* (*Cap.* 6), *section* 42 — *Ordinance No.* 4 *of* 1920.

**Held:** (1) That no mandate in the nature of a wirt of Quo Warranto can be issued by the Supreme Court to question the validity of the election of a Municipal Councillor on general grounds such as, general undue influence or intimidation and general bribery, inasmuch as no provision is made in respect of this matter by the Statute Law of Ceylon, and even according to the English Law, no Writ of Quo Warranto has been available in England on such grounds since 1872 (Victoria, Cap. 60).

(2) (*Per* **Siva Supramaniam, J.**) That since relief by way of a Writ of Quo Warranto had ceased to be available under the English Common Law to invalidate a Municipal election on such grounds before Ordinance No. 4 of 1920, which authorised the issue of mandates in the nature of such writs by the Supreme Court, it would not be appropriate to have recourse to the principles of the English Common Law to determine the grounds on which the Court should issue that writ in connection with the invalidation of a Municipal election.

*Per* **Siva Supramaniam, J.** — "Soertsz J. at the conclusion of his judgment in *Piyadasa's case* drew attention to the desirability of adopting *mutatis mutandis* the State Council Order in Council in regard to elections to the State Council to govern Municipal elections. That was in 1941. Nevertheless, when the Legislature enacted Ordinance No. 53 of 1946 (Cap. 262) to amend and consolidate the law relating to the election of members to Local Bodies it did not include therein provisions to invalidate an election on grounds of general corrupt or illegal practices. The omission is significant when one considers the provisions of Section 77 of the Ceylon (Parliamentary Elections) Order-in-Council of 1946 in connection with the election of members to Parliament. In those circumstances, this Court will be encroaching on the powers of the Legislature if it adds to the grounds on which elections to Municipal Bodies can be invalidated."

**Not followed:** *Piyadasa* vs. *Goonesinghe* (1941) 42 N.L.R. 339.

*E. R. S. R. Coomaraswamy*, with *Rajah Bandaranaike*, *S. S. Sahabandu* and *C. Chakradaran*, for the petitioner.

*H. W. Jayawardena, Q.C.*, with *R. R. Nalliah* and *N. Kasirajah*, for the respondent.

**Abeyesundere, J.**

The petitioner has applied for a Writ of Quo Warranto in order that this Court may determine the question whether the respondent, who was elected as a member of the Colombo Municipal Council on 18th December 1965, has the right to hold the office of Municipal Councillor. It is alleged by the petitioner that there was no free and fair election as there was general intimidation of the voters at the instance of the respondent, some voters were by undue influence induced to refrain from voting and the opposing candidate was by the use of force and intimidation prevented from holding meetings for the promotion of his candidature and canvassing support for his election.

The Local Authorities Elections Ordinance (hereinafter sometimes referred to as "the Ordinance") is, as its long title indicates, an Ordinance to amend and consolidate the law relating to the election of members of Local Authorities. A Municipal Council is one of the Local Authorities to which the Ordinance applies. Section 9 of the Ordinance specifies the disqualifications to be elected, or to sit or vote, as a member of any

Local Authority. Section 1 (1) provides that where any member of a Local Authority is, by reason of the operation of any of the provisions of Section 9, disqualified from sitting or voting as a member of such authority, his seat or office shall *ipso facto* become vacant. Section 11 of the Ordinance makes it an offence for a person knowingly to act in the office of member of any Local Authority after his seat or office becomes vacant under Section 10(1).

None of the grounds averred by the petitioner would under section 9 of the Ordinance have disqualified the respondent to be elected as a member of the Colombo Municipal Council or would under that Section disqualify him to sit and vote as a member of such Council.

Section 10 of the Municipal Councils Ordinance specifies the terms of office of a Municipal Councillor elected at a general election. Section 13 of that Ordinance provides for the vacation of the office of Municipal Councillor by the relinquishment or resignation of office or by the failure to attend 3 consecutive general meetings of the Council without leave of the Council first obtained. The petitioner does not aver that the respondent's right to hold office as a member of the Colombo Municipal Council is affected by Section 10 or Section 13 of the Municipal Councils Ordinance.

From the aforesaid provisions of statutory law in force in Ceylon it is reasonable to infer that if a person, who is not disqualified to be elected under Section 9 of the Local Authorities Elections Ordinance, is elected as a member of a Municipal Council, he has the right to hold the office of such member until that office is vacated by relinquishment or resignation of office or otherwise becomes vacant in accordance with the aforesaid statutory provisions.

Mr. E. R. S. R. Coomaraswamy, who appeared for the petitioner, argued that the case of the petitioner was that the respondent was not duly elected. When Section 10 of the Municipal Councils Ordinance specifies the term of office of a Councillor "elected at a general election", it does so in respect of a Councillor elected in accordance with the provisions of the Local Authorities Elections Ordinance. The essential provisions relating to elections contained in the latter Ordinance are those relating to nomination of candidates, the holding of a poll where there is a contest, voting at the poll, and the determination of the result of the poll by counting the votes cast at the poll. In the case before us, the facts averred by the petitioner indicate that there was a nomination of candidates, that voters had gone to the poll and voted, that 3886 voters had voted at the poll, that the votes were duly counted, and that the result of the poll was determined by reference to the majority ascertained at the counting. It must therefore be presumed that the election of the respondent was in accordance with the provisions of the Local Authorities Elections Ordinance.

Mr. Coomaraswamy conceded that under the statute law of Ceylon the averments of the petitioner afford no ground for declaring that the respondent has no right to hold office as a member of the Colombo Municipal Council, but he argued that the question whether the respondent has a right to hold office as a member of the Colombo Municipal Council must be determined by applying the English Law. He relied on the judgment of Mr. Justice Soertsz in the case of *Piyadasa* v. *Goonesinghe* (42 N.L.R. p. 339) in which it was held that a Writ of Quo Warranto lies to question the election of a person to a Municipal Council on the ground of general undue influence and general bribery. In holding as aforesaid Mr. Justice Soertsz relied on the English Common Law as general undue influence and general bribery were not grounds on which according to the law in Ceylon the election of a member to a Municipal Council could be invalidated. In 1872 a statute (Victoria, Cap. 60) was passed by the Parliament of England for "the better prevention of corrupt practices at Municipal Elections". That statute displaced the Common Law of England which permitted a Writ of Quo Warranto on the ground of corrupt practice at a Municipal election. Therefore, after the aforesaid statute was enacted, according to English Law no Writ of Quo Warranto lies to question the election of a member to a Municipal Council on the ground of general undue influence or general bribery. Consequently, with due deference to the learned Judge aforesaid, we are of the view that the issue of a Writ of Quo Warranto in the aforesaid case of *Piyadasa* v. *Goonesinghe* could not have been according to English Law. Mr. Coomaraswamy cited certain other cases in which the aforesaid judgment of Mr. Justice Soertsz was adopted with approval. The judgment in each of the aforesaid cases was that of a single Judge. We are therefore not bound by those judgments even under the convention of *stare decisis*. Mr. Coomaraswamy pleaded that the precedents created by this Court by the judgment in the

aforesaid cases should not be departed from. I need only quote Justinian's dictum: "Non examplis sed legibus judicandum est". The decisions of a Court must be based on law and not on precedents.

Section 3 of the Civil Law Ordinance provides that in all cases which have to be decided in Ceylon with respect to the law of corporations, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question had arisen or had to be decided in England, unless there is other provision in any enactment in force in Ceylon. A Municipal Council is a statutory corporation. The right of a person to hold office as a member of such a Council must therefore be determined by reference to the statute law applicable to such a Council. Mr. Coomaraswamy submitted that Section 3 of the Civil Law Ordinance applied to a Municipal Council. Assuming that the said Section 3 applies to a Municipal Council, it is clear from the terms of that section that, if there is statutory provision applicable to any matter relating to a Municipal Council the English Law will not apply to that matter. As indicated above there is statutory provision in Ceylon in regard to the disqualifications to be elected and to sit and vote as a member of a Municipal Council, the term of office of such a member, and the vacation of such office by relinquishment or resignation thereof or otherwise in accordance with those statutory provisions. The intention of the legislature, as evident from those statutory provisions, appears to be that a person not disqualified to be elected shall be entitled after election to hold the office of Municipal Councillor until his term of office expires or his office becomes vacant under those statutory provisions. We cannot agree with Mr. Coomaraswamy when he seeks to introduce from the law of England further circumstances in which an elected member of a Municipal Council may be held to cease to hold office as such member.

The question we have to determine is whether a Writ of Quo Warranto lies on the averments made by the petitioner. As stated above, even according to the law of England a Writ of Quo Warranto does not lie on such averments. We have indicated that the petitioner's averments do not disclose a ground on which under the statute law in Ceylon the respondent ceases to hold office as a member of the Colombo Municipal Council.

For the aforesaid reasons, we hold that the averments of the petitioner do not afford a legal ground for declaring on a Writ of Quo Warranto that the respondent has no right to hold the office of member of the Colombo Municipal Council to which he was elected at a general election. The Rule Nisi issued on the respondent is therefore dissolved.

The respondent is entitled to his taxed costs of the proceedings in this Court.

**Siva Supramaniam, J.**

I agree. It was only in 1920 when Section 42 of the Courts Ordinance No. 1 of 1889 was amended by Ordinance No. 4 of 1920 that this Court was authorised to grant and issue according to law, a mandate in the nature of a Writ of Quo Warranto. At that date, relief by way of a Writ of Quo Warranto had ceased to be available under the English Common Law to invalidate a Municipal election on the ground that a corrupt or illegal practice such as general bribery or general undue influence or general intimidation had been committed in connection with the election. It will not be appropriate, therefore, to have recourse to the principles of English Common Law to determine the grounds on which this Court should issue that writ in connection with the invalidation of a Municipal election.

Soertsz J. at the conclusion of his judgment in *Piyadasa's* case drew attention to the desirability of adopting *mutatis mutandis* the State Council Order in Council in regard to elections to the State Council to govern Municipal elections. That was in 1941. Nevertheless, when the Legislature enacted Ordinance No. 53 of 1946 (Cap. 262) to amend and consolidate the law relating to the election of members to Local Bodies it did not include therein provisions to invalidate an election on grounds of general corrupt or illegal practices. The omission is significant when one considers the provisions of Section 7 of the Ceylon (Parliamentary Elections) Order-in-Council of 1946 in connection with the election of members to Parliament. In those circumstances, this Court will be encroaching on the powers of the Legislature if it adds to the grounds on which elections to Municipal Bodies can be invalidated.

*Application refused.*

**T. S. Fernando, J. and Sri Skanda Rajah, J**

FERNANDO *vs.* MUNASINGHE

*S.C. No.* 60/1964—*D.C. Colombo No.* 53287/M

*Argued and decided on:* 14th April, 1965.

*Pleadings, amendment of — Amendment which would defeat plea of prescription not to be permitted — Unjust enrichment — Period of prescription for cause of action based thereon — Prescription Ordinance (Cap. 68), section 10.*

**Held:** (1) That a cause of action based on unjust enrichment would be prescribed in three years.

(2) That it would not be permissible to amend a plaint so as to include such a cause of action where this would have the effect of defeating a plea of prescription available to the defendant.

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

No appearance for the plaintiff-respondent.

**T. S. Fernando, J.**

On this appeal the defendant seeks to canvass the order made by the learned District Judge of Colombo allowing certain amendments of the plaint filed by the plaintiff on the 4th of July, 1961.

The basis of the cause of action sued upon in the plaint originally filed in this case was money lent and advanced. The defendant filed answer of the 24th of November, 1961 and the plaintiff sought to file an amended plaint dated the 16th of July, 1963. The defendant objected to the amendment of the plaint and, after argument, the learned Judge permitted the amendments.

It has been contended on behalf of the defendant that the amendment of the plaint by paragraph 7 of the amended plaint brings in a new cause of action based on unjust enrichment, a cause of action which would be prescribed within 3 years, and that to permit that amendment would defeat the plea of prescription which would otherwise be available to the defendant. We are in agreement with the contention of the counsel for defendant on this point and we set aside that part of the order of the District Judge which permits the inclusion of paragraph 7 of the amended plaint.

Learned counsel for the defendant also attempted to canvass the permitting of the amendment of the plaint in other respects implicit in the amended plaint of 16th July, 1963, on the ground that this part of the amended plaint alters the legal basis of the action. We are unable to agree with counsel on this point. The basis of the cause of action in both the original plaint and the amended plaint is money lent and advanced.

The defendant will be entitled to costs of this appeal.

**Sri Skanda Rajah, J.**

I agree.

*Appeal partly allowed.*

*Present :* **Alles, J.**

S. I. POLICE, DIVULAPITIYA *vs.* W. SARPINU FERNANDO

*S.C. No.* 1069/1964—*M.C. Negombo, No.* 3762.

*Argued and decided on:* 18th January, 1965.

*Judgment—Duty of Magistrate to give reasons for his decision—Criminal Procedure Code, section* 306(1).

Where a Magistrate merely reiterates the evidence of the witness for the prosecution without a finding that he accepts their evidence, and states that he cannot accept the evidence of the accused and that he does not appear to be speaking the truth—

**Held:** That the Magistrate had not discharged the duty cast upon him by section 306(1) of the Criminal Procedure Code and that the conviction should be set aside.

**Case referred to:** *Ibrahim* v. *Inspector of Police, Ratnapura,* (1957) 59 N.L.R. 235.

*Anil Obeyesekera,* for the accused-appellant.

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

ALLES, J.

The accused-appellant in this case has been convicted of the possession of 5 drams of distilled spirits, an offence punishable under section 47 of the Excise Ordinance.

In his order, the learned Magistrate has merely reiterated the evidence of the witnesses for the prosecution. There is no finding that he accepts their evidence in convicting the accused-appellant. On the other hand, in dealing with the case for the defence, he has stated that he cannot accept the evidence of the accused, and that he does not appear to be speaking the truth.

It has been held in the case of *Ibrahim* v. *Inspector of Police, Ratnapura,* 59 N.L.R., at page 235, that a mere outline of the case for the prosecution and the defence embellished by such phrases as " I accept the evidence for the prosecution ", " I disbelieve the defence ", is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306 (1) of the Criminal Procedure Code. In this case the Magistrate has not even gone to that extent. The order made by the Magistrate is unsatisfactory.

I allow the appeal and set aside the conviction of the accused-appellant and acquit him.

*Accused acquitted.*

*Present:* **Tambiah, J.**

V. T. RATNALINGAM, LABOUR OFFICER, TRINCOMALEE *vs.* SINNADURAI

*S.C.* 852/1964 — *M.C. Trincomalee No.* 5921

*Argued on:* January 22, 1965.
*Decided on:* 27th January 1965.

*Shop and Office Employees Act No.* 19 *of* 1954 (*Cap.* 129) — *Charge of keeping shop open and not preventing customer entering shop on Sunday—Contravention of Closing Order issued by Minister in terms of regulations made under section* 2 *of the Act — Does such order apply to an owner of a shop who has no employees.*

**Held:** That the owner of a shop, who has no employees, is an employer within the meaning of the Shop and Employees Act and is bound by the closing orders contained in the regulations made by the Minister under the provisions of the Act.

**Cases referred to :** *Attorney-General* v. *Prince Ernest Augustus of Hanover,* 1957 A.C. 436; (1957) 2 W.L.R. 1, *In re Wykes. Riddington* v. *Spencer & Others,* (1961) 2 W.L.R. 115.

*Shiva Pasupathy,* Crown Counsel, for the complainant-appellant.

*Siva Rajaratnam,* for the accused-respondent.

**Tambiah, J.**

The respondent in this case was charged under the provisions of the Shop and Office Employees Act No. 19 of 1954 (Cap. 129 of the Legislative Enactments of Ceylon), for having kept open his shop on June 30, 1963 at 5.30 p.m. and for not preventing a customer from entering the shop at this time in contravention of the Closing Order issued by the Hon'ble the Minister of Labour and approved by the Parliament and the Senate. The Minister's regulations were issued under section 2 of the Shop and Office Employees Act and are published in Government Gazettes No. 724 of October 15, 1954, No. 10,517 of April 10, 1953 and No. 13,187 of June 29, 1962 which are marked P2, P3 and P4 respectively. Under these regulations no shop in the area in which the respondent's shop is situated can be opened for business on Sundays.

It was established by the prosecution in this case that the respondent kept his shop open at 5.30 p.m. on Sunday the 30th of June, 1963 and served a customer. The short point for decision is whether these orders apply to an owner of a shop who has no employees. The learned Magistrate took the view that for the accused to be liable under the Act, he must have an employee and acquitted the respondent. The Attorney-General has appealed from this order.

The preamble to the Shop and Office Employees Act No. 19 of 1954 (Cap. 129 of the Legislative Enactments of Ceylon), states as follows: "An Act to provide for the regulation of employment, hours of work and remuneration of persons in shops and offices, and for matters connected therewith or incidental thereto." Counsel for the respondent contended that these provisions of the preamble to the Act, taken along with the other provisions, clearly indicate that the mischief the Legislature wanted to remedy was to safeguard employees from unscruplous employers. On a consideration of the provisions of this Act, it is clear that this Act was intended to protect employees and to give them certain rights.

Section 43 of this Act enacts as follows —

> "(1) No shop shall be or remain open for the serving of customers in contravention of any provision of any closing order made under this Act.
>
> (2) It shall be the duty of the employer to prevent any customer from entering the shop on any day or at any time when such shop is required by any closing order to be closed for the serving of customers."

Section 51(1) penalises any contravention of or failure to comply with any provisions of this Act or any regulations relating to any shop or office or to the employment of any person in or about the business thereof. The word employer is defined as follows:

> "employer —
>
> (a) in relation to any shop, means the owner of the business of that shop, and includes any person having the charge or the general management and control of that shop, and
>
> (b) in relation to any office, means the person carrying on, or for the time being responsible for the management of, the business for the purposes for which the office is maintained."

The learned Crown Counsel contended that the preamble to an Act cannot be looked into when the words of the statute are clear. He urged that the word "employer" has been given a special meaning in the interpretation clause of this Act and any owner of a shop will be regarded as an employer for the purpose of the obligations cast on an employer by this Act and the regulations made thereunder.

It is a well known canon of construction that if the words of a statute are clear, a preamble to an Act cannot control its clear and unambiguous provisions. In *The Attorney-General* vs. *Prince Ernest Augustus of Hanover* (1957) 2 W.L.R. p. 1 at p. 9, Viscount Simonds succinctly stated this proposition as follows —

> "I would suggest that it is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it."

In *re Wikes, Riddington* vs. *Spencer and others* (1961) 2 W.L.R. 115 at 123, Buckley J., re-iterated the same rule of construction as follows:

> "It is well established that the language of a statute must primarily be construed according to its natural meaning. If the language is

ambiguous the long title of the Act may be looked at to help resolve the ambiguity; it may not be looked so as to modify the interpretation of plain language."

In the Shop and Office Employees Act, the word "employer" is not given its natural meaning but is defined as a term of art and must be given the meaning found in the interpretation clause. Section 68 of the Act defines the word "employer" to mean the owner of a business of a shop. The counsel for the respondent contended that no harm could be done to an employee if an employer, who has no employee, keeps his shop open in contravention of the orders of the Minister. But it seems to me that the intention of the Legislature was not to leave any loop-hole in the Act for any person to say that he is not bound by the regulations of the Minister because he has no employees. If there should be such a lacuna in the legislation, unscruplous employers, who have employees can easily get over the provisions of the Act by providing some sort of proof that they have no employees when they are prosecuted under this Act. It is not necessary to speculate on the intention of the Legislature when it is clearly expressed in unambiguous language. I therefore, hold that the owner of a shop, who has no employees, is an employer within the meaning of the Shop and Office Employees Act and is bound by the closing orders contained in the regulations made by the Minister under the provisions of the Act.

For these reasons, I allow the appeal, set aside the order of the learned Magistrate and convict the accused on the counts on which he was charged. Since this appeal is in the nature of a test case, I impose a fine of Rs. 25/- on each count, i.e. Rs. 50/- in all. The respondent is given time to pay the fine. He should pay it within a month of the record reaching the Magistrate. In default of fine, he will undergo a term of two week's simple imprisonment.

*Set aside.*

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

A. R. M. L. THAMBY LEBBE *vs.* P. RAMASAMY*

*S.C.* 143 (*R.E.*) 1964 — *C. R. Gampola* — 13624

*Argued on:* 20th July, 1965.
*Decided on:* 27th July, 1965.

*Rent Restriction Act — Landlord suing for ejectment on the ground of reasonable requirement in order to run a business—Landlord's poor financial position and inability to get one out of several premises owned by him — Tenant running a prosperous business with branches elsewhere — Tenant's unwillingness to find alternative accommodation or to leave premises — Notice to quit — Failure to mention therein the purpose for which premises required — Can inference adverse to landlord be drawn therefrom.*

Plaintiff, once a successful businessman, but at the time of the institution of this action in a poor financial position and whose only means to support his wife and children consisted of some house rent, sued the defendant, his tenant, carrying on a business — ( a tea kiosk and hotel) for ejectment on the ground that the premises were reasonably required to run a textile business to enhance his income.

The learned Commissioner, while accepting the evidence of the plaintiff in regard to his poor financial position and the consequent neccessity to sell up his capital assets in order to meet his requirements, and holding that the plaintiff's inability to get one of the several premises he owned for his own use did cause hardship stated that because the notice to quit did not mention the purpose for which the premises were required, he was unable to hold that the plaintiff's needs outweighed those of the defendant.

Further, the learned Commissioner failed to consider the effect of the defendant's evidence on the question of alternative accommodation when he said in cross-examination.

(*a*) that he was not aware whether there were several other premises available to run his business.

(*b*) that he was not prepared to leave the premises even if other suitable alternative accommodation was offered to him by the plaintiff.

* For Sinhala translation, see Sinhala section, Vol. 13, part 6, p. 19

**Held:** (1) That the learned Commissioner misdirected himself when he drew an inference adverse to the plaintiff from the fact that the notice did not contain the purpose for which the premises were required, as there is no legal requirement that such purpose or any purpose at all need be mentioned in a notice to quit.

(2) That having regard to this misdirection which had influenced the learned Commissioner's mind and in view of

(*a*) the aforesaid evidence of the defendant regarding alternative accommodation, and his *mala fides* revealed thereby and the failure on the part of the learned Commissioner to consider this in arriving at his conclusion;

(*b*) the acceptance by him of the plaintiff's evidence that he wanted to carry on a new textile business;

the plaintiff was entitled to succeed.

(3) That even though the requirement of the landlord is to start a new business in premises where the tenant is already carrying on a business, he is entitled in law to recover possession of his premises provided his need is genuine and more urgent than that of the tenant.

(4) That in a case in which the relative urgency of the requirement of the landlord vis-a-vis that of the tenant is in issue, the comparative means of each of them is also a relevant though not a necessarily decisive factor.

**Cases referred to:** *Mendis* v. *Ferdinands*, (1950) XLIII C.L.W. 41; 51 N.L.R. 427.
*Suppiah Chettiyar* v. *Samarakoon*, (1954) 56 N.L.R. 161.
*Andree* v. *De Fonseka*, (1950) 51 N.L.R. 213; XLI C.L.W. 109
*Nanayakkara* v. *Pablis Silva*, (1959) 60 N.L.R. 490.

*S. Sharvananda*, with *S. Rajaratnam*, for the plaintiff-appellant.

*T. B. Dissanayake*, for the defendant-respondent.

**G. P. A. Silva, J.**

This is an action by the plaintiff-appellant against the defendant-respondent for ejectment of the defendant from certain premises at Nawalapitiya in which the latter is carrying on a business of a Tea Kiosk and Hotel. The plaintiff is the owner of a number of premises in Nawalapitiya town all of which are tenanted. From the evidence in the case it would appear that he was once a successful timber merchant and contractor but had, at the time of the institution of the action, come on evil days having to sell a number of properties to pay off his debts. His main source of income, at the time of the action, was some house rent from which he had to support his wife and children, four of whom were daughters, three being still unmarried. According to his evidence, his intention in obtaining possession of the premises let to the defendant is to enhance his diminished income by doing a textile business in the premises.

The main question which the learned Commissioner had to decide in this case was whether the plaintiff's contention, that he intended to run a textile business in these premises was true and, if so, whether the premises were reasonably required by him for the purpose of trade or business. In arriving at this decision, the learned Commissioner had to consider the relative requirements of the plaintiff vis-a-vis the defendant. The ancillary matters which arose for consideration were, *inter alia*:—

(*a*) Whether the plaintiff was able to obtain alternative accommodation;

(*b*) Whether the defendant was able to obtain alternative accommodation;

(*c*) Whether the plaintiff would stand to lose more by being kept out of his premises than the defendant would by being ejected from the premises;

(*d*) Whether the plaintiff was possessed of sufficient other income for the maintenance of himself and his family;

(*e*) Whether the defendant was possessed of sufficient other income for the maintenance of himself and his family.

Although the answer to any one of these questions would not be decisive, each of them would be of assistance in arrving at a decision as to whether the hardship to the plaintiff caused by deprivation of this premises outweighed the hardship to the

defendant by ejectment from the premises or vice versa. Counsel on both sides cited a number of authorities on the questions at issue. The difficulty in the application of these principles in the present case, however, has resulted from an absence of a definite finding by the learned Commissioner on the factual position, a finding as to whether the plaintiff's evidence is acceptable or not being vital to the decision of the main issue. The judgment shows that the learned Commissioner accepted the evidence of the plaintiff in regard to his poor financial position and the consequent necessity to sell up his capital assets in order to meet his requirements. He also accepted the position that the plaintiff's inability to have one of his premises for his own use while he owned several did cause hardship to him. Thereafter, however, he appears to have been influenced by an irrelevant consideration, namely, that the notice to the defendant to vacate the premises did not contain the purpose for which the premises were required to enable the plaintiff to carry on a textile business or trade. It must be stated that there is no legal requirement to mention such purpose or any purpose at all in a notice to quit. It would appear that the learned Commissioner was not able to accept the position taken up by the plaintiff mainly as a result of this misdirection of himself. After considering the plaintiff's evidence, the learned Commissioner has stated:

> "Under these circumstances I am unable to hold that the plaintiff wants the premises for business or that the plaintiff's needs outweigh that of the defendant."

It seems to me that if he had come to a definite finding as to whether the plaintiff's evidence was acceptable or not the above observation is inconsistent. For, if the evidence of the plaintiff did not impress him and if he could not, therefore, hold that the plaintiff, in fact, wanted the premises for a business, the question whether the plaintiff's needs outweighed those of the defendant's would not have arisen for consideration. His subsequent observation also to the effect that **it would work equally great hardship to the defendant** who will have to close up his prosperous business for the convenience of the plaintiff would also not be called for in that event, as there would be no question of equal or greater hardship if the plaintiff's evidence did not show that the plaintiff suffered any hardship at all.

The learned Commissioner has also failed to consider the full impact of the evidence of the defendant on the question as to the availability of alternate accommodation for him. The defendant stated in cross-examination as follows:—

> "I did not make any attempt at all to shift my business. I do not know whether on the same road on the same side new buildings owned by one Shahul Hamid have come up and are lying vacant for sometime. I am not aware whether 4 or 5 buildings were vacant off the *Kadireson* Maha Vidyalaya on the Kotmale Road. I did not interest myself to see whether there were new buildings. I do not know whether there is one more shop available next to this boutique. If a building is given to me close to this boutique I am not prepared to shift. This place is most suitable for me. I am not prepared to shift my business however it may be convenient away from these premises. I am not prepared to go anywhere else. Even if the plaintiff gets me another place I am not prepared to go."

One cannot, on this evidence, fail to be impressed by the mala fides of the defendant whose resistance to the plaintiff can only succeed—and that too after comparing the relative positions of the plaintiff and the defendant — if he cannot obtain suitable alternative accommodation for his business however much he may try. The learned Commissioner's judgment does not show that he has considered this evidence of the defendant at all.

Having regard, therefore, to the misdirection which has influenced the mind of the learned Commissioner in considering the plaintiff's evidence and the failure on the other hand to consider the vital admissions made by the defendant against himself, I am compelled to hold that the plaintiff's case must succeed. Counsel for the respondent, however, has drawn my attention to the fact that the learned Commissioner has answered in the affirmative the issue "Do the requirements of the premises in suit for the business of the defendant overwhelmingly outweigh those of the plaintiff?" I am unable, in the face of the analysis of the judgment which I have made earlier, to attach such degree of weight to this affirmative answer as would persuade me to change my view.

It seems to me, therefore, that the plaintiff has at least established — as the learned Commissioner himself has stated in effect at a certain stage of the judgment — that the hardship he would suffer, if he is kept out of his premises, is no less than the hardship that the defendant would suffer as a result of ejectment from the premises. Coupled with this the defendant has only gone so far as to say that he was not aware whether there were several other premises available

to him to run his business, the suggestion in cross-examination being that there were, in fact, some such premises available. His position is rendered still weaker by his assertion that he was not prepared to leave the premises even if other suitable accommodation was available or even if alternative accommodation was offered to him by the plaintiff.

On the basis of this finding, I shall proceed to consider some of the previous decisions cited by counsel on this matter. In the case of *Mendis* vs. *Ferdinands*, reported in 51 New Law Reports, page 427, Dias, S.P.J., set out three categories of comparative needs as between a landlord and a tenant, in accordance with the decision of which, the landlord or the tenant, as the case may be, would be entitled to a judgment in his favour:—

(i) Where the hardship of the landlord is equally balanced with that of the tenant, the landlord's claim must prevail;

(ii) Where the hardship to the landlord outweighs the hardship to the tenant, the landlord's claim must prevail;

(iii) Where the hardship to the tenant outweighs the hardship to the landlord, the landlord's action must be dismissed.

If one were to be guided by these bases, on my finding of the facts above, the decision should be made in favour of the plaintiff. In the case of *Suppiah* vs. *Samarakoon*, reported in 56 New Law Reports, page 161, it was held by Sansoni, J. that, when assessing whether the landlord reasonably requires the premises, the court should give weight to the advantage to the tenant of continuing to occupy the same premises and to the proportionate disadvantage suffered by him by being forced to leave them. While the principle laid down in this case on which the respondent's counsel relies is, no doubt, applicable in the present case, the evidence of the defendant has reduced the strength of his own case to a considerable extent in that he was not only not able to contradict the specific suggestion that there were several other suitable vacant premises in the area but also persisted in his attitude that he would not leave the premises even if an alternative was offered to him. The fact that the plaintiff in this case had also made a general admission of the difficulty of obtaining any vacant premises in the area does not, in my view, make a difference to the case, considering the inability of the defendant to deny the specific sugesstions put to him regarding the existence of alternative vacant premises and his mala fides as revealed by his evidence. The landlord's need, therefore, would be more pressing in the circumstances as the learned Commissioner would seem to have accepted the evidence of the plaintiff that he wanted to carry on a new textile business. On the question whether a landlord is entitled under the present law to recover the premises let to a tenant on the ground of his requirement to start a new business, counsel have referred me to the case of *Andree* vs. *De Fonseka*, reported in 51 New Law Reports, page, 213 and *Nanayakkara* vs. *Pablis Silva*, reported in 60 New Law Reports, page 490. Conflicting views have been taken in these two cases and I would prefer to take the view that a landlord is entitled in law to recover possession of his premises provided his need is genuine and more urgent than that of the tenant even though the requirement of the former is to start a new business in the premises where the tenant is already carrying on a business. In addition to these considerations I would say that in a case in which the relative urgency of the requirement of the landlord vis-a-vis that of the tenant is in issue, the comparative means of each of them is a relevant though not a necessarily decisive factor. Considering the evidence of this case as a whole it would appear that while the landlord's prosperity has continued to diminish, the position of the tenant has continued to improve and his business establishments have spread into even neighbouring towns.

For the reasons set out above, I allow the appeal, set aside the order of the learned Commissioner and enter judgment for the plaintiff as prayed for in the plaint with costs of appeal and of the court below.

*Appeal allowed.*

*Present:* **Manicavasagar, J. and Alles, J.**

K. M. B. M. WIJERATNE *vs.* R. B. SAMARAKOON & ANOTHER

*S.C.* 87/66 (*Inty*) — *D.C. Kandy* 57 3/P

*Argued on:* 23.1.67.
*Decided on:* 7.2.67.

*Partition action — Application to be added as a party-defendant by person claiming interest in land — Can party be added after delivery of judgment and order to enter interlocutory decree — Effect of decree not having been signed at time such application made and determined — Duty of Court when possessed of facts to adjourn hearing in order to give intervenient an opportunity to be added—Partition Act (Cap. 69), section 70.*

**Held** (1) That section 70 of the Partition Act does not prevent a person from intervening and being added as a party in a partition suit even after delivery of judgment and order to enter interlocutory decree so long as the interlocutory decree has not been signed by the judge.

(2) That, further, in the present case as the Court was during the hearing possessed of the fact that the appellant was a person claiming to have an interest in the land sought to be partitioned, it should, having regard to the provisions of section 70 of the Partition Act and the conclusive effect of the interlocutory decree, have adjourned the hearing in order to give the appellant an opportunity of being added as a party.

*Nihal Jayawickreme*, for the petitioner-appellant.

*T. B. Dissanayake*, with *Rajah Bandaranayake*, for the plaintiffs-respondents, and 1st defendant.

**Manicavasagar, J.:**

This is an appeal by Karunatilleke Mudiyanselage Bandara Menika Wijeyeratne, the wife of the 3rd defendant, from the order of the Additional District Judge, Kandy, refusing her application to be added as a party-defendant in a partition suit. The Judge took the view that her application was made after judgment had been delivered, and order made to enter interlocutory decree, and he was thereby precluded by Section 70 of the Partition Act (Chapter 69, Volume 3 of the Legislative Enactments, Revised Edition, 1956) from granting her prayer.

In our view, the learned Judge should have added her as a party-defendant, and inquired into her claim.

Before I state my reasons for this opinion, it is necessary to advert to certain relevant facts. The action was one for the partition of a land brought by two plaintiffs, who claimed that they were jointly entitled to an undivided one-third share, and the sole defendant (he was later designated the first defendant) to the balance two-third. The 3rd defendant intervened in the action. This claim was the only issue bofore the Court when the trial began on 18.6.65. Evidence on this issue was heard on five dates, and on the 5th day whilst the 3rd defendant was being cross-examined, it transpired that he had by deed No. 587 of 5.8.65 transferred the dominant tenement to his wife and children. On this statement being made, Counsel for the plaintiff raised the issue whether the 3rd defendant could maintain his claim; the hearing proceeded, and at the conclusion of the 3rd defendant's case, his Counsel was granted an adjournment in order to enable him to examine the document of transfer. When the case was resumed, Mr. Advocate Martin who appeared for the 3rd defendant, as well as the 1st defendant, said that the 3rd defendant had divested himself of his interests, and moved to withdraw the 3rd defendant's claim to a right of

way, and by consent the 3rd defendant's claim was dismissed. The Judge thereupon directed that the documents led in evidence in this case be tendered on 13.12.65, and reserved judgment for 20.12.65. Later in the day the Journal reads that in the presence of Counsel for the plaintiff, and Mr. Advocate Martin, who presumably at that stage could only have appeared for the 1st defendant, the dates given earlier in the day were advanced to 3.12.65 for filing of documents, and to 6.12.65 for judgment. On 6.12.65 the Court delivered judgment, and directed that interlocutory decree be entered and ordered the decree to be tendered on 17.1.66. On 6.12.65, the appellant, according to the date-stamp on the petition filed on her behalf, moved to intervene in the action: her application was submitted to the Judge on 9.12.65, and he ordered that the matter be mentioned on 13.12.65, which was the date he first gave for documents to be tendered. On 13.12.65 the inquiry into the appellants' application was fixed for 24.1.66. On 21.2.66, Proctor for the plaintiff tendered interlocutory decree, and moved that it be entered. On 11.3.66 the Judge made order dismissing the appellant's application for intervention with costs. The appellant filed a petition of appeal on 16.3.66, and interlocutory decree was entered on 2.5.66.

It is clear from the foregoing facts that the application for intervention by the appellant was made before interlocutory decree was entered; Section 70(1) of the Partition Act permits the Court to add before interlocutory decree is entered, as a party to the action, any person who in the opinion of the Court should be, or should have been made a party to the action, or any person, who claiming an interest in the land applies to be added as a party to the action. The learned Judge erred in holding that intervention should have been before judgment was delivered, and order made to enter decree. I take the view that Section 70 of the Partition Act enables a party to intervene until the interlocutory decree is signed by the judge. A person who claims a servitude over the land sought to be partitioned is one who has an interest in that land. The appellant's application was accepted by the Court even before interlocutory decree was tendered, and her application was heard and determined before the decree was entered by the Court. On this ground alone the appellant is entitled to succeed.

There is however another reason for setting aside the decree; the Court was possessed of the fact during the hearing of the action, even before judgment was delivered, that the appellant had a claim to a servitude of a right of way over the land sought to be partitioned. In this situation it was the obvious duty of the Court, having regard to the provisions of Section 70 of the Partition Act, and the conclusive effect of the interlocutory decree, to adjourn the hearing in order to give the appellant an opportunity of applying to be added as a party, if she decided to avail herself of that course of action: this the Court omitted to do.

In the result the appeal is allowed, and the record will go back to the Court of first instance for the appellant's claim to be heard and determined. The plaintiff-respondent will pay the costs of this appeal, and the costs of inquiry in the Court below.

**Alles, J.**

I agree.

*Appeal allowed.*

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

A. NAGARAJAH *vs.* P. AMIRTHAVALLY JEBARATNARAJAH

*S.C Application No.* 516/66 — *C.R. Colombo Case No.* 87945

*In the matter of an application for Revision and/or Restitutio in Integrum*

*Argued on:* 16th and 17th December, 1966.
*Decided on:* 16th January, 1967.

*Court of Requests — Jurisdiction — Rent and ejectment — Monetary value of action — Courts Ordinance, section 75 as amended by the Courts of Requests (Special Provisions) Act No. 5 of 1964—Civil Procedure Code, sections 35(1), 36(2) and 408—Consent decree—Estoppel.*

**Held:** (1) That in an action for ejectment, the monetary jurisdiction of the Court of Requests is determined under the provisions of section 75 of the Courts Ordinance as an action in which "the title to interest in or right to the possession of land" is in dispute.

(2) That where the action is for the ejectment of a monthly tenant, the value of the right to possession involved is the rent or profit which might have become due if the monthly tenancy continued.

(3) That a claim for arrears of rent if included, may be regarded as incidental and subsidiary to the claim to a right to possession and cannot oust the jurisdiction of the Court so long as the amount of arrears claimed at the date of action does not exceed Rs. 750/-.

(4) That the provisions of section 75 of the Courts Ordinance read with the provisions of the Civil Procedure Code regarding joinder of causes of action empower the Court of Requests to hear and determine an action, where a cause of action in connection with a debt damage or demand is joined with a cause of action relating to an interest in land, even though their aggregate value may exceed Rs. 750/- provided that each cause of action does not exceed its own monetary limit prescribed under section 75, as amended.

(5) That where the claim is one for continuing damages for being kept out of possession of a land, the Court of Requests is not restricted to the ordinary limits of its jurisdiction when granting relief as regards such damages.

(6) That where a party consented to the compromise of an action under section 408 of the Civil Procedure Code and enjoyed the benefit of a decree for over one and a half years, he was estopped from questioning subsequently the validity of the decree on the ground that the amount of the decree fell outside the scope of the action.

**Followed:** *Banda* vs. *Menika et al.* (1919) 21 N.L.R. 279 (F.B.).
*Hewavitarana* vs. *Marikar* (1916) 19 N.L.R. 239
*Pedris* vs. *Mohideen* (1923) 25 N.L.R. 105 (F.B.).

*Elmo Vannithamby*, for the defendant-petitioner.

*S. Sharvananda*, for the plaintiff-respondent.

**Siva Supramaniam, J.**

The defendant-petitioner has made an application by way of Revision and/or Restitutio in Integrum to set aside the decree entered in this case as null and void and to dismiss the plaintiff's respondent's action or in the alternative to remit the case to the lower Court for trial in due course.

The facts leading up to the present application are as follows:— The defendant-petitioner was during the relevant period, a monthly tenant under the respondent in respect of certain premises, which were subject to the provisions of the Rent Restriction Ordinance, on a monthly rental of Rs. 60/-. By a notice dated 25.2.64 the respondent terminated the tenancy with effect from 1.6.64. On 12.6.64 the respondent instituted this action for the ejectment of the petitioner from the said premises and for the recovery of a sum of Rupees seven hundred and twenty as arrears of rent and continuing damages at Rs. 60/- per month from 1.6.64. It was averred in the plaint that although the petitioner had been a tenant from 1st March 1962

he had paid only a total sum of Rs. 870/- as rent and was in arrears in a sum of Rs. 750/- up to the end of May 1964. It was further averred that the petitioner had sub-let the premises without the respondent's written consent. The respondent restricted her claim in respect of the arrears of rent to Rs. 720/-. The petitioner in his answer denied these averments and stated that he had paid rent at Rs. 200/- per month although the authorised rental was Rs. 55/- per month and that the total sum paid by him was Rs. 2,680/-. He claimed a sum of Rs. 975/- in reconvention from the respondent. The case was fixed for trial on 11th May 1965. On that date the petitioner who was present in person and was unrepresented admitted to the Court that he was in arrears of rent and that a sum of Rs. 3,300/- was due to the respondent from him as rent and damages up to the end of April 1965. The petitioner entered into a compromise with the respondent in terms of which he consented to judgment being entered against him for ejectment from the premises and for the recovery of a sum of Rs. 3,300/- and further damages at Rs. 61/62 per month from 1st May 1965 subject to the condition that if he paid each month's damages of Rs. 61/62 together with a sum of Rs. 77/50 out of the arrears of rent and damages on or before the 5th day of each month commencing from 1st June 1965 without making default, writ of ejectment should not issue till 31st December 1968. Decree was entered under S. 408 of the Civil Procedure Code in accordance with the said compromise. The petitioner continued in occupation of the premises in terms of the said consent decree and paid the instalments that fell due from month to month until March 1966. He defaulted in respect of the sums payable on 5th April 1966. On the respondent's application the Court issued writs for the recovery of the balance amount due under the decree and for ejectment of the petitioner from the premises. The petitioner then made an application for stay of execution and the matter came up for inquiry on 23rd June 1966. On that date both parties were represented by Proctors and they entered into a further compromise which was recorded by the Court in the following terms:

> "It is agreed that the defendant should deposit in Court Rs. 417/36 being damages and instalments due on 5.4.66, 5.5.66 and 5.6.66 on or before 26.6.66. The June damages and instalment to be deposited on 5.7.66 in Court and thereafter the sum of 139/12 on the 5th of the following months as from 5.8.66 to be deposited in Court. The application for writ already allowed be issued to the Fiscal but not to be executed till 31.12.66. In default of any one of these payment writ to be executed forthwith without any notice."

The petitioner defaulted again in regard to the payments and in terms of the aforesaid compromise entered into on 23.6.66 the respondent will be entitled to have the writs executed by the Fiscal after 31.12.66. On 7.12.66. the petitioner filed the present application in this Court.

The grounds on which he seeks to have the decree entered on 11th May 1965 set aside and all subsequent proceedings quashed may be summarised as follows:—

(*a*) That the Court had no jurisdiction to entertain the plaint in this case as the subject matter of the action exceeded the monetary jurisdiction of the Court of Requests.

(*b*) (i) That the Court had no jurisdiction to enter a decree in accordance with the compromise entered into between the parties on 11th May 1965 as the amount decreed to be payable by the petitioner to the respondent was for an amount in excess of the monetary jurisdiction of the Court of Requests.

(*b*) (ii) That the decree entered in pursuance of the compromise was bad as the compromise included matters outside scope of the action and

(*c*) That the compromise was not binding on him as "his consent was not real and valid and was extracted by putting him into fear of immediate ejectment if he did not consent."

As regards the first ground learned Counsel for the petitioner submitted that the plaint contained in fact two causes of action, one for the recovery of a sum of Rs. 720/- as arrears of rent and the other for ejectment of the petitioner and for recovery of possession of the premises along with continuing damages. He argued that the value of the second cause of action would be the amount of the monthly rent and that the Court of Requests had no jurisdiction to hear and determine an action in which the aggregate monetary value of the causes of action amounts to Rs. 780/-.

Under section 75 of the Courts Ordinance as amended by Act No. 5 of 1964 a Court of Requests has jurisdiction to hear and determine the following classes of actions:—

(*a*) Actions in which the debt, damage or demand shall not exceed Rs. 750/-

(*b*) Hypothecary actions in which the amount claimed shall not exceed Rs. 750/-

(*c*) Actions in which the title to, interest in or right to the possession of land shall be in dispute provided that the value of the land or the particular share, right or interest in dispute shall not exceed Rs. 300/- and

(*d*) Actions for partition or sale of land when the value of the land does not exceed Rs. 300/-.

An action by a landlord for ejectment of the tenant from the leased premises on the termination of the contract of tenancy will fail under class (c). It was held by a Divisional Bench of this Court in the case of *Banda* v. *Menika*, 21 N.L.R. 279 F.B. that the test of jurisdiction in such a case is the value of the land or interest in dispute irrespective of any damages or other relief claimed on the cause of action. Where the action is on for ejectment of a monthly tenant, "the value of the right of possession involved is the rent or profit which might be due if the monthly tenancy continued"—*per* De Sampayo, J. in *Hewavitarana* v. *Marikar* 19 N.L.R. 239 at 241.

In the instant case, the rent per month was Rs. 60/- and the action for recovery of possession of the premises was therefore within the jurisdiction of the Court of Requests. Does the fact that a sum of Rs. 720/- was also claimed as arrears of rent oust the jurisdiction of the Court?

In an action for the recovery of immovable property, section 35(1) of the Civil Procedure Code permits (unless with the leave of the Court) only the following claims to be made:—

(*a*) Claims in respect of mesne profits or arrears of rent in respect of the property claimed;

(*b*) Damages for breach of any contract under which the property or any part thereof is held; or consequential or the trespass which constitutes the cause of action; and

(*c*) Claims by a mortgagee to enforce any of the remedies under the mortgage.

As stated by De Sampayo, J. in *Banda* v. *Menika* (*supra*) at page 280 "In a land case the subject matter is the land and the main purpose of the action is its recovery." "The claims which may be included in such an action are incidental claims as are recognised as naturally arising in connection with land cases by the Civil Procedure Code itself (s. 35) subject always to the limitation of the Courts jurisdiction" — *per* Bertram, C.J. ibid at page 283. Since the test of jurisdiction is the value of the right of possession, the claim for arrears of rent should be regarded as incidental and subsidiary and its inclusion cannot oust the jurisdiction of the Court so long as the amount claimed at the date of action does not exceed Rs. 750/-.

If, on the other hand, the claim for arrears of rent is not regarded as incidental and subsidiary to the principal cause of action viz.—the recovery of possession of the land, but is treated as a separate and independent cause of action, the position will be that the plaintiff has joined in his action two causes of action (such joinder being permitted by Section 35(I) of the Civil Procedure Code) as follows:—

(*a*) A cause of action falling within the category of "Debt, damage or demand" valued at Rs. 720/- and

(*b*) A cause of action falling within the category of an interest in land valued at Rs. 60/-

In terms of S. 36(2) of the Civil Procedure Code the value of the aggregate subject matters is Rs. 780/-.

Is the jurisdiction of the Court of Requests ousted in cases in which the value of the aggregate subject matters exceeds Rs. 750/-? Section 75 of the Courts Ordinance provides that the Court of Requests has jurisdiction in money cases in which "the debt, damage or demand" does not exceed Rs. 750/-. It also provides that the Court of Requests has jurisdiction in land cases in which the value of the interest does not exceed Rs. 300/-. It does not, however, provide that the value of the aggregate subject matters should not exceed Rs. 750/- in order to enable the Court of Requests to exercise jurisdiction. Nor is there any other provision of law which imposes such a limitation.

I am therefore of the opinion that where several causes of action are joined in the same action in conformity with the provisions of the Civil

Procedure Code, a Court of Requests has jurisdiction to hear and determine such an action provided the total value of the cause (or causes) of action relating to a debt, damage or demand does not exceed Rs. 750/- and the total value of the cause (or causes) of action relating to interest in land does not exceed Rs. 300/-. This view finds support in the following passage in the judgment of Bertram C.J. in *Banda* v. *Menika*, (ibid page 283):— "It is no doubt a singular result that it should be possible to bring in conjunction a claim of land worth Rs. 300/- and a further incidental monetary claim to the same amount, but there is nothing in the section to prevent such claims from being combined....."

For the foregoing reasons, I hold that the Court of Requests had jurisdiction to entertain the plaint in the instant case.

The next point urged by Counsel for the petitoner was that, notwithstanding the petitioner's consent, the decree entered was bad since the amount payable under the decree was in excess of the jurisdiction of the Court of Requests. There can be no question but that if the Court had no jurisdiction the parties cannot, by their consent, confer jurisdiction. In terms of the compromise, the petitioner admitted liability in a sum of Rs. 3,300/- "as rent and damages up to the end of April 1965". It is submitted that the sum of Rs. 3,300/- included a sum payable by the petitioner to the respondent on account of certain repairs effected to the premises and that that claim was outside the scope of the action and could not therefore have been included in the compromise. The record however does not show the breakdown of the sum of Rs. 3,300/- although there is an admission of liability on account of repairs. It is now settled law that where the plaintiff claims continuing damages for being kept out of possession of any land, the relief as regards damages which the Court of Requests can grant is not restricted to the ordinary limit of its jurisdiction—*Pedris* v. *Mohideen*, 25 N.L.R. 105 F.B. *Ex facie*, the Court had jurisdiction to enter a decree for a sum of Rs. 3,300/- as rent and damages. In view of the petitioner's admission on the trial date that he was in arrear of rent, the respondent would have been entitled to a decree for ejectment of the petitioner forthwith from the premises. But in view of the petitioner's admission of liability in a sum of Rs. 3,300/- as rent and damages and his undertaking to liquidate that sum by monthly instalments, the respondent agreed to allow the petitioner to continue in occupation of the premises till December 1968 provided there was no default in the payment. The petitioner, having enjoyed the benefit of the decree entered in pursuance of the compromise and having continued in occupation of the premises for over one and a half years is now estopped from questioning the validity of the decree on the ground that the sum of Rs. 3,300/- included an amount which fell outside the scope of the action. The second ground of the application therefore fails.

The last ground urged, namely, that the petitioner's "consent to the compromise was not real and valid and was extracted by putting him into fear of immediate ejectment" is without any merit. According to the averments in the petition the petitioner agreed to the terms of the compromise because he was not in a position to proceed with the trial as his Counsel and Proctor had refused to appear for him on that date as he had failed to pay their balance fees. The fact that the petitioner entered into a compromise because he anticipated that decree would be entered against him if the case proceeded to trial on that date and that he would be ejected forthwith from the premises does not render the compromise invalid. The complete absence of bona-fides on the part of the petitioner is shown by the fact that although the decree was entered on 11th May 1965 and a second compromise was entered into on 23rd June 1966 he has waited until the approach of the date on which he has to vacate the premises to challenge the validity of the original compromise and of the decree.

I dismiss the petitioner's application with costs.

*Application dismissed.*

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

THE ATTORNEY-GENERAL *vs.* MOHAMED SALIE MOHAMED SANOON

*S.C. No.* 457/65 — *M.C. Panadura Case No.* 86868

*Argued on:* 7th July, 1966.
*Decided on:* 28th November, 1966.

*Statutes — Act of Parliament enacted and in force prior to Revised Edition of the Legislative Enactments becoming operative — Such Act reproduced as Chapter of Revised Edition — Is original Act thereby impliedly repealed — Effect of charge reciting sections of original Act — Revised Edition of the Legislative Enactments Act* (*Cap.* 1), *sections* 3(1) *and* 12(3).

**Held** (1) That an Act of Parliament which had been enacted and was in force before the Revised Edition of the Legislative Enactments came into force and which has been reproduced in the Revised Edition does not become impliedly repealed when the Revised Edition came into force.

(2) That when a Price Control order by error recited that it was made under Section 4 of the Control of Prices Act No. 29 of 1950, instead of Section 4 of the Control of Prices Act Cap. 173 Legislative Enactments, the error did not invalidate the order which must in law be taken to have been duly made under the law as set out in Cap. 173 of the Legislative Enactments, as

(a) section 4 of the Control of Prices Act 1950 had remained unaltered at the time it was reproduced in the revised edition and

(b) no prejudice was caused to the accused by the erroneous reference in the Order.

*L. B. T. Premaratne*, Senior Crown Counsel, with *G. P. S. Silva*, Crown Counsel for the appellant.

*C. Ranganathan, Q.C.*, with *M. T. M. Sivardeen*, for the accused-respondent.

**Fernando, C.J.**

The Respondent to this Appeal was charged in the Magistrate's Court with sale of beef at a price above the maximum price fixed by the Price Control Order published in Gazette No. 14041 of 22nd May 1964. The Price Control Order as published contains a recital that it was being made "by virtue of the powers vested by section 4 of the Control of Prices Act 29 of 1950 read with section 3(2) of the Act."

The Control of Prices Act No. 29 of 1950 is reproduced in the revised edition of the Legislative Enactments as Cap. 173 of that edition and section 1 of that Act as so reproduced provides that "this Act may be cited as the Control of Prices Act." By virtue of a proclamation made under section 12 of the Revised Edition of the Legislative Enactments Act (Cap. 1) the revised edition came into force in December 1961 and accordingly in terms of subsection 3 of section 12 that revised edition is to "be deemed to be and be without any question whatsoever in all courts of justice and for all purposes whatsoever the sole authentic edition of Legislative Enactments of Ceylon therein printed".

The learned Magistrate has in a careful judgment reached the conclusion that by reason of the Provisions of section 12(3) no proceedings can be had for any alleged contravention of an order which purports to have been made, not under the Control of Prices Act reproduced as Cap. 173 of the revised edition, but instead under "the Control of Prices Act 1950". One reason for this conclusion is the opinion of the learned Magistrate that the Control of Prices Act of 1950 became impliedly repealed when the revised edition came into force. This opinion is in our view erroneous. The powers conferred on the Commissioner appointed under Cap. 1 do not include the power to repeal any pre-existing statute. The only power which is in any way related to the concept of repeal is that conferred in section 3(1)(a) of Cap. 1, namely, "to omit any legislative enactment which has been repealed expressly or by necessary implication, or which has expired, has become spent, or has had its effect". Far from exercising any such power in the case of the statute providing for the Control of Prices, the Commissioner reproduced that statute in the revised edition, thus negativing any idea of a contemplated repeal of the statute formerly in force.

After holding that the former statute was repealed, the Magistrate (very properly in view of that holding) proceeded to consider whether there are any provisions in the revised edition which would mitigate the effect of the repeal and would serve to validate an erroneous reference in the Price Control Order to the statute under which it purported to be made. He could find no such provision and therefore reached his ultimate conclusion.

What has occurred in the case of this Order is that by error there has been included in the recital the words or figures No. 29 of 1950. Had those words and figures not been included, the reference to the statute would have been perfectly correct in view of section 1 of the Act as reproduced as Cap. 173.

A comparison of section 4 of the Control of Prices Act of 1950 with Section 4 of the Control of Prices Act as reproduced in Cap. 173 of the revised edition shows that the section had remained unaltered from the time of its original enactment until the time of its reproduction in the revised edition.

Since in terms of section 12(3) of Cap. 1 the revised edition is the sole authentic edition, any person who is aware of any order referring to a Control of Prices Act must in law refer to the revised edition, and only to that edition, in order to ascertain the provision of law under which the Order is made. Had the respondent in this case followed that course his attention must necessarily have be n drawn to section 4 of Cap. 173 which as already stated is identical with the section referred to in the Order. It is only if some prejudice was caused by the erroneous reference in the Order that the respondent would have been entitled to ask for any relief.

We hold that the error in the recital did not invalidate the Order and that the Order must in law be taken to have been duly made under the law as set out in Cap. 173 of the revised edition.

The learned Magistrate has found on the facts that the respondent did sell beef at a price in excess of the price fixed by the Order.

We set aside the acquittal and convict the accused of the offence charged. He is sentenced to a fine of Rs. 500/-.

**G. P. A. Silva, J.**

I agree.

*Appeal allowed.*

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

GUNAWARDENA *vs.* BANDARANAYAKA & ANOTHER

*S. C. Case No.* 335/1965 (*F*) — *D. C. Badulla Case No.* 2130/*L*

*Argued on:* 9th & 16th December, 1966.
*Decided on:* 14th February, 1967.

*Compensation for improvements — Whether bona fide possessor who has made improvements liable to account for value of fruits derived therefrom — Right of bona fide possessor to remain in possession until compensation paid.*

**Held:** (1) That a bona fide possessor who is entitled to compensation for improvements effected by him is under no liability to account to the owner of the land for the value of the fruits which he derived from his own improvements.

(2) That a bona fide possessor is entitled to remain in possession of the land until the compensation due to him is paid. Thereafter he is liable to pay to the owner the entire income derived or derivable from the land.

**Cases referred to:** *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.* (1915) A.D. 636
*Beebee* v. *Majid* (1929) 39 N.L.R. 361
*Newman* v. *Mendis* (1900) 1 Browne 77
*Bilindi* v. *Aththadassi Thero* (1946) 47 N.L.R. 276

*Bala Nadarajah*, for the plaintiff-appellant.

*T. B. Dissanayake*, with *Nalin Abeysekera*, for the defendants-respondents.

**Alles, J.**

The plaintiff instituted this action against the two defendants as heirs of the late T. B. M. Bandaranayake for a declaration of title to a portion of land called Hirimoletenne described in the schedule to the plaint, or in the alternative that the defendants be ordered to pay to the plaintiff compensation for the value of the improvements made by him in the event of the defendants being declared entitled to the land. According to the plaintiff, he cleared the land in 1947 when it was in scrub jungle, constructed some buildings and made certain plantations. The plaintiff maintained that prior to his death in 1952, Bandaranayake gave the land to him on an informal verbal agreement, having received a sum of Rs. 200/- as consideration and promising to give him a deed later. This evidence has not been accepted by the learned District Judge. By Indenture of lease No. 15545 of 22nd July, 1953 marked P4, Bandaranayake's widow leased an undivided seven acres in extent from the land called Hirimoletenne of ten acres extent to the plaintiff. The lease was to continue for five years, at the expiration of which the plaintiff was required to hand over possession of the leased premises to the defendants. According to the terms of the lease bond it was expressly agreed between the parties that the plaintiff would not be entitled to compensation for any improvements effected by him. It was the plaintiff's case that the portion leased to him on P4 did not constitute any part of the land in suit while the defendants contended otherwise. The learned District Judge has accepted the evidence of Surveyor Balasingham to the effect that the land in suit falls within the premises leased to the plaintiff on P4.

The learned Judge's findings on the above facts may be summarised as follows:—

(*a*) that the plaintiff is not entitled to a declaration of title in his favour to the land described in the schedule to the plaint;

(*b*) that although the said land was subsequently included in the lease bond P4, the plaintiff was a bona fide possessor of the said land and is entitled to compensation for the improvements effected by him.

We see no reason to disturb the aforesaid findings.

When the lease expired in 1957, the plaintiff continued to remain in possession of the land and in 1958 the widow, the first defendant in the present action, sued the plaintiff in the Court of Requests, Badulla, in Case No. 15453 for ejectment from the land and claimed damages at the rate of Rs. 25/- per year till she was restored to possession. The present plaintiff, who was the defendant in that case, filed answer on 20th January 1961 claiming title to the land. The case however did not proceed to trial and the present plaintiff undertook to file an action for declaration of title and the present action was instituted on 6th May 1961. The learned District Judge has held on a balance of evidence that the buildings and plantations had been made by the plaintiff prior to the execution of the lease and that therefore improvements did not fall within the ambit of the covenant in the lease that the plaintiff was not entitled to claim compensation for the improvements.

The learned Judge has assessed the compensation payable in respect of the buildings at Rs. 3,000/-. As regards the compensation payable in respect of the plantations, he has accepted Welgolla's valuation. Surveyor Welgolla valued the lime plantation at Rs. 634/- and the other permanent plantations at Rs. 49/-. There were also temporary plantations which he valued at Rs. 180/-. The sum payable as compensation for the permanent plantations is therefore Rs. 683/- and not Rs. 634/- as stated by the learned Judge. The total compensation payable is Rs. 3,683/-.

Having held that the defendants were liable to pay compensation for the improvements effected by the plaintiff, the learned Judge proceeded to state:

> "From this amount, however, the plaintiff has to restore to the defendants who are the owners of the soil, all the fruits actually gathered by him after the 'litis contestatio'. that is, after the closing of the pleadings in the action with reference to the possession or ownership of the ground, because by the 'litis contestatio" a bona fide possessor becomes converted into a mala fide possessor."

He fixed the date of litis contestatio to be 20th January 1961, being the date on which answer was filed in the C.R. action; and he determined the value of the fruits at Rs. 700/- per annum on the basis of an admission by the plaintiff in the course of his evidence that he sold limes from

the trees on the land for Rs. 900/- in 1962 and for Rs. 500/- in 1963 and on the average for about Rs. 600/- a year. Although the plaintiff did not say that the sums stated by him represented the nett profits from the sale of fruits, the learned Judge appears to have assumed that they were nett profits. He has held that on a set-off of the value of the fruits payable by the plaintiff to the defendants against the compensation payable by the defendants to the plaintiff, no sum of money is payable by the defendants and has dismissed the plaintiff's action.

In arriving at the aforesaid conclusion, the learned Judge has erred both on the facts and in law. In view of the finding that the plaintiff was a bona fide possessor who was entitled to compensation for improvements, the plaintiff was under no liability to account to the defendants for the value of the fruits which he derived from his own improvements. Voet in his Title on Vindications (Book 6, Title 1, Sections 38 and 39) states:

> ".....since decisions to the contrary are also found, I consider that the opinion of those is better founded on reason who hold it unfair that the fruits of improvements should be set off against the improvements themselves.'

(vide Gane's translation at p. 252 of Vol. 2). The reasons given by Voet for this view are worthy of reproduction. He says:

> "If such set-off were to be allowed, the ridiculous consequence would in the first place flow from it that a possessor in good faith would see his own improvement paid for out of his own property and his own fruits, which had been received by him in right of ownership from his personal funds invested in the benefit. Thus when the result is looked at, the possessor in good faith would for the whole period of such possession receive precisely no benefit from his own funds disbursed in the hope of profit, but the owner of the property alone would feel it. Not only that, but bear in mind that a possessor in good faith never recovers a greater value for improvements than what they are worth at the time of restoration so that the whole expenditure is at the risk of such possessor, and he gets either little or nothing according as either little or nothing is left of the improvement made. Thus if set-off is allowed, the effect would surely be that all gain from disbursements indeed would pass to the owner of the property improved, but the burden of the risk of them would fall only and solely on the possessor in good faith."....."To this may be added that the more careful the possessor in good faith has been, and the more zealous like a good father of a household to bring the property which he thinks his own into a better state, the worse by so much would be his condition; but the more careless he has been so much the more would he profit. No one can help seeing how far that departs from natural fairness."

Voet's view has been adopted in South Africa — vide *Fletcher and Fletcher* vs. *Bulawayo Waterworks Co. Ltd.* (1915 A.D. 636 at 651 and 660) and in Ceylon — *Beebee* vs. *Majid* (1929) N.L.R. 361 at 362 and *Newman* vs. *Mendis* (1900) 1 Browne 77. In the latter case, Browne, J. at p. 80 states as follows:—

> "And though in assessing compensation for *impensae utiles* the mesne profits including fruits consumed are to be taken into account, yet the fruits of the expenditure itself, *fructus ex ipsa meloratione percepti*, are to be excluded from the accounting and not to be set off as against the claim (1 N.L.R. 228). The reason thereof seems obvious. The mesne profits arise out of the original capital of the parties, the land itself; the fruits of improving the expenditure arise from the additional capital brought in by the improver."

In the case of *Bilindi* vs. *Aththadassi Thero* (47 N.L.R. 276) all the earlier authorities were referred to and this Court held that in a claim for compensation for improvements a bona fide possessor need not deduct the value of the fruits obtained by him, before the date of assessment, from the improvement itself. The date of assessment was held to be the date of the judgment. The finding, therefore, that the plaintiff should account to the defendants for the value of the fruits of his own improvements is wrong in law.

The learned Judge has also overlooked the fact that, in the answer filed by the defendants, they did not claim a set-off of the value of the fruits gathered by the plaintiff from the land and there was no issue on that point raised at the trial. All that the defendants prayed for, apart from a declaration of title in their favour and the ejectment of the plaintiff, was a decree for damages in a sum of Rs. 250/- and continuing damages at Rs. 50/- per annum from the date of the answer, namely, 25th October 1961 until possession of the land was restored to them. Issue 9(b) suggested by the defendants was as follows:—

> "What damages are the defendants entitled to?"

No evidence was placed before the Court by the defendants on that issue and the learned Judge did not answer that issue, stating that it did not arise for consideration.

On the basis that he was a bona fide possessor, the plaintiff was entitled to remain in possession of the land until the compensation due to him was paid. The defendants are not entitled to claim any damages until they pay to the plaintiff or

deposit in Court to the credit of the plaintiff with notice to him the sum of Rs. 3,683/- payable as compensation. On the date of such payment or deposit, the plaintiff will be liable to deliver possession of the land to the defendants and, on his failure to do so, will be liable to pay to the defendants the entire income derived or derivable by him from the said land (which will include reasonable rental for the buildings) from the said date, in addition to damages calculated at Rs. 50/- per annum until possession of the land is restored to the defendants. In that event, the learned Judge will, after holding such enquiry as he may think fit, determine the amount that should be paid by the plaintiff to the defendants as refundable income.

We set aside the decree entered in this case and direct that a fresh decree be entered

(*a*) dismissing the plaintiff's action for a declaration of title to the land set out in the schedule to the plaint and declaring the defendants entitled to the said land;

(*b*) ordering the defendants jointly and severally to pay to the plaintiff a sum of Rs. 3683/- as compensation for improvements;

(*c*) for ejectment, as prayed for in paragraph (c) of the defendants' answer, the writ of ejectment to issue only on deposit in Court or on proof of payment to the plaintiff of the sum of Rs. 3,683/- by the defendants; and

(*d*) ordering the plaintiff to pay to the defendants, with effect from the date of payment to the plaintiff or deposit in Court with notice to the plaintiff by the defendants of the sum of Rs. 3,683/-, all income derived or derivable by him from the said land, inclusive of reasonable rental for the buildings thereon, along with damages calculated at Rs. 50/- per annum from the said date, until possession of the said land is restored to the defendants.

The parties will bear their own costs in the lower Court. The appellant will be entitled to his costs in appeal.

**Siva Supramaniam, J.**

I agree.

*Decree varied.*

*Present:* **Sansoni, C.J. and Siva Supramaniam, J.**

HENDRICK APPUHAMY *vs.* JOHN APPUHAMY*

*S.C. No.* 261/65(F) — *D.C. Negombo Case No.* 643/L

*Argued on:* 25th September, 1966.
*Decided on:* 10th October, 1966.

*Paddy Lands Act, No. 1 of 1958, sections 3, 4, 6, 7, 8, 14 and 21 — Action in District Court by owner of paddy field for ejecting his tenant on the ground of failure to maintain it diligently — Can plaintiff maintain action in view of the provisions of Paddy Lands Act.*

The appellant, as the owner of a paddy field, instituted this action seeking to have his tenant cultivator ejected therefrom on the ground that the latter had failed to maintain the field diligently. The defence raised the plea that the action could not be maintained in view of the provisions of the Paddy Lands Act, No. 1 of 1958. The learned District Judge held that there was no section in the Act to oust the jurisdiction of his Court and gave judgment for the plaintiff. The defendant appealed.

**Held:** That the Paddy Lands Act, No. 1 of 1958 provides the machinery to which an owner of a paddy field must resort, if he wants to have his tenant cultivator evicted or his paddy field properly cultivated. This is the only machinery available to him since this act was passed, and consequently the plaintiff should not have filed this action.

*Per* **Sansoni, C.J.**: "In the absence of a specific exception such as is to be found in section 3(2), I think the word ("evict") as used in section 4(1) includes eviction by an order of a court."

* For Sinhala translation, see Sinhala section, Vol. 13, part 6, p. 23

**Cases referred to :** *Wilkinson* v. *Barking Corporation* (1948) 1 K.B. 721; (1948) 1 A.E.R. 564
*Pasmore* v. *Oswaldtwistle* U.D.C. (1898) A.C. 387; 78 L.T. 569
*Barraclough* v. *Brown* (1897) A.C. 615; 76 L.T. 797
*Dove* v. *Bridges* (1831) 1 B and Ad. 847
*Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 C.B. N.S. 336; 28 L.J.C.P. 424

*J. W. Subasinghe*, with *R. L. N. de Zoysa*, for the defendant-appellant.

*N. E. Weerasooria, Q.C.*, with *W. D. Gunasekera*, for the plaintiff-respondent.

**Sansoni, C.J.**

In this action the owner of a paddy field seeks to have his tenant cultivator ejected from it. He also claims damages for wrongful possession. In his plaint, which was filed in 1963, he has stated that from about 1959 the defendant failed to maintain the paddy field diligently, with the result that the yield began to deteriorate progressively. The defendant in his answer denied the allegation that he had not maintained the field in a proper state. He has also raised the important question of law, that the action could not be maintained in view of the Paddy Lands Act No. 1 of 1958.

It was admitted at the trial that this Act was in force in this area at the relevant times. The long title of the Act recites that it is "an Act to provide security of tenure to tenant cultivators of paddy lands", and various other matters.

Certain provisions of the Act may be considered in this connection. Section 4(1) states:— "A tenant cultivator of any extent of paddy land shall have the right to occupy and use such extent in accordance with the provision of this Act, and shall not be evicted from such extent notwithstanding anything to the contrary in any oral or written agreement by which such extent has been let to such tenant cultivator and no person shall interfere in the occupation and use of such extent by the tenant cultivator, and the landlord shall not demand or receive from the tenant cultivator any rent in excess of the rent required by this Act to be paid in respect of such extent to the landlord."

The word "evict" has been defined in section 63 to mean, in relation to a tenant cultivator, "to deprive, by using direct or indirect methods, that tenant cultivator of his right to use, occupy and cultivate the whole or any part of the extent of paddy land let to him."

Section 3(2) enables a tenant cultivator who has been evicted "otherwise than by an order of a court" to complain to the Commissioner of Agrarian Services, where such eviction had taken place before the Act came into operation in that particular area. I only draw attention to this because it is important to decide whether the word "evict" in section 4(1) includes eviction by an order of a court. In the absence of a specific exception such as is to be found in section 3(2), I think the word as used in section 4(1) includes eviction by an order of a court. Section 4(1A) enables a tenant cultivator to notify the Commissioner that he has been evicted, and after the landlord has been heard, the Commissioner may decide that the tenant cultivator shall be entitled to have the use and occupation of the land restored to him, and order every other person in occupation to vacate it.

There are further provisions in section 4 which protect the rights of a tenant cultivator. For example, his rights shall not be affected in any manner by a voluntary or forced sale, or by a transfer by gift or last will or otherwise, or by the devolution by the law of inheritance of the right title and interest of the landlord of the field: section 4(3). The tenant cultivator's right cannot be sequestered, seized or sold in execution of any decree of any court: section 4(4).

Under section 4(5) no landlord may, except with the written sanction of the Commissioner, evict from a paddy land any person who would be the tenant cultivator if the Act were to be brought into operation in that area. Under section 4(9) any person who contravenes sub-sections (1) and (5) would be guilty of an offence punishable with a fine. Section 4(10) prohibits the use of threats or force or violence against a tenant cultivator to prevent him exercising any right or privilege conferred upon him by this Act.

A tenant cultivator may nominate a successor in respect of his right to cultivate the extent he is entitled to (Section 6). When he dies without nominating a successor, his rights devolve on his surviving spouse, and failing her on one of the relatives (Section 7). He can transfer his rights

by sale, gift or otherwise and his transferee then becomes the tenant cultivator (sections 8 and 9). If he dies without leaving a surviving spouse or relative or nominated successor, his rights vest in the Cultivation Committee (Section 10).

Section 14 enables a landlord to become an owner cultivator of an area of paddy land, in respect of which there is a tenant cultivator, by applying to the Cultivation Committee. The Commissioner can permit the landlord to cultivate an approved area not exceeding 5 acres; and the Cultivation Committee can order the tenant cultivator to vacate that area, in default of which he shall be evicted. If the owner cultivator thereafter fails to cultivate the land he may be ordered to vacate it, and the Cultivation Committee can restore possession to the former tenant cultivator or some other suitable person. This section is important since it provides the remedy by which a landlord can recover the extent, or a part of it, which was in the tenant cultivator's possessions.

Under sections 18, 19 and 20 cultivators and landlords must cultivate their paddy lands in accordance with the principles of good paddy cultivation. If they fail to do so, the Cultivation Committee may recommend to the Commissioner to make a Supervision Order; and if the standard of cultivation does not improve, the Commissioner can issue an order of dispossession under which the cultivator or the landlord, as the case may be, must leave the land in question. Section 21 makes provision for the eviction of a person who fails to vacate in obedience to an order of dispossession.

I do not think it necessary to refer to any other sections of the Act. It seems clear that special rights have been conferred by the Act upon tenant cultivators and special liabilities have also been imposed on landlords, quite distinct from their common law rights and liabilities. The act makes specific provision for what is to happen in case of any breach of its provisions. Most significant, for the purposes of this appeal, are the special rights conferred upon tenant cultivators with regard to the quiet and undisturbed possession of their extents of paddy land, and their restoration to possession if evicted. It is clear that since this Act was passed the landowner of a paddy land no longer has the freedom he previously enjoyed in regard to the use and occupation of that land or the manner of dealing with it. His common law rights have been considerably curtailed, no doubt in the interests of good paddy cultivation and the country's food supply.

In *Wilkinson* v. *Barking Corporation* (1948) 1 K.B. 721, Asquith, L.J. said — "It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal, and not to others. As the House of Lords ruled in *Pasmore* v. *Oswaldtwistle* U.D.C. (1898) A.C. 387 (per Lord Halsbury) 'The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.' " Lord Watson in *Barraclough* v. *Brown* (1897) A.C. 615 said: "The right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other..... It cannot be the duty of any Court to pronounce an order when it plainly appears that, in so doing, the Court would be using a jurisdiction which the Legislature has forbidden it to exercise."

It was argued for the plaintiff that the normal right of access to the Queen's Courts should not be held to be barred unless the statute in question expressly or by necessary implication so provided. This is a sound argument. The only question is whether this Act does or does not take away the jurisdiction of the Courts by necessary implication. If the landlord of every paddy field were to continue to enjoy the rights he had prior to this Act, and that includes the right to ask for a decree of ejectment against every tenant, this Act may as well be torn up. There would be no rights of tenant cultivators left to be protected by Cultivation Committees or the Commissioner. The statutory protection against eviction, except under certain conditions, would be swept away, and the statutory provision for restoration to possession would be valueless.

The Act provides the machinery to which a landlord must resort if he wants to have his tenant cultivator evicted or his paddy field properly cultivated, and I think this is the only machinery available to him since this Act was passed. A specific remedy has been provided where a landlord finds that a tenant has infringed the rights given to him by the Act, and for breach of that statutory right the remedy provided by the Act must be sought. In *Doe* v. *Bridges* (1831) 1 B and Ad. 847, Lord Tenterden said: "Where an Act creates an obligation and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any

other manner." A similar rule was enunciated by Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 C.B. N.S. 336, where he said: "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it..... the party must adopt the form of remedy given by the statute." Another principle applicable here is that where a statutory right cannot, without very great inconvenience, co-exist with the ordinary common law right, the former must have been intended as a substitutional, not as an additional remedy.

The District Judge when dealing with this question of law in his judgment said that the plaintiff had complained against the defendants to the Cultivation Committee under section 14 of the Act, but he had not obtained any decision. The Judge also said that there was no section in the Act to oust the jurisdiction of the District Court, he therefore held that he had jurisdiction to hear the case. I regret that I am unable to agree with him, for the reasons I have given. The plaintiff should have sought his remedy under the Act and he should not have filed this action.

I would therefore allow this appeal and dismiss the plaintiff's action with costs in both courts.

**Siva Supramaniam, J.**

I agree.

*Appeal allowed.*

*Present:* **Sansoni, C. J. and Siva Supramaniam, J.**

LOCAL GOVERNMENT SERVICE COMMISSION *vs.* S. NAGENDRAN

*S. C. No.* 445/1964 (F) — *D. C. Colombo Case* 60495/*M*

*Argued on:* September 10, 1966.
*Decided on:* September 22, 1966.

*Local Government Service Commission — Liability to pay salary to member of the Service whose post has been abolished — Liability of local authority — Local Government Service Ordinance* (*Cap.* 264), *sections* 8, 9, 10, 11, 14, 23, 58 *and* 59.

The Plaintiff became on the 1st April 1946 a member of the Local Government Service, and in that capacity was appointed to various posts, the last being that of Electrical Engineer, Jaffna Municipal Council. This post was abolished by the Council as from 30th September 1962. The Plaintiff claimed in this action that the Local Government Service Commission was liable to pay his salary and emoluments from the 1st October 1962 to 31st August 1963.

**Held:** That upon a consideration of the relevant sections of the Local Government Service Commission Ordinance (Cap. 264), viz. sections 8, 9, 10, 11, 14, 23, 58 and 59, it was clear that the Commission was neither required, nor had the power, to pay the salaries of the members of the Service.

*Per Curiam:* "The Ordinance does not envisage a member of the Service not being appointed to a post in the service of a local authority; and once a member is so appointed, the obligation to pay his salary devolves under section 23 solely on that authority."

**Cases referred to:** *The Local Government Service Commission* v. *Kandasamy* (1965) 68 N.L.R. 1.
*Pathirana* v. *Gunasekera* (1962) 66 N.L.R. 464.

*H. W. Jayawardene, Q.C.*, with *W. D. Gunasekera* and *S. S. Basnayake*, for the defendant-appellant.

*S. Nadesan, Q.C.*, with *S. Sharvananda* and *S. C. Crossette Tambiah*, for the plaintiff-respondent.

**Sansoni, C.J.**

The plaintiff has sued the Local Government Service Commission to recover his salary and emoluments as a member of the Local Government Service for the period 1st October 1962 to 31st August 1963. He was employed prior to 1st April 1946 as Electrical Superintendent, Jaffna Urban Council. On 1st April 1946 he became a member of that Service, in which capacity he was appointed to various posts, the last being that of Electrical Engineer, Jaffna Municipal Council. The post was abolished by the Council as from 30th September 1962. The plaintiff

claims that the Commission is liable to pay his salary and emoluments from 1st October 1962.

The Commission pleaded, among other defences, that although the plaintiff was a member of the Service it is not liable in law to pay the plaintiff's salary. The plaintiff won in the lower Court and the Commission appealed. The main argument urged in support of the appeal is that the Commission is not liable to pay the salary of the plaintiff or any member of the Service, since that liability has to be discharged by local authorities where members of the Service are appointed to posts in the Service of those authorities.

Certain sections of the Local Government Service Ordinance, Cap. 264, are relevant to the matter in dispute.

Section 11(1)(a) provides that the Commission shall have, among other powers, the power to appoint, employ, remunerate and control its officers and servants. The phrase "officers and servants" in this context refers only to the Secretary, the Accountant and such other officers and servants as the Commission may deem necessary for the purpose of carrying out the provisions of the Ordinance, and who constitute the staff of the Commission — see ss. 8, 9 and 10. It is significant that no power is given by s. 11 to pay the salaries of members of the Service. Section 14 provides that the expenses of the Commission, including the salaries, allowances, pensions and gratuities payable to the members or the staff of the Commission, but not including the salaries, allowances, pensions and gratuities payable to members of the Service, shall be paid out of moneys provided for the purpose by Parliament under the annual Appropriation Act. Here again the omission to make the salaries and allowances of members of the Service payable by the Commission is worthy of note. Section 23 requires every local authority to permit each member of the Service who is appointed by the Commission to any post in the service of that authority to perform the duties of that post, and to pay out of its funds the salary and allowances of each such member. Section 59 states that the pension, gratuity or retiring allowance granted to a retired member of the Service, including the death gratuity granted under s. 58(2) in respect of a deceased member of the Service, shall be paid by the Commission.

All these provisions seem to me to indicate quite clearly that the Commission is neither required, nor has the power, to pay the salaries of the members of the Service, and that they are payable only by the local authorities, I took that view in an earlier case and I am still of the same view—see *The Local Government Service Commission* v. *Kandasamy* (1965) 68 N.L.R. 1. I would also refer to *Pathirana* v. *Gunasekera* (1962) 66 N.L.R. 464.

The Ordinance does not envisage a member of the Service not being appointed to a post in the service of a local authority: and once a member is so appointed, the obligation to pay his salary devolves under s. 23 solely on that authority.

Mr. Nadesan relied on s. 40(1)(e) of the Municipal Councils Ordinance, Cap. 252, which gives a Municipal Council the power to abolish any post or office in the service of the Council, whether or not such post or office is a scheduled post within the meaning of the Local Government Service Ordinance. He relied strongly on this provision to argue that once the post of Electrical Engineer was abolished by the Municipal Council of Jaffna, the Council ceased to be liable to pay the plaintiff's salary and the Commission then became liable to pay. I do not accept the argument that because the post was abolished the Council ceased to be liable to pay the salary and allowance of the plaintiff, even though he continued to be a member of the Service. Section 23 defines the liability of the local authority as a liability to pay the salary and allowances of each member of the Service appointed to a post in the Service of that authority. That liability will continue until the member is transferred to a post in some other local authority. The truth of the matter, I think, is that a situation such as that which arose in this instance was not contemplated by those who drew up the Municipal Councils Ordinance and the Local Government Service Ordinance. I doubt if they thought that the Commission and local authorities would ever be at cross purposes. And certainly the abolition of a post was never intended to be used as a means of getting rid of a member of the Service or avoiding the obligation to pay him his salary. So long as he is appointed to a post, he is entitled to his salary payable by the local authority because it is payable by nobody else, there being no statutory duty or power vested in the Commission (which is a statutory body) to pay the salaries of members of the Service.

It is not open to us to fill the gaps, which is what the plaintiff wants us to do. We cannot add words to s. 14 providing for a special supplementary vote to be obtained from Parliament,

which is what Mr. Nadesan suggested. Parliament when it enacted the Ordinance did not think it proper to introduce such a provision.

In this view of the matter it is not necessary to go into the question whether the Commission has terminated the employment of the plaintiff or not. I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

**Siva Supramaniam, J.**

I agree.

*Appeal allowed.*

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

M. M. MUTTUWAPPA & OTHERS *vs.* THE EASTERN SHIPPING CORPORATION LTD.

*S.C. No.* 147 (*Inty*) *of* 1964 — *D.C. Colombo* 51911/*M*

*Argued on:* 31st August, 1965.
*Decided on:* 15th September, 1965.

*Civil Procedure Code, section* 423—*Commission to examine person outside the Island — Circumstances in which it should issue.*

The Plaintiffs, the consignees of a shipment of apples from Fremantle to Colombo, sued the Defendants, the carriers, for breach of contract. The alleged breach was that, instead of bringing the apples direct from Fremantle to Colombo as agreed, the master had diverted the ship to Trincomalee. As a result of the ensuing delay, the apples had become unfit for human consumption. An issue was framed by Court on the question as to whether there had been a representation that the ship would sail direct from Fremantle to Colombo. The Plaintiff applied to take the evidence of one A on commission in Australia. A had refused to come to Ceylon to give evidence, but had given no reason for such refusal. Although it was conceded that the evidence was vital, the learned trial Judge refused to issue a commission because A had given no ground for his refusal to come.

**Held:** That since it was clear that A was unwilling to come, a Commission should issue. The fact that A had not stated the reason for his unwillingness was not a valid reason for refusing to issue the Commission.

*C. Ranganathan, Q.C.*, with *K. Thevarajah*, for the plaintiffs-appellants.

*J. W. Subasinghe*, for the defendant-respondent.

**T. S. Fernando, J.**

This is an appeal from an order refusing an application for the issue by the District Court of Colombo of a commission for the evidence of a witness for the plaintiffs to be recorded in Australia.

The action has been instituted by the plaintiffs, the consignees of a shipment of 200 cases of apples shipped in a vessel owned by the defendant for carriage from Fremantle to Colombo. The plaintiffs allege that, in breach of the agreement between them and the defendant, the vessel, instead of sailing direct from Fremantle to Colombo was diverted by its master to the port of Trincomalee resulting in a delay which rendered the apples unfit for human consumption and which caused the plaintiffs to suffer loss in a sum of Rs. 10,973/53 which they sought in this action to recover from the defendant.

At the stage of framing the issues to be tried in the action, the trial judge accepted an issue in the following form:—

> Issue 2(b) — Did the defendant represent to the said shippers and/or plaintiffs that the said ship would sail direct from Fremantle to Colombo for discharge of the said apples?

The trial was then refixed for the 19th August 1963. On the 28th June, 1963, the plaintiffs moved that a commission be issued for the recording in Australia of the evidence of one W. G. Adamson whom they alleged was the person who made all the shipping arrangements in Australia in connection with the shipment. They attached to their motion a copy of their letter to Adamson in which they had informed him that his evidence was important and vital and inquired from him what his fees would be for coming over to Ceylon for the taking of his evidence at the trial. Adamson replied to this letter to say that it will not be possible for him to travel to Ceylon, but that he would be

prepared to attend in Perth, Australia, if arrangements could be made for his evidence to be recorded there.

Before the learned District Judge and before us, counsel for both sides admitted that Adamson's evidence was vital for the decision of this action. It should not be overlooked that there is no procedure available for compelling Adamson to come to Ceylon to testify in a civil action. Section 423 of the Civil Procedure Code vests a discretion in a court to issue, on application thereto, a commission for the examination of a person resident outside Ceylon when the court is satisfied that his evidence is necessary. The learned District Judge declined to issue the commission substantially on the ground that no reason has been given for the inability of the witness to come to Ceylon. It is correct to say that Adamson's reason for his inability to come to Ceylon is not expressly disclosed in the correspondence between him and the plaintiffs. Even if that reason cannot be so inferred (and I am far from saying that it cannot be), it is plain that the witness is not willing to come and there is no law to be invoked which can compel him to come here. I am in agreement with the argument of counsel for the appellants that, where section 423 vests a discretion in the court to issue a commission only where the evidence of a witness is necessary, it is impossible to sustain the contention that that discretion should be exercised so as to refuse the issue of a commission where it is conceded that the evidence is not merely necessary, but indeed vital. It must also be mentioned that the present case is not one where it is plain that it is essential for the witness to be cross-examined before the trial judge. The party needing the evidence of the witness, of course, takes the risk of the weight that might otherwise attach to the evidence being affected by the absence of the witness in the proceedings taken in the presence of the trial judge.

In my opinion it is necessary for the purposes of justice being done between the parties to secure the evidence admitted in this case to be vital. The refusal to issue the commission appears to have been exercised on a wrong principle, viz. on the ground of the absence of a reason for the witness's inability to come to Ceylon, and is therefore reviewable by this Court.

I would set aside the order appealed from and remit the case back to the District Court with a direction that a commission do issue at the expense of the plaintiffs to such a court or person as the trial judge may deem fit for the evidence of the witness concerned to be taken. The plaintiffs will be entitled to the costs of this appeal and of the argument on the point in the District Court.

**Alles, J.**

I agree.

*Appeal allowed.*

*Present:* **Tambiah, J. and Alles, J.**

ALMEIDA & OTHERS *vs.* DE ZOYSA, S.I. POLICE, CRIMES, KEGALLE

*S.C. No.* 89-92/1964 *A.J.* (*D.C. Crim.*) — *D.C. Kegalle No.* 2854)

*Argued on:* 27th January, 1965; 4th, 5th and 24th March, 1965.
*Decided on:* 5th April 1965.

*Hire-Purchase Agreement— Possession of car under Agreement — Failure to pay balance purchase price on stipulated date—Absence of understanding regarding re-taking possession on default—Seizure and removal of car—Charge of robbery of car—Penal Code, section* 380.

Under a hire-purchase agreement between W.P. the registered owner of car No. 2 Sri 1619 and a Finance Company its absolute owner, the former paid the latter Rs. 4,500/- and obtained a loan of Rs. 4,600/- from it undertaking to repay the loan in eighteen monthly instalments. In default of any single instalment the Company was entitled to re-take possession of the car. Guarantor on the said agreement was C.

Subsequently the car came into the possession of C. who agreed to sell it (Vide P. 1) to S. for Rs. 10,450/- on C. receiving a sum of Rs. 4,000/- as an advance. Of the balance sum, S. was to pay 4,600/- to the Finance Company, and Rs. 1,850/- to C. within one month from the date of the agreement, viz. 24.6.62. The vehicle was handed to S. to be used in good condition. There was not even an understanding that the car could be re-taken for non-payment of the balance payable to C.

Although S paid an instalment due to the Finance Company on behalf of W.P. he was unable to pay the balance sum of Rs. 1,850/- to C within the month stipulated and he obtained further time till 3.8.61 on which date S, together with his wife and another came in the car to Kegalle where C resided with the object of paying Rs. 1,000/- and asking for further time to pay the balance. While S and his wife were waiting in the car before contacting C, the four accused came armed with knives and pulled out S and his wife from the car and the 4th accused drove it off.

The four accused were later indicted with having committed the offence of robbery of the said car No. 2 Sri 1619 from the possession of S and were convicted. The accused appealed.

In appeal it was contented that

(1) there was no prima facie case of robbery established as S had lost all rights to possession of the car when he defaulted payment on the due date. C was entitled to take possession of the car using such reasonable force as was necessary.

(2) there was no evidence that the accused intended to cause wrongful loss to S.

(3) there was admissible evidence given by S in cross-examination to the effect that the accused told him when they came up to the car that they intended to remove the car because he defaulted in paying the balance money to C, which proved that they were acting on the instructions of C.

**Held:** (1) That even assuming that S had defaulted in paying the balance sum of money to C, the car was admittedly in S's possession at the time of seizure, and as there is no common law right by which such a seizure could be effected by the owner of a movable without terminating the hiring or without having recourse to the Courts, the seizure of the car from S's possession was unlawful.

(2) That since the seizure was unlawful, and as S was entitled to possess the car under the agreement, the accused intended to cause wrongful loss to S.

(3) That in the absence of evidence given by the 1st, 2nd and 3rd accused, though their statements to S may be regarded as forming part of *res gestae* of the criminal transaction, they are not admissible in evidence as proof of their truth. Therefore there is no admissible evidence that they were acting as agents of C. and their action in seizing the car was unlawful.

*Per* **Tambiah, J.** (*a*) "The transaction evidenced by documents P 1 is in fact a hire-purchase agreement which is governed by the Roman Dutch Law."

(*b*) "The Roman Dutch authorities never allowed *parate executie* by which a person could take the law into his own hands. This principle has been consistenly applied to all transactions. The same principle has been applied to leases or hire of movables. I am unable to find any Roman Dutch authority in support of the proposition laid down in *de Silva* v. *Kuruppu*. For these reasons I am unable to agree with the proposition of law laid down in that case. That decision should be carefully considered when the occasion arises."

*Per* **Alles, J.** "The Malayan Courts in *P. N. Pillay and Co.Ltd.* v. *Kah Motor Co. Ltd.* (1965) 31 Malayan Law Journal 47, following the dictum of Asquith L.J. in *North Central Wagon and Finance Co. Ltd.* v. *Graham* (1950) 1 A.E.R. 780 held that in the case of hire-purchase the owner cannot re-possess until he has terminated the hiring. "There must be therefore some independent act indicating that the hiring has been terminated e.g. by the issue of a notice to the hirer." Otherwise the seizure would be unlawful entitling the hirer to sue the owner for damages."

**Cases referred to:** *De Silva* v. *Kuruppu* (1941) 42 N.L.R. 539 ; XXI C.L.W. 28
*P. N. Pillay and Co. Ltd.* v. *Kah Motor Co. Ltd.* (1965) 31 Malayan Law Journal 47.
*North Central Wagon and Finance Co. Ltd.* v. *Graham* (1950) 1 A.E.R. 780.
*Mitchell* v. *Fernando* (1945) 46 N.L.R. 265; XXX C.L.W. 57
*Krishnapillai* v. *Hong Kong and Shanghai Bank Corporation* (1932) 33 N.L.R. 249.
*Silva* v. *Dissanayake* (1898) 3 N.L.R. 248.
*Perera* v. *Perera* (1907) 10 N.L.R. 230.

*G. E. Chitty, Q.C.*, with *Elmo Vannitamby*, *H. Mohideen*, and *M. V. K. Nalliah*, for the accused-appellants.

*P. Colin Thome, Crown Counsel*, for the Attorney-General.

**Tambiah, J.**

I agree with the findings of my brother Alles, J. and I am of the view that this appeal should be dismissed. Both on the documentary and oral evidence led in this case, it is clearly established that the possession of the car which was forcibly taken away by the accused, was with Senanayake.

It is significant that in the hire-purchase agreement P1, Senanayake is referred to as the purchaser and there is no provision for the re-taking of possession after termination of the agreement.

Mr. Chitty contended that under the contract entered into in P1, Chandrasena was the owner of the car and when Senanayake defaulted to pay the instalment due, the former could take possession of the car either by himself or by his agent and sufficient force could be used for this purpose.

The transaction evidenced by document P1 is in fact a hire-purchase agreement which is governed by the Roman Dutch Law. Hahlo and Ellison Kahn aptly describe the hire-purchase agreement as follows (vide The British Commonwealth—The Development of its Laws and Constitutions, Vol. 5, p. 686).

> "Hire-purchase transactions are notoriously protean in form, appearing now as sales with the reservation of ownership, now as loans, now as resolutive sales, now as leases with an option of purchase. But their substance is always the same, namely, the immediate transfer of *possession* followed by periodical payments culminating in the acquisition of full title."

The agreement P1 has not been terminated. Therefore possession of the car, which was taken forcibly, was with Senanayake. In the absence of special agreement, the Roman Dutch Law never encouraged a person to take the law into his own hands. A sale by a creditor of property belonging to his debtor without the assistance or intervention of legal authority (*parate executie*) was never permitted (vide Wille on Mortgage and Pledge in South Africa, p. 176). Attempts to introduce into Ceylon, *parate executie*, through the medium of English Law, to sell shares pledged to a Bank, were not successful (vide *Mitchell* v. *Fernando* (1945) 46 N.L.R. 265; *Krishnapillai* v. *Hong Kong and Shanghai Bank Corporation* (1932) 33 N.L.R. 249).

Mr. Chitty relied on the ruling in *de Silva* v. *Kuruppu* (1941) 42 N.L.R. 539, where it was held that the owner of a movable which is the subject matter of a hire-purchase agreement, was entitled to re-take possession given to him under the agreement provided he uses no more force than is reasonably necessary for the purpose. The ruling in this case has no application to the instant case in view of the fact that P1 contained no agreement to re-take possession of the car and the contract of hire had not been terminated in this case.

In *de Silva* v. *Kuruppu* (Ibid) Howard C.J. (with whom Soertsz, J. agreed) relied on English cases for the principle he enunciated and took the view that there was no difference between the English and the Roman Dutch Law on this matter. The hire-purchase agreement contained in P1 is either a hire or an agreement to sell with the resolutive condition that the ownership of the property should vest in Senanayake on payment of all instalments under the agreement. A hire-purchase agreement is usually a sale or a hire (vide Institutes of South African Law by Maasdorp, Vol. III, 4th Edition, pp. 233 & 272). If it is regarded as a hire of movables as contended by Mr. Chitty, then there is no distinction between the Roman Dutch Law on the general principles applicable to the hire of movables and immovables. (vide An Introduction to Roman Dutch Law by R. W. Lee, 5th Edition, p. 299). In the Roman Dutch Law the rules relating to the lease of movables and hire of services correspond closely to the Roman Law (vide An Introduction to Roman Dutch Law by Lee, ibid).

The remedy of a lessor against an overholding lessee is to ask for damages and ejectment in a court of law (vide South African Law of Obligations by Lee and Honore, p. 105; Voet XIX. 2.18; *Silva* v. *Dissanayake* (1898) 3 N.L.R. 248; *Perera* v. *Perera* (1907) 10 N.L.R. 230). In the case of a movable the owner's remedy against a person who hires it and who overholds it is to ask for damages and return of the movable which was let.

The Roman Dutch authorities never allowed *parate executie* by which a person could take the law into his own hands. This principle has been consistently applied to all transactions. The same principle has been applied to leases or hire of movables. I am unable to find any Roman Dutch authority in support of the proposition laid down in *de Silva* v. *Kuruppu*. For these reasons

I am unable to agree with the proposition of law laid down in that case. That decision should be carefully considered when the occasion arises.

Therefore the contention of Mr. Chitty that the offence of theft has not been made out because Senanayake only had the detention and not possession, is not entitled to succeed. Mr. Chitty also contended that no wrongful loss has been caused to Mr. Senanayake as it was not his property. Under the agreement Senanayake was entitled to possess this car and he has been deprived of the use of this car by illegal means. Therefore wrongful loss has been caused to him and dishonest intention has been proved even on the assumption that the accused acted on the orders of Chandrasena.

I do not wish to interfere with the findings of facts of the learned District Judge in this case. The act of the accused is a high handed one. No submissions were made for the reduction in the sentence. I affirm the sentence passed on the accused and dismiss the appeal.

**Alles, J.**

The four accused were jointly charged on an indictment with having, on 3rd August, 1962, committed the offence of robbery of Morris car No. 2 Sri 1619 valued at Rs. 10,450/- from the possession of Dinadasa Senanayake of Kurunegala. After trial they were convicted and sentenced to a term of one year's rigorous imprisonment each.

The evidence that has been accepted by the trial Judge is to the following effect:

The absolute owners of the car were the Transport and General Finance Co. Ltd. but the registered owner was Kumarasinghe Walter Perera. According to the hire-purchase agreement which Walter Perera had entered into with the Finance Co. he had paid Rs. 4,500/- to the Company and obtained a loan of Rs. 4,660/- from them which he undertook to repay in eighteen monthly instalments. On his failure to pay a single instalment, the Company was entitled to retake possession of the car. The guarantor on the hire-purchase agreement was one D. L. R. Chandrasena, the proprietor of the Tropicana Hotel at Weweldeniya who resided at Kegalle. In June, 1962, Senanayake, who was a clerk in the Food Control Department at Kurunegala was anxious to purchase a car and contacted two brokers, Suwaris and Sunil. Sunil introduced Senanayake to Chandrasena. On 25.6.62, Sunil took Senanayake to inspect the car 2 Sri 1619 which was then in the possession of Chandrasena and Senanayake agreed to purchase the vehicle for Rs. 10,450/-. According to Senanayake, he understood that Walter Perera had authorised Chardasena to sell the car. Senanayake paid a sum of Rs. 4,000/- to Chandrasena on 24.6.62 and entered into an agreement with Chandrasena to take over the finance payable to the Finance Co. and to pay the balance Rs. 1,850/- to him in a month's time. Two documents, in identical terms were executed in respect of the transaction — P1 and P 5 — one by Senanayake and the other by Chandrasena. The document P1 is in the following terms:—

24.6.62

"I, D. L. E. Chandrasena of Kegalle having agreed to sell the Morris Minor vehicle bearing No. 2 Sri 1619 belonging to me on a receipt to Mr. D. Senanayake of Kurunegala for the some of Rs. 10,450/- received today as an advance a sum of Rs. 4,000/-. Of the balance sum of Rs. 6,450/- a sum of Rs. 4,600/- to be paid to the Transport General Finance Company Limited by the said purchaser Mr. D. Senanayake and the remaining balance of Rs. 1,850/- Mr. D. Senanayake shall pay to me D. L. R. Chandrasena within one month from today (24.6.62) and get all rights and claims to same transferred in his favour. The vehicle was handed to him to be used in good condition."

On the execution of the two documents, Senanayake was permitted to use the car and it was in his physical possession at Kurunegala thereafter until 3.8.62. Senanayake says he was unable to pay the balance sum of Rs. 1,850/- and on 24.7.62 he obtained further time from Chandrasena to pay it. Chandrasena agreed to give him further time.

According to the evidence of Senanayake, his wife and Sunil, they came to Kegalle in the car on 3rd August with the object of paying Rs. 1,000/- to Chandrasena and to ask him for further time to pay the balance Rs. 850/- on a later date. They reached Chandrasena's house at Kegalle at about 8.30 p.m. and while Senanayake and his wife remained in the car, Sunil went to the house to meet Chandrasena. Then a car driven by the 4th accused came and halted in front of their car and the four accused alighted from it. The 1st and 2nd accused who were armed with

knives pulled Senanayake from the driving seat while the third accused pulled Mrs. Senanayake from the rear seat tearing her saree in the process. The fourth accused then got into the driving seat and the car was taken away by the accused driven by the fourth accused. Sunil, on hearing cries, came from Chandrasena's house and found Senanayake and his wife stranded on the road. They then engaged another car and as Mrs. Senanayake was in a very distressed state of mind, they decided to return to Kurunegala and contact Chandrasena the following day. Senanayake was anxious to settle the matter without having recourse to litigation, so he returned to Kegalle the following day and tried to contact Chandrasena but failed. Finally he went to the Kegalle Police Station and made a complaint to the Police. When he was at the Police Station he saw the car driven by the fourth accused proceeding along the road. He informed the Police who gave chase and ultimately recovered the car. Senanayake accompanied the Police to the Tropicana Hotel where he identified the four accused. The incidents of the 3rd August have been spoken to by Senanayake, and his evidence has been corroborated by Mrs. Senanayake and Sunil. His evidence as to what transpired on the following day is supported by the Police.

The 4th accused who gave an address in the Pettah in Colombo but described himself as a driver of Chandrasena, gave evidence at the trial and stated that he was requested by Chandrasena to meet Senanayake at Chandrasena's house on the night of 3rd August and ask him to either hand over the car or pay the balance money. He denies that the other three accused were in his company. He says that when he made the request from Senanayake he peaceably handed over the car to him and told him that he would pay the balance the following day. As to how Senanayake knew that the 4th accused had the authority of Chandrasena to take the car from him remains a mystery. The Judge has quite justifiably rejected the evidence of the 4th accused.

Counsel for the appellants submitted that even assuming that violence was used to recover the car from Senanayake, no prima facie case of robbery has been established since the evidence did not disclose that Senanayake was in possession of the car on 3rd August. He also urged that there was no evidence that the accused intended to cause wrongful loss to Senanayake by depriving him of the use of the car. Counsel's first submission is based entirely on the evidence of Senanayake at the trial that he had promised to pay the balance to Chandrasena within a week of 24th July and since he defaulted in this payment, Counsel submitted that he had only a hope that Chandrasena would enter into a fresh agreement on 3rd August to pay the balance. It is not clear on the evidence whether the balance had to be paid on 3rd August or before that date. Counsel who appeared at the trial apparently accepted the position that the due date was 3rd August and proved the deposition of Senanayake in the Magistrate's Court where he had stated that the due date for the payment of the balance was 3rd August. The broker Sunil in the course of his evidence at the trial fixed the date for the payment of the balance as 3rd August. It is also significant that Chandrasena obviously knew that Senanayake was coming to Kegalle from Kurunegala on 3rd August as otherwise he could not have made arrangements for the seizure of the car on that date. But even assuming that Senanayake had defaulted in not paying the balance earlier than 3rd August, the car was admittedly in Senanayake's possession at the time of the seizure. He had paid Rs. 4,000/- to Chandrasena earlier, he had the use of the car up to 3rd August and he had paid an instalment to the Finance Company on behalf of Walter Perera by that date, which sum the Finance Company had accepted. According to the evidence of the representative of the Finance Company, no occasion arose for them to seize the car since the instalments on behalf of Walter Perera had been paid on the due date by Senanayake. According to Sunil there was no understanding between Chandrasena and Senanayake that the car could be seized for non-payment of the balance payable on the due date and it is not open to the defence to introduce such a term into the agreement P1 in the absence of any specific reference to that matter. According to Mr. Chitty, Senanayake had lost all rights to the possession of the car when he defaulted in paying the balance sum of 1,850/- on the due date and therefore on 3rd August all rights in the car passed to Chandrasena, who himself or through his agents were lawfully entitled to take possession of the car from Senanayake using such reasonable force as was necessary. I am unable to agree with such a startling proposition. There is no common law right by which such a seizure can be effected by the owner of a movable. If this was the law it would mean that the possessor or hirer of a movable, who has agreed to pay its price by instalments could be deprived of its use and enjoyment if he defaulted in the making of a single payment, even if he has paid almost the entirety

of the consideration, on the footing that on a single default all legal rights had vested in the owner. Such a situation would only encourage persons to take the law into their own hands instead of seeking their redress in the courts of law. Counsel for the appellants sought to support his submission by citing the decision of Howard, C.J. in *de Silva* v. *Kuruppu* (1941) 42 N.L.R. 539 where it was held that the owner of a lorry let on a hire-purchase agreement was entitled to exercise his right to re-take possession of the lorry without the intervention of Court, provided he uses no more force than was reasonably necessary for the purpose. Undoubtedly, where the parties had agreed in writing that the owner is entitled to re-take possession of an article on the non-payment of an instalment, such a right is available to the owner, but even such a right is subject to the use of reasonable force and after due notice is given to the hirer of the intention of the owner to re-take possession of the article. The representative of the Finance Company who gave evidence has detailed the procedure adopted by them in such an event. On the failure of the hirer to pay any instalment due on the vehicle, the Finance Company informs the hirer by letter and gives him notice of the day of the intended seizure. After the seizure is effected the Police are informed of this fact and an entry is made in the Police Station accordingly. These are salutary steps and intended to protect the owner's rights without a fear of a breach of the peace. The Malayan Courts in *P. N. Pillay & Co. Ltd.* v. *Kah Motor Co. Ltd.* (1965) 31 Malayan Law Journal 47, following the dictum of Asquith L.J. in *North Central Wagon and Finance Co. Ltd.* vs. *Graham* (1950) 1 A.E.R. 780 held that in the case of hire-purchase the owner cannot re-possess until he has terminated the hiring. "There must be therefore some independent act indicating that the hiring has been terminated e.g. by the issue of notice to the hirer." Otherwise the seizure would be unlawful, entitling the hirer to sue the owner for damages. If these precautions have to be taken in the case of an hire-purchase agreement where the parties have made provision for the seizure of the hired article, it necessarily follows that where no such provision is made in the agreement as in this case, and where there was not even an oral agreement to that effect, a seizure under such circumstances and aggravated by the use of violence is unlawful. I am therefore of the view that the seizure of the car from Senanayake's possession on 3rd August was unlawful. If the seizure was unlawful the accused obviously intended to cause wrongful loss to Senanayake. It was urged by Counsel for the appellants that the accused who were nominees of Chandrasena, did not intend to cause wrongful loss to Senanayake. He submitted that there was admissible evidence to prove that the 1st, 2nd and 3rd accused were only acting on the instructions of Chandrasena. He relied on the evidence given by Senanayake in cross-examination that the accused told him, when they came up to the car, that they intented to remove the car from his possession because he had defaulted in paying the balance money to Chandrasena. If it is sought to rely on the truth of the statements that are alleged to have been made to Senanayake that the accused were acting on behalf of Chandrasena it was necessary that the 1st, 2nd and 3rd accused should have given evidence. Even though these statements may relate to the details of the alleged criminal transaction and form part of the *res gestae*, I do not agree that they are admissible in evidence as proof of their truth. There is therefore no admissible evidence that the 1st, 2nd and 3rd accused were acting as agents of Chandrasena and their action in seizing the car from the possession of Senanayake was clearly unlawful and intended to cause wrongful loss to him. The fourth accused's evidence has been disbelieved by the trial Judge. The submissions of Counsel therefore, that no prima facie case of robbery has been established, are not tenable and the essential ingredients of the offences have been made out.

This is a most high-handed act and indicates that the accused intended to take the law into their own hands and deprive Senanayake of the use of his car. If Chandrasena thought he had a right in law to re-take possession of the car, he should have had recourse to the courts instead of sending his minions, armed with knives to intimidate Senanayake and his wife and rob the car from their possession. The appeals are therefore dismissed and the convictions and sentences affirmed.

*Appeals dismissed.*

*Convictions affirmed.*

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

THAMER PONNAMBLAM *vs.* LEDCHUMIPILLAI & OTHERS

*S.C. No.* 209/63 (*F*) — *D.C. Jaffna Case* No. 1222/T

*Argued and decided on:* 9th May, 1966.

*Civil Procedure Code, sections* 524, 530 *and* 534—*Material allegations of the petition—Whether necessary to establish what properties form part of the estate of the deceased in an application under section* 530—*Whether rebuttal of averments regarding properties necessary or relevant for a discharge of Order Nisi.*

Where on an Order Nisi made in terms of section 531, of the Civil Procedure Code allowing the application for letters of administration made by a brother of the deceased to the estate of the deceased, the widow of the deceased objected to the grant of letters on the ground that the estate was not of the value of Rs. 2,500/-:

**Held:** That unlike in the case of an application under section 524, it did not appear essential, when moving under section 530, to establish the properties which are alleged to form part of the deceased's estate. Therefore evidence in rebuttal under section 534 that the estate of the deceased is below Rs. 2,500/- in value would not amount to a rebuttal "of any material allegations in the petition", and the Order Nisi would not be recalled on that ground.

*C. Thiagalingam, Q.C.*, with *V. Arulambalam*, for the petitioner-appellant.

*C. Ranganathan, Q.C.*, with *K. Sivanathan*, for the 1st respondent-respondent.

**H. N. G. Fernando, S.P.J.**

In this case the petitioner, the brother of the deceased made application for Letters of Administration to the deceased's estate and, in terms of section 531 Order Nisi was made allowing the grant of Letters. Thereafter the widow objected to the grant of Letters on the ground that the estate left by the deceased was not of the value of Rs. 2,500/-.

The Learned Judge thereupon decided to take up the question whether or not the estate left by the deceased must be administered in terms of the Civil Procedure Code, and for that purpose proceeded to determine the value of the estate.

Having regard to section 530 which sets out the mode of application for Letters, it does not appear essential that an applicant for Letters must establish at that stage the properties which are alleged to form part of the deceased's estate. It is significant that, while section 524 requires an applicant for probate to set out the details and situation of the deceased's property, section 530 does not include a similar requirement.

Section 534 provides that an Order Nisi shall be discharged if it appears that the prima facie proof of any material allegations in the petition has been rebutted. If proof of such material allegations is not rebutted, the Court is bound to make the Order absolute.

In the present case the matter concerning the value of the deceased's estate was not subject of a material allegation referred to in Section 534. The Learned Judge therefore had no power to recall the Order Nisi upon the ground taken in this case.

It would appear that the petitioner's Counsel had conceded that if the grant of Letters was to be confirmed he was prepared to recognise the right of the widow to administer the estate. In spite of this concession, the proceedings show that the widow is not interested in administering the estate, and for that reason she must be regarded as having forfeited her preferent right.

We accordingly set aside the order made by the Learned District Judge and make order under Section 534 that the Order Nisi previously made in favour of the petitioner be made absolute.

The petitioner will be entitled to the costs in the Lower Court and to costs of appeal.

**Abeyesundere, J.**

I agree.

*Set aside.*

*Present:* **Sirimane, J.**

NAVARATNARAJAH (GOVERNMENT AGENT, GALLE) v. K. PIYADASA

*S.C. No.* 1291/'64 — *M.C. Galle No.* 24153

*Argued and decided on:* 22nd February, 1965.

*Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249) — Sections 4(1), 5(1) and 5(2) — Commission of offence under Ordinance and liability to fine — Recovery of tax due — Two different kinds of proceedings available against defaulter.*

The Government Agent filed a "plaint" under Section 148(1)(b) of the Criminal Procedure Code against the Accused-Appellant complaining that he had possessed a motor vehicle having failed to pay Heavy Oil Tax in contravention of section 5(1) of the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), and had thereby committed an offence under s. 5(2). The Accused-Appellant appeared upon summons, and upon being charged pleaded not guilty. On the trial date, the prosecuting officer withdrew the charge, and the Accused-Appellant was discharged. Thereupon, in the same proceedings, the prosecuting officer filed a certificate issued by the Government Agent under s. 4(1) of the Ordinance, specifying the amount due by way of tax, together with a statement that the defaulter had been given 7 days' notice to pay the amount.

**Held:** That the procedure followed in the first instance, and the procedure followed after the discharge, were two different kinds of proceedings available against a defaulter. It was not legally possible *in the same proceedings* to take action under section 4(1) of the Ordinance, after a discharge had been given in a case where plaint had been filed under section 148 of the Criminal Procedure Code.

*M. T. M. Sivardeen*, for the accused-appellant.

*Ranjit Dheeraratne*, Crown Counsel, for Attorney-General.

**Sirimane, J.**

The procedure adopted in this case is confusing.

A person who makes default in the payments of Heavy Oil Tax and possesses a motor vehicle in respect of which such Tax is due commits an offence under Section 5(1) of the Heavy Oil Motor Vehicles Taxation Ordinance, Chapter 249. If convicted he is liable to a fine and/or imprisonment under Section 5(2) of that Ordinance.

In order to recover the Tax due, the Government Agent may under Section 4(1) issue a Certificate to the Magistrate specifying the amount due together with a statement that the defaulter had been given 7 days' notice in which to pay the amount.

It is clear, therefore, that two different kinds of proceedings can be initiated against a defaulter. In this case, the Government Agent filed what is commonly referred to as a "Plaint" under Section 148(1)(b) of the Criminal Procedure Code complaining that the appellant had possessed a motor vehicle having failed to pay Heavy Oil Tax in contravention of Section 5(1) and thereby committed an offence under Section 5(2). Summons was issued on the appellant. On his appearing in Court he was charged from a charge sheet. He pleaded not guilty and the case was set down for trial. On the trial date (9.9.63) the prosecuting officer moved to withdraw the charge. This application was apparently allowed, for the appellant was discharged. At the same time the prosecutor moved to file *in the same proceedings* a Certificate under Section 4(1) of Chapter 249. This application, in my opinion, should not have been allowed. Once the appellant was discharged, the proceedings came to an end. It was open to the prosecutor to initiate new proceedings under Section 4(1), if he so desired; but this case could not have been "revived" or "resuscitated" as the prosecutor sought to do so.

I set aside the orders of the learned Magistrate made after the discharge of the accused-appellant on 9.9.63.

*Set aside.*

*Present:* **Siva Subramaniam, J.**

ROLAND JAYARATNE *et al. vs.* SUB-INSPECTOR RANASINGEH

*S.C.* 778-790/'66 — *M.C. Galle* 26544

*Argued & Decided on:* 15th, September, 1966.

*Unlawful Gaming — Search warrant issued without written information on oath — Failure to prove that public had access to place where gaming took place — Can conviction be sustained?*

**Held:** (1) That where a search warrant under the Gaming Ordinance was issued without the Magistrate having before him any written information on oath, it is invalid and the presumptive evidence of guilt under the Ordinance will not apply.

(2) That when the evidence led does not show that the public had access to the place where the card game is alleged to have been carried on, a conviction for unlawful gaming cannot be sustained.

*C. Ranganathan, Q.C.*, with *H. Mohideen* and *M. T. M. Sivardeen*, for the accused-appellants.

*F. C. Perera*, Crown Counsel, for the Attorney-General.

**Siva Supramaniam J.**

The appellants in this case have been convicted of the offence of unlawful gaming and each of them has been sentenced to three months rigorous imprisonment, in addition to a fine of Rs. 100/-.

The proceedings appear to have commenced on a search warrant issued by the Magistrate. Under section 5(1) of the Gaming Ordinance, (Cap. 46), it is a condition precedent to the issue of a search warrant that a Magistrate should be satisfied upon written information on oath and after any further enquiry which he may think necessary that there is good reason to believe that any place is kept as a common place of gaming. It is conceded by Crown Counsel that, in the instant case, the Magistrate did not have before him any written information on oath. The search warrant issued by him is, therefore, not valid and the presumptive evidence of guilt under the Ordinance will not apply.

In order to establish a charge of unlawful gaming, the prosecution should prove, *inter alia*, that the act of betting or playing a game for stakes is practised in any place to which the public have access, whether as of right or not. The evidence led in this case does not show that the public had access to the place where the card game is alleged to have been carried on. An essential ingredient necessary to constitute the charge has therefore not been established.

I set aside the conviction and acquit all the accused.

*Accused acquitted.*

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

FILICIA NONA *vs.* LIYANAGE ELARIS

*S.C. No.* 145/65(I) — *D.C. Avissawella No.* 7821/P

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

*Surveyors Ordinance, section* 3 — *Plan made and submitted by Surveyor who had failed to renew his annual license — Effect.*

**Held:** That a plan prepared and submitted to court by a surveyor at a time when his annual license had not been renewed is not receivable as evidence in view of section 3 of the Surveyor's Ordinance (Cap. 108).

*H. V. Perera, Q.C.*, with *T. N. Wickremesinghe*, for the defendant-appellant.

*S. W. Jayasuriya*, for the plaintiff-respondent.

**Sri Skanda Rajah, J.**

The commissioner in this case was one D. W. Gunaratne, Surveyor. He prepared a scheme for final partition and that scheme is depicted in plan 319A. The plaintiff was not satisfied with that scheme for partition and moved for a commission to be issued to one Warnakulasuriya, who prepared the scheme depicted in plan No. 1276. It would appear that the latter was not a licensed surveyor from 1962. At the time he prepared the plan No. 1276, on 18.6.65, he was not holding a licence as a surveyor. The Surveyor General's letter dated 2nd November, 1965, states that Warnakulasuriya had not renewed his licence in Surveying and Levelling since 1962. All these facts were brought to the notice of the learned Judge and on 3.12.65 Warnakulasuriya produced before the learned Judge licence dated 22.11.65 with an explanation.

Section 3 of the Surveyos Ordinance chapter 108 runs as follows: "No survey or plan and no copy or tracing of any survey or plan, purporting to have been made or prepared by any land surveyor after the commencement of this Ordinance shall be receivable in evidence in any civil court in Ceylon unless it has been made or prepared by a permanently licensed surveyor or by a surveyor holding an annual licence and has not been declared defective by the Surveyor General".

The learned Judge entered a final decree in terms of the scheme of partition submitted by Warnakulasuriya. In view of section 3 of the Surveyors Ordinance which I have quoted above, it could not have been received in evidence.

Therefore, we set aside the proceedings entering the final decree for partition and direct that proceedings be taken according to law. The appellant will have the costs of the appeal.

**Alles, J.**

I agree.

*Set aside.*

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

DAHANAYAKE *vs.* JAYASINGHE

*S.C. No* 11/65 (*Inty.*) — *D.C. Galle No.* 3094/M

*Argued and decided on:* 15th June, 1966.

*Civil Procedure Code, section* 394(2) — *Meaning of term "executor"—Does it include executor de son tort.*

**Held:** That the term "executor" in section 394(2) of the Civil Procedure Code includes an executor *de son tort.*

*W. D. Gunasekera*, for the substituted-defendant-appellant.

*E. B. Vannitamby*, with *Hanan Ismail*, for the plaintiff-respondent.

**Sri Skanda Rajah, J.**

In this action the plaintiff sued the defendant. Pending the action the defendant died. He successfully sought to substitute the defendant's widow as executrix *de son tort*. The widow now appeals from that order and contends that she is not the legal representative and, therefore, she cannot be substituted.

The legal representative is either the executor or the administrator, under Section 394(2) of the Civil Procedure Code. In our opinion, an executor also includes an executor *de son tort*. There was ample evidence to indicate that the appellant intermeddled with her late husband's estate and thereby constituted herself executrix *de son tort*.

The appeal is, therefore, dismissed with costs.

**Alles, J.**

I agree.

*Appeal dismissed.*

END OF VOLUME LXXI

# සති පතා ලංකා නීතිය

ඉංග්‍රීසි භාෂාවෙන් පළවන තෝරාගත් සමහර නඩු තීන්දුවල වාසිය සහ විශේෂ අවස්ථාවල දී
ශ්‍රේෂ්ඨාධිකරණය කැඳවන සභාවල පැවැත්වෙන කථාවන්හි
වාසිය ද අඩංගු වේ.

## සංහිතාව


### 13 වෙනි කාණ්ඩය

**රාජනීතිඥ හේම එච්. බස්නායක**
(උපදෙශක කර්තෘ)

**ජී. පී. ජේ. කුරුකුලසූරිය**
ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥ
(කර්තෘ)

**බී. ජී. පිරිස්** එල්.එල්.බී. (ලන්ඩන්)
**ඩී. රත්නසභාපති** බී.ඒ.(ලංකා), එල්.එල්.බී.(ලන්ඩන්)
**ඩබ්. ජ්. එස්. පෙරේරා** එම්.ඒ.(ලන්ඩන්)
**එන්. එම්. එස්. ජයවික්‍රම** එල්.එල්.බී.(ලංකා)
**එම්. එච්. එම්. නසීනමරික්කාර්** බී.ඒ., එල්.එල්.බී., (කැන්ටැබ්)
**එස්. එස්. බස්නායක** බී.ඒ., බී.සී.එල්. (ඔක්ස්ඵර්ඩ්)
**එන්. එස්. ජ්. ගුණතිලක** එල්.එල්.බී. (ලංකා)
**වරුන බස්නායක**

ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥවරු
සහකාර කර්තෘවරු

**1967.**

පිටපත් ලබාගත හැක්කේ තො: 50/3, සිරිපා පාර, හැවිලොක් ටවුව—කොළඹ 5.

# පාර්ශවකාරයින්ගේ නාම

---

## ඉඩම් හිමි සහ බදුකරු

ගෙවල් හිමියා සහ බදුකරු—ගෙවල්හිමියාගේ අභාවයෙන් මාස්පතා බද්දක් අහෝසිද?—ඔහුගේ අයිතිවාසිකම් සහ යුතුකම් ඔහුගේ උරුමක්කාරයින් පිට පැවරේ ද?

**තීන්දුව: මාස්පතා ගිවිසුමකට සම්බන්ධ හෙවල් හිමියාගේ අභාවයෙන් පමණක් එම ගිවිසුම අහෝසි නොවේ. ප්‍රමානවත් නිවේදනයකින් එය නිම නොකෙළේ නම් ඔහුගේ අයිතිවාසිකම් සහ යුතුකම් තමාගේ උරුමක්කාරයින් පිට පැවරේ.**

ඩබලිව්. ටී. ඇස්. ප්‍රනාඳු සහ තවත් අය ථ. ඇලියන් ද සිල්වා ... ... ... 17

ගෙහිමියා සහ කුලියට ගත් තැනැත්තා — කුලියට ගත් ගෙය ගින්නෙන් විනාශ වීම—එහි ප්‍රතිඵලයක් වශයෙන් කුලියට ගත් අය ගෙය අත් හැරීම — ගෙහිමියා අලුත් ගොඩනැගිල්ලක් ඉදි කිරීම ; කුලියට ගත් තැනැත්තා බලාත්කාරකමින් පදිංචි වීම — පොලීසිය කුලියට ගත් තැනැත්තාට විරුද්ධව චෝදනා ඉදිරිපත් කිරීම — තමා කුලියට ගත් තැනැත්තා යයි ප්‍රකාශයක් කරවා ගැනීමට කුලියට ගත් තැනැත්තා නඩු දැමීම — ගෙවල් කුලි පාලන පණත — නීතිගත කුලියට ගැනීමක් සම්බන්ධයෙන් එය බලපවත්වන අයුරු.

**තීන්දුව: (1) කුලියට දීමකට භාජන වූ ගෙයක් ගෙහිමියාගේ හෝ කුලියට ගත් තැනැත්තාගේ වරදක් නැතුව ගින්නෙන් දැවී ගිය කල එම ගේ කුලියට දීමේ කොන්ත්‍රාත්තුව නිමාවට යේ. මෙසේ වන්නේ කුලියට දිය හැකි වස්තුව නිමාවට යෑම නිසා ය. මෙම කොන්ත්‍රාත්තුව ගෙවල් කුලි පාලන පණත යටතට අයුවන නමුත් එයින් එහි වෙනසක් නොවේ.**

**(2) ගෙයක් කුලියට ගත් තැනැත්තකුට ගෙවල් කුලි පාලන පණතින් ලැබෙන ආරක්ෂාව අවසන් වන එක් මාර්ගයක් නම් එම ගෙය ගෙහිමියාට නැවත භාර දීම ය.**

ජේෆ්රි ථ. ද සිල්වා ... ... ... 7

## කුඹුරු පණත

කුඹුරු පණත — 1958 අංක 1, එහි 3, 4, 6, 7, 8, 14 සහ 21 වන ඡේද — තමාගේ කුඹුර වපුරන ගොවියා එය කායර්‍යක්ෂම ලෙස නොකරන බව කියමින් එම ගොවියා ඉන් පිටමං කිරීමට කුඹුරු හිමියකු විසින් දිස්ත්‍රික් උසාවියේ දමන ලද නඩුවක් — කුඹුරු පණතේ පැණවීම් අනුව සලකා බලන කල එම පණතේ පැනවීම් අනුගමනය නොකර එම නඩුව පැමිණිලිකරුට කියා ගෙන යා හැකි ද?

කුඹුරු හිමියකු ලෙස මෙහි ඇපැල්කරු තමාගේ කුඹුර වපුරන ගොවියා එය කායර්‍යක්ෂම අන්දමට නොකරන නිසා ඔහු ඉන් පිටමං කිරීමට උත්සාහ කරන අයුරින් මෙම නඩුව දමා තිබේ. වර්ෂ 1958 අංක 1 දරණ කුඹුරු පණතේ පැණවීම් වලට අනුව මෙම නඩුව කියාගෙන යාමට නොහැකි බව කී උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා පැමිණිලිකරුගේ වාසියට තීන්දුව දුන්නේය. විත්තිකරු අභියාචනයක් ඉදිරිපත් කෙළේ ය.

**තීන්දුව: තමාගේ කුඹුර යෝග්‍ය ලෙස වගා කරවීමට හෝ තමාගෙන් වැඩ කිරීමට ගත් ගොවියා කුඹුරෙන් ඉවත් කිරීමට හෝ උවමනා වූ විට කුඹුරු හිමියා ගත යුතු මාර්ගය වර්ෂ 1958 අංක 1 දරණ කුඹුරු පණතෙහි ම ඇතුළත් වී තිබේ. මෙම පණත පැණවුනු පසු කුඹුරු හිමියා විසින් අනුගමනය කළ යුතු වූ ක්‍රියාපත මාර්ගය මෙය වේ. එහි ප්‍රතිඵලයක් වනුයේ පැමිණිලිකරු විසින් මෙබඳු නඩුවක් ඉදිරිපත් නොකර සිටිය යුතු බව ය.**

සන්යෝනි අග්‍ර විනිශ්චයකාරතුමා: "3(2) ඡේදයෙහි ගැබ් වී ඇති අන්දමට විශේෂ ව්‍යතිරේකයක් නොපෙනෙන නිසා 4(1) ඡේදයේ යෙදී ඇති එම වචනයට අධිකරණ නියෝගයකින් පිටමං කිරීම ද ඇතුළත් වී ඇති බව මාගේ නිගමන යයි."

හෙන්ඩ්‍රික් අප්පුහාමි ථ. ජෝන් අප්පුහාමි ... 23

## ගෙවල් කුලී පාලන පණත

ගෙවල් කුලී පණත — වෙළෙඳ ව්‍යාපාරයක් ආරම්භ කිරීමේ පරමාර්ථය පෙරදැරි වූ යුක්තියුක්ත ආවශ්‍යකත්ත්වය යටතේ ගෙහිමියා දැමූ නඩුවක් — ගෙහිමියාගේ ආදයට තත්ත්වය හීනවීම සහ තමාට තිබී ගෘහස්ථාන කීපයකින් එකක්වත් ලබා ගැනීමට නොහැකිකම — අත් තැන්වල ශාඛා පිහිටුවන ලද සමෘඩිමත් වෙළඳ ව්‍යාපාරයක් කුලියට සිටින තැනැත්තා විසින් කරගෙන යාම — ස්ථානය අත්හැර යාමට හෝ වෙන ස්ථානයක් සොයා ගැනීමට හෝ කුලියට ගත් තැනැත්තාගේ ඇති අකැමැත්ත — ගෙය හැර යෑමට දෙන ලද නිවේදනය — ගෘහස්ථානය උවමනා කළේ කුමන හේතුවක් නිසාදැයි යන්න එහි සඳහන් නොවීම — මෙබඳු නිවේදනයකින් ගෙහිමියාට අහිතකර සැලකීමක් ඇති විය හැකි ද යන්න.

වරක් සාර්ථක ව්‍යාපාරිකයකු වූවත් මේ නඩුව දමන කාලයේ මුදල් තත්ත්වයෙන් අබලන්ව තමාගේ අඹු-දරු පෝෂණය සඳහා තිබූ එක ම ආදයම් මාර්ගය ලෙස යමකිසි ගෙවල් කුලියක් පමණක් ඇතුව සිටි පැමිණිලිකරු තමාගේ ගෘහ ස්ථානයක් (තේ කඩයක් සහ හෝටලයක් තිබුනු තැනක්) කුලියට ගත් අය වන විත්තිකරුට විරුද්ධව තමාට එම ස්ථානයේ රෙදිපිළි වෙළෙඳ ව්‍යාපාරයක් අරඹා ආදයම දියුණු කර ගැනීමට උවමනා නිසා එම ස්ථානය යුක්තියුක්ත ලෙස අවශ්‍ය වී තිබේ යයි නඩු පැවරී ය.

උගත් කොමසාරිස්වරයා පැමිණිලිකරුගේ ආදයම් දුර්වල තත්ත්වය පිළිබඳව හා එයි ප්‍රතිඵලයක් ලෙස ඔහුගේ අවශ්‍යතාවයන් සපුරා ගැනීමට තමාගේ විටිනා දේපොළ විකිණීමට සිදු වූ බව ද පැමිණිලිකරුගේ සාක්ෂියෙන් පිළි ගත්තේ ය. එසේ ම පැමිණිලිකරුට තමා සතු ගෘහස්ථානයන් ගෙන් එකක් හෝ තමාගේ පරිහරණයට ලැබීමට නොහැකි කමින් ඔහු අමාරුවට වැටී සිටින් බව ද ඔහු ඒත්තු ගත්තේ ය. නමුත් ගෙය අත්හැරීමට යවන ලද නිවේදනයෙහි එම ගෙය තමාට අවශ්‍ය වූයේ කුමන කරුණකට දැයි පැමිණිලිකරු සඳහන් කර නොමැති නිසා පැමිණිලිකරුගේ අවශ්‍යතාවය විත්තිකරුගේ අවශ්‍යතාවය අබිභවා තිබේ යයි තීරණය කිරීමට නොහැකි බව කීය.

තවද, විත්තිකරු තමාගෙන් කෝන්තර අසනු ලබද්දී පහත සඳහන් පරිදි කී සාක්ෂියෙන් වෙනත් ස්ථානයක් ලබා ගැනීමේ ප්‍රශ්නය මෙහි ලා බල පවත්වන අයුරු කල්පනා කර නැත.

(ඒ) තමාගේ ව්‍යාපාරය කරගෙන යාමට තවත් තැන් ඉඩ හැරී තිබෙදැයි තමා නොදත් බව.

(බී) පැමිණිලිකරු විසින් විත්තිකරුට වෙනත් සුදුසු තැනක් ලබා දුන්නත් විත්තිකරු යාමට අකැමැති බව.

**තීන්දුව: (1) ගෙයක් අත්හැර යාමට දෙනු ලබන නිවේදනයක එයට හේතුව හෝ මොනයම් හේතුවක් හෝ සඳහන් කළ යුතු යයි නීතිගත අවශ්‍යකමක් නොමැති කලක එබඳු නිවේදනයක එවැනි හේතුවක් නොමැතිකමින් එය පැමිණිලිකරුට අහිතකර යයි සලකා ගැනීම නිසා උගත් කොමසාරිස්වරයා කරුණු වරදවා වටහාගෙන තිබේ.**

**(2) මෙසේ උගත් කොමසාරිස්වරයාගේ සිතට බල පැවැත් වූ යට කී ලෙස කරුණු වරදවා වටහා ගැනීම ගැනත් එමෙන් ම**

**(ඒ) අන් තැනක් ලබාගැනීම ගැනත් එයින් විත්තිකරුගේ හිත නොහොඳකම අනාවරණයවීම ගැනත් නිගමනයට බැස ගැනීමේ දී මේ දේ ගැන සිතා බැලීම කොමසාරිස්වරයාගෙන් සිදු නොවීම ගැනත් සලකා බැලීමේදීද,**

**(බී) පැමිණිලිකරු තමාට අලුතින් රෙදිපිළි වෙළඳ ව්‍යාපාරයක් ඇරඹීමට උවමනා යයි කීම කොමසාරිස්වරයා විසින් පිළිගෙන තිබීම ගැන සලකා බැලීමේ දී පැමිණිලිකරු නඩුවෙන් ජය ලැබීමට සුදුසු තත්ත්වයක සිටී.**

**(3) කුලියට ගත් තැනැත්තා විසින් ව්‍යාපාරයක් කරගෙන යන ස්ථානයෙහි අළුත් ව්‍යාපාරයක් පටන් ගැනීම ගෙහිමියාගේ අවශ්‍යතාවය වුව ද, ගෙහිමියාගේ එම ආවශ්‍යකත්වය අව්‍යාජ නම්, එසේ ම එය කුලියට ගෙන සිටින තැනැත්තාගේ ආවශ්‍යකත්ත්වයට වඩා ඉක්මනින් සිදුවිය යුතු දෙයක් නම්, ගෙහිමියාට එසේ තමාගේ ගෙය ලබා ගැනීමට නීතියෙන් සුදුසුකමක් ඇත්තේ ය.**

**(4) ගෙහිමියාගේ ආවශ්‍යකත්ත්වය හා සමග ම කුලියට පදිංචිව සිටින්නාගේ ආවශ්‍යකත්ත්වය ද යන දෙක ම එක විට, එකට පැන නැගී ඇති නඩුවක, ඔවුන් එක එක්කෙනාගේ සමෘඩිමත්කම සමාන කර බැලීම, එහි විනිශ්චයකට බැසීමට අවශ්‍යයෙන් ම තීරණාත්මක සාධකයක් නොවූවත් එය එම කරුණට අදාළ ද වන්නේ ය.**

**ඒ. ආර්. ඇම්. ඇම්. තම්බි ලෙබ්බේ එ. පී. රාම සාමි ... ... ... ... 19**

ඉඩම හිමි සහ බදුකරු යටතේ බලනු ... ... 7

## තීරු බදු ආඥා පණත

තීරු බදු ආඥා පණත යටතේ අල්ලාගත් රාජසන්තක කළ රන් පොලු ඉල්ලා පැවරූ නඩුවක — පැමිණිල්ලේ සාක්ෂි නිම වූ පසු චිත්තිය විසින් පිටරට නිවැසි පුද්ගලයන් තුන් දෙනකුගෙන් යුත් කොමිසමක් විසින් සාක්ෂි සටහන් කිරීමට කොමිසමක් ඉල්ලීම — රන් පොලුවල සැම්පල් ද යැවීමට ඉඩ දීම — සිවිල් නඩු නීති සංග්‍රහයේ 423 වෙනි 434 වෙනි ඡේද — මේ ගැන උසාවියට ඇති බලතල.

තීරු බදු ආඥා පණත යටතේ රාජසන්තක බව කියමින් යමකිසි රන් පොලු කීපයක් අල්ලා ගැනීම නීති විරෝධී යයි ද ඒවා නැවතත් පැමිණිලිකරුට දිය යුතු යයි ද ප්‍රකාශයක් කරවා ගැනීම සඳහා පවරන ලද නඩුවක දී දිස්ත්‍රික් විනිශ්චයකාරතුමා චිත්තිකරුගේ පහත සඳහන් ඉල්ලීම්වලට ඉඩ දුන්නේ ය.

(1) නියමිත පුද්ගලයන් කීපදෙනකුගේ සාක්ෂි ලන්ඩන් නගරයේ දී සටහන් කරවා ගැනීමට කොමිසම වරප්‍රසාදයක් නිකුත් කිරීම.

(2) මෙම කොමිසමේ සාක්ෂි සටහන් කර ගන්නා තැනැත්තාට එම රන් පොලුවල සැම්පලයක් යැවීම.

මෙම නඩුවේ අභියාචනයේ දී පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් කළ එක ම තර්කය වූයේ එම රන් පොලුවල සැම්පලයක් යැවීමට අධිකරණ බලයක් නැතැයි යන්න ය.

**තීන්දුව: (1) මෙබඳු අවස්ථාවක සාක්ෂි සටහන් කිරීමට පත්කරනු ලබන කොමසාරිස් වරයාට එම රන් පොලු ගෙන්වා ගැනීමට බලය සිවිල් නඩු විධාන සංග්‍රහයේ 434 වන ඡේදයෙන් පුළුවන්කම් ලැබේ.**

**(2) සිවිල් නඩු විධාන සංග්‍රහයේ 434 වන ඡේදය නොමැති කලෙක වුව ද අධිකරණය එබඳු කොමිසමක් පත් කිරීමෙන් තමා වෙත පැවරී ඇති ලිඛිත නීතිගත බලය පරිහරණය කළ විට එසේ කරන ලද පරමාර්ථය ඉටුකර ගැනීමෙහි ලා යුක්තියුක්ත ලෙස අවශ්‍ය සියලු කටයුතු කිරීමට ද එයට බලය පිරිනැමී තිබේ.**

**ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා: "වැඩි දුරටත් සලකා බලන කල එබඳු ලිපි ලේඛනයක් හෝ ද්‍රව්‍යයක් තාවකාලික වශයෙන් උසාවියේ භාරකාරත්ත්වයෙන් බැහැරව තිබුණත් එබඳු දේ උසාවියෙහි පාලනය යටතේ පවතින බව එයේ නැතැයි නොකියා පිළිගැනීමට සිදු වේ."**

**ඇල්. කේ. ලෙබ්බෙ තම්බි සහ තවත් අය එ. ඇටෝර්නි ජනරාල්තුමා සහ තවත් අයෙක් ... 13**

## නඩත්තුව

නඩත්තුව — භාර්‍යාවක් විසින් තමා සහ දරුවා වෙනුවෙන් කරන ලද ඉල්ලීමක් — චිත්තිකරු භාර්‍යාව කැඳවා ගැනීම ප්‍රතික්ෂේප කර ළමයාට රුපියල් 25/- බැගින් ගෙවීමට කැමති වීම — මහේස්ත්‍රාත්තුමා මෙය අන්තර් නියෝගයක් ලෙස සටහනක් ලිවීම — ඉන්පසු නඩුව සමථයකට බැසීම නිසා භාර්‍යාව විසින් ඉල්ලීම අස්කර ගැනීම — එකඟ වූ පරිදි ළමයාට නඩත්තුව ගෙවීම පැහැර හැරීම — වරෙන්තුවක් නිකුත් වීම — චිත්තිකරුගේ නීත්‍යානුකූල බැඳීම — ළමයින්ගේ නඩත්තු පිළිබඳ අන්තර් නියෝග — එහි ඇති යෝග්‍යතාවය.

භාර්‍යාවක් විසින් තමාට සහ තම දරුවාට නඩත්තුව ඉල්ලා සිටියෙන් චිත්තිකරු භාර්‍යාව කැඳවා ගැනීමට නොහැකි බවත් දරුවාට මසකට

රුපියල් විසිපහ බැගින් ගෙවීමට පොරොන්දු වූ නිසා එම ඉල්ලීම භාර්‍යාවගේ නඩත්තුව පිළිබඳව පරීක්ෂණයකට භාජන කිරීමට නියම විය. දරුවාට මුදල් ගෙවීම 'අන්තර් නියෝගයක්' ලෙස වාර්තා ගත විය.

පරීක්ෂණයට මෙය භාජනය වූ පසු දිනක ඉඩමක් අරවා ගැනීම සඳහා රුපියල 1,950/- ක් ගෙවීමට භාරගත් විත්තිකරුගෙන් නඩත්තුව ඉල්ලීම අස් කිරීමට ඉල්ලුම්කාරියගේ නීතිවේදියා අධිකරණයට යෝජනා කර සිටියේ ය. මෙම ඉල්ලීමට ඉඩ ලැබිණි.

විත්තිකරු විසින් මාස 20 ක් ළමයාට ගෙවීමට පොරොන්දු වූ මුදල නොගෙවා පැහැර හැරීම නිසා එය ලබා ගැනීමට වරෙන්තුවක් ඉල්ලුම්කාරිය අයැද සිටියා ය. විත්තිකරු මේ ඉල්ලීමට විරෝධය දැක්වී ය.

**තීන්දුව: (1) තමාගේ එකඟවීම නිසා පියකු හැටියට දරුවාගේ රැකවරණය තමාට ලැබෙන තුරු විත්තිකරු දරුවා නඩත්තු කිරීමට බැඳී සිටී.**

**(2) විත්තිකරුට එම බැඳීමෙන් මිදීමට උචිත නා වී නම් ඒ සම්බන්ධයෙන් යුදුසු ඉල්ලීමක් කළ යුතුව තිබුණි.**

**ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා: "ළමයින් පිළිබඳව නඩත්තු දීමේ දී පරීක්ෂණයකින් පසුව අවසාන නියෝගයක් දෙන තුරු අන්තර් කාලීන නියෝග දීම ප්‍රයෝජනවත් යයි ද එය යෝග්‍ය ක්‍රියා මාර්ගයකැයි ද මට සඳහන් කළ හැක."**

පරමානන්ද එ. මහේශ්වරි ... ... 11

## විදුලි බල පණත

විදුලි බල පණත — 65 සහ 67 වන ඡේද — විදුලි බල වෙගය සොරකම් කිරීම සහ බල මාපක යන්ත්‍රයට ඇඟිලි ගැසීම —චෝදිතයා වරදකරුවකු වීම — ඇතුළත් නොකළ යුතු සාක්ෂි ඇතුළත් කර ගැනීම නිසා එසේ වරදකරු වීම නිෂ්ප්‍රභාවේ යයි කියමින් කරුණු සැල කිරීම — වරදකරු කිරීමට ප්‍රමාණවත් වන අනිත් සාක්ෂි තිබීම අපරාධ සහායකයෙකු සාක්ෂි දීම—එම සාක්ෂිය සමඟ සැසඳෙන වෙන සාක්ෂි නොමැති කල පවා එසේ වරද කරු බවට පත්කිරීම — එසේ ම තිබීමට ඉඩ දිය යුතු ද යන්න — සාක්ෂි ආඥා පනතේ 133 වන ඡේදය.

කපටි අන්දමින් හා වංචනශීලි අන්දමින් බල ශක්තිය උකහා ගන්නා ලද බැවින් ද, බල මාපක යන්ත්‍රයට ඇඟිලි ගසන ලද බැවින් ද විදුලි බල පනතේ 65 සහ 67 වන ඡේදයන් යටතේ චෝදිතයාට විරුඬව නඩු පවරනු ලැබ වරදකරු විය. මෙම නඩුවේ දී නීත්‍යානුකූලව ඇතුළත් කළ නොහැකි සාක්ෂි ස්වල්පයක් ද තිබුණ අතර

(ඒ) චෝදිතයා යටතේ සේවය කළ චෝදිතයාගේ සාවද්‍ය වැඩ පිළිවෙල සම්බන්ධයෙන් චෝදිතයා විසින් තමාට පහර දෙන ලද නිසා නගර සභා අධිකාරින්ට දැනුම් දුන් කදිරවෙලු නමැත්තාගේ සාක්ෂිය ද,

(බී) නගර සභා සේවයේ නියුක්ත ව සිටිමින් සිනමා යන්ත්‍ර මැදිරි කාමරයක් පරීක්ෂා කිරීමේ දී බල මාපක යන්ත්‍රයේ සටහන් නොවන ලෙස බලය උකහා ගැනීමට හැකිවන පරිදි කමිකරුවෙකු නිලුණු බව සොයාගත් විදුලි බල අධිකාරිවරයාගේ සාක්ෂිය ද එහි වූහ.

**තීන්දුව: (1) කදිරවේලු නැමැති සාක්ෂිකරු අපරාධ සහායකයකුගේ තත්ත්වයේ ගිණිය හැකි අයකු නමුත් ඔහුගේ සාක්ෂිය විදුලිබල අධිකාරිවරයාගේ සාක්ෂිය හා සැසඳී තිබෙන නිසා, ඇතුළත් නොකළ හැකි සාක්ෂි ගැන නොසලකා හැර මෙයේ වරදකරු කිරීම යනාථ කිරීමට බහුතර ප්‍රමාණයක සාක්ෂි තිබේ.**

**(2) කදිරවේලුගේ සාක්ෂිය හා සැසඳෙන සාක්ෂි නැති කලෙක වුව ද මෙසේ වරදකරු කිරීම සාක්ෂි ආඥා පනතේ 133 වන ඡේදය අනුව බලන කල එසේ ම තිබීමට ඉඩ හැරිය හැක.**

(3) විදුලිබල පනතේ 65 සහ 67 වන ඡේදයන්ට අනුව පැන නැගෙන පූර්ව නිගමනය මෙහි චෝදිතයා විසින් බිඳ හෙලා නැත.

රෝමිස් සිඤ්ඤෝ එ. ප්‍රනාන්දු ... ... 15

## සමුපකාර සමිති ආඥා පණත

සමුපකාර සමිතිආඥා පණත (124 අධිකාරය) 53 ඡේදය—වර්ෂ 1949 අංක 12 දරණ සංශෝධන පණත — කළමනාකරු සහ සමිතිය අතර වූ අර්බුදයක් නිරාකරණය නැන වෙන යැවීම — එබඳු නිරණයක් දීමට විනිශ්චයාත්මක බලයක් යෙදවිය යුතු ද යන්න.

සමුපකාර සමිති ආඥා පණතේ 53 වන ඡේදය යටතේ රෙජිස්ට්‍රාර් තැන විසින් යම්කිසි සමුපකාර සමිතියක් සහ එහි කළමනාකරු අතර වූ අර්බුදයක් නිරණය කිරීම පිණිස නීරකයෙකු නම් කරන ලදී.

කළමනාකරුට විරුද්ධව කරන ලද ඉල්ලීම ඉදිරිපත් කරන ලද්දේ සමිතියේ පොත්පත්වල හැටියට ඔහුගේ පරිපාලනයෙහි වූ බඩුවල හෝ ඒවායේ වටිනාකම පිළිබඳව හෝ ගණන් හිලව් පෙන්වීමට ඔහු බැඳී සිටිය යන පදනම මත කරුණු සැලකිරීමෙනි.

නීරක තැන විසින් කළමනාකරුට විරුද්ධව ගෙවීමේ නියෝගයක් දෙන ලදුව එකී කළමනාකරු එය අවලංගු කර ගැනීමට සර්ටියෝරේරයි ආඥාවක් යදිමින් ආයාචනා පත්‍ර ඉදිරිපත් කෙළේ ය.

පෙත්සම්කරුට පක්ෂව ඉදිරිපත් කළ ප්‍රධාන තර්කය වූයේ එබඳු ගෙවීමේ නියෝගයක් දීම සහ එය ක්‍රියාවේ යෙදවීම විනිශ්චයාත්මක බලතල පරිහාවිතා කිරීමක් වශයෙන් වන නිසා එසේ වීම අපේ පාලන සංස්ථා පණතේ බලතල වෙන්කර නැබීමේ ප්‍රඥප්තිය හා ගැටෙය යන්න විය.

**තීන්දුව: (1) කළමනාකරුගේ බැඳී සිටීම උද්ගතවන්නේ ඉහා ම අඩුවශයෙන් නියෝජිත භාවය ඇසුරින් මතුවන අද්ධ්‍යාහාරයෙන් සිතා ගත හැකි කොන්ත්‍රාත්තුවක එල්බගෙන වේ.**

**(2) මෙය සම්ප්‍රදායයක් අනුව පැවති එන අධිකරණයේ ආඥ බලයට අයුවන සාමාන්‍ය සිවිල් අර්බුදයකි. එබැවින් පාලන සංස්ථා පණත බලපැවැත්වීම ඇති වූ කාලයට පෙර අධිකරණ වශයෙන් තිබූ ආඥ බලයක් 1949 අංක 21 දරණ සංශෝධන පණතින් අධිකරණයට එබඳු අර්බුද විසඳීමට තිබුණ අනිවාර්‍ය බලයක් නෙරපී තිබෙන යේ පෙනෙන නිසා මෙම නියෝගය නිෂ්ප්‍රභා කළ යුතු ය.**

**එච්. ඇස්. කරුණාතිලක එ. ඇල්. ඩී. අබේවීර සහ ගලතුඹ සමුපකාර සමිතිය ... ... 9**

## සාක්ෂි ආඥා පණත

133 වෙනි ඡේදය
විදුලි බල පනත යටතේ බලනු.

## සිවිල් නඩු විධාන සංග්‍රහය

423, 434 වෙනි ඡේද
නීරුබඳු ආඥ පණත යට බලනු.

## හවුල් ව්‍යාපාර පනත

හවුල් ව්‍යාපාර පනත, 29 සහ 42 වන ඡේද — සේවා ස්ථානයකින් පැට්‍රෝල් සහ අනිකුත් අදල ද්‍රව්‍ය විකිණීමේ ව්‍යාපාරයක් — ''ආර්'' නැමැති හවුල් කරුවකු විසින් කාල සීමාවක් තුළ කෙරුණු ගණන් හිලව් බැලීම සඳහා පවරන ලද නඩුවක් (නඩුව පවරන ලද්දේ ව්‍යාපාරය විසුරුවා නොහැර එය කිරීම පිණිස ය) — ''ඒ'' නැමැති හවුල්කරුවා විසින් (මෙම නඩුව පවරා ඇත්තේ මොහුට විරුද්ධව ය.) හවුල් වෙළෙඳ ව්‍යාපාරය නිම වූ බැව් නිවේදනය කිරීම සහ ''ආර්'' නැමැති හවුල්කරුවා නොදැනුවත්ව ඔහු විසින් තමාගේ ''ඒ'' යන නම යටතේ සේවා ස්ථානයේ අයිතිකරුවන් සමග අලුත් සම්මුතියක් ඇතිකර ගැනීම — ''ඒ'' යන අය නමින් ව්‍යාපාරය කර ගෙන යෑම — උසාවිය මගින් ගණන් හිලව් බැලීමට සහ ව්‍යාපාරය නිමාවට පත් කිරීමට ''ආර්'' නැමැති හවුල්කරුවා විසින් දමන ලද නඩුවක් — ''ඒ'' නැමැති හවුල්කරුවා ගනන් හිලව් පෙන්වීමට බැඳී සිටී ද?

වර්ෂ 1942 දී ඇපැල්කරු යහ වගඋත්තරකරු ලංකාවේ සීමාසහිත කැල්ටැක්ස් සමාජයට අයත් සේවා ස්ථානයකින් කැල්ටැක්ස් වඊයේ පැට්‍රෝල් සහ භූමිතෙල් විකිණීම පිණිස ලියවිල්ලකින් හවුල්

ව්‍යාපාරයක් කරගෙන යෑමට සම්මුතියකට එළඹෙන ලදහ. පසු කලෙක දී හවුල්කරුවන් දෙදෙනා අතර මතභේද පැන නැගීමේ හේතුවෙන් වගඋත්තරකරු විසින් ව්‍යාපාරයේ ගණුන් හිලව් බැලීමට සහ 31.3.1948 දරණ දින දක්වා ඇති ශුද්ධ ලාභයෙන් තමාට ඇති කොටස ලබා ගැනීම් සඳහා කුරුණෑගල දිස්ත්‍රික් උසාවියේ අංක 5029 දරණ නඩුව ඇපැල්කරුට විරුද්ධව පවරා තිබේ. මෙම නඩුවට පසු ඇපැල්කරු විසින් වගඋත්තරකරුට 10.12.1948 වන දින හවුල් වෙළෙඳ ව්‍යාපාරය නිමාවට පත් කළ බැවි දන්වන ලද එම නිවේදනයේ පිටපතකුත් අමුණා කැල්ටැක්ස් සමාගමට වගඋත්තරකරුගේ අනුමැතිය නොමැතිව එතෙක් කෙරීගෙන ආ නියෝජීන භාවය තමාගේ පුද්ගලික නමට හැරවීමට යැයි ලියා යැවී ය. මෙම අයැදීම නොපමාව ඉටුවුණු නිසා කැල්ටැක්ස් සමාගම සමග කරගත් අලුත් අනුමැතිය අනුව ඇපැල්කරු ව්‍යාපාරය තමාගේ නමින් ම කරගෙන ආයේ ය. ඇපැල්කරුගේ මෙම ක්‍රියාකලාපයෙන් සින් තැවුලට පත් වගඋත්තරකරු එම ව්‍යාපාරය උසාවිය මගින් නිමාවට පත් කිරීමේ ප්‍රතිඵලයක් ලබා ගැනීමටත් හවුල් වෙළෙඳ ව්‍යාපාරයේ වත්කම් හවුල්කරුවන් දෙදෙනා අතර බෙදු දෙන ලෙසත් මෙම නඩුව දමා තිබේ.

මේ අතර තුර ඉහත සඳහන් අංක 5029 දරණ නඩුව විසඳුනු ලැබ ඇපැල්කරු විසින් වගඋත්තරකරුට 31.3.1948 දින දක්වා ගෙවිය යුතු ලාභයෙන් කොටස දීමට යැයි ඇපැල්කරුට නියෝගකොට තිබේ.

මෙම නඩුවෙහි දී උගත් දිස්ත්‍රික් විනිශ්චයකාර තුමා (1) 31.3.1948 දරණ දින සිට (මෙය අංක 5029 දරණ නඩුවේ තීන්දුව දුන් දිනය වේ.) වගඋත්තරකරුට අයිති ලාභයෙන් කොටස රු: 2,300/- කැයි ද (2) නඩුවෙහි දී ගණුන් හිලව් පොත් ඉදිරිපත් නොකළ නිසා වගඋත්තරකරුට ව්‍යාපාරයේ මුදල් බෙදු දෙන දින දක්වා අවුරුද්දකට රුපියල් 2,000/- ක් ලැබීමට සුදුසු කම් තිබේ යයි ද තීරණය කළේ ය.

මේ තීරණයට විරුද්ධව ග්‍රේෂ්යාධිකරණයට ගන්නා ලද ඇපැල ද අප්‍රධාන කරුණු දෙකක් පමණක් වෙනස් කරමින් නිෂ්ප්‍රභා කළ නමුත් මෙම කරුණුවලට වර්ෂ 1890 හවුල් ව්‍යාපාර පනතේ 42 වන ඡේදය අදාළ වන බව එහි දී නිගමනය විය.

රාජාධිකරණයේ දී තර්ක කරන ලද්දේ එකී 42 වන ඡේදය මෙම නඩුවට අදාළ නොවන්නේ "මෙම හවුල් වෙළෙඳ ව්‍යාපාරය දිගින් දිගට ම කරගෙන යන ව්‍යාපාරයක් නොවන නිසාත් ඔවුනට නිබුණේ කැල්ටැක්ස් සමාගමේ බඩු භාණ්ඩ හා එයට අවශ්‍ය අනිකුත් භාණ්ඩ කිපයක් විකිණීමට ඇති අවසරයක් නිසාත් මෙම අවසරය ඉතා ම සෙට් දුන්වීමකින් නිම කළ හැකි නිසාත් එබැවින් මෙහි ඇපැල්කරු වෙළෙඳ ව්‍යාපාරය වියුරුවා හැර පසුව හවුල් ව්‍යාපාරයක් කරගෙන නොගිය නමුත් ඔහුට එම ස්ථානයෙහි ම අලුත් වෙළෙඳාමක් කරගෙන යෑමට අවසරයක් පමණක් කැල්ටැක්ස් සමාජය දී ඇති නිසාත්" බව කියවිනි.

**තීන්දුව: (1) ප්‍රශ්නයට භාජනයවී ඇති මෙම ව්‍යාපාරය යම්කිසි ප්‍රමාණයක වෙළෙඳ කීර්තියක් ඇති වෙළෙඳ ව්‍යාපාරයකි.**

**(2) ව්‍යාපාරය වියුරුවා හැරි පසුත් ඇපැල්කරු විසින් එවකට 31.3.48 දින දක්වා එහි වූ වගඋත්තරකරුගේ මූල ධනය සහ ඔහුගේ ලාභයෙන් කොටස පරිහරණය කරමින් වෙළඳ ව්‍යාපාරය දිගට ම කරගෙන ගොස් තිබේ.**

**(3) ඇපැල්කරු සහ කැල්ටැක්ස් සමාගම අතර හවුල් ව්‍යාපාරය පවතින වකවානුවේ දී සිදු වී ඇති අලුත් සම්මුති හවුල් ව්‍යාපාරයට අයත් දේ නිසා ඒ මගින් ඇපැල්කරු ලබා ගත් ලාභ පිළිබඳ ගණන් හිලව් ඔහුට පෙන්වීමට බලකළ යුතු ය.**

**(4) හවුල් වෙළෙඳ ව්‍යාපාර පනතෙහි අංක 29 සහ 42 දරණ ඡේද දෙක ම මෙම නඩුවෙහි කරුණුවලට අදාළ වේ.**

රාජාධිකරණ අභියාචනය වර්ෂ 1963 අංකය 27

ගරු ගෙස්ට් සාමිවරයා, පියර්ස් සාමිවරයා, අප්ජෝන් සාමිවරයා ,පියර්සන් සාමිවරයා සහ ග්‍රිමන් ප්‍රෙඩරික් සෙලර්ස් රාජාධිකරණ විනිශ්චයකාරතුමන් ඉදිරිපිට

# රොබට් වත්තේ පතිරණ එ. ආරිය පතිරණ*


ශ්‍රී ලංකාද්වීපයේ ශ්‍රේෂ්ඨාධිකරණයෙනි

වර්ෂ 1966 ජූනි මස 28 වන දින ප්‍රකාශ කරණ ලද රාජාධිකරණයේ විනිශ්චය මණ්ඩලයේ සාමිවරයන්ගේ නඩු තීන්දුවකි.

හවුල් ව්‍යාපාර පනත, 29 සහ 42 වන ඡේද—සේවාස්ථානයකින් පැට්රෝල් සහ අනිකුත් අදල ද්‍රව්‍ය විකිණීමේ ව්‍යාපාරයක්—"ආර්" නැමැති හවුල් කරුවෙකු විසින් කාල සීමාවක් තුළ කෙරුණු ගණන් හිල්වී බැලීම සඳහා පවරන ලද නඩුවක් (නඩුව පවරන ලද්දේ ව්‍යාපාරය විසුරුවා නොහැර මෙය කිරීම පිණිසය)—"ඒ" නැමැති හවුල් කරුවා විසින් (මෙම නඩුව පවරා ඇත්තේ මොහුට විරුඩව ය.) හවුල් වෙළඳ ව්‍යාපාරය නිම වූ බැවි නිවේදනය කිරීම සහ "ආර්" නැමැති හවුල් කරුවා නොඳනුවත්ව ඔහු විසින් තමාගේ "ඒ" යන නම යටතේ සේවා ස්ථානයේ අයිතිකරුවන් සමග අලුත් සම්මුතියක් ඇති කර ගැනීම—මෙසේ කළ පසු "ඒ" යන අය නමින් ව්‍යාපාරය කරගෙන යෑම—උසාවිය මගින් ගණන් හිලවී බැලීමට සහ ව්‍යාපාරය නිමාවට පත් කිරීමට ආර්. නැමැති හවුල් කරුවා විසින් දමන ලද නඩුවක්—ඒ. නැමැති හවුල් කරුවා ගණන් හිලවී පෙන්වීමට බැඳී සිටීද?

වර්ෂ 1942 දී ඇපැල්කරු සහ වගඋත්තරකරු ලංකාවේ සිමාසහිත කැල්ටැක්ස් සමාජයට අයත් සේවා ස්ථාන යකින් කැල්ටැක්ස් වර්ගයේ පැට්රෝල් සහ භූමිතෙල් විකිණීම පිණිස ලියවිල්ලකින් හවුල් ව්‍යාපාරයක් කරගෙන යෑමට සම්මුතියකට එළඹෙන ලදහ. පසු කලකදී හවුල්කරුවන් දෙදෙනා අතර මතභෙද පැන නැගීමේ හේතුවෙන් වගඋත්තරකරු විසින් ව්‍යාපාරයේ ගණන් හිලවී බැලීමට සහ 31. 3. 1948 දරණ දින දක්වා ඇති ශුද්ධ ලාභයෙන් තමාට ඇති කොටස ලබා ගැනීම සඳහා කුරුණෑගල දිස්ත්‍රික් උසාවියේ අංක 5029 දරණ නඩුව ඇපැල්කරුට විරුඩව පවරා තිබේ. මෙම නඩුවට පසු ඇපැල්කරු විසින් වගඋත්තරකරුට 10. 12. 1948 වන දින හවුල් වෙළඳ ව්‍යාපාරය නිමාවට පත්කළ බැවි දන්වන ලද එම නිවේදනයේ පිටපතකුත් අමුණා කැල්ටැක්ස් සමාගමට වගඋත්තරකරුගේ අනුමැතිය නොමැතිව එතෙක් කෙරීගෙන ආ නියෝජිත භාවය තමාගේ පුද්ගලික නමට හැරවීමට යැයි ලියා යැවී ය. මෙම අයැදීම නොපමාව ඉටුවුණු නිසා කැල්ටැක්ස් සමාගම සමග කරගත් අලුත් අනුමැතිය අනුව ඇපැල්කරු ව්‍යාපාරය තමාගේ නමින් ම කරගෙන ගියේ ය. ඇපැල්කරුගේ මෙම ක්‍රියාකලාපයෙන් සිත් නැවුලට පත් වගඋත්තර කරු එම ව්‍යාපාරය උසාවිය මගින් නිමාවට පත් කිරීමේ ප්‍රතිඵලය ලබා ගැනීමටත් හවුල් වෙළඳ ව්‍යාපාරයේ වත්කම් හවුල්කරුවන් දෙදෙනා අතර බෙදා දෙන ලෙසත් මෙම නඩුව දමා තිබේ.

මේ අතර තුර ඉහත සඳහන් අංක 5029 දරණ නඩුව විසඳුනු ලැබ ඇපැල්කරු විසින් වගඋත්තරකරුට 31. 3. 1948 දින දක්වා ගෙවිය යුතු ලාභයෙන් කොටස දීමට යැයි ඇපැල්කරුට නියෝගකොට තිබේ.

මෙම නඩුවෙහිදී උගත් දිස්ත්‍රික් විනිශ්චයකාර තුමා (1) 31. 3. 1948 දරණ දින සිට (මෙය අංක 5029 දරණ නඩුවේ තීන්දුව දුන් දිනය වේ.) වගඋත්තරකරුට අයිති ලාභයෙන් කොටස රුපියල් 2,300/- කැයි ද (2) නඩුවෙහි දී ගණන්හිලවී පොත් ඉදිරිපත් නොකළ නිසා වගඋත්තරකරුට ව්‍යාපාරයේ මුදල් බෙදා දෙන දින දක්වා අවුරුද්දකට රුපියල් 2,000/- ක් ලැබීමට සුදුසු කම් තිබේ යයි ද තීරණය කළේ ය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 11 වෙනි පිට බලනු.

මේ තීරණයට විරුඩව ශ්‍රේෂ්ඨාධිකරණයට ගන්නා ලද ඇපැල ද අප්‍රධාන කරුණු දෙකක් පමණක් වෙනස් කරමින් නිෂ්ප්‍රභා කළ නමුත් මෙම කරුණුවලට වර්ෂ 1890 හවුල් ව්‍යාපාර පනතේ 42 වන ඡේදය අදාල වන බව එහි දී නිගමනය විය.

රාජාධිකරණයේදී තර්ක කරන ලද්දේ එකී 42 වන ඡේදය මෙම නඩුවට අදාල නොවන්නේ "මෙම හවුල් වෙළඳ ව්‍යාපාරය දිගින් දිගටම කරගෙන යන ව්‍යාපාරයක් නොවන නිසාත් ඔවුනට තිබුණේ කැල්ටැක්ස් සමාගමේ බඩු භාණ්ඩ හා එයට අවශ්‍ය අනිකුත් භාණ්ඩ කීපයක් විකිණීමට ඇති අවසරයක් නිසාත් මෙම අවසරය ඉතාම කෙටි දැන්වීමකින් නිම කළ හැකි නිසාත් එබැවින් මෙහි ඇපැල්කරු වෙළඳ ව්‍යාපාරය විසුරුවා හැර පසුව හවුල් ව්‍යාපාරයක් කරගෙන නොගිය නමුත් ඔහුට එම ස්ථානයෙහි ම අලුත් වෙළඳාමක් කරගෙන යෑමට අවසරයක් පමණක් කැල්ටැක්ස් සමාජය දී ඇති නිසාත්" බව කියමිනි.

තීන්දුව: (1) ප්‍රශ්නයට භාජනය වී ඇති මෙම ව්‍යාපාරය යම්කිසි ප්‍රමාණයක වෙළඳ කීර්තියක් ඇති වෙළඳ ව්‍යාපාරයකි.

(2) ව්‍යාපාරය විසුරුවා හැරි පසුත් ඇපැල්කරු විසින් එවකට 31. 3. 48 දින දක්වා එහි වූ වගඋත්තර කරුගේ මුල් ධනය සහ ඔහුගේ ලාභයෙන් කොටස පරිහරණය කරමින් වෙළඳ ව්‍යාපාරය දිගට ම කරගෙන ගොස් තිබේ.

(3) ඇපැල්කරු සහ කැල්ටැක්ස් සමාගම අතර හවුල් ව්‍යාපාරය පවතින වකවානුවේ දී සිදු වී ඇති අලුත් සම්මුති හවුල් ව්‍යාපාරයට අයත් දේ නිසා ඒ මගින් ඇපැල්කරු ලබා ගත් ලාභ පිළිබඳ ගණන් හිලව් ඔහුට පෙන්වීමට බලකළ යුතු ය.

(4) හවුල් වෙළඳ ව්‍යාපාර පනතෙහි අංක 29 සහ 42 දරණ ඡේද දෙක ම මෙම නඩුවෙහි කරුණුවලට අදාල වේ.

**ගරු අප්ජෝන් රාජාධිකරණ විනිශ්චයකාරතුමා**

කලින් අවදියක දී වගඋත්තරකරු සහ ඇපැල්කරු අතර කෙරිගෙන ගිය හවුල් ව්‍යාපාරයක දී ඇතිවූන ගනුදෙනුවලින් මතු වූ යම්කිසි මුදලක ගණන් පෙන් වීමට ඇපැල්කරු බැඳි ඇතැයි කියමින් වර්ෂ 1958 ජූලි මස 31 වැනි දින කුරුණෑගල දිස්ත්‍රික් උසාවියෙන් දෙන ලද නඩු තීන්දුවක් වෙනස් කිරීම් කිහිපයකට පමණක් යටත්කොට ස්ථිර කරමින් ශ්‍රී ලංකා ද්වීපයෙහි ශ්‍රේෂ්ඨාධිකරණය (ගුණසේකර සහ සින්නතම්බි විනිශ්චයකාරවරු) විසින් වර්ෂ 1958 ජූලි මස 31 වන දින දෙන ලද නඩු තීන්දුවකට* විරුඩව ගන්නා ලද ඇපැලකි මේ.

මෙහි ඇපැල්කරු හා පෙන්සම්කරු එකම නම් ඇති අය වුවත් ඥතීහු නොවෙති. ඔවුහු සීමාසහිත ලංකා කැල්ටැක්ස් සමාගමට අයත් සේවා ස්ථානයකින් කැල්ටැක්ස් පැට්රෝල් හා භූමිතෙල් විකිණීමේ ව්‍යාපාරයක හවුල්කරුවෝ ය. සීමාසහිත ලංකා කැල්ටැක්ස් සමාගමට මින් පසු මෙහිදී කැල්ටැක්ස් සමාගම යැයි සඳහන් කරමු. වර්ෂ 1942 සිට ඔවිහු කුරුණෑගල දිස්ත්‍රික්කයේ කැල්ටැක්ස් සමාගමේ නියෝජිතයෝ වූහ. මේ දෙදෙනා අතුරෙන් ව්‍යාපාරයේ දිනපතා කාර්‍ය්‍ය විධිවිධානය පරිපාලනය කළ ක්‍රියාකාරී හවුල්කරුවා ඇපැල්කරු විය. මේ අතර දන්ත වෛද්‍ය වෘත්තියක කටයුතු කළ වගඋත්තරකරු, පෙනෙන හැටියට, අක්‍රියාකාරී හවුල්කාරයෙකු වී ඇති නමුත් කැල්ටැක්ස් සමාගම සමග වැඩකටයුතු කිරීමේ දී ඔහුගේ ඉංග්‍රීසි භාෂාව පිළිබඳ තිබුණ උසස් දැනීම ප්‍රයෝජනවත්යැයි සිතා ගන්නා ලද බව පෙනී යයි.

වර්ෂ 1942 නොවැම්බර් මස 31 වැනි දින හවුල් කරුවන් අතර ඇතිකර ගන්නා ලිඛිත සම්මුතියකින් මෙම හවුල් ව්‍යාපාරය පාලනය වී තිබේ. එහි සඳහන් කොන්දේසි පිළිබඳ අර්බුදයක් පැන නැගී නැතුවාක් මෙන් ම ඒවා පිළිබඳව සවිස්තර ලෙස සමාලෝචනය කිරීම අනාවශ්‍ය ය. නමුත් පහත සඳහන් කරුණු පමණක් මෙහි ලා ප්‍රමාණවත් ය.

* 61 ස. ල. නි. 51

(අ) එක් හවුල්කරුවකු විසින් තව හවුල්කරු වෙකුට තුන් මාසයක නිවේදනයක් දීමෙන් පසු අවසාන කරන තුරු මෙම හවුල් ව්‍යාපාරය ගෙන යා යුතුයි.

(ආ) මෙම වෙළඳ සමාගමේ නාමය ''ආර්. ඩබ්ලිව්. සහ ඒ. පතිරන'' විය යුතු යි.

(ඉ) වෙළඳ සමාගමේ මූලික තැන්පත් මුදල රුපියල් 4000/- ක් විය යුතු අතර එසේම එය හවුල්කරුවන් දෙදෙනා විසින් සමාන කොටස්වලින් ප්‍රදානය කළ යුතු අතර ව්‍යාපාරයෙන් ඇතිවන ලාභ සහ පාඩු ඔවුන් අතරේ සම සමව බෙදී යා යුතුයි.

(ඊ) ව්‍යාපාරයේ පරිපාලනය ඇපැල්කරු අතෙහි තිබිය යුතු අතර ඔහු මෙම සේවය කරන නිසා මසකට රුපියල් 50/- ක පාරිතෝෂික මුදලක් ලැබීමට සුදුස්සෙක් විය යුතු ය.

(උ) හවුල් ව්‍යාපාරය හමාර කළ කලක එහි වත්කම පළමුවෙන් යෙදිය යුත්තේ වෙළඳ සමාජයේ ණය සහ බැඳීම්වලින් නිදහස් වීමට ය. දෙ වැනුව එය යෙදිය යුත්තේ එක් එක් හවුල් කරුවෙකු ම ප්‍රදානය කළ මූල ධනය ආපසු බෙදීමට ය. යම් හෙයකින් මින්පසු තම වැඩි මනත් වත්කමින් කොටසක් ඉතිරි වූවහොත් එය හවුල්කරුවන් අතරේ සම සමව බෙදී යා යුතුයි.

(ඌ) මෙම ව්‍යාපාරයේ එකම වෙළඳාම මෙය විය. එපමණක් නොව මෙම හවුල් ව්‍යාපාරය පෙර කී සේවා ස්ථානය ව්‍යාපාර වාස භූමිය කරගැනීමෙහි බලපවත්වන කොන්දේසි කැල්ටැක්ස් සමාගම හා වෙළඳ සමාජය අතර ඇති වූ සම්මුති සංඛ්‍යාවකට සවිස්තරව ඇතුළත් කරන ලදි. කොටින් සලකා බලන විට මෙම අනුමැතිවලින් සඳහන් ව ඇත්තේ කැල්ටැක්ස් සමාජය එකී සේවා ස්ථානයෙහි නීතිගත භුක්තිය චින්දනය කරන අතර තමාගේ වෙළඳ ව්‍යාපාරය කරගෙන යාමට එනම් කැල්ටැක්ස් සමාගමින් නිපැයෙන ද්‍රව්‍ය එම ස්ථානයේ දී සිල්ලර වශයෙන් විකිණීමටත් එමෙන් ම, කැල්ටැක්ස් සමාජයේ කැමැත්ත අනුව ටයර් තොග වශයෙන් තබාගැනීමට හා වෙළඳාමටත් බනිජ තෙල් නොවන අනිකුත් මොටෝරිය උපකරණ වෙළඳාමටත් නිදහස ලැබී තිබෙන බව සලකා ගතහැක. එපමණක් නොව එම භූමි සීමාව තුළ ඇති මෙවලම් සහ උපයෝගී උපකරණ ඇතුලු අනිකුත් ද්‍රව්‍ය කැල්ටැක්ස් සමාගමට පමණක් අයිති බඩු භාණ්ඩ වශයෙන් පැවැතිය යුතු නමුත් මාස්පතා දෙපක්ෂය අනුමත කරන ලද කුලියක් ගෙවීමෙන් සේවා ව්‍යාපාර කටයුතු සඳහා පරිහරණය කිරීමට, වෙළඳ සමාජයට බලය තිබේ; කැල්ටැක්ස් සමාජය තමාට සුදුසු යැයි වැටහෙන අන්දමට තමාගේ නිෂ්පාදන සංඛ්‍යාවක් වෙළඳ සමාජයට අත්පිට මුදලට විකිණිය යුතු ය; කැල්ටැක්ස් සමාජය විසින් නියම කරන ලද මුදලකට වෙළඳ සමාජය විසින් එම සේවා ස්ථානයට පැමිණෙන මහජනයාට සිල්ලර වශයෙන් පැට්රෝල් විකිණිය යුතු ය. කැල්ටැක්ස් සමාජය විසින් සිල්ලර විකුණන්නන්ට ඒ ඒ අවස්ථාවල ඉඩ හරින දිමනා සහ පාරිතෝෂිකයන් ලැබීමට වෙළඳ සමාජය සුදුසු තැඩයක සිටියි.

එක් අවධියක වෙළඳ සමාජයට මුදල් ණයට ගැනීමට සිදුවී ඇති නමුත් මෙම ව්‍යාපාරය සාර්ථකවූ බව කිව යුතුයි. කෙසේ නමුත් හවුල්කරුවන් අතර යම් යම් මතභෙද පැන නැඟ තිබේ. කුරුණෑගල දිස්ත්‍රික් උසාවියට ඉදිරිපත් කරන ලද අංක 5029 දරණ පැමිණිල්ලකින් වර්ෂ 1948 අගෝස්තු 18 වැනි දින වගඋත්තර කරු ඇපැල්කරුට විරුඩව යම් යම් ඉල්ලීම් ඉදිරිපත් කරන ලදි. ඇපැල්කරු හවුල් ව්‍යාපාරයේ ගණුන් ගිලවි ඇතුළත් පොත්පත් බැලීමට වගඋත්තරකරුට ඉඩ නුදුන් බවත් ව්‍යාපාරය පිළිබඳ ක්‍රමානුකූල ගණුන් ගිලවි ඉදිරිපත් කිරීමට ඔහුට නොහැකි බවත් කී වගඋත්තරකරු වර්ෂ 1948 මාර්තු 31 වැනිදායින් අවසන් වන තුන් අවුරුදු කාලය තුළ හවුල් ව්‍යාපාරයේ ශුද්ධ ලාභය වන තමාගේ කොටස කුමක්දැයි දැනගනු රිසි බවත් ඉන් කියා සිටියේය. හවුල් ව්‍යාපාරය විසිරුවා හැරිය යුතුයැයි ඉල්ලීමක් නොකරන ලද මෙම නඩුව වර්ෂ 1954 දී විභාගය සඳහා ඉදිරිපත් කරන ලදුව එහි නඩු

තීන්දුව වර්ෂ 1954 නොවැම්බර් මස 12 වැනිද නිකුත් විය. එම තීන්දුවේදී හා තීන්දු ප්‍රකාශයේදී නියෝගය ලැබුනේ වර්ෂ 1948 මාර්තු මස 31 වැනිදායින් අවසන් වන තුන් අවුරුදු කාල සීමාව තුළ වගඋත්තරකරු ලබාගන්නා මුදල් අඩු කොට ඔහුගේ කොටස හැටියට රුපියල් 10,550/- ක් ගෙවිය යුතුයි කියායි. මේ අතර තුර නිසැකයෙන් ම එකී පැමිණිල්ලට තුඩු දුන් කරුණු වලින් පෙළෙනු ලැබසිටි ඇපැල්කරු වර්ෂ 1948, සැප්තැම්බර් මස 10 වැනි දින හවුල් ව්‍යාපාරය අවසාන කරන බව කියමින් වගඋත්තරකරුට නිවේදනයක් යවනු ලැබීමෙන් පසු ඒ අනුව වර්ෂ 1948 දෙසැම්බර් මස 10 වැනි දින මෙම හවුල් ව්‍යාපාරය නිමාවට ගෙන ගියේ ය.

වර්ෂ 1948 සැප්තැම්බර් මස 21 වැනි දින දුන් මෙම නිවේදනයෙන් නොබෝ කලකට පසු ඇපැල් කරු වගඋත්තරකරුගේ දැනීම හෝ අනුමැතිය නොලබා කැල්ටැක්ස් සමාජයට වැදගත් ලියමනක් යවා තිබේ. මෙම ලියමනට අමුණා ඔහු විසින් වගඋත්තරකරුට යවන ලද ලිපියේ පිටපතක් ද අමුණා තිබිණි. එම ලියමනේ වැඩිදුරටත් ''ඔක්තෝබර් මස 1 වෙනි දින සිට දැනට පවත්නා නාමය වන ආර්. ඩබ්ලිව්. සහ ඒ. පතිරන යන්න වෙනස් කොට ආර්. ඩබ්ලිව්. පතිරන යන්න යෙදුවොත් මා ඉතා ම කෘතඥවන බව'' ද එහි ලියැ වී තිබිණි.

කැල්ටැක්ස් සමාගම හැරෙන තැපැලෙන් ම මෙම ඉල්ලීමට එකඟ විය. යථා පරිදි එවකට පැවැත්වෙමින් තිබුණු අනුමනි සියල්ල ම නිමකිරීමට නිවේදන දුන් ඔහු වර්ෂ 1948 සැප්තැම්බර් මාසයේ සහ ඔක්තෝබර් මාසයේ (හවුල් ව්‍යාපාරය නිමාවට යාමට පෙරාතුව) ඇපැල්කරු සමග පමණක් අලුත් ගිවිසුම්වලට ඇතුළත් වූහ. ඉන්පසු එම ස්ථානයෙහි ම තමාගේ නමින් ව්‍යාපාරය දිගට ම කරගෙන ගිය ඇපැල්කරුවා වගඋත්තරකරුගේ මූල ධනයේ කොටසට හෝ කිසිම ලාභයකට හෝ වගඋත්තරකරුට ගණන් හිලව් නොපෙන්විය.

මෙසේ නම වෙනස් කිරීම හා කැල්ටැක්ස් සමාජය සමග ඇපැල්කරු තනිව ගිවිසුම්වලට ඇතුළත්වීම හවුල් ව්‍යාපාරය පැවැත්වීගෙන එන අවස්ථාවක දී කෙරුනක් බව ඉන්පසු වගඋත්තරකරුට දැනගන්ට ලැබිණ. මේ පිළිබඳව — ස්වාභාවික වශයෙන් ම සිදුවන පරිදි ඔහු ඉතා ම සිත් වේදනාවෙන් පැමිණිලිකරන ලද නමුත් ඔහුට තමා පැමිණිලි කළ ලියමන පිළිබඳව කෘත්‍යයට පත්විය හැකි පිළිතුරක් නොලැබුණ නිසා වර්ෂ 1949 අගෝස්තු 25 වැනි දින ඔහු තවත් නඩුවක් කුරුණෑගල දිස්ත්‍රික් උසාවියෙහි දැම්මේ ය. මේ නඩුවෙන් ඔහු ඉල්ලා සිටියේ ඇත්ත වශයෙන් ම උසාවිය මගින් ව්‍යාපාරය නිමාවට ගෙනගොස් හවුල් ව්‍යාපාරයේ ඇති වත්කම් හවුල්කරුවන් අතර බෙදා දෙන ලෙස ය.

මේ නඩුව පිළිබඳව ආයාචනා යථා පරිදි ඉදිරිපත් වූ නමුත් කලින් සඳහන් කළ අංක 5029 දරණ පැමිණිල්ලෙන් නගින නඩුව අසනතුරු ඒවා අක්‍රියාකාරීව තිබුණ ලෙස සැලකේ. අන්තිමේ දී එම නඩුව වර්ෂ 1958 මැයි මාසයේ දී දිස්ත්‍රික් විනිශ්චයකාර තුමා ඉදිරිපිටට පැමිණිනි. එහි දී විසඳිය යුතු ප්‍රශ්න බොහෝ ගණනක් සම්පාදනය වී ඔහු විසින් කල් දමන ලද තීන්දුව දුන් දිනෙහි ඒ ප්‍රශ්න වලට පිළිතුරු දී තිබේ.

මෙම විනිශ්චය මණ්ඩලය ඉදිරියේ කරන ලද කරුණු සැලකිරීම් අනුව බලන කල එම ප්‍රශ්නවලින් අවශ්‍යව ඇත්තේ තුනක් ගැන සලකා බැලීම පමණකි.

අංක 5029 දරණ පැමිණිල්ලෙන් විනිශ්චයට භාජනය කරන ලද කරුණුවූ වර්ෂ 1948 මාර්තු 31 වැනිද දක්වා නිපැයුණු ලාභ විනිශ්චිත කරුණක් (Res Judicata) හැටියට නිවැරදි ලෙස සලකා තිබේ. විසඳිය යුතු ප්‍රශ්න අතුරෙන් පළමු වැන්න වියදමේ දී විනිශ්චය කාර වරයා එදින සිට හවුල් ව්‍යාපාරය විසුරුවා හරින ලද දිනය වූ වර්ෂ 1948 දෙසැම්බර් 10 වන දින දක්වා ඇති වූ ලාභ රුපියල් 4,600/- ක් යයි තීන්දු කර තිබේ. විසඳිය යුතු කරුණු අතුරෙන් දෙවැන්න විසඳා පිළිතුරු දුන් ඔහු මෙම හවුල් ව්‍යාපාරය විසුරුවා හරින ලද දිනයෙහි පැමිණිලිකරුට ලැබිය යුතු මුදල රුපියල් 2,300/- ක් වන බව කීවේ ය. මෙම ගණන විනිසකරු පළමුවන ප්‍රශ්නය විසඳීමේ දී දුන් පිළිතුරට අඩංගු මුදලින් භාගයක් යයි මෙම විනිශ්චය මණ්ඩලයට නිරවුල් ලෙස අවබෝධ වේ. විසඳිය යුතු (6) වන පැනයට පිළිතුරු දුන් දිස්ත්‍රික් විනිශ්චයකාර වරයා ''ගණන් හිලව් ලියා ඇති පොත් පත් ඉදිරිපත් කර නොමැති නිසා පැමිණිලිකරුට

ව්‍යාපාරය විසුරුවා හරින තුරු ලබන ලද ලාභ වලින් වසරකට රුපියල් 2,000/- ක් ලැබීමට සුදුසුකම් ඇතැයි මම මිල කරමි'' යයි කියා තිබේ.

ඇපැල්කරු වෙනුවෙන් පෙනී සිටින නීතිවේදියා මෙහි ''විසුරුවා හරින තුරු'' යන්න ''ලාභ බෙදා දෙන තුරු'' යන්න වෙනුවට යෙදුනු මුද්‍රණ දෝෂයක් ලෙස පිළිගනී. මීළඟට ඇපැල්කරු විසින් වගඋත්තරකරුට වර්ෂ 1948 මාර්තු මස 31 වන දින සිට ඔහුගේ මූල ධනය ආපසු පවරා දී මෙම නඩු ගාස්තුව විමසා ගෙවන තුරු වර්ෂයකට රුපියල් 2,000/- ක් ලාභ වශයෙන් ගෙවිය යුතු යයි නියෝගකර තීන්දු ප්‍රකාශයක් ද කෙරේ ය. මෙම තීන්දුවට විරුද්ධ ඇපැල්කරු ශ්‍රේෂ්ඨාධිකරණයට ඇපැල් ගන්නා ලද නමුත් එම අධිකරණය අංශ දෙකකින් එය වෙනස් කොට එම තීන්දුව සහ තීන්දු ප්‍රකාශය අනුමත කළේ ය. විසඳීමට උද්ගත වූ පළමුවන ප්‍රශ්නය අනුව වගඋත්තකරුට ලැබිය යුතු රුපියල් 2,300/- ක මුදලක් දිස්ත්‍රික් විනිශ්චයකාර වරයා වෙතින් අත්හැර තිබුණු නිසා නඩු තීන්දුවෙන් තීන්දු වූ මුදලට මෙය එකතු කිරීම පළමු වන වෙනස් කිරීම ය. මෙම වෙනස් කිරීමට විරුද්ධව මෙම විනිශ්චය මණ්ඩලය ඉදිරියේ විරෝධයක් ඉදිරිපත් වූයේ නැත. වගඋත්තරකරුගේ නීතිවේදියා විසින් ශ්‍රේෂ්ඨාධිකරණයේ දී කරන ලද ඉල්ලීමක් අනුව වර්ෂයකට රුපියල් 2,000/- ක් යයන තීන්දුව නඩුවේ තීන්දු ප්‍රකාශය දෙන තුරු ය යනුවෙන් සීමා කිරීම දෙවැනි වෙනස් කිරීම ය.

මෙම විනිශ්චය මණ්ඩලය ඉදිරියේ ඇපැල්කරුගේ නීතිවේදියා තමාගේ ප්‍රධාන තර්කය එල්ල කළේ වර්ෂ 1890 හවුල් ව්‍යාපාර පණතේ 42 වන ඡේදය මෙම නඩුවේ කරුණුවලට ගැලපේද යන්න පිළිබඳව ය. එය මේ නඩුවේ කරුණුවලට ගැලපේය යන හැඟීම ඇතිවන යේ දිස්ත්‍රික් විනිශ්චය කාර වරයා පිළිගෙන ඇති අතර එය ලංකා ශ්‍රේෂ්ඨාධිකරණය අවධාරණයෙන් ම පිළිගෙන තිබේ.

42(1) ඡේදය පහත සඳහන් පරිදිවේ.

''වෙළඳ ව්‍යාපාරයක යම්කිසි සාමාජිකයෙකු මිය ගිය අවස්ථාවක හෝ ඔහු එහි හවුල්කරුවකු ලෙස සිටීම නිම වූ අවස්ථාවක එම ව්‍යාපාරය සහ එයින් එසේ තුරන්ව යන හවුල්කරු හෝ ඔහුගේ බුදලයෙහි අධිකාරින් අතර ව්‍යාපාරයේ ගනුදෙනු පිළිබඳව අවසාන බේරුමක් නැතිව ව්‍යාපාරයේ ජීවමානව හෝ එහි නිරතව ඉතිරිව සිටින අනිත් හවුල්කරුවන් විසින් ව්‍යාපාරික මූල ධනය හෝ වත්කම් පරිහරණය කරමින් ව්‍යාපාරයේ කෘත්‍ය කටයුතු කරගෙන ගිය හොත් — එසේ වූ කල ප්‍රතිවිරුද්ධ ගිවිසුමක් නොපවත්නේ නම් — හවුල් ව්‍යාපාරය අහෝසිවීමෙන් පසු ව්‍යාපාරයේ වත්කමින් ඔහුගේ කොටස භාවිතා කර තිබීම සම්බන්ධයෙන් ප්‍රදානය කළ යුතු ලෙස අධිකරණයට පෙනී යන පරිදි එහි ලාභයෙන් යම් කිසිකොටසක් හෝ වර්ෂයකට සියයට පහක පොලියක් හෝ ඔහුගේ අභිමතය පරිදි හෝ නැතහොත් ඔහුගේ නියෝජිතයන්ගේ අභිමතය පරිදි හෝ එම ව්‍යාපාරයේ වත්කමින් ඔහුගේ කොටස අනුව ලැබීමට ඔහුට හෝ ඔහුගේ නියෝජිතයන්ට හිමිකම් තිබේ.''

ඉහත සඳහන් ඡේදය අයථා පරිදි මෙම නඩුවේ දී එයට අදාළ ලෙස සලකා තිබෙන බව කියමින් මෙම විනිශ්චය මණ්ඩලය ඉදිරියේ විවාද කරන ලදී.

මෙම හවුල් ව්‍යාපාරය වත්කමක් හෝ දිගට ම කෙරී ගෙන යන වෙළඳ කටයුතු නොමැති දෙයක් ය කියමින් ද තර්ක ඉදිරිපත් විය. ඔවුනට තිබුණේ කැල්ටැක්ස් සමාජයේ බඩු සහ එයට උවමනා තවත් උපකරණ ස්වල්පයක් විකිණීමට අවසරය බවත් එම අවසරය ඉතාම සුලුකාලයක දී නිවේදනයක් දීමෙන් නතර කළ හැකි බවත් මෙහි ලා කියවිනි. මෙය සාමාන්‍ය වෙළඳාම අනුව ව්‍යාපාරයක් ලෙස විස්තර කිරීමට නොහැකි බව සහ මෙය වෙළඳාම් කිරීමට ඇති අවසරයක් පමණක් යැයි කියමින් ද තර්ක ගෙන හැර දක්වන ලදී. ඒ අනුව සැලකර සිටියේ ඇපැල්කරු ව්‍යාපාරය විසුරුවා හැරීමෙන් පසු එය පවත්වාගෙන නොගිය බව සහ එම ස්ථානයෙහි ඔහුට කැල්ටැක්ස් සමාජය විසින් අලුත් ව්‍යාපාරයක් ගෙන යෑමට අවසර දී නිබුණා පමණකැ යි යන්නය.

නමුත් මෙම විනිශ්චය මණ්ඩලයට හැඟී යන්නේ මෙම තර්කය සම්පූර්ණයෙන් ම සාවද්‍ය තර්කයක් බවයි. එම ව්‍යාපාරය කරගෙන ගිය භූමියෙහි පදිංචිවීම හෝ

එහි වෙළඳාම් කිරීම කැල්ටැක්ස් සමාජයේ හොඳ හිත උඩ නිතර ම සිනිදු නූලකින් ගැටගසනු ලැබ තිබුණ සේ පැවැතීම සත්‍යයකි. නමුත් මෙවැනි දෙයක් බොහෝ විට සිදුවීම සිරිතකි. මෙම හවුල් ව්‍යාපාරයට එම ස්ථානයෙහි තමාගේ වෙළඳ කටයුතු අවුරුදු ගණනක් කරගෙන යෑමට ඉඩදීමේ හේතුවෙන් එම ව්‍යාපාරයට අගනා වෙළඳ තත්වයක් ලැබීමට හැකිව තිබේ. මේ සමගම සැහෙන ප්‍රමාණයක වෙළඳ කීර්තියක් ද එනම් නියම බඩු මිලට ගණන් වැඩි පැට්‍රෝල් ආදි වෙළඳ ද්‍රව්‍ය ලබා ගැනීමට අවශ්‍ය වූ විට මිළ දී ගත්තත් ආපසු ඒමේ පුරුද්ද ඇතිවීමයි. මෙයට හේතුව විශේෂයෙන්ම හවුල් ව්‍යාපාරයේ ගිවිසුම අනුව ඔවුන්කැල්ටැක්ස් ද්‍රව්‍ය පිළිබඳ එක ම ඒජන්තවරු වී සිටීමයි. රෝමර් විනිශ්චයකාරතුමා **මැන්ලි එ. සාර්ටෝරි** යන නඩුවේ ප්‍රකාශ කරනු ලැබ (1927) වාන්සරි 1 කාණ්ඩයේ 157 වන පිටුවෙහි වාර්තාවී ඇති පරිදි වෙළඳ කීර්තිය පවුම, සිලිම, පැන්ස ආදියෙන් මිල කළ නොහැකි තඹයක තිබුණත් එය පැවැතිය හැකි බව මෙහි ලා සැලකිය යුතුයි. මේ න්‍යායෙන් බලන කල එක් ප්‍රමාණයක වෙළඳ කීර්තියක් ඇති ලාභ ලැබිය හැකි වෙළඳ ව්‍යාපාරයක් මෙහි පැවතුන බව පෙනේ. එය විසුරුවා හැරිය පසුත් ඇපැල්කරු වගඋත්තරකරුට ආපසු නොදුන් ඔහුගේ මූල ධනය සහ ව්‍යාපාරයෙහි ශේෂව තිබූ වර්ෂ 1946 මාර්තු මස 31 වැනි ද දක්වා වගඋත්තරකරුට අයත් ලාභය පරිහරණය කරමින් ව්‍යාපාරය ගෙන ගිය බව සම්පූර්ණයෙන් ම පැහැදිලි ය. එපමණක් ද නොව ඇපැල්කරු කැල්ටැක්ස් සමාජය සමග වර්ෂ 1948 සැප්තැම්බර් සහ ඔක්තෝබර් යන මාසවල ඇති කරගත්තා ලද අලුත් ගිවිසුම ඇති වූයේ හවුල් ව්‍යාපාරය ජීවමානව ඇති අවස්ථාවක බැවින් ඉතාම ස්ථාවර ලෙස තීරණය වී ඇති ප්‍රඥප්තීන්ට අනුව සලකන කල ඒ ගිවිසුම් හවුල් ව්‍යාපාරයට අයිති බව පෙනේ. ඒවා ව්‍යාපාරයේ ජීව රුධිරය ලෙස සැලකෙන නිසා ලංකාවේ ශ්‍රේෂ්ඨාධිකරණය පෙන්වා දී ඇති පරිදි එයින් ඇපැල්කරු ලබන ලද ලාභය පිළිබඳ ගණන් හිලව් ඔහු විසින් පෙන්නා දිය යුතුයි.

එම නිසා 42 ඡේදය මෙයට අදාළ වන සේ මෙම විනිශ්චය මණ්ඩලයට පෙනී යයි. වගඋත්තරකරු හවුල් ව්‍යාපාරයට තමා විසින් දමන ලද වත්කමේ ප්‍රමාණය අනුව ව්‍යාපාරය විසුරුවා හැරියාට පසු පවරා දිය හැකි යම් කිසි ලාභයකට හිමිකම් ඇතිව සිටියි.

හවුල් ව්‍යාපාර පණතෙහි 29 වැනි ඡේදය මෙයට අදාළයි යනුවෙන් ශ්‍රේෂ්ඨාධිකරණය කරන ලද තීන්දුවට ද මෙම විනිශ්චය මණ්ඩලය එකඟ වේ. 42 වැනි ඡේදය මෙයට අදාළ වේ නම් මෙම නඩුව ඉහත සඳහන් **මැන්ලි එ. සාර්ටෝරි** යන නඩුවේ කලාක් මෙන් ම මෙම නඩුව සම්බන්ධයෙන් ද පරීක්ෂණ පැවැත්වීමට යැයි නිර්දේශයන් ඇතිව දිස්ත්‍රික් උසාවියට යැවිය යුතු යැයි ද නවත් තර්කයක් ඉදිරිපත් කරන ලදි. කෙසේ හෝ එබඳු නිර්දේශයන් දීමට මෙම විනිශ්චය මණ්ඩලය අදහස් නොකරයි. එයට මූලික හේතුව ඇපැල්කරු මෙම සහනය ඉල්ලමින් පහළ උසාවි දෙකෙහි ම කරුණු ඉදිරිපත් කර නොතිබීමයි. දෙවන හේතුව මෙතරම් කාලයක් ගත වූ පසුත් එබඳු ගණන් හිලව් පිළිබඳ ඇති කරුණු පරීක්ෂාකර බැලීම වැරදි ක්‍රියාවක් වන නිසාත් අවසාන වශයෙන් මෙහි දී පෙනී යන පරිදි ඇපැල්කරු නඩු විභාගයේ දී තමාගේ ගණන් පොත් ඉදිරිපත් කිරීම ප්‍රතික්ෂේප කර තිබිය දී අප විසින් එසේ කිරීම වගඋත්තරකරුට ඉතාම අසාධාරණ ක්‍රියාවක් වීම නිසාත් ය.

42 වැනි ඡේදයෙන් මතුවන වගඋත්තරකරුට හිමිකම් ඇති ලාභ කොටස ගැන මතුවන ප්‍රශ්නය දිස්ත්‍රික් විනිශ්චයකාරවරයාට ඔහු ඉදිරියේ තිබූ සාක්ෂි අනුව ඉතාම එඩිතර ලෙස විසඳිය යුතුව තිබුණේ ඇපැල්කරු නඩුවේදී ගණන් පොත් ඉදිරිපත් කිරීමද පැහැර හැර තිබූ බැවිනි. මේ නියා හවුල් ව්‍යාපාරය කෙරී ගෙන ගියේ නම් වගඋත්තරකරුට ලාභයෙන් භාගයක කොටසක් ලැබීමට ඉඩ තිබිය දී එය ලාභවලින් තුනෙන් කොටයක් අඩු කොට දිස්ත්‍රික් විනිශ්චයකාරවරයා ප්‍රශ්නය ක්‍රියාත්මක අන්දමින් විසඳා තිබේ. ඒ අනුව ඔහු විසින් අවුරුදු පතා ලැබෙන ලාභයෙන් රුපියල් 2,000/- වගඋත්තරකරු ලැබිය යුතුයැයි දිස්ත්‍රික් නඩු කාරවරයා තීරණය කළේ ය.

ක්‍රියාත්මක මිල කිරීමක් වන මෙම තීරණයට විරුද්ධ වීමට ශ්‍රේෂ්ඨාධිකරණයට හේතුවක් නොපෙනුන අතර මෙම විනිශ්චය මණ්ඩලයට ද එසේ ම හේතුවක් නොපෙනේ.

මේ නිසා මෙම අභියාචනය නිෂ්ප්‍රභා කිරීමටයැයි මහරජිනට මෙම විනිශ්චය මණ්ඩලය ගෞරව පෙරටුව අවවාද දෙනු ඇත.

**ඇපැල නිෂ්ප්‍රභා කරණ ලදී.**

ගරු සන්සෝනි අග්‍ර විනිශ්චයකාරතුමා සහ සිරිමාන්න විනිශ්චයකාරතුමා ඉදිරිපිට

# ජීප්රි එ. ද සිල්වා*



ශ්‍රේ. අ. අංක 139/64 — පානදුරේ දිස්ත්‍රික් උසාවියේ නඩු නො. 8121

විවාද කළ දිනය: 30 සැප්තැම්බර් 1965
නීන්දු කළ දිනය: 8 ඔක්තෝබර් 1965.

ගෙහිමියා සහ කුලියට ගත් තැනැත්තා — කුලියට ගෙන ගින්නෙන් විනාශවීම — එහි ප්‍රතිඵලයක් වශයෙන් කුලියට ගත් අය ගෙය අත්හැරීම — ගෙහිමියා අලුත් ගොඩනැගිල්ලක් ඉදිකිරීම — කුලියට ගත් තැනැත්තා බලාත්කාර කමින් පදිංචි වීම — පොලිසිය කුලියට ගත් තැනැත්තාට විරුද්ධව චෝදනා ඉදිරිපත් කිරීම — තමා කුලියට ගත් තැනැත්තා යයි ප්‍රකාශයක් කරවා ගැනීමට කුලියට ගත් තැනැත්තා නඩු දැමීම — ගෙවල් කුලි පාලන පණත — නීතිගත කුලියට ගැනීමක් සම්බන්ධයෙන් එය බලපවත්වන අයුරු.

නීන්දුව: (1) කුලියට දීමකට භාජන වූ ගෙයක් ගෙහිමියාගේ හෝ කුලියට ගත් තැනැත්තාගේ වරදක් නැතුව ගින්නෙන් දැවී ගිය කල එම ගේ කුලියට දීමේ කොන්ත්‍රාත්තුව නිමාවට යේ. මෙසේ වන්නේ කුලියට දිය හැකි වස්තුව නිමාවට යෑම නිසාය. මෙම කොන්ත්‍රාත්තුව ගෙවල් කුලි පාලක පණත යටතට අසුවන නමුත් එයින් එහි වෙනසක් නොවේ.

(2) ගෙයක් කුලියට ගත් තැනැත්තෙකුට ගෙවල් කුලි පාලක පණතින් ලැබෙන ආරක්ෂාව අවසන් වන එක් මාර්ගයක් නම් එම ගෙය ගෙහිමියාට නැවත බාර දීම ය.

නීතිඥවරු: රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇම්. ටී. ඇම්. සිවාර්ඩීන් මහතා සහ ඩී. ඇස්. විජේවර්ධන මහතා සමඟ, චිත්තිකාර ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ සී. නාගලිංගම් මහතා, නිහාල් ජයවික්‍රම මහතා සමඟ, පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන්.

**ගරු සන්සෝනි විනිශ්චයකාරතුමා**

පානදුරේ කෙලින් වීදියේ නොම්මර 360 දරණ ගොඩනැගිල්ල චිත්තිකරු පැමිණිලිකරුට කුලියට දී තිබේ. මේ නිසා 1961 අගෝස්තු මස 4 වන දිනට කලින් යම් කිසි අවස්ථාවක ඔහු එම ගෙයි පදිංචිව සිටියේ ය. එදින රාත්‍රී මෙම ස්ථානයෙහි ගින්නක් හට ගති. මෙම ගින්නෙන් සිදු වූ අලාභය හේතුවෙන් පැමිණිලිකරු එම වාසස්ථානය අතහැර ගියේ ය. චිත්තිකරු එහි අළුත් ගොඩනැගිල්ලක් ඉදිකොට පදිංචි වීමට ආයත්න අවස්ථාවෙහි පැමිණිලිකරු එහි පදිංචි විය. චිත්තිකරු විසින් පොලීසියට කරන ලද පැමිණිල්ලක් අනුව පැමිණිලිකරුට විරුද්ධව එසේ ඇතුළු වීම නිසා උසාවියෙහි නඩු පවරන ලදී.

පැමිණිලිකරු විසින් මෙම නඩුව දමා ඇත්තේ තමා එම ගෙයි කුලියට සිටින්නාය යන ප්‍රකාශය සහ තමාට එහි පදිංචිව සිටීමට බලයක් ඇතැයි ද නීතියට අනුව ගෙවල් කුලියට ගත් කෙනෙකුට ඇති සියළු අයිතිවාසිකම් ක්‍රියාවේ යෙදීමට තමාට බලයක් ඇතැයි ද යන ප්‍රකාශයන් කරවා ගන්නා බලාපොරොත්තුවෙනි.

නඩුවට පිළිතුරු බඳින අවස්ථාවෙහි චිත්තිකරු විසින් කියන ලද්දේ පැමිණිලිකරු තමාගෙන් ගෙයක් කුලියට ගත් තැනැත්තකු නොවන බව ය. ඔහු කීවේ පැමිණිලිකරු බලහත්කාරයෙන් නීති විරෝධී ලෙස එම භූමියෙහි පදිංචිව සිටි බවකි. එමෙන් ම ඔහු පැමිණිලිකරු පිටමං කර දෙන ලෙස සහ ඔහුගෙන් අලාභය අය කර දෙන ලෙස ද ඉල්ලා සිටියේ ය. නඩු විසඳීමෙන් පසු උගත් විනිශ්චයකාරවරයා පැමිණිලිකරුට පක්ෂව තීන්දුව දුන් නිසා චිත්තිකරු මෙම ඇපැල් පෙත්සම ඉදිරිපත් කර තිබේ.

මෙහි දී සලකා බැලිය යුතු ප්‍රමුඛ කරුණ නම් දෙදෙනා අතර වූ ගෙවල් කුලි ගනුදෙනුවට එම ස්ථානයේ ගින්නක් හට ගත් නිසා ඇති වූ ප්‍රතිඵලය වේ. උගත් විනිශ්චයකාරවරයා විටහා ගෙන ඇති අන්දමට ගෙයි ඉස්සරහ දොර ලැලි කොටස සහ අල්මාරි පේළියකින් යුක්ත වූ එක පැත්තක් ද ගින්නෙන් සම්පූර්ණයෙන් ද ගොස් තිබේ. එසේම ගොඩනැගිල්ලට අයත් ප්‍රධාන වහල ද ගින්නෙන් පිලිස්සුනේ ය. අනික් දෙපාර්ශ්වයේ ඇති බිත්ති දෙක පමණක් කඩා නොවැටී තිබුණි. ගොඩනැ-

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 14 වෙනි පිට බලනු.

ගිල්ල පිටුපස තිබුණු එක් කාමරයකට ද ගින්නෙන් අලාභ හානි සිදු වී නැති නිසා එය කඩා වැටී නැත. කෙසේ හෝ පැමිණිලිකරු ගේ එම සාක්ෂි අනුව කල්පනා කරන විට එම කාමරය ගින්න හට ගත් කාලයේ තමාගේ පදිංචියට ගොදුරු වූ කොටසක් නොවේ. මෙම කාමරය විත්තිකරු විසින් තුන්වැන්නකුට කුලියට දෙන ලද කොටසකි.

හට ගත් ගින්නෙන් පසු ගොඩනැගිල්ලක් හැටියට සලකා පදිංචි වීමට පැමිණිලිකරුට ඉතිරි වූ කිසිවක් නොතිබුණු බව ඉතා ම පැහැදිලි ය. ඔහු එම භූමි ස්ථානය අතහැර ගියේ ද මේ නිසා ය. ගින්නෙන් පසුව ඉතිරිවුණු ගොඩනැගිල්ලේ කොටස් මනුෂ්‍ය වාසයට හෝ ව්‍යාපාරයකට හෝ සුදුසු තත්ත්වයක නොතිබුණු බව උගත් විනිශ්චයකාරවරයා විසින් පිළිගැනීම නිවැරදි ය. එම නිසා බද්දට දීමට හේතුභූත වූ ද්‍රව්‍ය එනම්, ගොඩනැගිල්ලේ බිත්ති දෙකක් හැර අන් කිසිවක් ගින්නට පසු ඉතිරි නොවූ නිසා සම්පූර්ණයෙන් ම විනාශ වී ගිය ලෙස සැලකෙයි. ගෙය හිමියා ගේ හෝ කුලියට ගත් තැනැත්තාගේ වරදක් නැතිව, බද්දකට හේතුභූත වූ ගොඩනැගිල්ලක් පිලිස්සී ගිය විටෙක එම කොන්ත්‍රාත්තුව නිතැතින් ම නිමාවට යන බව නීතියේ ඉතා ම පැහැදිලි ලෙස සඳහන් වී ඇත. මෙයට හේතුව කොන්ත්‍රාත්තුවට හේතු වූ ද්‍රව්‍යය නිමාවට යාමයි. කලින් තිබුණු කොන්ත්‍රාත්තුවට අනුව ඒ ගෙයි කුලියට සිටි අයට එම ගෙය භාවිතා කිරීමට සහ එහි පදිංචි වීමට ද බලය තිබේ. නමුත් තමාට පදිංචි වීමට සහ පරිහරණය කිරීමට ගොඩනැගිල්ලක් නොමැති විට ඒ නිසා ම පවත්වාගෙන එන යම් කිසි කොන්ත්‍රාත්තුවක් ද නොමැති බව සැලකිය යුතු ය. වෙල්ලේ මහතා විසින් ලියන ලද ''දකුණු අප්‍රිකාවේ ගේ හිමියා සහ පදිංචිකාරයා'' යන පොතෙහි 5 වන මුද්‍රණයෙහි 255 වන පිට බලන්න.

මෙම කුලියට දීමේ ස්ථානය ගෙවල් කුලි පාලන පනතට අයුවන භූමි ප්‍රදේශයකට අයත් බව මෙම නඩුවේ දෙපක්ෂය ම පිළිගෙන තිබේ. නමුත් මෙයින් සිදුවන කිසිදු වෙනසක් නැත. නීත්‍යානුකූලව දෙන ලද කුලිය නියම කෙරී ඇත්තේ ගොඩනැගිල්ල පිළිබඳවම ය. එම නිසා ගොඩනැගිල්ල නෂ්ටප්‍රාප්ත වූ කලෙක නීත්‍යානුකූලව ගෙවල් කුලියට දීම ඒ හේතුව නිසා ම නොපවත්නා තත්ත්වයට වැටේ.

මේම කරුණ පිළිබඳව ලංකාවේ නීතිය එංගලන්තයේ නීතියට වඩා වෙනස් ය යන්න මම නොසිතමි. මේ දෙරටෙහි ම හිස් ඉඩමක් සම්බන්ධයෙන් පැන නගින නීත්‍යානුකූල කුලියට දීමක් ඇති විය නොහැක. එම නිසා ගෙවල් කුලි පනත් පිළිබඳව ආර්. ඊ. මේගාරි මහතා විසින් ලියන ලද පොතෙහි 8 වන මුද්‍රණයේ සඳහන් පරිදි ''මනුෂ්‍ය වාසයට දෙන ලද ගෙය බිඳ වැටුණු පසු පනතෙහි ඇති සීමාවකින් ඉඩම සීමා නොවේ. එහෙත් ඒවා ගෙය පවතිනතාක් ම පැවැත්වේ.'' යන ප්‍රකාශය මෙහි දී සලකා ගත හැක. මෙම ප්‍රකාශය, සීමාසහිත බර්මිංහැම් බෝර්ලි සමාගම එ. ස්ලේටර් — 1950 1 කේ.බී. 506 යන නඩුවේදී එවර්ෂෙඩ් විනිශ්චයකාරතුමා විසින් අනුමත කොට තිබේ. එම නිසා එය ලංකාවට ද අදල වේ ය යනු මගේ නිගමනයයි.

මෙම කරුණු පසෙක තිබිය දී ගින්න හට ගැනීමෙන් පසු පැමිණිලිකරු භූමි ප්‍රදේශය අතහැර ගිය බවත් එහි භුක්තිය විත්තිකරුට දුන් බවත් සාක්ෂිවලින් කියවේ. විනාශ වී ගිය ගොඩනැගිල්ල වෙනුවට අළුත් ගෙයක් ඉදි කිරීමට විත්තිකරුට අවස්ථාව සැලසුනේ මේ නිසා ය. මෙසේ පැමිණිලිකරු විසින් එහි භුක්තිය විත්තිකරුට භාර දීමෙන් මතු වන නීතිය පිළිබඳ තර්කය නම් ගෙවල් කුලී ගනුදෙනුව මෙයින් හමාර වූ බවයි. එම නිසා පැමිණිලිකරු ගෙයි කුලියට සිටින්නකු ලෙස පණතෙන් ඔහුට ලැබෙන රැකවරණය එතැනින් ම නිමාවට යේ. ඉබ්‍රහිම් එ. මන්සූර් 1953-54 න.නී.වා. 217 යන නඩුවෙහි මෙම අධිකරණය විසින් එකී නිගමනයට බසින ලද බව පෙනේ. ගෙයක් කුලියට ගත් තැනැත්තෙකුට ගෙවල් කුලී පාලන පනතෙන් ලැබෙන රැකවරණය නිමාවට යන එක් ක්‍රමයක් නම් ඔහු විසින් ගෙහිමියාට තමා පදිංචි ගෙය ආපසු භාර දීමයි.

ගින්න හටගත් දිනට දෙදිනකට පමණ පසු විත්තිකරු විසින් පැමිණිලිකරුට එම ගෙය යළිත් ප්‍රතිසංස්කරණය කොට ආපසු භාර දෙන බවට වූ පොරොන්දුවක් ගැන න්‍යාගලිංගම් මහතා විශ්වාසය තැබූ බව කිවයුතු ය. මේ පොරොන්දුව සත්‍ය වුවත් විත්තිකරු විසින් නැවත වරක් එම ගෙය පැමිණිලිකරුට කුලියට දීමට සම්මුතියක් ඇති කර ගැනීමට වැඩි දෙයක් මෙයින් සිදු නොවේ. එබඳු සම්මුතියක් බිඳ හෙලීම නිසා ඇති වන්නේ, එයින් ඇති වන අලාභය ඉල්ලා නඩුවක් දමීමට හැකි වීම පමණකි. ඇත්ත වශයෙන් එම නිසා පැමිණිලිකරුට මෙහි දී ඔහු කළාක් මෙන් පෙනියන හැටියට බලහත්කාරයෙන් ගොඩනැගිල්ලට ඇතුළු වී එය භුක්ති විඳීමට පුළුවන්කමක් නැත.

එම නිසා පැමිණිලිකරු විසින් එම ගොඩනැගිල්ලේ නැවත වරක් පදිංචි වී එය භුක්ති විඳීම වැරදි ක්‍රියාවකි. මේ හේතුවෙන් ඔහු පිටමන් කළ යුතු ය. වැරදි ලෙස භුක්ති විඳීම නිසා ඔහු විසින් එයින් සිදුවුණු අලාභය ගෙවිය යුතු ය. ඔහු ම කියා සිටි අන්දමට මෙහි මාසික කුලිය රුපියල් 58.85 කි. අලාභය මිනිය යුත්තේ ඒ අනුව ය.

උගත් විනිශ්චයකාරවරයාගේ නිගමනය මම ඉවත හෙලමි. එසේම පැමිණිලිකරුගේ නඩුව ද නිෂ්ප්‍රභා කරමි. මෙම නඩුවේ විත්තිකරු, පැමිණිලිකරු පිටමං කිරීමට නියෝගයක් ලබා ගැනීමට සුදුසු යයි ද තීරණය කරන මම ඔහුට අලාභය වශයෙන් වර්ෂ 1961 දෙසැම්බර් 16 වන දා සිට මසකට රුපියල් 58.85 ක් බැගින් නැවත භුක්තිය ලැබෙන තුරු අය විය යුතු යයි තීන්දු කරමි. මෙම උසාවියේ සහ පහළ උසාවියේ ගාස්තුව ද පැමිණිලිකරු විසින් විත්තිකරුට ගෙවිය යුතු ය.

**සිරිමාන්න විනිශ්චයකාරතුමා**

මම එකඟවෙමි.

**පහළ උසාවියේ තීන්දුව ඉවත දමා පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කෙළේය.**

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු, ජ්‍යෙෂ්ඨ ශ්‍රේෂ්‍යාධිකරණ විනිශ්චයකාරතුමා සහ ගරු ශ්‍රී ස්කන්ධ රාජා, ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමන් ඉදිරිපිට

# එච්. ඇස්. කරුණාතිලක එ. ඇල්. ඩී. අබේවීර සහ ගලතුඩ සමුපකාර සමිතිය*

**අධිකරණ ආඥාපණතේ 42 වන ඡෙදය අනුව සර්ටියෝරේරයි ආඥා පණතක ස්වභාවය ඇති නියෝගයක් නිකුත් කිරීමටයයි කරන ලද ඉල්ලීමක්.**

**ශ්‍රේෂ්‍යාධිකරණයේ අංකය: 298—1963**

**විවාද කළ දිනය: 29 ජූනි 1966**
**තීන්දු කළ දිනය: 13 අගෝස්තු 1966**

**සමුපකාර සමිති ආඥාපණත (124 අධිකාරය) 53 ඡෙදය—වසී 1949 අංක 12 දරණ සංශෝධන පණත—කළමනාකරු සහ සමිතිය අතරවූ අර්බුදයක් තීරක තැන වෙත යැවීම—එබඳු තීරණයක් දීමට විනිශ්චයාත්මක බලයක් යෙදවිය යුතුද යන්න.**

සමුපකාර සමිති ආඥා පණතේ 53 වන ඡෙදය යටතේ රෙජිස්ට්‍රාර් තැන විසින් යම්කිසි සමුපකාර සමිතියක් සහ එහි කළමනාකරු අතර වූ අර්බුදයක් තීරණය කිරීම පිණිස තීරකයකු නම් කරන ලදී.

කළමනාකරුට විරුඬව කරන ලද ඉල්ලීම ඉදිරිපත් කරන ලද්දේ සමිතියේ පොත්පත්වල හැටියට ඔහුගේ පරිපාලනයෙහි වූ බඩුබල හෝ ඒවායේ වටිනාකම පිළිබඳව හෝ ගණන් හිලව් පෙන්වීමට ඔහු බැඳී සිටිය යන පදනම මත කරුණු සැලකිරීමෙනි.

තීරක තැන විසින් කළමනාකරුට විරුඬව ගෙවීමේ නියෝගයක් දෙන ලදුව එකී කළමනාකරු එය අවලංගු කරගැනීමට සර්ටියෝරේරයි ආඥාවක් යදිමින් ආයාචනා පත්‍ර ඉදිරිපත් කෙළේ ය.

පෙත්සම්කරුට පක්ෂව ඉදිරිපත් කළ ප්‍රධාන තර්කය වූයේ එබඳු ගෙවීමේ නියෝගයක් දීම සහ එය ක්‍රියාවේ යෙදවීම විනිශ්චයාත්මක බලතල පරිහාවිතා කිරීමක් වන නිසා එසේ වීම අපේ පාලන සංස්ථා පණතේ බලතල වෙන් කර තැබීමේ ප්‍රඥප්තිය හා ගැටෙය යන්න විය.

තීන්දුව: (1) කළමනාකරුගේ බැඳී සිටීම උද්ගතවන්නේ ඉකාම අඩුවශයෙන් නියෝජිත භාවය ඇසුරින් මතුවන අද්ධ්‍යාහාරයෙන් සිතාගත හැකි කොන්ත්‍රාත්තුවක එල්බගෙන වේ.

(2) මෙය සම්ප්‍රදයයක් අනුව පැවති එන අධිකරණයේ ආඥාබලයට අසුවන සාමාන්‍ය සිවිල් අර්බුදයකි. එබැවින් පාලන සංස්ථා පණත බලපැවැත්වීම ඇතිවූ කාලයට පෙර අධිකරණ වශයෙන් තිබූ ආඥා බලයක් 1949 අංක 21 දරණ සංශෝධන පණතින් අධිකරණයට එබඳු අර්බුද විසඳීමට තිබුණු අතිවාශ්‍ය බලයක් නෙරපී තිබෙනසේ පෙනෙන නිසා මෙම නියෝගය නිෂ්ප්‍රභා කළ යුතුය.

නීතිඥවරු: නිමල් සේනානායක මහතා, බාල නඩරාජා මහතා සමග පෙත්සම්කරු වෙනුවෙන්.
එච්. දෙහෙරගොඩ, ජ්‍යෙෂ්ඨ රජයේ නීතිඥ මහතා, එච්. ඇල්. ද සිල්වා මහතා සමග, අධිකරණ සහායකවරුන් වශයෙන්.

**ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා**

සමුපකාර සමිති ආඥාපණතේ (124 වැනි අධිකාරය) 53 වන ඡෙදයෙන් සමුපකාර සමිතිවල රෙජිස්ට්‍රාර් විරයාට යම් යම් අර්බුද විනිශ්චය කළ හැකි බව පැනවී තිබේ. එම අර්බුද සංඛ්‍යාවට ගැනෙන්නේ පහත සඳහන් කරුණු අනුව පැන නගින අර්බුද වෙති.

(ඒ) සමුපකාර සමිතියේ සාමාජිකයන් හෝ අතීත සාමාජිකයන් අතර

(බී) එක් පසෙකින් සාමාජිකයකු හා අනිත් පසින් සමිතිය හෝ එහි කොමිටිය අතර

(සී) සමිතිය හෝ එහි විධායක මණ්ඩලය සහ සමිතියේ නිලධාරියෙක් හෝ සේවකයකු අතර

53 වැනි ඡෙදයෙන් දක්වෙන්නේ ආඥාපනතේ කලින් තිබුණු 45 වන ඡෙදයේ සංශෝධිත ආකාරයකි. (වර්ෂ 1938 මුද්‍රණයේ 147 වන අධිකාරිය බලන්න.) දැනට කල්පනාවට හාජන වී තිබෙන මෙම නඩුවෙහි කටයුතු වලට කලින් තිබුණ 45 වැනි ඡෙදයෙහි ''ලියා පදිංචි කරන ලද සමිතියක් විසින් යම් කිසි ණයක්, ලැබිය යුත්තක් හෝ පාඩුවක් පිළිබඳව එහි සාමාජිකයකුගෙන් හෝ ආදි සාමාජිකයකුගෙන් හෝ කරන ඉල්ලීමක් වෙතොත් එය සමිතියේ කර්තව්‍ය ආශ්‍රය කොට ගෙන හටගත් කලහයකි'' යයි පැනවී තිබීම සලකා ගැනීම මෙහි ලා වැදගත් වෙයි. මෙම ඡෙදය වර්ෂ 1949 යේ අංක 21 දරණ පනතින් සංශෝධනය වී දැනට 124 වන අධිකාරයෙහි විද්‍යමාන වන 53 වන ඡෙදයේ සමිතියක් විසින් එම සමිතියේ නිලධරයකුට හෝ සේවකයකුට හෝ විරුඬව කරන ඉල්ලීමක් ද ''අර්බුද'' සංඛ්‍යාවට ඇතුලත් කොට ප්‍රකාශ වේ.

දැනට අප ඉදිරියේ ඇති නඩුවේ අර්බුදය පැන නැගී ඇත්තේ වගඋත්තරකාර සමිතියේ කළමනාකරු වශයෙන් පත්ව සිටි තැනැත්තෙකු සහ එම සමිතිය අතර ය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 36 වෙනි පිට බලනු.

ආඥාපනතේ ම ඇති එක් විශ්‍රහයකට කළමනාකරු ද 'නිලධාරියකු' ලෙස ගිණිය හැකි පරිදි ඇතුළත් කොට තිබේ. නමුත් සමිතිය 'ඉල්විය යුතු දෙයක්' හැටියට ඇති යමකිසිවක් නිමිත්තෙන් සමිතියේ නිලධරයකු සහ සමිතිය අතර උද්ගතවන යම්කිසි අර්බුදයක් රෙජිස්ට්‍රාර්වරයා හෝ තීරකයකු විසින් තීරණයක් දී සමථයකට පත්කළ හැකි දෙයක් හැටියට මා විසින් ඉහතින් සඳහන් කරන ලද 1948 සංශෝධනයට කලින් පැණ වී නැති බව ඉදුරා පෙනියේ. තීරකයකු විසින් තමාට විරුඬව කරන ලද ගෙවීම් නියමයක් අවලංගු කරන ලෙස මෙම නඩුවෙන් පෙත්සම්කරු දැන් ඉල්ලා සිටින්නේ ප්‍රධාන වශයෙන් එම ගෙවීම් නියෝග කිරීම හෝ එය ක්‍රියාවෙහි යෙදීම විනිශ්චයාත්මක බලයක් අනුව කළයුතු දෙයකැයි ද එය අපේ පාලන සංස්ථා පණත යටතේ ඇති බලතල වෙන්කර තැබීමේ ප්‍රඥප්තිය සමග ගැටේ යයි ද කියමිනි.

ආඥ පණතේ කලින් තිබුණු 45 වන ඡේදයෙන් පැහැදිලි ලෙස ඉටුකර ගැනීමට බලාපොරොත්තුවී ඉන් අදහස් කරන ලද්දේ මොනවාද යනු සොයා බැලීම ප්‍රයෝජනවත් යයි මට හැඟියේ. යම්කිසි සමිතියක් සහ එහි සාමාජිකයින් අතර එම සාමාජිකයින් අතර අන්‍යොන්‍ය අන්දමින් ද එමෙන් ම සමිතිය සහ සාමාජිකයින් අතර දෙපසක් ලෙස ද තම තමන් වෙත බල පවත්වන ව්‍යවස්ථා පිළිබඳ අර්ථ කථනය අනුව නොයෙක් අර්බුද පැන නැගීමට පිළිවන. ඒ අර්බුද සමහර විට සමිතිය හෝ එහි සාමාජිකයෙකු ව්‍යවස්ථා උල්ලංඝණය කර තිබේ ද යන්න ගැන හෝ සමිතියේ නිලතල ඉසිලීමට සාමාජිකයෙකුට ඇති සුදුසුකම ගැන හෝ නිලයකට තෝරාගැනීමේ දී හෝ සේවයකට පත්කිරීමේ දී හෝ එහි නිත්‍යානුකූල භාවය පිළිබඳව හෝ සමිතියෙන් කරගෙන යා හැකි වැඩ කටයුතු වල සීමා ප්‍රමාණය සහ පුද්ගලයන්ගේ සමිතිවලට විශේෂ වූ තවත් මෙබඳු දේ ගැන එබඳු අර්බුද පැන නැගිය හැක. රෙජිස්ට්‍රාර් වරයා විසින් තමාගේ පරිපාලන කටයුතු ක්‍රියාවේ යෙදීමක් හැටියට ඔහු විසින් හෝ ඔහු විසින් පත්කරන ලද තීරකයන් විසින් හෝ ඒ අර්බුද නිමාවට පත් කෙරෙන සේ සමිතියක් විසින් තම සාමාජික හවතුන්ට විරුඬව කරන යම් යම් ඉල්ලා සිටීම් පිළිබඳ අර්බුද ඇති වූ විට ඒවාද එහි ඇතුළත් වීම ගැන ප්‍රශ්නයක් නොමැත. නමුත් සාමාජිකයින්ට විරුඬව කෙරෙන සාමාජිකත්වය අග්‍රයෙන් පැන නොනගින එහෙත් සාමාන්‍ය අයිතිවාසිකම් හා බැඳිසිටීම්වල හේතුවෙන් හෝ යම්කිසි සිවිල් වරදක හේතුවෙන් හෝ මතුවියහැකි යම් යම් ඉල්ලීම් ද මෙයට ඇතුළත්ද යි යන්න ගැන විවාද කළ හැකි තත්වයක් තිබේ යයි කිවහැක. අන්තිම වශයෙන් ඉහත සඳහන් ස්වභාවය ඇති ඉල්ලා සිටීම් පිළිබඳව හැර මෙහියදහන් අනිත් කටයුතු වලදී එකුවන අර්බුද සම්බන්ධයෙන් රෙජිස්ට්‍රාර්වරයා හෝ තීරකයෙකු විසින් විසඳා නිමාවට පත්කිරීම රජයේ විනිශ්චයාත්මක බලය ක්‍රියාත්මක බවට පත් කෙරෙන දෙයක් කිරීමක් නොවේයයි මම සැක නොකරමි.

සමූපකාර සමිතියක 'නිලධරයෙක්' එම සමිතිය සමග කොන්ත්‍රාත්තුවක් වැනි දෙයක සම්බන්ධයක් ඇතිව සිටීම අවශ්‍යම දෙයක් නොවේ. සභාපති කෙනෙකුගේ හෝ ලේකම්වරයකුගේ කායිඛ යුතුකම් සහ වගකීම් සමහර විට දෙපසක්ම ම කොන්ත්‍රාත්තුවක ඇති ගරුක සම්බන්ධයෙන් ඉවත්වී සිටීමේ හැකියාව ඇති කටයුතු විමට ඉඩ තිබේ. නමුත් මීට අතිරේකව යම්කිසි නිලධරයෙකු වෙත සමිතියේ බඩු භාණ්ඩාදියේ හෝ මුදල් සම්බන්ධයෙන් භාරකාරත්වය හෝ පරිපාලනය පැවරී තිබේ නම් එසේ නැතහොත් ඔහුට සමිතිය වෙනුවෙන් යම්යම් කොන්ත්‍රාත්තු ඇති කර ගැනීම පුළුවන්කම තිබේනම් ප්‍රධානියෙකු සහ නියෝජිතයෙකු අතර ඇති වන සම්බන්ධතාවයට සමාන කොන්ත්‍රාත්තු සම්බන්ධකමක් සමිතිය සහ කළමනාකරු අතර ඇතිවීමට හැකි ය. මේ අනුසාරයෙන් කොන්ත්‍රාත්තුවකින් පැන නගින අයිතිවාසිකම් බැඳී සිටීම් යථා පරිදි ඉටුවීද නැද්ද යන්න ගැන අර්බුද පැන නැගිය හැකි ය. අප ඉදිරියට පැමිණි තිබෙන මෙම නඩුවෙහි, සමිතිය සහ පෙත්සම්කරු අතර කොන්ත්‍රාත්තුවේ, එසේ කොන්ත්‍රාත්තුවක් ඇත්නම්, ඇතුලත්වූ කොන්දේසි මොනවාදැයි අප ඉදිරියේ සාක්ෂි නැත. නමුත් පෙත්සම්කරුට විරුඬව ඉදිරිපත් කර ඇති ඉල්ලා සිටීම් ඉදිරිපත්කොට ඇත්තේ කළමනාකරු හැටියට ඔහුගේ පාලනයෙහි තිබුණු බඩු සම්බන්ධයෙන් ගණන් හිලව් පෙන්වීමට ඔහු බැඳී සිටිය යන පදනම උඩය. නියෝජිතයෙකු හැටියට ඉතාම අඩුවශයෙන් ඇතිවියයි සලකා ගත හැකි කොන්ත්‍රාත්තුවක් යටතේ කළමනාකරු බැඳී සිටීමක් මෙහිදී උද්ගතවේ. මෙසේ බැඳීමක් ඇද්ද යන්න ගැනත් එය ඉටුකිරීමට ඇති යුතුකම ගැනත් ඇති අර්බුදය වූ කලී අධිකරණයේ සම්ප්‍රදායික ආඥා බලය ඇතුළත පවතින සිවිල් අර්බුදයකි. මෙම අර්බුදය වර්ෂ 1949 අංක 21 දරණ පණත සම්මත කිරීමට කලින් සමූපකාර සමිති ආඥා පණතේ ඇති විශේෂ සම්ප්‍රදයට අනුකූලව විසඳිය හැකි ස්වභාවයේ අර්බුදයක් නොවන්නේය. පාලනසංස්ථාපණත (කොන්ස්ටිටියුෂන්) ක්‍රියාවට යෙදීම ඇරඹුණු කාල පරිච්ඡේදයේ අනිවාර්‍යයෙන්ම අධිකරණය සතුවතිබූ එවැනි අර්බුද පසිඳීමේ එම ආඥා බලමහිමය සංශෝධන පණතින් පිටමන් කිරීමට ආයාසයක් ගත් සේ පෙනියේ. නොබෝද ප්‍රකාශයටපත් නඩු තීන්දුවල භාෂා විලාසයට අනුව සලකන කල මෙයින් අධිකරණය වෙත අනන්‍ය සාධාරණ ලෙස පැවරී තිබුණු බලතල මත පැහැදිලි ලෙසම ආක්‍රමණය කිරීමක් මේ අයුරින් සිදුවිය.

සමූපකාර සමිතියක සහ එහි සාමාජිකයන් අතර සාමාජිකත්වයට අදළ කරුණකින් මතු නොවන යම්කිසි කොන්ත්‍රාත්තුවක අයිතිවාසිකමකට හෝ බැඳී සිටීමකට ආඥා පණතේ කලින් ගැඹුනු අයුරින් තිබූ ඡේදය පිළිසරණ දේ ද යන්න ගැන මගේ ඇති සැකය දැනටමත් මා ප්‍රකාශකොට තිබේ. එම ආඥා පණත් යටතේ යම්කිසි ගෙවීම් නියෝගයක් දුන්විට එය ක්‍රියාත්මක කිරීමට එහි පැණවීම් නොමැති වීම මේ ප්‍රස්තුතය අනුව කල්පනා කරන විට සැලකීම ඉතා වැදගත් ය. මේ සම්බන්ධයෙන් ආඥා පණතේ පැණ වී ඇත්තේ (54(ථ්) ඡේදය) මේ කටයුත්තට රෙගුලාසි සාදගත හැකි බවත් පමණකි. මේ කරුණ රෙගුලාසි මාර්ගයෙන් ක්‍රියාකරවීමට ඉඩහැර නිබී මෙන් තරමක් දුරට පෙනියන්නේ සාමාන්‍යයෙන් අධිකරණය මඟින් විනිශ්චයට පාත්‍රවන අර්බුද ගෙවීම් නියෝග යන්ට තුඩුදෙන කරුණු හැටියට සලකා නොතිබෙන බවය.

පෙත්සම්කරුට විරුඬව දී ඇති ගෙවීම් නියෝගය මෙයින් අවලංගු කරනු ලැබේ.

**ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා**
මම එකඟ වෙමි.

**ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා**
මම එකඟ වෙමි.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට



# පරමානන්දු එ. මහේස්වරී*

ශ්‍රේෂ්‍යාධිකරණයේ අංකය: 434/1964 — මුලතිව් මහේස්ත්‍රාත් උසාවියේ නඩු අංකය: 33967

විවාදකොට නිත්දු කළ දිනය: 10 ජූලි 1964

නඩත්තුව — භාර්යාවක් විසින් තමා සහ දරුවා වෙනුවෙන් කරන ලද ඉල්ලීමක් — විත්තිකරු භාර්යාව කැඳවා ගැනීම ප්‍රතික්ෂේප කර ළමයාට රුපියල් 25 බැගින් ගෙවීමට කැමති වීම — මහේස්ත්‍රාත්තුමා මෙය අන්තර් නියෝගයක් ලෙස වාර්තා සටහනක් ලිවීම — ඉන්පසු නඩුව සමථයකට බැසීම නිසා භාර්යාව ඉල්ලීම අස්කර ගැනීම — එකඟ වූ පරිදි ළමයාට නඩත්තුව ගෙවීම පැහැර හැරීම — වරෙන්තුවක් නිකුත් වීම — විත්තිකරුගේ නීත්‍යානුකූල බැඳීම — ළමයින්ගේ නඩත්තු පිළිබඳ අන්තර් නියෝග — එහි ඇති යෝග්‍යතාවය.

භාර්යාවක් විසින් තමාට සහ තම දරුවාට නඩත්තුව ඉල්ලා සිටියෙන් විත්තිකරු භාර්යාව කැඳවා ගැනීමට නොහැකි බවත් දරුවාට මසකට රුපියල් විසිපහ බැගින් ගෙවීමට පොරොන්දු වූ නිසා එම ඉල්ලීම භාර්යාවගේ නඩත්තුව පිළිබඳව පරීක්ෂණයකට භාජන කිරීමට නියම විය. දරුවාට මුදල් ගෙවීම "අන්තර් නියෝගයක්" ලෙස වාර්තාගත විය.

පරීක්ෂණයට මෙය භාජනය වූ පසු දිනක ඉඩමක් අරවා ගැනීම සඳහා රුපියල් 1950/-ක් ගෙවීමට භාරගත් විත්තිකරුගෙන් නඩත්තුව ඉල්ලීම අස් කිරීමට ඉල්ලුම්කාරියගේ නීතිවේදියා අධිකරණයට යෝජනා කර සිටියේ ය. මෙම ඉල්ලීමට ඉඩ ලැබිණි.

විත්තිකරු විසින් මාස 20 ක් ළමයාට ගෙවීමට පොරොන්දු වූ මුදල නොගෙවා පැහැර හැරීම නිසා එය ලබා ගැනීමට වරෙන්තුවක් ඉල්ලුම්කාරිය අයැද සිටියා ය. විත්තිකරු මේ ඉල්ලීමට විරෝධය දක්වී ය.

නිත්දුව: (1) තමාගේ එකඟවීම නිසා පියකු හැටියට දරුවාගේ රැකවරණය තමාට ලැබෙන තුරු විත්තිකරු දරුවා නඩත්තු කිරීමට බැඳී සිටී.

(2) විත්තිකරුට එම බැඳීමෙන් මිදීමට උවමනා වී නම් ඒ සම්බන්ධයෙන් සුදුසු ඉල්ලීමක් කළ යුතුව තිබුණි.

ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා: — "ළමයින් පිළිබඳව නඩත්තු දීමේ දී පරීක්ෂණයකින් පසුව අවසාන නියෝගයක් දෙන තුරු අන්තර් කාලීන නියෝග දීම ප්‍රයෝජනවත් යයි ද එය යෝග්‍ය ක්‍රියා මාර්ගයකැයි ද මට සඳහන් කළ හැක."

නීතිවේදියෝ: වී. නල්ලයියා මහතා, වගඋත්තරකාර පෙත්සම්කරු වෙනුවෙන්.

ඇම්. ටී. ඇම්. සිවාර්දීන් මහතා, නිහාල් ජයවික්‍රම මහතා සමග ඉල්ලුම්කාර වගඋත්තරකරු වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 51 වෙනි පිට බලනු.

**ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා**

මෙය භාර්‍යාවක් විසින් තමාට සහ තමාගේ දරුවාට නඩත්තුව සඳහා ඉදිරිපත් කරන ලද ඉල්ලීමකි. සිතාසි ලැබ 27.9.60 දරණ දින උසාවියට පැමිණි විත්තිකරු තමා ඉල්ලුම්කාරිය සමග කසාදබඳින ලද බවද 'ශාන්තිනී' නම් ළමයාගේ පියා තමා බව ද පිළිගත්තේ ය. නමුත් තම භාර්‍යාව කැඳවා ගැනීමට විත්තිකරු අකමැති වූයෙන් විනිශ්චයකාරවරයා විසින් මෙම කරුණ පිළිබඳව භාර්‍යාවට සහ දරුවාට නඩත්තුව දීම සම්බන්ධයෙන් කෙරෙන පරීක්ෂණය වර්ෂ 1960 ඔක්තෝබර මස 25 වැනි දින පැවැත්වීමට නියම කළේ ය. ඒ නඩුය පැන නැගුන පසු විත්තිකරු, ළමයාගේ නඩත්තුව වශයෙන් මසකට රුපියල් 25!- බැගින් ගෙවීමට එකඟවිය. ''මෙය අන්තර් කාලීන නියෝගයක'' යැයි වාර්තාවේ සටහන් කළ මහේස්ත්‍රාත්වරයා ඉන්පසු එදින ම පරීක්ෂණය පවත්වන දිනය 8.11.60 යැයි වෙනස් කළේ ය.

8.11.60 දරණ දින විත්තිකරු උසාවියට පැමිණ සිටියේ නැත. ඔහු විසින් වෛද්‍ය සහතිකයක් එවන ලද නිසා මෙම කරුණ පරීක්ෂණය සඳහා ඉදිරිපත් වූයේ 20.12.60 දරණ දිනයේ දී ය. එයට කලින් යම්කිසි තීරණයකට බැස ගෙන තිබෙන සේ පෙනී යයි. එදින ඉල්ලුම්කාරියට නීතිවේදියකු පෙනී සිටිය නමුත් විත්තිකරු තමා ම පෙනී සිටියේ ය. ඉල්ලුම්කාරිය වෙනුවෙන් පෙනී සිටි නීතිවේදියා වූ ධර්මලිංගම් මහතා විත්තිකරු ඉල්ලුම්කාරියට ඉඩමක් නිදහස් කරගැනීම සඳහා රුපියල් 1950!- ක මුදලක් ඇයට ගෙවීමේ හේතුවෙන් ඉල්ලුම්කාරිය වෙනුවෙන් නඩත්තුව ඉල්ලීම, ඉල්ලා අස්කර ගැනීමට අයැද සිටින බව උසාවියට සැළකර සිටියේ ය. මෙම ඉඩම මුදල ගෙවීමෙන් පසු ඉල්ලුම්කාරිය නමට ලියා ඇති බව ද පෙනේ. මේ නිසා ඉල්ලීමට ඉඩ දෙන ලදි.

මෙසේ අස්කර ගන්නා ලද ඉල්ලීම ඉල්ලුම්කාරිය තමාට නඩත්තුව ලබා ගැනීමට කරන ලද ඉල්ලීම බව ඉතා ම පැහැදිලි ය. එම නිසා ළමයාට නඩත්තුව දීම සඳහා අන්තර්කාලීන ඉල්ලීමක් යැයි විස්තර කොට දෙන ලද ඉල්ලීම එය නිකුත් කරන ලද දින සිට බල පැවැත් වී ගෙන ගියේ ය. එම නියෝගය විත්තිකරු විසින් කරනු ලබන ඉල්ලීමකින් නිෂ්ප්‍රභා කළ කලක විනා එසේ ම එය නිෂ්ප්‍රභා කරන තුරු බලපැවැත් වී ගෙන ඒ. එසේ නැතහොත් නඩත්තු ආඥාපණතේ සඳහන් පරිදි එයට අයත් කාල සීමාව ගෙවී යනතුරු බලපැවැත් වේ.

ටික කලක් ගතවනතුරු ඉල්ලුම්කාරිය දරුවාගේ නඩත්තුව පිළිබඳ ලැබෙන මුදල ලබා ගැනීමට යම්කිසි පියවරක් නොගත්තා ය. 18.6.62 දරණ දින වීසි ඔසක දරුවාගේ නඩත්තුව සඳහා ඇ නියෝග වරෙන්තුවක් ඉල්ලා සිටියා ය. විත්තිකරුත් මෙම ඉල්ලීමට විරුඬ වූයෙන් එය වෙන මහේස්ත්‍රාත්වරයකු ඉදිරිපිට විභාගයට භාජනය විය. මෙම මහේස්ත්‍රාත්වර්යා අන්තර්කාලීන නියෝගයන් යැයි විස්තර කරමින් නියෝග දෙන ලද මහේස්ත්‍රාත්වරයාට පසුව පත් වූ මහේස්ත්‍රාත්-වරයා වේ.

විත්තිකරු විසින් ඉදිරිපත් කරන ලද විරෝධයන් ගැන සාකච්ඡා කිරීමේ දී මහේස්ත්‍රාත්වරයා නඩත්තු පිළිබඳව අන්තර්කාලීන නියෝග දීම අනාදිමත් කාලයක සිට පැවැත එන සුරුද්දක් යැයි සඳහන් කර තිබේ.

ඉල්ලුම්කාරිය සමඟ ජීවත්වන දරුවකු පිළිබඳව නඩත්තු ඉල්ලීමක් කළ විටෙක එම දරුවා නඩත්තු කිරීමට විත්තිකරු බැඳී සිටී. නමුත් බොහෝ විට සිදුවන්නේ දීර්ඝ කාලයක් ගත වන තුරු එබඳු දරුවකු සඳහා නඩත්තු නියෝගයක් නොදී සිටීම ය. ඇපැල් පෙත්සමක් ඉදිරිපත් කරන ලදුව මෙම අධිකරණය විසින් මීට කලින් සලකාබලන ලද මෙම මහේස්ත්‍රාත් උසාවියේ ම නඩුවක සිදු වූ පරිදි සමහර විට දරුවාට අවුරුදු දෙකක් පමණ කාලයක් සිටීමට සිදු වේ. විශේෂ යෙන් ම මෙම නඩුවේ දරුවා සමග සිටි භාර්‍යාව ආපසු ගැනීමට විත්තිකරු කැමැති නොවී ය. ඇත්ත වශයෙන් ම ඔහු බිරිඳට කියේ ''ඔබ ආපසු කැඳවා ගැනීමටවත් ඔබව නඩත්තු කිරීමටවත් මා සූදානම් නැත.'' නමුත් පියකු වශයෙන් දරුවා නඩත්තු කිරීමට ඔහු බැඳී සිටියේ ය. එම බැඳීමෙන් නිදහස් වීමට නිසි පරිදි ඉල්ලීමක් ඔහු විසින් ඉදිරිපත් කළ යුතුව තිබුණි. දරුවාගේ භාර කාරත්වය ඔහුට ලැබෙන තුරු එම දරුවා නඩත්තු කිරීමට ඔහු බැඳී සිටියේ ය.

ළමයින් පිළිබඳව නඩත්තු දීමේ දී අවසාන නියෝග යක් පරීක්ෂණයකින් පසුව දෙන තුරු අන්තර්කාලීන නියෝග දීම ප්‍රයෝජනවත් යැයි ද එය අවශ්‍ය ක්‍රියා මාර්ගයක් යැයි ද මට සඳහන් කළ හැක. එම ඇපැල ගාස්තුවටත් යටත් කොට නිෂ්ප්‍රභා කරමු.

**ඇපැල නිෂ්ප්‍රභා කරන ලදී.**

ගරු ටී. ඇස්. ප්‍රනාන්දු සහ ගරු අලස් විනිශ්චයකාරතුමන් ඉදිරිපිට

# ඇල්. කේ. ලෙබ්බෙතම්බි සහ තවත් අය එ. ඇටෝර්නි ජනරාල්තුමා සහ තවත් අයෙක්*

ශ්‍රේ. ඳ. අංකය 24 (අතුරු ඇපැල) වර්ෂ 1964 — දි. උ. කොළඹ අංකය 935/ඉසෙඩ

වාදකළ සහ තීන්දුව දුන් දිනය: 1965, ජූලි 20 වන දින
කරුණු ප්‍රකාශයට පත් කළ දිනය: 1965 ජූලි 23 වන දින.

තීරු බදු ආඥා පණත යටතේ අල්ලාගත් රාජ සන්තක කල රන් පොලු ඉල්ලා පැවරූ නඩුවක්—පැමිණිල්ලේ සාක්ෂි නිමවූ පසු විත්තිය විසින් පිටරට නිවැසි පුද්ගලයන් තුන්දෙනෙකුගෙන් යුත් කොමිසමක් විසින් සාක්ෂි සටහන් කිරීමට කොමිසමක් ඉල්ලීම—රන් පොලුවල සැම්පල්ද යැවීමට ඉඩදීම—සිවිල් නඩු නීති සංග්‍රහයේ 423 වෙනි 434 වෙනි ඡේද—මේ ගැන උසාවියට ඇති බලතල.

තීරු බදු ආඥා පණත යටතේ රාජ සන්තක බව කියමින් යම්කිසි රන් පොලු කිපයක් අල්ලා ගැනීම නීති විරෝධී යයි ද ඒවා නැවතත් පැමිණිලි කරුට දිය යුතු යයි ද ප්‍රකාශයක් කරවා ගැනීම සඳහා පවරන ලද නඩුවකදී දිස්ත්‍රික් විනිශ්චයකාරතුමා විත්තිකරුගේ පහත සඳහන් ඉල්ලීම්වලට ඉඩ දුන්නේ ය.

(1) නියමිත පුද්ගලයන් කිපදෙනකුගේ සාක්ෂි ලන්ඩන් නගරයේ දී සටහන් කරවා ගැනීමට කොමිසම් වරප්‍රසාදයක් නිකුත් කිරීම.

(2) මෙම කොමිසමේ සාක්ෂි සටහන් කරගන්නා තැනැත්තාට එම රන් පොලුවල සැම්පලයක් යැවීම.

මෙම නඩුවේ අභියාචනයේ දී පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් කළ එක ම තර්කය වූයේ එම රන් පොලුවල සැම්පලයක් යැවීමට අධිකරණයට බලයක් නැතැයි යන්න ය.

තීන්දුව: (1) මෙබඳු අවස්ථාවක සාක්ෂි සටහන් කිරීමට පත්කරනු ලබන කොමසාරිස්වරයාට එම රන් පොලු ගෙන්වා ගැනීමට බලය සිවිල් නඩු විධාන සංග්‍රහයේ 434 වන ඡේදයෙන් පුලුවන් කම ලැබේ.

(2) සිවිල් නඩු විධාන සංග්‍රහයේ 434 වන ඡේදය නොමැති කලක වුව ද අධිකරණය එබඳු කොමිසමක් පත් කිරීමෙන් තමා වෙත පැවරී ඇති ලිඛිත නීතිගත බලය පරිහරණය කළ විට එසේ කරන ලද පරමාර්ථය ඉටුකර ගැනීමෙහි ලා යුක්තියුක්ත ලෙස අවශ්‍ය සියලු කටයුතු කිරීමට ද එයට බලය පිරිනැමී තිබේ.

ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා "වැඩිදුරටත් සලකා බලන කල එබඳු ලිපි ලේඛනයක් හෝ ද්‍රව්‍යයක් තාවකාලික වශයෙන් උසාවියේ භාරකාරත්වයෙන් බැහැරව තිබුණත් එබඳු දේ උසාවියෙහි පාලනය යටතේ පවතින බව එසේ නැතැයි නොකියා පිළිගැනීමට සිදු වේ."

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 49 වෙනි පිට බලනු.

**ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා**

තීරු බදු ආඥා පණත යටතේ අල්ලා ගන්නා ලදුව රාජ සන්තක කරන ලද රත්‍රන් පොලු 132 ක් එසේ අල්ලා ගත නොහැකි යයි ද එපරිදි රාජ සන්තක කිරීම නීති විරෝධී යයි ද ප්‍රකාශයක් ලබා ගන්නා අටියෙන් එම රත්‍රන් පොලු පැමිණිලිකරුට ආපසු භාර දිය යුතු යයි කියමින් තීරණයක් ලබා ගන්නා පිණිස පවරන ලද නඩුවක පැමිණිලිකාර පක්ෂයෙහි සාක්ෂි නිමාවට ගිය අවස්ථාවෙහි එම නඩුවෙහි විත්තිකරුවන් විසින් සිවිල් නඩු විධාන සංග්‍රහයෙහි 423 වන ඡේදය යටතේ ලංඩන් නගරයේ නිවාසී පුද්ගලයන් කිප දෙනකුගේ සාක්ෂි සටහන් කරවා ගැනීමේ පරමාර්ථයෙන් කොමිසමක් නිකුත් කිරීමට යයි උසාවියෙන් ඉල්ලීමක් කළහ. වර්ෂ 1963 දෙසැම්බර් මස 4 වන දින දෙන ලද නියෝගයෙන් උසාවිය මෙම ඉල්ලීමට ඉඩ දුන් අතර විත්ති කරුවන් විසින් එම රත්‍රං පොලුවල සැම්පල් කීපයක් කලින් සඳහන් කළ කොමිසම ක්‍රියාත්මක කරන පුද්ගලයාට යැවිය යුතු යයි කියමින් කරන ලද ඉල්ලීමකට ද ඉඩ දුන්නේ ය. වර්ෂ 1963 දෙසැම්බර් මස 4 වන දින දෙන ලද උසාවියෙහි නියෝගයෙහි සාවද්‍ය භාවය හෝ නිරවද්‍ය භාවය තීරණය කර ගැනීමේ බලාපොරොත්තුවෙන් මෙම අභියාචනය ඉදිරිපත් කොට තිබේ. ඇපැල්කරුවන් වෙනුවෙන් පෙනී සිටි පෙරේරා මහතා ඉහත සඳහන් පරිදි නියමිත පුද්ගලයන්ගෙන් සාක්ෂි ලබා ගැනීම වැරදි යයි කියමින් ඉදිරිපත් කරන ලද අභියාචනය මගින් ඔහු උසාවිය විසින් අතිරේකව දෙන ලද රත්‍රං පොලුවලට සැම්පල් යැවීමටයයි කෙරුණු නියෝගය කිරීමට උසාවියට බලයක් නැති බව සැල කර සිටියේ ය. මෙම රත්‍රං පොලු නඩුවට හේතු භූත වූ කාරණාව බවත් සිවිල් නඩු විධාන සංග්‍රහයේ හෝ වෙන කිසියම් නීතියක හෝ එබඳු දෙයක් උසාවියට තමාගේ භාරකාරත්වයෙන් පිට වෙන තැනෙකට යැවීමට ඇත්ත වශයෙන් බැලුවහොත් මෙම නඩුවෙහි දී තමාගේ ආඥා බලයෙනුත් පිට තැනෙකට යැවීමට නොහැකි යයි කියමින් තර්ක ගෙනහැර දැක්වී ය. නමුත් නඩුවට හේතුභූත වූ කරුණක් හෝ ද්‍රව්‍යයක් උසාවියේ භාර කාරත්වයෙන් පිටට යැවීම වැළැක්වෙන යම් කිසි විශේෂ නීති ප්‍රඥප්තියක් නැති බව ද ඔහු පිළිගත්තේ ය.

සිවිල් නඩු විධාන සංග්‍රහයේ 434 වන ඡේදයෙන් එම සංග්‍රහයේ 29 වන පරිච්ඡේදය යටතේ පත් කරන ලද කොමසාරිස්වරයකුට වුවමනා වූ විටෙක ලියවිලි වලින් හෝ පරීක්ෂණයට අදාල ද්‍රව්‍යයක් පරීක්ෂා කිරීමට බලය තිබෙන බව උගත් රජයේ නීතිඥවරයා පෙන්වා දුන්නේ ය. මෙම රත්‍රං පොලු හෝ ඒවායේ සැම්පල් නඩුවට අදාල ද්‍රව්‍යයක්ය යන්න කිසිම අර්බුදයකට තුඩු නොදෙන කරුණක් සේ පිළිගත යුතු ය. එම නිසා කොමසාරිස්වරයාට අවශ්‍ය වුනි නම් මේ නඩුවට පාත්‍ර වූ එම ද්‍රව්‍යය වන රත්‍රං පොලු ගෙන්වා බැලීමට අවසර තිබුණි. එය එසේ නම් ඒවා ඉල්ලන තුරු නොසිට එම රත්‍රං පොලු අධිකරණයට මෙබඳු පැහැදිලි නඩුවක දී පිටරට යැවීමට බැරි මන්දැයි මට නොපෙනේ. මේ නඩුවෙහි දී ගෙන තිබෙන පියවර නඩුවෙහි අවසාන තීරණය දීම කෙටි කලෙකින් කිරීමේ වැදගත්කමකින් ද යුක්ත බව කියමි.

කොමසාරිස්වරයාට ලිපි ලේඛනයක් හෝ නඩුවට අදාල අනිකුත් දෙයක් ගෙන්වා ගැනීමට හැකියාවක් ලබා දෙන 434 වන ඡේදය පනවා නොතිබුණෙන් උසාවිය කට තමාගේ අධිකරණ බලය යොදු නිකුත් කළ කොමසාරිස්වරයා බලාපොරොත්තු වන පරමාර්ථ කරවා ගැනීමට සාධාරණ ලෙස අවශ්‍ය වන සියළු දෙයක් කිරීමට පුළුවනැයි කීමට මා සූදානම් බව මෙහි ලා කියමි. යම් හෙයකින් එබඳු ලිපි ලේඛනයක් හෝ නඩුවට පාත්‍ර වූ යම් කිසි ද්‍රව්‍යයක් නොබලා සාක්ෂි කරුවකුට අර්ථවත් සාක්ෂියක් දිය නොහැකි නම් එබඳු ලිපි ලේඛනයක් හෝ ද්‍රව්‍යයක් ඔහු වෙතට පත් කිරීමට නිරායාසයෙන් ම උසාවියට බලයක් තිබෙන බව සහතික වශයෙන් කිව යුතු ය. විය හැකි නැතිවීමක් ගැන හෝ ද්‍රව්‍ය මාරු කිරීමක් ගැන හෝ කියමින් කරන ලද තර්ක එතරම් සැලකිය යුතු ගණයට නොවැටෙන අතර අධිකරණය විසින් එය සුරක්ෂිතව යැවීමට හෝ සුරක්ෂිතව ආපසු ගෙන්වා ගැනීමට හෝ වුවමනා කරන සියළු සාධාරණ පියවරක් ම ගන්නට ඇතැයි සිතා ගැනීම යුක්ති යුක්ත ය. වැඩිදුරටත් සලකා බලන කල එබඳු ලිපි ලේඛනයක් හෝ ද්‍රව්‍යයක් හෝ තාවකාලික වශයෙන් උසාවියේ භාරකාරත්වයෙන් බැහැරව තිබුණත් එබඳු දේ උසාවියෙහි පාලනය යටතේ පවතින බව එසේ නැතැයි නොකියා පිළිගැනීමට සිදු වේ.

මේ හේතු නිසා අපි මෙම අභියාචනය නඩු ගාස්තුවට ද යටත් කොට නිෂ්ප්‍රභා කරමු.

**ඇපැල නිෂ්ප්‍රභා කරණ ලදී.**

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

ශ්‍රේෂ්ඨාධිකරණයේ අංකය 95/1965 — බදුල්ලේ මහේස්ත්‍රාත් උසාවියේ නඩු අංකය 3005

# රෝමිස් සිඤ්ඤෝ, එ. ප්‍රනාන්දු, විදුලිබල අධිකාරි වැලිමඩ නගර සභාව*

විවාද කොට තීන්දු කළේ: 1965, දෙසැම්බර් 20 වන දා

**විදුලි බල පණත — 65 සහ 67 වන ඡේද — විදුලි බල වේගය සොරකම් කිරීම සහ බල මාපක යන්ත්‍රයට ඇහිලි ගැසීම — චෝදිතයා වරදකරුවකු වීම — ඇතුළත් නොකළ යුතු සාක්ෂි ඇතුළත්කර ගැනීම නිසා එසේ වරදකරු වීම නිෂ්ප්‍රභාවේ යයි කියමින් කරුණු සැලකිරීම — වරදකරු කිරීමට ප්‍රමාණවත් වන අනිත් සාක්ෂි තිබීම — අපරාධ සහායයෙකු සාක්ෂි දීම — එම සාක්ෂිය සමග සැසඳෙන වෙන සාක්ෂි නොමැති කල් පවා එසේ වරද කරු බවට පත්කිරීම—එසේම තිබීමට ඉඩදිය යුතු ද යන්න — සාක්ෂි ආඥා පණතේ 133 වන ඡේදය.**

කපටි අන්දමින් හා වංචනශීලි අන්දමින් විදුලි බල ශක්තිය උකහා ගන්නා ලද බැවින්ද, බල මාපක යන්ත්‍රයට ඇහිලි ගසන ලද බැවින් ද, විදුලි බල පණතේ 65 සහ 67 වන ඡේදයන් යටතේ චෝදිතයාට විරුඬව නඩු පවරනු ලැබ ඔහු වරද කරු විය. මෙම නඩුවේදී නීත්‍යානුකූලව ඇතුළත් කළ නොහැකි සාක්ෂි ස්වල්පයක් ද තිබුණු අතර

(ඒ) චෝදිතයා යටතේ සේවය කළ චෝදිතයාගේ සාවද්‍ය වැඩපිළිවෙල සම්බන්ධයෙන් චෝදිතයා විසින් තමාට පහර දෙන ලද නිසා නගර සභා අධිකාරීන්ට දැනුම් දුන් කදිරවේලු නමැත්තකුගේ සාක්ෂියද,

(බී) නගර සභා සේවයේ නියුක්තව සිටිමින් සිනමා යන්ත්‍ර මැදිරි කාමරයක් පරීක්ෂා කිරීමේ දී බල මාපක යන්ත්‍රයේ සටහන් නොවන ලෙස බලය උකහා ගැනීමට හැකිවන පරිදි කම්බි යොදා තිබුණු බව සොයාගත් විදුලි බල අධිකාරිවරයාගේ සාක්ෂිය ද එහි වූහ.

තීන්දුව: (1) කදිරවේලු නමැති සාක්ෂිකරු අපරාධ සහායයෙකුගේ තත්වයේ ගිණිය හැකි අයකු නමුත් ඔහුගේ සාක්ෂිය විදුලි බල අධිකාරිවරයාගේ සාක්ෂිය සමග සැසඳී තිබෙන නිසා, ඇතුළත් නොකළ හැකි සාක්ෂි ගැන නොසලකා හැර මෙසේ වරද කරු කිරීම සනාථ කිරීම බහුතර ප්‍රමාණයක සාක්ෂි තිබේ.

(2) කදිරවේලුගේ සාක්ෂිය හා සැසඳෙන සාක්ෂි නැති කලක වුවද මෙසේ වරදකරු කිරීම සාක්ෂි ආඥා පණතේ 135 වන ඡේදය අනුව බලන කල එසේ ම තිබීමට ඉඩ හැරිය හැක.

(3) විදුලි බල පණතේ 65 සහ 67 වන ඡේදයන්ට අනුව පැන නැගෙන පූර්ව නිගමනය මෙහි චෝදිතයා විසින් බිඳ හෙලා නැත.

නීතිවේදියෝ: රාජනීතිඥ ජී. ඊ. විට්ටි මහතා සමග නිමල් සේනානායක මහතා, ඒ. පී. අබේරත්න මහත්මිය සහ එන්. ජේ. අබේසේකර මහතා චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

සී. ඩී. එස්. සිරිවර්ධන මහතා සී. එම්.එම්. කරුණාරත්න මහත්මිය සමග, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

**ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා**

මෙම නඩුවෙහි පැමිණිල්ල අපරාධ නඩු විභාග සංග්‍රහයේ 148(1)(ඩී) ඡේදයට අනුව දමා තිබෙන්නක් සේ පෙනේ. පැමිණිල්ලේ මුලින් ම ඇති "මා ඉදිරියට පැමිණ දිවුරා කීය" යි යන වචන අතර වචන ලෙස හැඟෙන බැවින් ඒ වචන ගැන සැලකිල්ලක් නොදක්වීමට පුළුවන. කෙසේ හෝ මේ අනුව සිතාසි නිකුත් කරන ලදී. වර්ෂ 1963 අගෝස්තු මස 7 වැනි දින ඉදිරිපත් කරන ලද ලිඛිත රිපෝර්තුවේ පැමිණිලිකරු සුලු නගර සභාව ය. පැමිණිලිකරු ගැන සිතාසියේ සඳහන්කර තිබෙන්නේ වැලිමඩ සුලු නගර සභාවේ විදුලිබල අධ්‍යක්ෂකවරයා හැටියටය. "විදුලිබල අධ්‍යක්ෂකවරයා" යනුවෙන් ඇති මෙම වචන ද අතර වචන නිසා ඒවා ගැන නොසලකා සිටිය හැක.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 68 වෙනි පිට බලනු.

අපරාධ නඩු විභාග සංග්‍රහයේ 171 සහ 426 වන ඡේද මෙම නඩුවට අදාළ වේ. තමාට විරුඬ ව එල්ල වී ඇති චෝදනා මොනවාද යන්නත් මෙම පැමිණිල්ලේ ස්ථානය ගැනත් චිත්තිකරු මුල සිට ම අග දක්වා ම දැනගෙන සිටී බව සලකා ගතහැක. එම නිසා කොයි ලෙසකින්වත් ඔහුට අවාසියක් සිදුවී නැතිවාක් මෙන් ම වැරදිකරුවකු නිදහස් වීම හෝ නිවැරදි පුද්ගලයකු වැරදිකරුවකු වීම වැනි යුක්තිය කෙලෙසීමක් ද මෙහි සිඬ වී නැත. — ජයවර්ධන එ. අලුවිහාරේ. 64 සතිපතා නීති සංග්‍රහය 93 පිට බලන්න.

නමුත් මෙම නඩුවෙහි පිළිනොගතහැකි සාක්ෂි ඇතුලත් කර තිබීම ගැන කිසිදු සැකයක් නැත. කෙසේ වෙතත් එබඳු සාක්ෂි බැහැර කළ කල්හි පවා චිත්තිකරු මෙහි දී වැරදිකරු කිරීම යුක්ති යුක්තය යන්න ගැන සලකා බැලීමට බොහෝ සාක්ෂි තිබේ. මේ සම්බන්ධයෙන් කුලියාපිටියේ මහේස්ත්‍රාත් උසාවියේ 150, 39 සහ ශ්‍රේෂ්ඨාධිකරණයේ අංක 1130/64 දරණ නඩුවේදී 24.6.65 යන දින ශ්‍රේෂ්ඨාධිකරණය සඳහන් කරන ලද සටහන ගැන අවධානය යොමු කිරීම මැනැවි.

මෙම නඩුවේ විසඳීමට ඇති ඉතා ම සුලු ප්‍රශ්නය නම් චිත්තිකරු විසින් භාවිතා කෙරුනු විදුලි බලය මාපක යන්ත්‍රයේ සටහන් නොවන අයුරු එය ලබා ගැනීම සඳහා උපක්‍රමයක් යෙදෙන සේ ඔහු විසින් කම්බි ඇද තිබේ ද යන්නයි. චිත්තිකරු යටතේ වැඩ කළ සේවකයෙකු වූ තමාට ද පහර දෙන ලදැයි පැමිණිල්ලක් කළ කදිරවේලු නමැති පුද්ගලයා මෙම වැරදි ක්‍රියාවෙහි ආධාරකරුවකුගේ තත්වයට වැටෙන කෙනෙකි. කෙසේ හෝ ඔහුට පහර දෙන ලද නිසා ඔහු ගොස් සුලු නගර සභාවේ අධිකාරීන්ට ඔත්තුවක් දී තිබේ. වර්ෂ 1963 ජූලි මස 19 වැනි දින සුලු නගර සභාවේ සේවය කරන මෙම නඩුවේ පැමිණිල්ලට අත්සන් තබා ඇති විදුලි බල අධ්‍යක්ෂකවරයා සිනමා යන්ත්‍ර මැදිරි කාමරය පරීක්ෂා කරන විට ඔහුට පෙනී ගියේ මාපක යන්ත්‍රයෙහි නියම වශයෙන් ම භාවිතා වන විදුලි බලය පිළිබඳ ඒකීභූතරාශී සංඛ්‍යාව සටහන් නොවන ලෙස එය ලබා ගැනීම පිණිස කම්බි ඇද තිබූ බවකි. මේ නයින් බලන කල විදුලි බල අධ්‍යක්ෂක ප්‍රනාන්දුගේ සාක්ෂිය මෙම වරදට සහයෝගය දුන් කදිරවේලුගේ සාක්ෂිය සමග සැසඳෙන තත්වයකට යන බව මෙහි ලා කිවයුතුයි. මහේස්ත්‍රාන්වරයා කදිරවේලු ගැන අපරාධ සහායකයෙකු යැයි හුහක් වචන යොද සඳහන් කර නැතත් මෙම උපක්‍රමයෙන් කදිරවේලුට කිසිම වාසියක් නොලැබී ගිය අතර එය චිත්තිකරුගේ වාසියට හේතු වී ඇතැයි කීමෙන් මෙම ප්‍රශ්නය ගැන ඔහුගේ ද අවධානය යොමු වී තිබෙනසේ ය. එම නිසා පැමිණිලි කරන ලද ඇතුලත් නොකළ යුතු සාක්ෂි සියල්ල නොසලකා හැරියත් චිත්තිකරු වැරදිකරු බවට පත්කිරීමට බොහෝ සාක්ෂි තිබේ.

විදුලි බල පනතේ 65 වැනි ඡේදයේ සහ 67 වැනි ඡේදයේ පැන වී ඇති **පූර්** නිගමනය ගැන ඒ අනුව චිත්තිකරුට විරුඬව චෝදනා ඉදිරිපත් කරන ලද නිසා සලකා බැලිය යුතු යි. 65 වැනි ඡේදයේ මෙම කරුණට අදාළ වචන පහත පෙනෙන පරිදි ය. ''විදුලි බලය ඇද ගැනීමට යොදන ලද කෘත්‍රිම උපක්‍රමයන් ඇත් නම් එය ඒ ආකාරයෙන් වංචනික ලෙස සහ ප්‍රයෝගකාරී ලෙස විදුලි බලය ඇද ගැනීම පිළිබඳ බැලූ බැල්මට පෙනෙන සාක්ෂියකි.'' 67 වැනි ඡේදයේ අපට අදාළ වචන ගතහොත් මෙසේ ය. ''එබඳු විදුලි බලය ඇද ගැනීමේ සම්බන්ධකමක් ඇති කිරීමට කෘත්‍රිම උපක්‍රමයක් යම් කෙනකුගේ පරිහරණයෙහි තිබුණොත් .....එය .....එබඳු සම්බන්ධකමක් වෙනස් කිරීමක් හෝ වැළැක්වීමක් එසේ නැතහොත් විදුලි බලය දැන දැන ම ඕනෑකමින් ම චෝදනා ඉදිරිපත් කරන ලද නැනැත්තා විසින් කරන ලද බවට බැලූ බැල්මට පෙනෙන සාක්ෂියකි.'' මෙසේ පැන නැඟී ඇති පූර්ව නිගමනය බිඳ හෙලීමට චිත්තිකරු සමත් වී නැත.

සාක්ෂි ආඥා පණතේ 133 වැනි ඡේදයට අවධානය යෙදවීම මෙහිදී ගැලපෙන සේය. එහි පැනවී ඇත්තේ පහත පෙනෙන පරිදි ය.

> ''චෝදිතයකුට විරුඬව අපරාධ සහායයෙකු සුදුසු සාක්ෂිකාරයකු වන අතර එබඳු සහායයෙකුගේ තව සාක්ෂියක් සමග නොගැලපෙන සාක්ෂියකින් වුවද කෙරෙන වරදකරු කිරීමක් නීති විරෝධි නොවේ.''

එබැවින් කදිරවේලුගේ සාක්ෂිය තව සාක්ෂියක් සමග නොසැසඳෙන කලක වුව ද චෝදිතයා වරදට පත්කිරීම වෙනස් නොකර සිටීමට ඉඩ හැරීමට සුලුවන. නමුත් මෙම නඩුවේ දී කදිරවේලුගේ සාක්ෂිය සමග සැසඳෙන බොහෝ සාක්ෂි තිබිණි. එම නිසා කරුණු දෙක උඩ ම චෝදිතයා වරදකරුවීම ස්ථිර කිරීමට මම රිසියෙමි.

මේ ඉතා ම බරපතල වරදක් වන හෙයින් චිත්තිකරුට සැලකිය යුතු ප්‍රමාණ කාලයක සිර දඬුවමක් දීමට මට සිත් පහල වූ නමුත්, චෝදිතයාට සිනිමා හල කරගෙන යෑමට දී ඇති බලපත්‍රය ඔහුගෙන් ඉවත් කරන ලද බව මට දන්වන ලද නිසා මෙම දඬුවම වෙනස් කිරීමෙන් මම ඉතා ම අකැමැත්තෙන් වළකිමි. චෝදිතයා වරද කරු කිරීම හා ඔහුට දෙන ලද දඬුවම ද ස්ථිර කරමි.

**වරදකරු කිරීම හා**
**දඬුවම ස්ථිර කරණ ලදී.**

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු, ජ්‍යෙෂ්ඨ ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමන් සහ මානික්කවාසගර් විනිශ්චයකාරතුමන් ඉදිරිපිට

# ඩබ්ලිව්. ටී. ඇස්. ප්‍රනාන්දු සහ තවත් අය එ. ඇලිසන් ද සිල්වා*

සු.උ. අංකය 429/64 (අවසාන) — දි.උ. කොළඹ අංක 10220/එල්.

විවාද කළ දිනය: 10.9.66
තීන්දු කළ දිනය: 25. 10. 1966

**ගෙවල්හිමියා සහ බදුකරු — ගෙවල් හිමියාගේ අභාවයෙන් මාස්පතා බද්දක්ද? — ඔහුගේ අයිතිවාසිකම් හා යුතුකම් ඔහුගේ උරුමක්කාරයින් පිට පැවරේද?**

**තීන්දුව: මාස්පතා ගිවිසුමකට සම්බන්ධ ගෙවල් හිමියාගේ අභාවයෙන් පමණක් එම ගිවිසුම අහෝසි නොවේ. ප්‍රමාණවත් නිවේදනයකින් එය නිම නොකළේ නම් ඔහුගේ අයිතිවාසිකම් සහ යුතුකම් තමාගේ උරුමක්කාරයින් පිට පැවරේ.**

**එකඟ නොවූ තීන්දු: අබ්දුල් හපිල් සහ තවත් අය එ. මුත්තු බාතුල්. 58 වෙනි න.නී.වා. 492 වෙනි පිට.**

**නීතිවේදියෝ: රාජනීතිඥ සී. රෙත්ගනාදන් මහතා, ඩී. සී. සමරසිංහ මහතාත් සමග පැමිණිලි-ඇපැල්කරුවන් වෙනුවෙන්.**

**රාජනීතිඥ ජී. ටී. සමරවික්‍රම මහතා, ඇස්. ඩබ්ලිව්. වල්පිට මහතාත් සමග, විත්තිකාර-වගඋත්තර කරුවන් වෙනුවෙන්.**

**මානික්කවාසගර් විනිශ්චයකාරතුමා**

මෙම අභියාචනයෙහි අපට නිරාකරණය කිරීමට සිදුවී ඇති ප්‍රශ්නය ගෙහිමියාගේ මරණයෙන් මාස්පතා ගෙවල් කුලී ගෙවෙන කොන්ත්‍රාත්තුවක් නිමාවට යේද යන්නය.

ගෙහිමියාගේ මරණයෙන් එවැනි කොන්ත්‍රාත්තුවක් නිමාවට ගියේය යන්න පදනම්කොටගෙන මෙම නඩුවේ අභාවප්‍රාප්ත ගෙහිමියාගේ උරුමක්කාරයන් වන පැමිණිලි කරුවෝ එහි කුලියට පදිංචිව සිටිනා තැනැත්තා ඉන් පිටමං කිරීමට පරිශ්‍රමයක් දරති.

උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කළ පසු ඇපැල්කරුවන්ගේ නීතිවේදියා මෙහි දී කරුණු සැළකර සිටින්නේ එම විනිශ්චයකරුගේ තීරණය වැරදි බැව කියමිනි. ඔහුගේ තර්කය වී ඇත්තේ මාසික කොන්ත්‍රාත්තුවක් එහි පාර්ශ්වකරුවන්ගෙන් කොයි පක්ෂයක හෝ අභාවයෙන් නිමාවට යන බවකි. මෙබඳු කරුණු සැළකිරීමකට ඔහු ප්‍රතිශ්ඨාව කොට ගෙන ඇත්තේ අබ්දුල් හපිල් සහ තවත් කෙනෙක් එ. මුතුබාතුල් නැමැති අය අතර කියැවී (58 න.නී.වා. 409) වාර්තාවී ඇති නඩුවේ ඇතුළත් වී ඇති බස්නායක අග්‍රවිනිශ්චයකාරතුමාගේ (පුල්ලෙ විනිශ්චයකාරතුමාගේ අනුමැතිය ඇතුව) මතයක් මත ලැගුම් ගනිමිනි. එම මතය අනුව ගෙයක කුලියට පදිංචිව සිටින්නකුගේ අභාවයෙන් පසු එහි මාස්පතා කුලී ගෙවීමෙන් ලබන පදිංචිය නිමාවට යන බව හා ඔහුගේ අයිතිවාසිකම් හා බැඳීම් උරුමක්කාරයන් පිට නොපැවරෙන බවය. රෝම-ඕලන්ද නීතිය පිළිබඳ ග්‍රන්ථයන්හි ඇතුළත් යම් යම් කොටස් උපුටා දක්වමින් උගත් අගවිනිසුරුතුමා කියා ඇත්තේ මාසික පදිංචිවීමක් මසකට වඩා නොපවත්නා කොන්ත්‍රාත්තුවක් බවත් එය මාසයෙහි අවසාන දිනයෙහි අභාවයට යන නමුත් කොන්ත්‍රාත්තුවට ඇතුළත් පාර්ශ්වකරුවන්ගේ නිශ්ශබ්දතාවය හා හැසිරීම අනුව එය යළින් එක් එක් මසක පළමුවන දින නිරායාස යෙන්ම ප්‍රකෘතිමත් වන බවත්ය.

මාගේ අදහසේ හැටියට පූර්ව ග්‍රන්ථ කර්තෘවරයාගේ කෘතීන්ගෙන් උපුටා දක්වන ලද (නව වන ග්‍රන්ථය, පරිච්ඡේද 2, 9 සහ 10) කරුණු සහ සෙන්සියුරා ෆොරෙන්සිස් නැමැති ග්‍රන්ථයෙන් ද (iv. xxxii. 14) උපුටා දක්වනු ලැබූ එම නඩු තීන්දුවෙහි සඳහන් වී ඇති කොටස් ගැලපෙන්නේ නියමිත කාලසීමාවකට බෙදදෙන ලද කලක ඇති වන කොන්ත්‍රාත්තුවකට මිස එසේ නැති යම්කිසි කාලයකට කුලියට ගත් අවස්ථාවක දී නොවේ. බදු දී ඇති කාලසීමාව අවසන් වූ පසු යම්හෙයකින් බදුගත් තැනැත්තා එම බදු දී ඇති වස්තුව පරිභෝග කළහොත් එසේම එබඳු පරිභෝග කිරීමකට බදු දෙන්නාගේ අවසරය ලැබුණොත් එය ඒ අයුරින් සිදුවිය හැක. ඩයිජෙස්ට් (Digest) නැමැති ග්‍රන්ථයෙහි (19.214) ඇති කොටසක් උත්පාඨනය කොට දක්වන පොතියර් ගත්කතුවරයා මෙසේ කියා තිබේ.

''පුනරුත්ථාපන කොන්ත්‍රාත්තුවක් යනුවෙන් හැඟවෙන්නේ යම්කිසි බද්දක් දෙන කෙනෙකුගේ කැමැත්ත හා අවසරය ඇතිව එම බදු දෙන ලද කාලසීමාවෙන් පසුව බදුගත් තැනැත්තා තමා බදුගත් වස්තුව පරිභෝග කිරීමෙන් ඒ දෙදෙනා අතර යලිත් නිරායාසයෙන් ඇති වන කොන්ත්‍රාත්තුවකි. මේ නයින් බලන කල මෙසේ පැන නගින පුනරුත්ථාපන කොන්ත්‍රාත්තුව කලින් තිබූ බදු දීමේ කොන්ත්‍රාත්තුවේ දිගින් දිගට කෙරිගෙන යන කොටසක් නොවේ. නමුත් එය පාර්ශ්වකරුවන් අතර නිහඬ එකඟතාවයකින් පැන නගින අනුමැතියකින් පිහිටන අළුත් බදු දීමකි. මෙය කලින් පැවති කොන්-

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 70 වෙනි පිට බලනු.

ත්‍රාත්තුව අනුව පැවතීගෙන යන බව සැබෑය. (කුලියට දීමේ හා ගැනීමේ කොන්ත්‍රාත්තු — 342 ඡේදය, 1953 මුද්‍රණය)

ගෙයක මාසික පදිංචියක් මාසය අවසානයේ දී අවසන් වේය යන්න ගැන හෝ එය මසින් මසට නිරායාසයෙන් ම ප්‍රතිසංස්කරණය වේය යන්න ගැන හෝ මා එකඟ නොවෙන බව යන්න ගැන ගෞරවයෙන් මෙහිලා සඳහන් කරමි. මාසික පදිංචියක කොන්ත්‍රාත්තුවක් හැටියට සැලකෙන්නේ යම්කිසි කාලසීමාවක පදිංචියක් ඇති කරන කොන්ත්‍රාත්තුවකි. එය කොන්ත්‍රාත්තුවට ඇතුලත් පාර්ශ්වකරුවන්ගේ අනුමැතිය මසින් මසට පැවැත්වී ගෙන යන්නක් වන නමුත් **එය නිමාවට යන්නේ මාසයක නිවේදනයක් දීමෙනි.** ''ව්‍යවහාර නීතිය අනුව යම්කිසි කාල සීමාවක් තුළ කෙරෙන පදිංචියක් ඇති කරන කොන්ත්‍රාත්තුවක සාරය නම් යම්කිසි පාර්ශ්වකරුවකු විසින් නිවේදනයකින් එය නිමාවට පත් කරන තුරු එය අනුක්‍රමයෙන් එබඳු කාලසීමාවක් තුළ පැවැත්වී ගෙන යේ.'' ඉහත සඳහන් ප්‍රකාශය වෙල්ලේ ගත් කතුවරයා විසින් කරන ලද්දකි. (ගෙහිමියා සහ ගෙවල් කුලියට ගන්නා, 45 පිට, 5 වන මුද්‍රණය).

මේ නයින් සලකා බලන කල නියමිත කාලපරිච්ඡේදයේ ඇවැමෙන් නිමාවට යන නියමිත කාලපරිච්ඡේදයක් ඇතුළත පදිංචිවීමට ඉඩ ලැබෙන කොන්ත්‍රාත්තුවක් මෙන් නොව මාසික පදිංචියක කොන්ත්‍රාත්තුවක් අවසන් වන්නේ යුක්ති යුක්ත නිවේදනයක් නිකුත් කිරීමෙනි.

අප ඉදිරියේ විසඳීමට ඉදිරිපත් වී ඇති ප්‍රශ්නයට පිළිතුර ඇත්තේ අන් තැනකය. මෙය නිරාකරණය කෙරෙන ලිඛිත නීතිගත පැනවීමක් නොමැති නියා මේ සඳහා ව්‍යවහාර නීතිය කෙරෙහි අවධානය යොමු විය යුතුය. මේම ප්‍රශ්නයට අදාළවන ප්‍රඥප්ති පිළිබඳව පොතියර් ග්‍රන්ථ කතෘවරයා පහත සඳහන් අයුරින් කරුණු දක්වා තිබේ.

''බදු දීමේ කොන්ත්‍රාත්තුවක් එක් පාර්ශ්වකරුවෙකුගේ අභාවයෙන් නිමාවට නොයේ. නමුත් සෑම කොන්ත්‍රාත්තුවකට ම සාධාරණ වන රීතියක් අනුව එබඳු කොන්ත්‍රාත්තුවකින් පැනනගින අයිතිවාසිකම් හා බැඳීම් ජන්මාන්තරගත පාර්ශ්වකරුවාගේ උරුමක්කරුවන්ට හෝ ඔහුගේ බුදලය පිට හෝ නිතැතින්ම පැවරේ.'' (317 වන ඡේදය)

මෙම සාමාන්‍ය රීතියට ඇතුළත් නොවන අවස්ථා දෙකක් ගැන ඔහු විසින් සඳහන් කර තිබේ. එම අවස්ථා දෙක රෝම-ඕලන්ද නීතිය ගැන ග්‍රන්ථ නිර්මාණය කළ ලේඛකයන් විසින් ද පිළිගෙන තිබේ. එම කරුණු දෙක පහත සඳහන් වේ.

(1) බදුදෙන අයගේ නිමිකම් තමාගේ ජීවිතාන්තය දක්වා පමණක් නම් උදාහරණයක් වශයෙන් ගතහොත් ජීතකොමිසමක පාරිභෝගිකයෙකුගේ නඩය වැනි නඩුයක ඇති නිමිකමක් නම් එබඳු අවස්ථාවක දී බදු දෙන්නාගේ අභාවයෙන් එම බදුදීමේ කොන්ත්‍රාත්තුව ද නිමාවට පත්වේ.

(2) යම්කිසි බදුදීමක් බදු දෙන්නාගේ කැමැත්ත අනුව අහෝසි කළ හැකි නම් එබඳු කලක බදු දෙන්නාගේ හෝ බද්දට ගන්නාගේ හෝ අභාවයෙන් එම කොන්ත්‍රාත්තුව නිමාවට යේ.

බදු දීමේ කොන්ත්‍රාත්තුව යම්කිසි නියමිත කාල පරිච්ඡේදයකට සීමාවී ඇත්නම් කොන්ත්‍රාත්තුව පැවැත් වීගෙන යන එම කාල පරිච්ඡේදය ඇතුළත එකී කොන්ත්‍රාත්තුවේ පාර්ශ්ව කරුවන්ගේ දෙපක්ෂයෙන් එක් පක්ෂයක් වියගිය කල එම කොන්ත්‍රාත්තුව නිමාවට නොයාම ගැන සහ එවැනි අවස්ථාවක බදු දෙන්නාගේ හිමිකම ඔහුගේ ජීවිතාන්තය දක්වා සීමාවී නොමැති නම් එම බදු දීමෙන් ඔහුගේ බුදලය ද බැඳී ඇති බව ගැන ද යථොක්ත ග්‍රන්ථ කර්තෘවරයන් අතර ඒකමතික තාවයක් පෙනේ.

කරුණු මෙසේ නම් මෙම නඩුවේ පැන නැගී ඇති ප්‍රශ්නයට දියයුතු පිළිතුර කුමක් ද? යම්කිසි කාල සීමාවකට බදු දීමේ කොන්ත්‍රාත්තුවක් ඉහත සඳහන් ග්‍රන්ථවල පෙනෙන විශේෂ අවස්ථාවන්ට ඇතුළත් කිරීමට ඉඩක් නැත. එම නිසා එය නිමාවට යන්නේ දෙපක්ෂයෙන් එක් පක්ෂයක් විසින් දෙනු ලබන නිවේදන යකිනි. දෙපක්ෂයේ අනුමැතිය ඇතිව මසින් මස පැවැත්වී ගෙන යන කොන්ත්‍රාත්තුවක් යුක්ති යුක්ත නිවේදනය කින් නිමාවට පත් නොකළ කල ගෙහිමියාගේ මරණ යෙන් එය අභාවයට නොයේ. නමුත් ඔහුගේ අයිනි වාසිකම් හා බැඳීම් ඔහුගේ උරුමක්කාරයන් පිට පැවරේ, අප ඉදිරියේ දැනට ඇති මෙම නඩුවේද මෙහි ඇති පදිංචිවීමේ කොන්ත්‍රාත්තුව පැමිණිලිකරුවන් විසින් නිමාවට ගෙන ගොස් නැත.

එබැවින් පැමිණිලිකරුවන්ගේ නඩුව නිවැරදි ලෙස නිශ්ප්‍රභාකර තිබේ. මෙම අභියාචනය ද ඒ නිසාම අසාර්ථකවේ.

ගෙවල් කුලිය පාලනය කරන ලද නිවාසස්ථානයක කුලියට පදිංචිව සිටින කෙනෙකුට දිවංගත ගෙහිමියාගේ උරුමක්කාරයන් විසින් කොන්ත්‍රාත්තුව නිමාවට ගෙන ගිය කලක පවා ගෙවල් කුලි පනතින් ආරක්ෂාව ලැබෙද යන ප්‍රශ්නය ගැන මෙහි දී මාගේ අවධානය යොමු නොවිය. මා බැසගත් නිගමනය සලකා බලන කල එබඳු ප්‍රශ්නයක් සැලකිල්ලට භාජනය කිරීම අනවශ්‍ය සේ පෙනේ.

එසේම බස්නායක අගවිනිසුරුතුමාගේ මතය නිවැරදි යයි පිළිගත් කලෙක වුවද මාසික පදිංචියක් ලබා ඇති කෙනෙකුට තමාගේ ගෙහිමියාගේ මරණයෙන් පසු ගෙයින් පිටමං කිරීමට පරිශ්‍රමයක් දරන කලක ඔහුට එම පනතින් ආරක්ෂාව ලැබෙද යන වඩා පුළුල් ප්‍රශ්නය ගැනද මගේ අවධානය යොමු නොවිය.

පහළ උසාවියේ නඩු ගාස්තුව සහ මෙම උසාවියේ නඩු ගාස්තුව ද ඇපැල්කරුවන් විසින් ගෙවිය යුතුය.

**ගරු එච්. ඇන් ජී. ප්‍රනාන්දු, ශ්‍රේෂ්ඨාධිකරණයේ ජ්‍යෙෂ්ඨ විනිශ්චයකාරතුමා.**

මම එකඟවෙමි. **ඇපැල නිශ්ප්‍රභා විය.**

ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

## ඒ. ආර්. ඇම්. ඇල්. තම්බි ලෙබ්බෙ එ. පී. රාමසාමි*



ශ්‍රේ.අ. අංක 143 (ආර්.ඊ.) 1964 — ගම්පොළ රික්වැස්ට් උසාවිය 13624

විවාද කළ දිනය: 20 ජූලි 1965
තීන්දු කළ දිනය: 27 ජූලි 1965

ගෙවල් කුලි පණත — වෙළඳ ව්‍යාපාරයක් ආරම්භ කිරීමේ පරමාර්ථය පෙරදැරි වූ යුක්තියුක්ත ආවශ්‍යකත්වය සරිතේ ගෙහිමියා දැමූ නඩුවක් — ගෙහිමියාගේ ආදයම් තත්වය හීනවීම සහ තමාට හිමි ගෘහස්ථාන කිපයකින් එකක්වත් ලබාගැනීමට නොහැකිකම — අන් තැන්වල ගාබා පිහිටුවන ලද සමෘද්ධිමත් වෙළෙඳ ව්‍යාපාරයක් කුලියට සිටින තැනැත්තා විසින් කරගෙන යාම — ස්ථානය අත්හැර යාමට හෝ වෙන ස්ථානයක් සොයා ගැනීමට හෝ කුලියට ගත් තැනැත්තාගේ ඇති අකැමැත්ත — ගෙය අත් හැර යැමට දෙන ලද නිවේදනය — ගෘහස්ථානය උවමනා කළේ කුමන හේතුවක් නිසාදැයි යන්න එහි සඳහන් නොවීම — මෙබඳු නිවේදනයකින් ගෙහිමියාට අහිතකර සැලකීමක් ඇති විය හැකිද යන්න.

වරක් සාර්ථක ව්‍යාපාරිකයෙකු වූවත් මේ නඩුව දමන කාලයේ මුදල් තත්වයෙන් අබලන්ව තමාගේ අඹු-දරු පෝෂණය සඳහා තිබූ එක ම ආදයම් මාර්ගය ලෙස යම්කිසි ගෙවල් කුලියක් පමණක් ඇතුව සිටි පැමිණිලිකරු තමාගේ ගෘහස්ථානයක් (තේ කඩයක් සහ හෝටලයක් තිබුනු තැනක්) කුලියට ගත් අය වන විත්තිකරුට විරුද්ධව තමාට එම ස්ථානයේ රෙදි පිළි වෙළඳ ව්‍යාපාරයක් අරඹා ආදයම දියුණු කර ගැනීමට උවමනා නිසා එම ස්ථානය යුක්තියුක්ත ලෙස අවශ්‍ය වී තිබේ යයි නඩු පැවරී ය.

උගත් කොමසාරිස්වරයා පැමිණිලිකරුගේ ආදයම් දුර්වල තත්වය පිළිබඳව හා එහි ප්‍රතිඵලයක් ලෙස ඔහුගේ අවශ්‍යතාවයන් සපුරා ගැනීමට තමාගේ වටිනා දේපොළ විකිණීමට සිදු වූ බව ද පැමිණිලිකරුගේ සාක්ෂියෙන් පිළි ගත්තේ ය. එසේ ම පැමිණිලිකරුට තමා සතු ගෘහස්ථානයන් ගෙන් එකක් හෝ තමාගේ පරිහරණයට ලැබීමට නොහැකි කමින් ඔහු අමාරුවට වැටී සිටින බව ද ඔහු ඒත්තු ගත්තේ ය. නමුත් ගෙය අත්හැරීමට යවන ලද නිවේදන යෙහි එම ගෙය තමාට අවශ්‍ය වූයේ කුමන කරුණකට දැයි පැමිණිලි කරු සඳහන් කර නොමැති නිසා පැමිණිලි කරුගේ අවශ්‍යතාවය විත්තිකරුගේ අවශ්‍යතාවය අභිභවා තිබේ යයි තීරණය කිරීමට නොහැකි බව කීය.

තවද, විත්තිකරු තමාගෙන් කෝන්තර අසනු ලබද්දී පහත සඳහන් පරිදි කී සාක්ෂියෙන් වෙනත් ස්ථානයක් ලබා ගැනීමේ ප්‍රශ්නය මෙහි ලා බලපවත්වන අයුරු කල්පනා කර නැත.

(ඒ) තමාගේ ව්‍යාපාරය කරගෙන යාමට තවත් තැන් ඉඩ හැරි තිබෙදැයි තමා නොදත් බව.

(බී) පැමිණිලිකරු විසින් විත්තිකරුට වෙනත් සුදුසු තැනක් ලබාදුන්නත් විත්තිකරු යාමට අකමැති බව.

තීන්දුව: (1) ගෙයක් අත්හැර යාමට දෙනු ලබන නිවේදනයක එයට හේතුව හෝ මොනයම් හේතුවක් හෝ සඳහන් කළ යුතු යයි නීතිගත අවශ්‍යකමක් නොමැති කලක එබඳු නිවේදනයක එවැනි හේතුවක් නොමැතිකමින් එය පැමිණිලිකරුට අහිතකර යයි සලකා ගැනීම නිසා උගත් කොමසාරිස්වරයා කරුණු වරදවා වටහාගෙන තිබේ.

(2) මෙසේ උගත් කොමසාරිස් වරයාගේ සිතට බල පැවැත් වූ යට කී ලෙස කරුණු වරදවා වටහා ගැනීම ගැනත් එමෙන් ම

(ඒ) අන් තැනක් ලබාගැනීම ගැනත් එයින් විත්තිකරුගේ හිත නොහොඳකම අනාවරණය වීම ගැනත් නිගමනයට බැස ගැනීමේදී මේ දේ ගැන සිතා බැලීම කොමසාරිස් වරයා ගෙන් සිදු නොවීම ගැනත් සලකා බැලීමේදී ද

(බී) පැමිණිලි කරු තමාට අලුතින් රෙදි පිළි වෙළඳ ව්‍යාපාරයක් ඇරඹීමට උවමනා යයි කීම කොමසාරිස්වරයා විසින් පිළිගෙන තිබීම ගැන සලකා බැලීමේදී ද පැමිණිලිකරු නඩුවෙන් ජය ලැබීමට සුදුසු තත්වයක සිටී.

(3) කුලියට ගත් තැනැත්තා විසින් ව්‍යාපාරයක් කරගෙන යන ස්ථානයෙහි අළුත් ව්‍යාපාරයක් පටන් ගැනීම ගෙහිමියාගේ අවශ්‍යතාවය වුවද, ගෙහිමියාගේ එම ආවශ්‍යකත්වය අව්‍යාජ නම්, එසේ ම එය කුලියට ගෙන සිටින තැනැත්තාගේ ආවශ්‍යකත්වයට වඩා ඉක්මනින් සිදුවියයුතු දෙයක් නම්, ගෙහිමියාට එසේ තමාගේ ගෙය ලබා ගැනීමට නීතියෙන් සුදුසුකමක් ඇත්තේය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 83 වෙනි පිට බලනු.

**(4) ගෙහිමියාගේ ආවශ්‍යකත්වය හා සමගම කුලියට පදිංචිව සිටින්නාගේ ආවශ්‍යකත්වය ද යන දෙකම එක විට, එකට පැන නැගී ඇති නඩුවක, ඔවුන් එක් එක්කෙනාගේ සමෘද්ධිමත්කම සමාන කර බැලීම, එහි විනිශ්චයකට බැසීමට අවශ්‍යයෙන් ම තීරණාත්මක සාධකයක් නොවූවත්, එය එම කරුණට අදල ද වන්නේය.**

**නීතිඥවරු: ඇස්. ෂර්වානන්ද, ඇස්. රාජරත්නම් සමඟ, පැමිණිලිකාර-ඇපැල්කරුවන් වෙනුවෙන්.**
**ටී. බී. දිසානායක, විත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.**

**ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා**

විත්තිකරු විසින් නාවලපිටියේ තේ පැන් ශාලාවක් සහ හෝටලයක් පවත්වා ගෙන යමින් ව්‍යාපාරයක් කරන ස්ථානයකින් ඔහු පිටමං කිරීම සඳහා මෙම නඩුව පැමිණිලිකාර ඇපැල්කරු විසින් වගඋත්තරකරුට විරුද්ධව පවරා තිබේ. මෙම නඩුවෙහි පැමිණිලිකරුට අයත් ස්ථාන රාශියක් නාවලපිටි නගරයෙහි තිබේ. ඒ හැම එකක්ම කුලියට දී ඇත. නඩුවෙහි සාක්ෂිවලින් පෙනී යන පරිදි පැමිණිලිකරු කලක් ඉතාම සාර්ථක ලෙස ව්‍යාපාර ගෙන ගිය ලී වෙළෙන්දකු සහ කොන්ත්‍රාත් කරුවකු බව පෙනී යන අතර මෙම නඩුව දැමූ අවසියෙහි ඔහු නරක කාල පරිච්ඡේදයකට ගොදුරු වී තමාට අයිති ඉඩකඩම් රාශියක් විකුණා ඔහු විසින් ණය ගෙවීමට සිදු වී තිබෙන බව පෙනේ. මෙම නඩුව පවතින කාලයෙහි ඔහුගේ ප්‍රධාන ආදායම් මාර්ගය වූයේ ඔහුට ලැබුණු ගෙවල් කුලිය පමණි. මෙයින් ඔහුට තමාගේ භාර්යාව සහ එවකට අවිවාහකව සිටි දරු සතර දෙනෙකුගෙන් යුත් දරු පවුලක් නඩත්තු කිරීමට සිදු විය. ඔහුගේ සාක්ෂියට අනුව මෙම ඉඩමෙන් විත්තිකරු පිටමං කර ඔහුගේ ප්‍රයෝජනයට එය ගැනීමට අදහස් කරන ලද්දේ තමාගේ නැති වී ගිය ආදායම යළිත් ප්‍රකෘතිමත් කර ගැනීමේ චේතනාවෙන් එම ස්ථානයෙහි රෙදි පිළි වෙළඳාමක් ආරම්භ කිරීම පිණිසය.

උගත් කොමසාරිස්වරයාට මෙම නඩුවෙහි තීරණය කිරීමට තිබුණු ප්‍රධාන කරුණු වූයේ පැමිණිලිකරුගේ එම තර්කය වූ පරිදි ඔහුට මෙම ස්ථානයෙහි රෙදි පිළි වෙළඳාමක් ආරම්භ කිරීමට සිතක් පහළ වී තිබීම ඇත්තදැයි යන්න සහ එය ඇත්ත නම් ඔහුට යුක්ති යුක්ත ලෙස මෙම භූමි භාගය වුවමනා කර තිබුණිදැයි යන්න වේ. මේ තීරණය ගැනීමේ දී පැමිණිලිකරුගේ අවශ්‍යතාවයෙහි ඇති සම්බන්ධකම් විත්තිකරුගේ අවශ්‍යතාවයන් සමඟ එක්වරම ඔහුට සසඳා බැලීමට සිදු වේ. එම නිසා මෙම තීරණය ගැනීමේ දී එයින් උද්ගත වන අනික් කරුණු හැටියට වෙනත් කරුණු අතර පහත සඳහන් කරුණු ද පෙන්වා දිය හැකිය.

(ඒ) පැමිණිලිකරුට ඉඩ පහසු ඇති වෙනත් තැනක් ලබා ගැනීමට පුළුවන් වී තිබුණේද?

(බී) විත්තිකරුට ඉඩ පහසු ඇති වෙනත් ස්ථානයක් ලබා ගැනීමට පුළුවන් විද?

(සී) තමාට අයිති මෙම ස්ථානය නොලැබීමෙන් පැමිණිලිකරුට අයත් වන පාඩුව එම ස්ථානයෙන් විත්තිකරු පිටමං කිරීමෙන් විත්තිකරුට ඇති වන පාඩුවට වැඩිද?

(ඩී) තමාගේ සහ තමාගේ පවුලේ නඩත්තුව පිණිස ප්‍රමාණවත් වෙනත් ආදායමක් පැමිණිලිකරුට තිබුණේද?

(ඊ) විත්තිකරුට තමාගේ සහ තමාගේ පවුලේ නඩත්තුව ගෙන යාමට වෙන මාර්ගවලින් ප්‍රමාණවත් ආදායමක් තිබුණේද?

මේ ප්‍රශ්නයන්ගෙන් එක් එක් ප්‍රශ්නයට ලැබෙන පිළිතුර මුළු ප්‍රශ්න විසඳීමෙහි ලා තීරණාත්මක නොවන නමුදු පැමිණිලිකරුට තමාගේ එම ස්ථානය නොලැබී යාමෙන් ඇති වන දුර්භාග්‍යය විත්තිකරු එම ඉඩමෙන් පිටමං කිරීමෙන් ඔහුට ලභා වන දුර්භාග්‍යයට වඩා බර වැඩිවේද යන්න තීරණය කිරීමට මේ එක් එක් ප්‍රශ්නයට ලැබෙන පිළිතුර ඉවහල් වේ.

මතු වී තිබෙන මෙම ප්‍රශ්නය විසඳීමට උපයෝගි කර ගැනීමේ පරමාර්ථයෙන් දෙපක්ෂයටම පෙනී සිටි නීතිවේදියෝ සාධක පාඨ රාශියක් ගෙනහැර දක්වූහ. නමුත් එම සාධකවල සඳහන් ප්‍රඥප්තීන් දැනට අප ඉදිරියෙහි ඇති නඩුවට අදල වේද යන්න දුෂ්කර ප්‍රශ්නයන් වී ඇත්තේ උගත් කොමසාරිස්වරයා පැමිණිලිකරුගේ, සාක්ෂිය පිළිගත හැකිද නැද්ද යන්න ගැන තීරණයක් කර නොමැති නිසාය. නඩු නීත්‍යනුවෙන් කොමසාරිස්වරයා පැමිණිලිකරුගේ අසරණ ආර්ථික තත්ත්වය පිළිබඳව දෙන ලද සාක්ෂිය පිළිගත්තා ලද බව සහ එහි ප්‍රතිඵලයක් වශයෙන් ඔහුට අවශ්‍යකම් සපුරාලීම සඳහා ඔහු වෙත ඇති තැන්පත් පරිභෝග ද්‍රව්‍ය Capital Assets—විකිණීමට සිදු වූ බව පිළිගෙන තිබේ. එපමණක් නොව පැමිණිලිකරුට අයත් ස්ථාන රාශියක් තිබියදී මේ එකක් වත් ඔහුට ලබා ගත නොහැකි වීම නිසා ඔහුට දුර්භාග්‍යයකට එළඹීමට සිදු වී තිබීම ද කොමසාරිස්වරයා විසින් පිළිගෙන තිබේ. මේවා කෙසේ වෙතත්, ඉන් පසු කොමසාරිස්වරයා කාරණාවට අදල නොවන යම්කිසි

නිගමනයන් තමා කෙරෙහි බල පැවැත්වීමට ඉඩ දී ඇති සේ පෙනේ. එනම්, නියමිත ස්ථානයෙන් පිටමං වී යාමටැයි විත්තිකරුට යවන ලද නිවේදනයෙහි විත්තිකරුට එම ස්ථානය වුවමනා කර තිබුණේ රෙදි පිළි ව්‍යාපාරයක් හෝ වෙළඳාමක් ගෙන යාමට අවස්ථාව ලබා ගැනීමේ පරමාර්ථයෙන් යයි එහි සඳහන් නොවීමයි. නමුත් යම් ස්ථානයකින් බැහැර වී යාමට යවන නිවේදනයක එබඳු පරමාර්ථයක් හෝ කෙබඳු පරමාර්ථයක් වුවත් සඳහන් කළයුතු යයි නීතියෙන් කරන ලද පැනවීමක් නොමැති බව මෙහි ලා කිවයුතුය. මේ කරුණ වරදවා තේරුම් ගත් නිසාම පැමිණිලිකරු විසින් නඩුවෙහි දී ස්ථාපිත කරන ලද තත්ත්‍වය කොමසාරිස්වරයාට පිළිගැනීමට නොහැකි වී තිබෙන සේ පෙනේ. පැමිණිලිකරුගේ සාක්ෂි ගැන කල්පනා කළ පසු උගත් කොමසාරිස් වරයා පහත සඳහන් පරිදි ප්‍රකාශ කොට තිබේ.

"මෙම කරුණු යටතේ සලකා බලන කල පැමිණිලිකරුට ව්‍යාපාරයකට මෙම ස්ථානය අවශ්‍ය වී තිබෙය යන්න හෝ පැමිණිලිකරුගේ අවශ්‍යකම් විත්තිකරුගේ අවශ්‍යකම්වලට වඩා ගරුක තත්වයක ඇති බව හෝ මට පිළිගත නොහැක."

පැමිණිලිකරුගේ සාක්ෂියක් පිළිගත හැකිද නැද්ද යන කරුණ ගැන නියම තීරණයකට ඔහු බැස ගත්තේ නම් ඉහත සඳහන් ප්‍රකාශය නොගැලපෙන ප්‍රකාශයක් සේ මට හැඟී යයි. එයට හේතුව, පැමිණිලිකරුගේ සාක්ෂියෙන් ඔහුට හැඟීමක් ඇති නොවූයේ නම් එම නිසා ඇත්ත වශයෙන් පැමිණිලිකරුට ව්‍යාපාරයක් ගෙන යාම සඳහා එම භූමි භාගය වුවමනා කර තිබුණු බව ඔහුට පිළිගැනීමට නොහැකි වූයේ නම් පැමිණිලිකරුගේ අවශ්‍යකම විත්තිකරුගේ අවශ්‍යකමට වඩා ගරුක බවක් නැනැයි කීම කිසිසේත් අවශ්‍ය නොවෙන සේ පෙනේ. එයින් පසු ඔහු කරන ලද ප්‍රකාශය මෙසේය:

"මෙයින් විත්තිකරුටද ඒ සමානම විශාල දුර්භාග්‍යයක් උදාවෙයි."

සාර්ථකව විත්තිකරු දැනට කර ගෙන යන ව්‍යාපාරය වසා දැමීමට සිදු වන්නේ පැමිණිලිකරුගේ සැප පහසුව සලකා ගෙන බව ඔහු කියන නිසා එවැනි ප්‍රකාශයක් ද කිසිසේත් මෙහිලා අනවශ්‍ය බව කිව යුතුය. පැමිණිලිකරුගේ සාක්ෂියෙන් ඔහුට කිසිම දුර්භාග්‍යයක් ළඟා වෙයයි නොපෙනේ නම් සමාන හෝ ගරුකතර හෝ දුර්භාග්‍යයක් ගැන ප්‍රශ්නයක් පැන නොනගී. තවදුරටත් සලකා බලන කල විත්තිකරුට ඉඩ පහසුකම් ඇති වෙනත් ස්ථානයක් ලබා ගැනීමේ අවස්ථාව පිළිබඳ ප්‍රශ්නයෙහි ඇති සම්පූර්ණ වටිනාකම් ගැනද කොමසාරිස් වරයා කල්පනා කර නැත. කෝන්තරවලට පිළිතුරු දෙන විත්තිකරු පහත සඳහන් පරිදි කියා තිබේ:—

"මගේ ව්‍යාපාරය වෙන තැනෙකට ගෙන යාමට මම කිසි පරිශ්‍රමයක් නොදරමි. එම පාරේම ඒ පැත්තේ ෂහුල් හමීඩ් නමැත්තෙකුට අයිති අළුත් ගොඩනැගිලි නිමාවට පත් වී දැන් කලක් තිස්සේ හිස්ව තිබෙදැයි මම නොදනිමි. කොත්මලේ පාරේ කදිරේසන් මහා විද්‍යාලයට ඔබබෙහි ගොඩනැගිලි 4 ක් හෝ 5 ක් හිස්ව තිබෙන බව ද මම නොදනිමි. අළුත් ගොඩනැගිලි නිබේ දැයි සොයා බැලීමට මා විසින් සැලකිල්ලක් නොදක්වන ලදී. මෙම කඩයට යාබඳව තවත් යාප්පුවක් තිබෙදැයි මම නොදනිමි. මෙම කඩයට ආසන්නව ගොඩනැගිල්ලක් මට දෙන ලද කලෙක වුව ද මම එතැනට යාමට සූදානම් නොවෙමි. මා දැන් සිටින තැන මට ඉතාම සුදුසු ස්ථානයයි. කොතරම් සුදුසු වුවත් දැන් සිටින තැනින් පිටවී මගේ ව්‍යාපාරය ගෙන යාමට මා සූදානම් නැත. මා වෙන තැනෙකට යාමට බලාපොරොත්තුවක් නැත. යම් භෙයකින් පැමිණිලිකරු විසින් මට තවත් ස්ථානයක් ලබා දුන්නත් මා එතැනට යන්න සූදානම් නැත."

මෙම සාක්ෂිය පරීක්ෂා කරන විට විත්තිකරුගේ ද්වේෂ පරවශ චේතනාව පැහැදිලිව පෙනේ. එම නිසා පැමිණිලිකරුට ඔහු දක්වන විරෝධය සාර්ථක වන්නේ ඔහු කොතරම් උත්සාහ කළත් ඔහුගේ ව්‍යාපාරයට සරිලන සුදුසු වෙනත් තැනක් ලබා ගැනීමට ඔහුට නොහැකි වුවොත් පමණකි. මෙය පවා ඉටු වන්නේ පැමිණිලිකරුට සහ විත්තිකරුට මුහුණ දීමට සිදු වන තත්ත්වය ගැන සංසන්දනය කළ පසුව පමණකි. උගත් කොමසාරිස්වරයාගේ නඩු තීන්දුවෙහි ඔහු මෙම විත්තිකරුගේ සාක්ෂිය කොහෙන්ම සලකා බලන ලද බවක් නොපෙනේ.

මේ හේතුවෙන් පැමිණිලිකරුගේ සාක්ෂි සලකා බැලීමේ දී උගත් කොමසාරිස්වරයාගේ සිතට බලපාන ලද කරුණු වරදවා තේරුම් ගැනීමත්, අනික් අතින් විත්තිකරු තමාටම විරුද්ධව කරන ලද වැදගත් පිළිගැනීම් සලකා නොබැලීමත් නිසා පැමිණිලිකරුගේ තත්ත්වය ජය ගතයුතු යයි මට තීරණය නොකොට නොහැකි බව කිවයුතුය. කෙසේ හෝ වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි නීතිවේදියා "විත්තිකරුගේ ව්‍යාපාරයට මෙම ස්ථානයේ ඇති අවශ්‍යකම පැමිණිලිකරුට ඇති අවශ්‍යකමට වඩා ගරුකද?" යන ප්‍රශ්නයට "ඒ එසේමයි" යනුවෙන් කොමසාරිස්වරයා විසින් පිළිතුරු දී තිබෙන බව පිළිබඳව මගේ අවධානය යොමු කෙළේය. නමුත් මා විසින් කරන ලද පරීදි නඩු තීන්දුවේ ඉහත සඳහන් කරුණු බෙදා බැලීමේදී එම පිළිතුර සැලකිය යුතු තරම් තත්ත්වයකින් මගේ මතය වෙනස් කිරීමට තරම් ඉඩ නොදෙන බව කියමි.

එම නිසා තමාගේ නඩු තීන්දුවෙහි එක්තරා අවස්ථාවක නියම වශයෙන් උගත් කොමසාරිස්වරයා කියා ඇති පරිදි පැමිණිලිකරුගේ අපහසුව යටත් පිරිසෙයින් විත්තිකරු එම ස්ථානයෙන් පිටමං කිරීමෙන් විත්තිකරුට ඇති වන ප්‍රතිඵලයට වඩා නොඅඩු බව පැමිණිලිකරු විසින් ස්ථාපිත කොට ඇති බව මට ද හැඟියයි. වැඩි දුරටත් විත්තිකරු විසින් කියන ලද පරිදි ඔහුට තමාගේ ව්‍යාපාරය ගෙනයාමට ප්‍රයෝජන ගතහැකි තවත් ස්ථාන බොහොමයක් ඇති බව ඔහු නොදන්නා බව කියා තිබේ. කෝන්තර ඇසීමේ දී මෙවැනි ස්ථාන තවත් ඇති බව අදහස් කිරීමෙන් තේරුම් ගතහැක්කේ තවත් සුදුසු ස්ථානයන් ඇති බවයි. තමාට සුදුසු ස්ථානයක් ලද කලෙක එසේ නැතහොත් පැමිණිලිකරු විසින් තමාට සුදුසු ස්ථානයක් ලබා දුන් කලෙක පිට වී යාමට බලා පොරොන්තු නොවන්නේ යයි විත්තිකරු කියා සිටීමෙන් ඔහුගේ තත්වය තවත් දුර්වල විය.

මෙම තීරණය පදනම් කොට ගෙන නිතිවේදීන් විසින් මට පෙන්වන ලද මෙම උසාවිය විසින් කලින් දෙන ලද තීරණ කීපයක් ගැන සලකා බැලීමට මම දැන් සූදානම් වෙමි. **මෙන්ඩිස්** එ. **පර්ඛිනන්ස්** අතර කියවුණු 51 නව නීති වාර්තාවෙහි ඇතුළත් වූ නඩුවේ 427 වෙනි පිටුවෙහි ශ්‍රේෂ්ඨාධිකරණයේ ජ්‍යෂ්ඨ විනිශ්චයකාර ඩයස් මහතා විසින් ගෙහිමියා හෝ කුලියට ගත් තැනැත්තා තම තමන්ගේ නඩු දිහිමට ඔවුනට තිබිය යුතු අවශ්‍ය කම් 3 ක් පෙන්වා දී තිබේ. එනම්:—

1. ගෙහිමියාට සහ කුලියට පදිංචිව සිටින්නාට උදා වන දුර්භාග්‍ය සම බර වූ කල ගෙහිමියාගේ ඉල්ලීම ජය ගතයුතුයි.
2. ගෙහිමියාගේ දුර්භාග්‍යය කුලියට ගත් තැනැත්තාට උදාවන දුර්භාග්‍යයට වඩා ගරුක වූ කලෙක ගෙහිමියාගේ ඉල්ලීම ඉටු විය යුතුයි.
3. කුලියට ගත් තැනැත්තාට ඇති වන දුර්භාග්‍යය ගෙහිමියාගේ දුර්භාග්‍යයට වඩා බරපතල නම් ගෙහිමියාගේ නඩුව නිෂ්ප්‍රභා කළ යුතු ය.

යම් කෙනෙකු ඉහත සඳහන් කරුණු පදනම් කොට එනයින් මාර්ගොපදේශිතව කටයුතු කරන කල ඉහත සඳහන් පරිදි මා විසින් පිළිගෙන තිබෙන කරුණු අනුව ඒ අය කළ යුත්තේ පැමිණිලිකරුට පක්ෂව මෙහි තීරණය දීමයි. 56 නව නීති වාර්තා 161 වන පිටේ වාර්තා කරන ලද **සුප්පයියා** එ. **යමරකෝන්** අතර කියැවුනු නඩුවෙහි සන්සෝනි විනිශ්චයකාරතුමා විසින් පහත සඳහන් පරිදි නිගමනය කර තිබේ:

''ගෙහිමියාට යුක්තියුක්ත ලෙස කුලියට දෙන ලද ගෙයක් වුවමනාදායි තීරණය කිරීමෙහි දී එම ගෙයි ම පදිංචිව සිටීමෙන් එම ගෙය කුලියට ගත් තැනැත්තාට ඇති වන වාසිය ගැන ද එමෙන් ම ඒ අනුව ඔහු ගෙයින් පිට මං කළ විට ඔහුට ඇති වන පාඩුව ද යන දෙක සලකා බැලිය යුතු ය.''

වග උත්තරකරුගේ නීතිවේදියා තමාගේ ප්‍රතිඵ්‍යාව පිණිස එම නඩුවෙහි විද්‍යමාන වන මෙම ප්‍රඥප්තිය මෙම නඩුවේ දී අදාළ කරගත් නමුත් මෙහි දී විත්තිකරු විසින් ම තමාගේ තත්ත්වයෙහි ශක්තිය තමාගේ සාක්ෂියෙන් සැහෙන ප්‍රමාණයකින් අඩුකර ගෙන තිබෙන බව කිව යුතු ය. තවත් සුදුසු ස්ථාන රාශියක් ප්‍රයෝජන ගත හැකි පරිදි තිබෙන බව කියමින් කරන ලද ප්‍රකාශයට ඔහුට විරෝධය දක්වීමට නුපුළුවන් වූවා පමණක් නොව ඔහුට වෙන භූමියක් යපයා දුන් කලෙක පවා ඔහු එතැනින් පිටවී යාමට සූදානම් නැති බව කියන තත්ත්වයක එල්බ ගෙන කුලියට ගත් තැනැත්තා තදින් ස්ථාවරව සිටියේය.

පැමිණිලිකරු විසින් ද මේ ප්‍රදේශයෙහි හිස් වූ ස්ථාන ලබා ගැනීමට අපහසු බවක් තිබේ යයි දක්වමින් කරන ලද සාමාන්‍ය පිළිගැනීමක් නිසා මගේ අදහසේ හැටියට විත්තිකරුට වෙනත් හිස් ස්ථාන තිබෙය යන අදහස ඉදිරිපත් කළ විට ඊට විරුද්ධ වීමට නොහැකි වීම සහ ඔහුගේ සාක්ෂියෙන් අනාවරණය වී තිබෙන ද්වේෂ පරවශ භාවය ගැන සලකා බලන විට තත්වය එතරම් වෙනසක් වේ යයි මම නොසිතමි. ගෙහිමියාට රෙදිපිළි ව්‍යාපාරයක් අළුතෙන් කර ගෙන යාමට ඇති අවශ්‍යතාවය ගැන දුන් සාක්ෂිය උගත් කොමසාරිස්වරයා විසින් පිළිගෙන තිබෙන බව හැඟී යන නිසා මෙහි දී ගෙහිමියාගේ ආවශ්‍යකත්වය වඩා බරපතල බව කිව යුතු ය. කුලියට දෙන ලද ගෙයක් අළුත් ව්‍යාපාරයක් පටන් ගැනීමේ ආවශ්‍යකත්වය උඩ නැවත ලබා ගැනීමට ගෙහිමියකුට අයිතියක් තිබේ ද, නැද්ද යන ප්‍රශ්නය සම්බන්ධව **අන්ද්‍රි** එ. **ද ෆොන්සේකා** අතර කියැවුණු 51 නව නීති වාර්තාවේ 213 වන පිටේ වාර්තා වී ඇති නඩුව සහ **නානායක්කාර** එ. **පබලිස් සිල්වා** අතර කියැවුණු 60 නව නීති වාර්තාවේ 490 වන පිටේ වාර්තා වී ඇති නඩුව ද නීති වේදියා මා ඉදිරියේ ගෙනහැර පෑවේ ය. මේ නඩු දෙකේ පරස්පර විරෝධී මතයන්හි එල්බ ඇණී බව පෙනෙන නිසා විනිශ්චයට භාජන වී ඇති නඩුවෙහි දැනට කුලියට ගත් තැනැත්තා විසින් ව්‍යාපාරයක් කර ගෙන යන ස්ථානයෙහි අළුත් ව්‍යාපාරයක් පටන් ගැනීම ගෙහිමියාගේ අවශ්‍යතාවය වුව ද ගෙහිමියාගේ එම ආවශ්‍යකත්වය අවාහ නම් එසේ ම එය කුලියට ගෙන සිටින තැනැත්තාගේ ආවශ්‍යකත්වයට වඩා ඉක්මණින් සිදු විය යුතු දෙයක් නම් ගෙහිමියාට එසේ තමාගේ ගෙය ආපසු ලබා ගැනීමට සුදුසුකමක් තිබෙය යන මතය පිළිගැනීමට මම කැමැත්තෙමි. මෙම ප්‍රකාශයන්ට අතිරේකව, ගෙහිමියාගේ ආවශ්‍යකත්වය හා සමගම කුලියට පදිංචිව සිටින්නාගේ ආවශ්‍යකත්වය ද යන දෙකම එක විට, එකට පැන නැගී ඇති නඩුවක ඔවුන් එක් එක්කෙනාගේ සමෘද්ධිමත්කම සමාන කර බැලීම, එහි විනිශ්චයකට බැසීමට අවශ්‍යයෙන් ම තීරණාත්මක සාධකයක් නොවූවත් එය එම කරුණට අදාළ බව ද කියනු කැමැත්තෙමි. මෙම නඩුවෙහි සාක්ෂි සම්පූර්ණයෙන් ගෙන සලකා බලන කල ගෙහිමියාගේ සමෘද්ධිමත් භාවය ක්‍රමක්‍රමයෙන් අඩු වී යාමට පටන් ගෙන ඇති අතර එම ස්ථානය කුලියට ගත් තැනැත්තාගේ තත්ත්වය ක්‍රමක්‍රමයෙන් වර්ධනය වී ඔහුගේ ව්‍යාපාරික ස්ථාන යාබද නගරවලටත් විහිදී ගොස් ඇති බව පෙනේ.

ඉහත සඳහන් හේතූන් නිසා මෙම ආයාචනයට ඉඩ දෙන මම උගත් කොමසාරිස්වරයාගේ නියෝගය, ප්‍රතික්ෂේප කරන අතර පැමිණිල්ලේ යාඥා කර තිබෙන අන්දමට ම පැමිණිලිකරුගේ වාසියට නඩු තීන්දුව දෙමි.

ඇපැල් උසාවියේ සහ පහළ උසාවියේ නඩු ගාස්තුව ද පැමිණිලිකරුට අය කර ගත හැක.

**ඇපැලට ඉඩ දෙන ලදී.**

සන්සෝනි අග්‍රවිනිශ්චයකාරතුමා සහ සිවසුප්‍රමනියම් විනිශ්චයකාරතුමා ඉදිරිපිට

# හෙන්ද්‍රික් අප්පුහාමි එ. ජෝන් අප්පුහාමි*

ශ්‍රේ.අ. අංක 261/65(එෆ්ප්) — මීගමුවේ දිස්ත්‍රික් උසාවියේ අංක 643/එල්


විවාද කළ දිනය: 25 සැප්තැම්බර් 1966
තීන්දු කළ දිනය: 10 ඔක්තෝබර් 1966

කුඹුරු පණත — 1958 අංක 1, එහි 3, 4, 6, 7, 8, 14 සහ 21 වන ඡේද—තමාගේ කුඹුර වපුරන ගොවියා එය කායර්ක්ෂම ලෙස නොකරන බව කියමින් එම ගොවියා ඉන් පිටමං කිරීමට කුඹුරු හිමියකු විසින් දිස්ත්‍රික් උසාවියේ දමන ලද නඩුවක්—කුඹුරු පණතේ පැණවීම් අනුව සලකා බලන කල එම පණතේ පැනවීම් අනුගමනය නොකර එම නඩුව පැමිණිලිකරුට කියා ගෙන යා හැකි ද?

කුඹුරු හිමියකු ලෙස මෙහි ඇපැල්කරු තමාගේ කුඹුර වපුරන ගොවියා එය කායර්ක්ෂම අන්දමට නොකරන නිසා ඔහු ඉන් පිටමං කිරීමට උත්සාහ කරන අයුරින් මෙම නඩුව දමා තිබේ. වර්ෂ 1958 අංක 1 දරණ කුඹුරු පණතේ පැණවීම්වලට අනුව මෙම නඩුව කියාගෙන යාමට නොහැකි බව විත්තියෙන් සැලකර සිටියේය. එම පණතෙහි තමාගේ අධිකරණ ආඥා බලය ඉවත් වන කිසිම ඡේදයක් නොමැති බව කී උගත් දිස්ත්‍රික් විනිශ්චය කාරතුමා පැමිණිලිකරුට වාසියට තීන්දුව දුන්නේ ය. විත්තිකරු අභියාචනයක් ඉදිරිපත් කෙළේය.

තීන්දුව: තමාගේ කුඹුර යෝග්‍ය ලෙස වගා කරවීමට හෝ තමාගෙන් වැඩ කිරීමට ගත් ගොවියා කුඹුරෙන් ඉවත් කිරීමට හෝ උවමනා වූ විට කුඹුරු හිමියා ගත යුතු මාර්ගය වර්ෂ 1958 අංක 1 දරණ කුඹුරු පණතෙහි ම ඇතුලත් වී තිබේ. මෙම පණත පැණවුනු පසු කුඹුරු හිමියා විසින් අනුගමනය කළ යුතුවූ ඒකායන මාර්ගය මෙය වේ. එහි ප්‍රතිඵලයක් වනුයේ පැමිණිලිකරු විසින් මෙබඳු නඩුවක් ඉදිරිපත් නොකර සිටිය යුතු බවය.

සන්සෝනි අග්‍රවිනිශ්චයකාරතුමා: "3 (2) ඡේදයෙහි ගැබ්වී ඇති අන්දමට විශේෂ ව්‍යතිරේකයක් නොපෙනෙන නිසා 4(1) ඡේදයේ යෙදී ඇති එම වචනයට අධිකරණ නියෝගයකින් පිටමං කිරීම ද ඇතුලත් වී ඇති බව මාගේ නිගමනයයි."

නීතිඥවරු: ජේ. ඩබ්ලිව්. සුබසිංහ මහතා, ආර්. ඇල්. ඇන්. ද සොයිසා මහතා සමග විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ ඇන්. ර්. විරසූරිය මහතා, ඩබ්ලිව්. ඩී. ගුණසේකර මහතා සමග පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු සන්සෝනි අග්‍ර විනිශ්චයකාරතුමා,

කුඹුරු හිමියෙක් මෙම නඩුවෙන් එහි ගොවිතැන් කරන තැනැත්තා පිටමං කර ගැනීමට පරිශ්‍රමයක් දරයි. එම කුඹුරු අයථා අන්දමින් භුක්ති විඳීම ගැන ඔහු අලාභයක් ද ඉල්ලා සිටියි. වර්ෂ 1963 ඉදිරිපත් කරනු ලැබූ ඔහුගේ පැමිණිල්ලෙන් එම කුඹුරු කායර්ක්ෂම අයුරින් අස්වැද්දීමට විත්තිකරු අපොහොසත් වූ බවත් ඒ හේතුවෙන් එහි පලදව ක්‍රමක්‍රමයෙන් පිරිහුණු බවත් ඔහු කියා සිටියි. තමා විසින් එම කුඹුර යෝග්‍ය ලෙස වගා නොකළේයයි චෝදනා මුඛයෙන් කරන කථාව පිළිනොගත් ඔහු මෙම නඩුව වර්ෂ 1958 කුඹුරු පණත අනුව සලකා බලන කල කියා ගන යා නොහැකැයි යන වැදගත් නීති ප්‍රශ්නයක් ද මතු කෙළේ ය.

මෙම කරුණට අදළවන කාල පරිච්ඡේදයේ දී එම පණත එකී ප්‍රදෙශ සීමාව තුළ බල පැවැත් වූ බව නඩුවේ දී

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 71 වෙනි කා., 97වෙනි පිට බලනු.

පිළිගෙන තිබේ. පණතේ දීර්ඝ නාමය ගැන කල්පනා කිරීමේ දී ''එය කුඹුරු වපුරන්නන්ට තම සේවය සුරක්ෂිත කිරීමේ පරමාර්ථයෙන් එම පණත පැණවුනු'' බව සහ අනිකුත් වෙන කරුණු රාශියක් එයින් පැණ වී ඇති බව පෙනියේ.

මේ සම්බන්ධයෙන් පණතේ ගැබ් වී ඇති ඇතැම් පැණවීම් කල්පනාවට ගන්නේ නම් මැනවි. එහි 4(1) ඡේදයේ මෙසේ පැණ වී තිබේ. කුඹුරු වපුරන්නකුට මෙම පණතේ පැණවීම් අනුව තමා ලද කුඹුර එහි බිම් ප්‍රමාණය කවරක් හෝ වේවා එහි වාසය හා එහි පරිහරණය ලැබීමේ අයිතිවාසිකම ලැබිය යුතුවාක් මෙන් ම එබඳු වපුරන්නකුට එම කුඹුර පවරා දීමේ දී ඇති කරගන්නා ලද වාචෝද්ගත හෝ ලිඛිත සම්මුතියක ඇති කෙබඳු ප්‍රඥප්තියක වුව ද පිළිපරණ ලබා ඔහු, ඒ කුඹුරෙන් පිටමං කර දැමීමට නොහැකි වන අතර එහි වාසය හා පරිහරණය ඔහු විසින් කර ගෙන යාමේ අන් කිසිම පුද්ගලයකුට එයට අවහිර කිරීමට නොහැකි වනු පමණක් නොව කුඹුරු හිමියාට එසේ වැඩ කිරීමට දුන් අයගෙන් ඒ කුඹුරු බිම් ප්‍රමාණය සඳහා මෙම පණතින් ඉඩ ලැබී තිබෙන මුදලට වැඩි මුදලක් ඉල්ලීමට හෝ ලබා ගැනීමට ද නොහැකි වේ.

පිටමං කිරීම යන්න 63 වන ඡේදයේ කුඹුර වපුරන්නා ගැන විස්තර කර තිබෙන්නේ ''තමාගේ වාසයට, පරිහරණයට හා එහි සම්පූර්ණ ප්‍රමාණය හෝ කොටසක් වගා කිරීමට තමාට ඇති අයිතිවාසිකම ප්‍රකට හෝ ගුප්ත විධියකින් ඔහුගෙන් බැහැර කිරීම''ය කියා ය.

යම් හෙයකින් කුඹුර වපුරන තැනැත්තකු මෙම පණත එම ප්‍රදේශයට බල පැවැත්වීමට පෙර යම් කුඹුරකින් අධිකරණ නියෝගයක් නොමැතිව පිටමං කළ කලෙක ගොවිජන සේවා කොමසාරිස්වරයාට පැමිණිලි කිරීමට ඔහුට 3(2) ඡේදය අනුව ඉඩ දී ඇත. මෙම කරුණට මා අවධානය යොමු කලේ 4(1) ඡේදයේ ඇති පිටමං කිරීම යන වචනයට අධිකරණ නියෝගයකින් පිටමං කිරීමත් ඇතුළත් ද යන්න ගැන විනිශ්චය කළ යුතු නිසා ය. 3(2) ඡේදයේ ගැබ් වී ඇති අන්දමට විශේෂ ව්‍යතිරේකයක් නොපෙනෙන නිසා 4(1) ඡේදයේ යෙදී ඇති එම වචනයට අධිකරණ නියෝගයකින් පිට මං කිරීම ද ඇතුළත් වී ඇති බව මාගේ නිගමනයයි. තමා කුඹුරෙන් පිටමං කරන ලදුයි ගොවියකු පැමිණිලි කළ විට කුඹුරු හිමියාගෙන් කරුණු විමසූ කොමසාරිස් වරයාට එම කුඹුරේ පරිහරණය සහ වාසය යළි ලැබිය යුතුයයි ද එහි නිවැසි අනිත් සෑම කෙනෙකු ම පිටවිය යුතු යයි ද තීරණයකට සුදුසු පරිදි බැස ගැනීමට 4(1ඒ) ඡේදයෙන් ඉඩ දී තිබේ.

කුඹුර වපුරන්නාගේ අයිතිවාසිකම් සුරැකෙන අයුරු පැණවීම් 4 වන ඡේදයෙහි ද තිබේ. උදාහරණයක් වශයෙන් කුඹුරු හිමියා සිය කැමැත්තෙන් හෝ බලකරනු ලැබීමෙන් හෝ කුඹුර විකුණු කලක වේවා, තෑගිකරයකින්, අන්තිම කැමති පත්‍රයකින් හෝ අන් අයුරකින් පවරා දුන් කලක වේවා, එම කුඹුරේ අයිතිවාසිකම, හිමිකම, සම්බන්ධකම උරුමයෙන් පැවරී ගිය කලක වේවා කිසිම විධියකින් කුඹුර වැඩ කරන්න ගොවියාගේ අයිතිවාසිකම් නොකෙලෙසෙනු ඇත. 4(3) වන ඡේදය කිසිම උසාවියක ආඥා, නියෝගයකින් කුඹුර වපුරන අයගේ අයිතිවාසිකම් තහනම් කිරීමට, අල්වා ගැනීමට හෝ විකිණීමට හෝ නොහැක. 4(4) උප ඡේදය.

කුඹුරු පණත ප්‍රදේශයේ බලපැවැත් වෙන කාලයක කුඹුර වපුරන්නකු ලෙස ගිණිය හැකි යම්කිසි පුද්ගලයකු පිටමං කිරීම කොමසාරිස්වරයාගේ ලියමනකින් අනුමැතිය ලබා මිස කුඹුරු හිමියකුට කළ නොහැක්කක් බව 4(5) ඡේදයෙන් පෙනේ. 4(9) ඡේදයෙන් පෙනෙන පරිදි උප ඡේද (1) සහ (5) උල්ලංඝනය කළ කෙනකු. දඩ ගැසිය හැකි වරදක් කළ කෙනෙකි. මෙම පණතින් පිරිනැමෙන අයිතිවාසිකමක් හෝ වරප්‍රසාදයක් හෝ ක්‍රියාවේ යෙදවීම වළක්වන අටියෙන් කුඹුර වපුරන්නකුට තර්ජනය කිරීම, බලපෑම් හෝ හිංසා කිරීම් 4(10) ඡේදයෙන් වළක්වා තිබේ.

තමාට අයිතිවාසිකම් ඇති කුඹුරු ප්‍රමාණය වැපිරීමට යම් කෙනෙකු නම් කිරීමට කුඹුර වපුරන්නකුට බලය තිබේ (6 වන ඡේදය). එසේ නම් නොකොට ඔහු අභාවයට පත් වූ කලක ඔහුගේ අයිතිවාසිකම් බිරිඳ පිට පැවරේ. ඇය පිට ද පැවරෙනු නොහැකි කලක එය ඥාතීන්ගෙන් කෙනකු පිට පැවරේ. (7 වන ඡේදය). තමාගේ අයිතිවාසිකම් ඔහුට විකිණීමෙන් හෝ ප්‍රදානය කිරීමෙන් හෝ පවරාදිය හැක. එසේ පැවරුණු කලක ඉන් පසු පවරනු

ලැබූ තැනැත්තා කුඹුර වපුරන තැනැත්තා වනු ඇත. (8 වන 9 වන ඡේද). කුඹුර වපුරන තැනැත්තා බිරිඳ හෝ දූතීන් හෝ නම් කරන ලද තැනැත්තකු හෝ නොමැතිව ජන්මාන්තරගත වූ විටක අයිතිවාසිකම් ගොවිකම් කමිටුව පිට පැවරේ (10 වන ඡේදය).

14 වන ඡේදයට අනුව කුඹුර වපුරණ ගොවියකු සිටින කුඹුරු ප්‍රමාණයක වපුරණ හිමිකරු ගොවියකු වීම කුඹුරු හිමියකුට කළ හැක්කේ ගොවිකම් කමිටුවට ඉල්ලීමක් ඉදිරිපත් කිරීමෙනි. අනුමත කරණ ලද අක්කර 5 කට නොවැඩි කුඹුරු බිම් ප්‍රමාණයක් වගා කිරීමට කුඹුරු හිමියකුට අවසර දීමට කොමසාරිස් වරයාට බලය තිබේ. කුඹුර වපුරන තැනැත්තාට කුඹුර හැර යාමට නියෝග කිරීමට ගොවිකම් කොමිටුවට බලය තිබේ.

ඔහු එය නොපිළිපදී නම් පිටමං කළ හැක. මින් පසු එහි භුක්තිය කලින් කුඹුර වැපුරූ ගොවියාට හෝ අන්කිසි සැහෙන පුද්ගලයකුට දීමට ගොවිකම් කමිටුවට බලය තිබේ. කුඹුරු හිමියාට කුඹුර වපුරන්නට දී නිබුනු කුඹුර හෝ ඉන් කොටයක් ලබා ගැනීමට මෙයින් පුළුවන් වන බැවින් මේ ඡේදය වැදගත් ඡේදයකි.

18, 19, 20 වන ඡේදයන්ට අනුව ගොවීන් සහ කුඹුරු හිමියන් කුඹුරු වගා කළ යුත්තේ මහා ගොවි කම්කාන්ත ප්‍රතිපත්තීන්ට අනුව ය. එසේ නොකෙරෙන විට කොමසාරිස්වරයාට ''පරිපාලන නියෝගයක්'' නිකුත් කරන ලෙස කරුණු සැලකර සිටීමට ගොවිකම් කමිටුවට බලය තිබේ. ඉන් පසුත් ගොවිකම්හි නැඹිය උසස් නොවූ වොත් භුක්තිය අත්හැරවීමේ නියෝගයක් කිරීමට, කොමසාරිස්වරයාට බලය තිබේ. ඒ අනුව ගොවියා හෝ කුඹුරු හිමියා ප්‍රශ්නයට භාජන වී ඇති කුඹුරෙන් නික්ම යා යුතුය. භුක්තිය අත්හැරවීමේ නියෝගයකින් කුඹුරින් බැහැර නොවන තැනැත්තකු පිටමං කිරීමේ විධිවිධාන 21 වන ඡේදයේ ගැබ් වී තිබේ.

පණතේ ඇති අනිකුත් ඡේදයන් ගැන සඳහන් කිරීම අවශ්‍ය යයි මම නොසිතමි. මෙම පණතින් කුඹුර වපුරන අයට විශේෂ අයිතිවාසිකම් ලැබී තිබේ. එමෙන්ම කුඹුරු හිමියන් මත යුතුකම් රාශියක් පැවරී තිබේ. මේවා ඔවුනොවුන්ගේ පොදු නීතියේ ඇති අයිතිවාසිකම් හා බැඳීම්වලින් තොරව ප්‍රකට ලෙස පැණ වී තිබේ. පණතේ පැණවීම් උල්ලංඝණය වූ විට සිදුවිය යුතු දේ ගැන විශේෂ පැණවීම් ද පණතෙහි ම ඇතුළත් වී ඇත. මෙම අභියාචනය ගැන සලකා බලන විට පැහැදිලිව පෙනී යන්නේ තමන්ට පැවරී ඇති කුඹුරු ප්‍රමාණය සඳහා ඒවා සන්සුන්ව අවහිර නැතුව පරිහරණය කිරීමට පැණ වී ඇති විශේෂ අයිතිවාසිකම් සහ ඒ තැන්වලින් ඔවුන් පිටමං කළ විට ඒ භූමි නැවත ලබා ගැනීමට හැකි වන පරිදි ඇති පැණවීම් ය. කුඹුරු හිමියාට මේ පණත පැණවීමෙන් පසු කලින් භුක්ති විඳගෙන ආ ආකාරයට නිදහස හා එම කුඹුරේ වාසය නොමැති බවත් ඒ කුඹුරු ගැන පෙර සේ කටයුතු කිරීමට නිදහස නොමැති බවත් පැහැදිලිව පෙනේ. පොදු නීතියෙන් ඔහුට ලැබුනු අයිතිවාසිකම් යැලකිය යුතු ප්‍රමාණයකට ඇහිරී තිබේ. මෙය නිසැකවම කෙරී ඇත්තේ යොග්‍ය ලෙස වී වැපිරීමේ බලාපොරොත්තුවෙන් සහ රටේ ආහාර සම්පාදනය දියුණු කිරීමේ බලාපොරොත්තුවෙනි.

**විල්කින්සන් එ. බාර්කිංග් කෝපරේෂන්** නමැති නඩුවේ **(1948) 1 කේ. බී. 721** ඇස්ක්විත් විනිශ්චය කාර ස්වාමිතුමා විසින් කියා තිබෙන්නේ පහත සඳහන් පරිදි ය. ''යම්කිසි ලිඛිත නීතියකින් අයිතිවාසිකමක් පැණවී ඒ සඳහා පැහැදිලි පිලියමක් ලෙස යොදා තිබෙන අවස්ථාවක හෝ එම අයිතිය ක්‍රියාවේ යෙදීමට විශේෂ අධිකරණ අංශයක් පත්කර ඇති අවස්ථාවක එම අයිතිය ක්‍රියාවේ යෙදවීමට බලාපොරොත්තු වන අය ඒ සඳහා එම පිළියමේ පිළිසරණ සොයා යෑම නැතහොත් එම අධිකරණ අංශය වෙත යෑම මීස වෙන අතක නොයෑම ඉතා ම යෝග්‍ය නීති සම්ප්‍රදයකි.'' **පැස්මෝර්** එ.. **ඔස්වල්ඩ ට්විස්ල්** අතර කියැවී (1898) ඒ. සී. නමැති වාර්තා ග්‍රන්ථයෙහි 387 වෙනි පිටුවේ පළ වී ඇති නඩුවේ හෝල්ස්බරි සාමිවරයා මෙසේ ද කියා තිබේ. ''යම් කිසි පිළියමක් විශේෂයෙන් ලිඛිත නීතියකින් නියමිතව ඇති අවස්ථාවක එම නීතිය වෙන විධියක පිළියමක් පතමින් සිටින තැනැත්තකු එසේ එම නීතියෙන් පිට ඇති පිළියම් පැතීමෙන් බැහැරට ගෙන යේ.'' **බාර්ක්ලෝ** එ. **බ්‍රවුන්** අතර කියැවුනු නඩුවේ (1897) ඒ.සී. 615 වන පිටුවේදී චොට්යන් සාමිවරයා මෙසේ කියයි. ''අයිතිවාසිකම සහ පිළියම සැපයී ඇත්තේ එකම පැණවීමකින්

නියා එකින් එකක් වෙන්කොට ගත නොහේ. නීති සම්පාදක මණ්ඩලය විසින් අධිකරණයට පරීශීලනය කිරීමට තහනම් කර ඇති අධිකරණ බලමහිමයෙන් පරීශීලනය කිරීමක්ය කියහැකි නියෝගයක් නිකුත් කිරීම අධිකරණයේ යුතුකම් විය නොහේ.''

මහ රජනගේ අධිකරණ වෙත යාමට ඇති අයිතිය ප්‍රශ්නයට භාජන වී ඇති පණතින් ප්‍රකට ලෙස ම ඉවත් වී හෝ හැඟියන පරිදි ඉවත් වී හෝ නොමැති නම් එය තහනම් වී ඇති හැටියට සලකා ගැනීමට බැරියයි පැමිණිලි කරු වෙනුවෙන් තර්ක ඉදිරිපත් විය. මෙය සතුවන තර්කයකි. නමුත් ප්‍රශ්නය වී ඇත්තේ මේ පණතින් එබඳු අධිකරණ ආඥා බලයක් ඉවත්කොට ඇතැයි යන්න අවශ්‍යයෙන් සලකා ගත හැකි ලෙස එය පැණ වී තිබේ ද යන්න ය. සැම කුඹුරු හිමියකුට ම මේ පණත පැණවීමට කලින් තිබුණු අයිතිවාසිකම් දිගට ම පැවතී ගෙන යන ලෙස තිබේ නම්—එයට කුඹුර වැඩ කරන ගොවියකුට ම විරුද්ධව පිටමං කිරීමේ නියෝගයක් ලබාගැනීමේ අයිතිය ද ඇතුළත් ව ඇති නිසා මේ පණත ඉරා වීසි කිරීම හොඳ ය. එබඳු කලක යළිත් ගොවිකම් කමිටුවලට හෝ කොමසාරිස්වරයාට ආරක්ෂා කිරීමට වැඩ කරන ගොවීන්ගේ අයිතිවාසිකමක් ඉතිරි වන්නේ නැත. විශේෂ කොන්දේසිවලට යටත් වූ එක්තරා අවස්ථාවක හැර කුඹුරකින් පිට මං කිරීම තහනම් කිරීමට පැණ වී ඇති ලිඛිත නීතිගත ආරක්ෂාව ඉබේම අතු ගැ වී යේ. එවිට නැවත නැවත භුක්තිය ලබා ගැනීම සඳහා පැණවී ඇති පැණවීම් වැදගැම්මකට නැති තත්වයකට වැටේ.

තමාගෙන් කුඹුර වැපිරීමට ගත් ගොවියා පිටමං කිරීමට හෝ තමාගේ කුඹුර යෝග්‍ය පරිදි වගාකිරීමට හෝ උවමනා නම් කුඹුරු හිමියා විසින් පිළිසරණ පතා අනුගමනය කළයුතු සම්ප්‍රදය මෙම පණතෙහි පැණවී තිබේ. මා කල්පනා කරන හැටියට මේ පණත පැණවුනු පසු ඔහුට ඇති එක ම ප්‍රතිකර්මය මෙයයි. කුඹුර වපුරන්නකුට පණතින් ලැබී ඇති අයිතිවාසිකම් කැඩී ගිය විට කුඹුරු හිමියකුට පෙනී ගිය විට ඊට වෙසෙස් පිළියමක් පැණ වී තිබේ. ලිඛිත නීතියකින් පැණවුනු එම අයිතිවාසිකම් බිඳුනු විට එම ලිඛිත පණතින් පැණවෙන ප්‍රතිකර්මය මය යෙදිය යුතු ය. **ඩෝ එ. බ්‍රිජස්** (1831) 1 බී. සහ ඇඩ් 847 වන පිටේ ටෙන්ටර්ඩන් සාමිවරයා මෙසේ කීය. ''යම්කිසි පණතකින් බැඳීමක් නිරූපණය වී එය ක්‍රියාත්මක වන අන්දමද විශේෂ අයුරින් එහි පැණවුනු විට එය වෙනත් අයුරකින් ක්‍රියාකාරී කරවීමට නොහැකිය යන්න සාමාන්‍ය රීතිය හැටියට අපි පිළිගනිමු. '' වෙල්ලේ විනිශ්චයකාරතුමා ද මෙවැනි ම ප්‍රකාශයක් කරන ලදුව එය වෝල්වර් හැම්ප්ටන් අලුත් ජලකර්මාන්ත සමාගම එ. හොක්ස්ෆෝර්ඩ (1859) 6සී.බී.ඇන්.ඇස්. නමැති වාර්තාවේ 336 වන පිටේ වාර්තාවී තිබේ. ඒ මෙසේ ය: ''යම්කිසි පණතකින් පොදු නීතියේ නොමැති අවනතකර බැඳ තැබීමක් ඇති කොට එය ක්‍රියාත්මක කිරීමට විශේෂ ප්‍රතිකර්මයක් පණවා තිබේ නම් යම් කෙනකු කළ යුත්තේ එම පණතින් පැණ වී ඇති ප්‍රතිකර්මයම අනුගමනය කිරීමයි.'' මෙවැනි අවස්ථාවකට අදළවන තවත් ප්‍රතිපත්තියක් තිබේ. එනම් ලිඛිත නීතියකින් පැණවෙන යම්කිසි අයිතිවාසිකමක් ඉතා ම දැඩි අපහසුවක් නොමැතිව පොදු නීතිගත අයිතිවාසිකමක් හා එකට පවත්වාගෙන යා නොහැකි නම් එබඳු අවස්ථාවක ඒ පැණවීම අනෙක වෙනුවට පැණ වී ඇති දෙයක් හැටියට මිස එයට අතිරේකව පැණවුනු පිළියමක් හැටියට අදහස් කරන ලද දෙයකැයි සිතා ගත යුතු ය.

මෙම නීති ප්‍රශ්නය ගැන තමාගේ නඩු තීන්දුවේ සලකා බලා ඇති දිස්ත්‍රික් විනිශ්චයකාර වරයා කියා ඇත්තේ පැමිණිලිකරු විත්තිකරුවන්ට විරුද්ධව ගොවිකම් කමිටුවක පණතේ 14 වන ඡේදය යටතේ පැමිණිලි කර ඇති බවත් ඔහුට ඒ සඳහා තීරණයක් නොලැබුනු බවත් ය. දිස්ත්‍රික් උසාවියේ ආඥා බලමහිමය ඉවත් කෙරෙන ඡේදයක් පණතේ නැති බව කියන දිස්ත්‍රික් විනිශ්චයකාරවරයා ඒ නිසා තමාට මෙම නඩුව ඇසීමට ආඥා බලය ඇතැයි සිතා ගත්තේ ය. ඔහු සමඟ එකඟ වීමට බැරිවීම ගැන මම කණගාටුවෙමි. එයට හේතූන් ඉහත සඳහන් කෙළෙමි. පැමිණිලිකරු තමාට පිළිසරණ සෙවිය යුතුව තිබුණේ පණත අනුව ය. ඔහු විසින් මෙබඳු නඩුවක් දැමීම සුදුසු නැත.

එම නිසා මෙම අභියාචනයට ඉඩදෙනවිට අධිකරණ දෙක්හිම ගාස්තුවටත් යටත් කොට පැමිණිලි කරුගේ නඩුව නිෂ්ප්‍රභා කරමි.

**පිළිසුම්මනියම් විනිශ්චයකාරතුමා.**

මම එකඟවෙමි.

**ඇපෑලට ඉඩ දී පැමිණිල්ල නිෂ්ප්‍රභා විය.**